

BRB No. 11-0438 BLA

CASBY G. BOWMAN)
)
 Claimant-Respondent)
)
 v.)
)
 BOWMAN COAL COMPANY,)
 INCORPORATED)
)
 and)
)
 AMERICAN BUSINESS & MERCANTILE) DATE ISSUED: 03/22/2012
 REASSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order on Remand 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order on Remand (05-BLA-5070) of Administrative Law

Judge Pamela J. Lakes granting an attorney's fee in connection with a claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² In her initial Order, the administrative law judge awarded claimant's counsel a total fee of \$9,175.00 for 30.25 hours of legal services at an hourly rate of \$250.00 (Joseph E. Wolfe), 1.75 hours of legal services at an hourly rate of \$250.00 (Bobby S. Belcher), 3.0 hours of legal services at an hourly rate of \$200.00 (Andrew Delph), and 5.75 hours of legal services at an hourly rate of \$100.00 (legal assistant).

Pursuant to employer's appeal, the Board held that the administrative law judge improperly shifted the burden of proof to employer to establish that the requested hourly rates were unreasonable. *C.B. [Bowman] v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.). The Board also held that the administrative law judge did not apply the criteria set forth at 20 C.F.R. §725.366(b) to the fee petition.³ *Id.* The Board, therefore, vacated the administrative law judge's award of attorney fees, and remanded the case for further consideration. *Id.*

In an Order on Remand dated February 15, 2011, the administrative law judge considered counsel's amended fee petition, and employer's objections thereto, and awarded claimant's counsel a total fee of \$10,637.50, for 30.25 hours of legal services at an hourly rate of \$300.00 (Mr. Wolfe), 1.75 hours of legal services at an hourly rate of

¹ In a Decision and Order dated November 30, 2006, the administrative law judge awarded benefits. In a Decision and Order dated July 23, 2008, the Board affirmed the administrative law judge's award of benefits. *C.B. [Bowman] v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.). The Board subsequently denied employer's motion for reconsideration. *C.B. [Bowman] v. Bowman Coal Co.*, BRB No. 07-0320 BLA (Sept. 30, 2009) (Order) (unpub.).

² The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not affect employer's appeal of the administrative law judge's attorney fee award.

³ Section 725.366(b) provides, in pertinent part, that an approved fee 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 the fee requested." 20 C.F.R. §725.366(b).

\$250.00 (Mr. Belcher), 3.0 hours of legal services at an hourly rate of \$200.00 (Mr. Delph), and 5.25 hours of legal services at an hourly rate of \$100.00 (legal assistant).⁴

On appeal, employer contends that the administrative law judge's attorney's fee award is excessive. Claimant's counsel responds in support of the administrative law judge's attorney's fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.⁵

The amount of an award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

In determining the amount of attorney's fees to award 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. This sum constitutes the "lodestar" amount. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008).

An attorney's 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 prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). The fee applicant has the burden to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

⁴ In considering claimant's counsel's amended fee petition, the administrative law judge reduced Andrew Delph's requested hourly rate from \$250 to \$200. Order on Remand at 7. The administrative law judge also disallowed one-half hour of time claimed by the legal assistant as non-compensable clerical or overhead work. *Id.* at 7-8.

⁵ The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Employer contends that the administrative law judge's fee award should be vacated because claimant's counsel failed to establish the prevailing market rates for the legal services provided in this case. We disagree. As the administrative law judge accurately noted, claimant's counsel, Mr. Wolfe, provided an extensive list of black lung cases from 2006 to 2008, in which he was awarded an hourly rate of \$300.00. Similarly, claimant's counsel listed six cases from 2006 and 2007, in which his associate, Mr. Belcher, was awarded an hourly rate of \$250.00, and nine cases from same time period, in which his associate, Mr. Delph, was awarded an hourly rate of \$200.00. In *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010), the United States Court of Appeals for the Fourth Circuit recognized that evidence of fees received in the past is an appropriate factor to take into account when establishing a market rate.⁶

In awarding the respective hourly rates of \$300.00, \$250.00, and \$200.00, the administrative also relied upon the attorneys' extensive experience in litigating federal black lung cases, noting that Mr. Wolfe's law firm "handles a significant number of Black Lung cases in southwestern Virginia."⁷ Order on Remand at 5. This is a relevant

⁶ The administrative law judge also listed additional fee awards granted by other administrative law judges and the Board from 2007 to 2009, wherein Joseph E. Wolfe, Bobby S. Belcher, and Andrew Delph were awarded hourly rates "along the same lines as those requested here." Order on Remand at 5.

Employer submitted fee petitions from Mr. Mark Ford, Mr. James Hamilton, and Mr. Brent Yonts. Employer also submitted copies of decisions wherein the hourly rates awarded by administrative law judges and district directors to Mr. Wolfe, Mr. Belcher, and Mr. Delph were lower than those requested in this case. The administrative law judge considered this evidence, but found it unpersuasive. The administrative law judge noted that some of the awarded hourly rates were granted to attorneys who handled fewer black lung cases than Mr. Wolfe's law firm. Order on Remand at 8. The administrative law judge further found that several decisions cited by employer were not relevant because they related to different programs (Social Security) or occurred at a different level of proceeding (district director). *Id.* The administrative law judge noted that, of the two decisions at the administrative law judge level, one decision was subsequently reversed by the Board, while the hourly rates awarded in the other decision were improperly based upon the fees awarded in the same case at the district director level. *Id.* The administrative law judge, therefore, found that this evidence "did not undermine the market value established by [c]laimant's [c]ounsel." *Id.*

⁷ In his initial fee petition, claimant's counsel noted that his law firm "has handled Black Lung cases for 30 years and is recognized as one of very few firms willing to represent coal miners." Director's Exhibit 90.

factor that an administrative law judge may consider in determining a reasonable hourly rate for claimant's counsel. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228 (4th Cir. 2009); *Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124.

Based on the administrative law judge's proper analysis of the regulatory criteria, we hold that the administrative law judge did not abuse her discretion in determining that claimant's counsel's requested hourly rates were reasonable, and reflected the applicable market rates. Order on Remand at 7; *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *see also Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010). We, therefore, affirm the administrative law judge's approval of the requested hourly rates.⁸

In light of the foregoing, we affirm the administrative law judge's attorney's fee award in the total amount of \$10,637.50, for 30.25 hours of legal services at an hourly rate of \$300.00 (Mr. Wolfe), 1.75 hours of legal services at an hourly rate of \$250.00 (Mr. Belcher), 3.0 hours of legal services at an hourly rate of \$200.00 (Mr. Delph), and 5.25 hours of legal services at an hourly rate of \$100.00 (legal assistant). *Abbott*, 13 BLR at 1-16.

⁸ On remand, employer filed a motion to compel discovery, seeking information from claimant's counsel regarding his attorney fee requests in other cases. By Order dated December 6, 2010, the administrative law judge denied employer's discovery request, finding, *inter alia*, that employer failed to establish "good cause for doing so." Employer contends that the administrative law judge erred in denying its discovery request. However, because employer has not demonstrated prejudicial error or an abuse of discretion on the part of the administrative law judge in denying its request, the administrative law judge's decision to deny employer's motion to compel discovery is affirmed. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Accordingly, the administrative law judge's Order on Remand awarding attorney fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge