BRB No. 12-0479 BLA

EMILY E. BOLLING (Widow of OWEN BOLLING)	)	
Claimant-Respondent	)	
v.	)	
INDIAN MOUNTAIN COAL COMPANY	)	DATE ISSUED: 06/14/2013
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier- Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Third Remand Denying Recusal and Awarding Fees of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Third Remand Denying Recusal and Awarding Fees (2005-BLA-05307) of Administrative Law Judge

Pamela J. Lakes, relating to an award of benefits on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for a third time and relates solely to a fee petition filed by claimant's counsel.[1] We incorporate the procedural history set forth in *Bolling v. Indian Mountain Coal Co.*, BRB No. 11-0390 BLA (Feb. 28, 2012) (unpub.). Most recently, the Board vacated the administrative law judge's February 7, 2011 Order Awarding Attorney Fees on Second Remand because she did not explain how the factors set forth at 20 C.F.R. §725.366(b) supported the hourly rates requested by claimant's counsel and did not weigh employer's evidence relevant to the applicable market rate.[2] *Id*. at 5, 7 n.7. The Board also held that the administrative law judge erred in failing "to specifically address employer's allegations that there is no documentation to support the charges for the reports of Drs. Perper and Robinette, the x-ray reading from Professional Imaging, and the bills for x-rays from St. Mary's [Hospital]." *Id*. at 6. Accordingly, the case was remanded for further consideration.

On May 29, 2012, employer filed a motion requesting that the administrative law judge recuse herself because her prior decisions in this case, and in others, suggested that she was biased and had prejudged the issues for consideration on remand. Attached to the Motion to Recuse was an affidavit from an attorney in the law firm representing employer, Laura Metcoff Klaus. On June 4, 2012, the administrative law judge issued her Decision and Order on Third Remand, wherein she denied employer's motion and awarded $2,920.00 in attorney fees and $3,747.35 for costs incurred while the case was before the Office of Administrative Law Judges between March 7, 2008 and November 11, 2008.[3] The administrative law judge directed employer to pay these fees and costs, in addition to the $9,012.50 previously approved.

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[1] Claimant's counsel submitted a fee petition to the administrative law judge, requesting $2,995.00 for legal services performed while the case was before the Office of Administrative Law Judges between March 7, 2008 and November 11, 2008, representing: 3.15 hours of work by Attorney Joseph E. Wolfe at an hourly rate of $300.00; 11.0 hours of work by Attorney Ryan C. Gilligan at an hourly rate of $175.00; 1.25 hours of work by a legal assistant at an hourly rate of $100.00; and expenses totaling $3,747.35

[2] The Board affirmed, as unchallenged on appeal, the administrative law judge's disallowance of one-quarter of an hour of time submitted by claimant's counsel for the telephone call with an official in the district director's office. *Bolling v. Indian Mountain Coal Co.*, BRB No. 11-0390 BLA, slip op. at 4 n.3 (Feb. 28, 2012) (unpub.).

[3] The administrative law judge issued an Errata on June 6, 2012, modifying the final paragraph of her Decision and Order on Third Remand in order to clarify the bases for her findings pursuant to 20 C.F.R. §725.366(b).

On appeal, employer contends that the administrative law judge deprived employer of a fair hearing on remand, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), based on statements she made in prior decisions that reflect her bias against employer and the Board. Employer requests that the Board vacate the attorney fee award and remand the case with instructions that it be assigned to a different administrative law judge. Alternatively, employer argues that, because claimant's counsel failed to produce specific evidence of the prevailing market rate for the legal services performed, the administrative law judge erred in finding that the hourly rate requested was reasonable. Employer also asserts that the administrative law judge erred in rejecting the sworn affidavit of Christine Terrill, along with employer's fee award evidence, and that she improperly relied on past fee awards to establish the prevailing market rate. Further, employer argues that the administrative law judge erred in relying solely on canceled checks as documentation supporting the medical expert charges. In addition, employer contends that the administrative law judge erred in considering the corrected bill from Dr. Perper's office and approving the reimbursement for these costs.

Claimant responds, urging affirmance of the administrative law judge's denial of employer's request for recusal and the award of attorney fees. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer has filed a reply brief, reiterating its arguments.

I. Request for Reassignment

Employer argues that the administrative law judge erred in denying its motion for recusal. Employer asserts that the administrative law judge was incorrect both in requiring it to demonstrate personal bias and in believing that the standard of "the appearance of impropriety" applicable to the recusal of Article III judges is inapplicable to administrative law judges. Employer's Brief in Support of Petition for Review at 7; *see* Decision and Order on Third Remand at 5. Employer maintains that the administrative law judge denied employer a fair and impartial hearing on remand, as she made clear that her mind was made up on the issues presented, and that she considered the Board's remand orders to be "unnecessary" and "simply for a rewrite." Employer's Brief in Support of Petition for Review at 6; *see* Decision and Order on Third Remand at 1, 5. Citing the American Bar Association's Model Code of Judicial Conduct for Federal Administrative Law Judges (1989), employer maintains that the administrative law judge was required to recuse herself in order to avoid the appearance of impropriety and "to avoid the appearance of pre-judging." Employer's Brief in Support of Petition for Review at 8.

Charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). In *Liteky v. United States*, 510 U.S. 540, 555 (1994), the Supreme Court of the United States declared that where, as here, a party contends that the judge's conduct in the course of the current proceeding or prior proceedings demonstrates bias or partiality warranting recusal, the party must show that the conduct complained of "displayed deepseated and unequivocal antagonism that would render fair judgment impossible." *Id*. The Court explained that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, parties or their cases, ordinarily do not support a bias or partiality challenge." *Id*. This standard has been held to govern in both the Article III and administrative law contexts. *Beiber v. Dep't of the Army*, 287 F.3d 1358, 1362 (Fed. Cir. 2002).

In the instant case, employer has not met its burden to establish bias or prejudice. While employer points to statements by the administrative law judge that it believes indicate personal bias against either employer's counsel or the Board, we disagree that the administrative law judge statements show "a deep seated favoritism or antagonism" that made it impossible for her to render a fair judgment of the issues presented in this case. *Liteky*, 510 U.S. at 555. Contrary to employer's argument, although the administrative law judge has been critical of the bases for the Board's prior remand orders in this case, "the tone and tenor of frustration expressed in the administrative law judge's comments do not, in and of themselves, establish bias." *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 620, 23 BLR 2-345, 2-358 (4th Cir. 2006), *citing Liteky* at 555-556 (Expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display, do not establish bias or partiality); *see Cochran*, 16 BLR at 1-107-08.

Furthermore, the mere fact that the administrative law judge on remand reached the same conclusion again does not, as employer suggests, show that she was biased or that she prejudged the issues. Despite her criticisms, the administrative law judge followed the Board's instruction that she reconsider all of the record evidence and explain the bases for her findings. We therefore deny employer's request that we vacate the award of attorney fees and remand the case for assignment to a different administrative law judge. *See Marcus v. Director, OWCP*, 548 F.2d 1044, 1050 (D.C. Cir. 1976); *Zamora v. C.F. & I. Steel Corp.*, 7 BLR 1-568 (1984); *see also* 20 C.F.R. §725.352.

II. Merits of the Fee Petition

The amount of an attorney's fee award by an administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.

See Abbott v. Director, OWCP, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); *see also Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998) (en banc).

A. Market Rate

In determining the amount of attorneys' fees to be awarded under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case and then multiply those hours by a reasonable hourly rate. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The Court has held that a reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The United States Court of Appeals for the Fourth Circuit has held that a market rate should be established with evidence of earnings attorneys received from paying clients for similar services in similar circumstances.[4] *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 244 (4th Cir. 2009). The fee applicant bears the burden of producing specific evidence of prevailing market rates. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-290 (4th Cir. 2010); *Plyler v. Evatt*, 902 F.2d 273 (4th Cir. 1990).

Furthermore, the regulation at 20 C.F.R. §725.366(b) states that "[a]ny fee approved under . . . this section shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested." 20 C.F.R. §725.366(b).

Employer asserts that the administrative law judge did not follow the Board's remand instructions in determining the appropriate hourly rates for claimant's counsel. We disagree. Initially, we reject employer's contention that the administrative law judge erred in giving little weight to the sworn affidavit of Ms. Terrill, the supervisor of occupational disease claims at Old Republic Insurance Company (carrier). The administrative law judge observed:

> Ms. Terrill states that she is familiar with the market rates of attorneys in each of the areas where the Carrier hires attorneys, but she does not state how she has obtained that information or what it consists of, except with

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

> respect to what Carrier pays its own attorneys. On that issue, she states that Carrier pays unspecified attorneys who litigate black lung claims in southwestern Virginia between $125 and $150 hourly depending on experience; she does not indicate at what level the attorneys practice (i.e., district director, Office of Administrative Law Judges, or Benefits Review Board) or the complexity of the cases they handle.

Decision and Order on Third Remand at 12. Because the administrative law judge rationally explained her credibility findings with respect to the affidavit, we affirm her conclusion that it does "not undermine the appropriateness of the fees claimed here." *Id*.; *see Abbott*, 13 BLR at 1-16; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

We reject employer's arguments that the administrative law judge erred in relying on prior fee awards to establish the prevailing market rate and improperly shifted the burden of proof to employer to establish that the requested rates were not reasonable. Employer's Brief in Support of for Review at 12. Contrary to employer's assertion, the administrative law judge has explained, in accordance with the APA, how the rates requested for Attorney Wolfe, Attorney Gilligan and the legal assistants were supported by the information provided in the fee petition and rationally found that the fees requested reflected the market rate. Decision and Order on Third Remand at 13; *see Wojtowicz*, 12 BLR at 1-165. We also disagree with employer's suggestion that claimant's counsel's fee request is improper based on the holding of the Fourth Circuit in *Cox*, as employer overlooks the substance of the appellate court's decision. *Cox*, 602 F.3d at 290, 24 BLR at 2-291. In *Cox*, the court vacated the attorney fee award because counsel failed to provide evidence of the prevailing market rate, but the court added that counsel has a range of sources from which to obtain the requisite information, including evidence of fees he has received in the past. *Id*. Accordingly, the law cited by employer does not support its contention that counsel's prior fee awards are not relevant evidence and do not support the rates requested. The administrative law judge thus permissibly relied, in part, on prior fee awards in determining the reasonable hourly rates for claimant's counsel. *Id*., *see Bowman v. Bowman Coal Co.*, 24 BLR 1-165, 1-170 n.8 (2010) (Order), *appeal docketed, Bowman Coal Co. v. Director, OWCP* [*Bowman*], No. 12-1642 BLA (4th Cir. May 16, 2012).[5] In addition, as experience is a relevant factor

[5] We deny employer's request to hold this case in abeyance, pending the Fourth Circuit's disposition of appeals in *Gosnell v. Eastern Assoc. Coal Co.*, BRB Nos. 11-0131 BLA and 10-0384 BLA (July 29, 2011) (unpub.) *appeal docketed, Eastern Assoc. Coal Co. v. Director. OWCP* [*Gosnell*], Nos. 11-2380 and 11-2038 (4th Cir. Dec. 19, 2011); *Bowman v. Bowman Coal Co.*, 24 BLR 1-165, 1-170 n.8 (2010) (Order) (unpub.), *appeal docketed, Bowman Coal Co. v. Director, OWCP* [*Bowman*], No. 12-1642 (4th Cir. May 16, 2012). *See* Employer's Brief in Support of Petition for Review at 6.

that an administrative law judge may consider in determining a reasonable hourly rate, the administrative law judge properly considered the attorneys' experience in litigating federal black lung cases, along with the prior fee awards.[6] Decision and Order on Third Remand at 13; *see Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228 (4th Cir. 2009); *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 664-65, 24 BLR 2-106, 124 (6th Cir. 2008).

Moreover, in accordance with the Board's remand instruction, the administrative law judge performed the requisite analysis set forth in 20 C.F.R. §725.366(b), considered employer's objections and the evidence provided by both parties as to the prevailing market rate for black lung attorneys, and adequately explained her determination that the hourly rates of $300.00 and $175.00 for work performed by Attorneys Wolfe and Gilligan, respectively, as well as the hourly rate of $100.00 for the legal assistants, were reasonable under the facts of this case. *See Cox*, 602 F.3d at 289, 24 BLR at 2-291; *Bentley*, 522 F.3d at 663, 24 BLR at 2-121; Decision and Order on Third Remand at 13. The administrative law judge correctly considered "the nature of the issues involved, the complexity of this case, the degree of skill with which the claimant was represented, and the amount of time and work involved." Decision and Order on Third Remand at 14; *see* 20 C.F.R. §725.366(b). The administrative law judge explained that the work performed by claimant's counsel from March 7, 2008 to November 11, 2008, related to the remand of the underlying claim. She concluded:

> The Board's decision required analysis of complex medical and legal issues under the Black Lung Benefits Act, warranting even higher fees than those usually awarded. Indeed, my remand decision required over 20 pages to address the issues remanded (in supplement to my initial 28-page decision), and the remand decision was affirmed by both the Benefits Review Board and the U.S. Court of Appeals for the Fourth Circuit. Mr. Wolfe's firm addressed the issues on remand in a highly competent manner, and I did not find the amount of time and work involved to be excessive.

June 6, 2012 Errata to Decision and Order on Third Remand at 2. The administrative law judge permissibly considered these factors, along with evidence of fees counsel received

[6] Attorney Wolfe asserted in the fee petition that the requested hourly rates are customary billing rates for black lung representation and outlined the level of experience of each of the attorneys and legal assistants who billed time in the case. December 1, 2008 Fee Petition (unpaginated) at [1]. He further stated that he knows of "no other firms in Virginia and very few across the nation taking new [black lung] cases." *Id*.

in the past, to ascertain a reasonable rate.[7] *Id.*; *see Maggard v. Int'l Coal Group*, 24 BLR1-203, 1-205 (2010) (Order); *Maggard v. Int'l Coal Group*, 24 BLR 1-172, 1-174-75 (2010) (Order); *Bowman*, 24 BLR at 1-170 n.8; *Parks v. Eastern Assoc. Coal Corp.*, 24 BLR 1-177, 1-181 n.5 (2010). Thus, because the administrative law judge rationally found that claimant's counsel provided sufficient evidence to support the requested hourly rates, we affirm her approval of the hourly rates of $300.00 and $175.00 for work performed by Attorneys Wolfe and Gilligan, respectively, as well as the hourly rate of $100.00 for the legal assistants. *See Abbott*, 13 BLR at 1-16; *Wojtowicz*, 12 BLR at 1-165; Decision and Order on Third Remand at 13.

B. Costs/Expenses

Employer contends that the administrative law judge erred in awarding $3,747.35 in costs, not because any of the identified costs was unreasonable, but because, in employer's view, the costs lacked proper documentation. We disagree. The administrative law judge found that the fee petition "was supported by two canceled checks to Dr. Perper, reflecting payment by claimant of $2,000.00 on February 12, 2005 and $1,000.00 on July 30, 2005; three receipts from St. Mary's Hospital, reflecting payment of $119.45 on three occasions; a bill for $155.00 from Highlands Pathology Consultants, P.C.; a cancelled check of $84.00 dated January 5, 2000 from Mr. Wolfe's firm payable to Professional Imaging; and a cancelled check of $150.00 dated April 28, 2000 from Mr. Wolfe's firm, payable to Emery Robinette, M.D." Decision and Order on Third Remand at 14. In additional to the cancelled checks, the administrative law judge found that the record included a "corrected invoice" dated April 13, 2001, signed by Dr. Perper, indicating that $3,000.00 was billed for his services. *Id*. The administrative law judge further noted the explanation provided by claimant that the three charges from St. Mary's Hospital, in the amount of $119.45 each, were for chest x-rays taken and interpreted by Dr. DePonte; the charge of $84.00 was for an x-ray re-reading; and the charge of $150.00 was for a medical report by Dr. Robinette. *Id*.

Contrary to employer's argument, the administrative law judge has considered the bills associated with the evidence presented in this case, reviewed the documentation supporting the costs, and has explained the basis for her conclusion that the request for costs is "adequately documented." *Id*.; *see Bentley*, 522 F.3d at 661, 24 BLR at 2-117;

[7] Contrary to employer's argument, the administrative law judge did not base her findings as to the applicable market rate on the Altman &Weil Survey. Rather, she noted only that it is "entirely consistent with the customary fees claimed" by claimant's counsel and further supported her conclusion that the rates claimed were appropriate under the facts of this case. Decision and Order on Third Remand at 13; *see* Employer's Brief in Support of Petition for Review at 12.

Jones, 21 BLR at 1-108; *Wojtowicz*, 12 BLR at 1-165. We therefore affirm the administrative law judge's determination that claimant is entitled to reimbursement for costs in the amount of $3,747.35.

In summary, we reject employer's assertion that the administrative law judge did not render her findings in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165. Furthermore, based on the administrative law judge's proper analysis of the regulatory criteria, we conclude that the administrative law judge did not abuse her discretion in determining that the hourly rates, of $300.00 for Mr. Wolfe and $175.00 for Mr. Gilligan, were reasonable and reflected the applicable market rates. *See Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *see also Maggard*, 24 BLR at 1-174-75; *Bowman*, 24 BLR at 1-170-71. We further hold that the administrative law judge did not act arbitrarily, capriciously, or abuse her discretion, in finding that the requested costs were reasonable. *See* 20 C.F.R. §725.366; *Jones*, 21 BLR at 1-108. We, therefore, affirm the administrative law judge's award of attorney's fees and costs.

Accordingly, the administrative law judge's Decision and Order on Third Remand Denying Recusal and Awarding Fees is affirmed. We order employer to pay claimant's counsel $2,920.00 for legal services rendered to claimant while the case was before the Office of Administrative Law Judges and to pay $3,747.35 for costs incurred by claimant in this case.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge