

BRB Nos. 09-0700 BLA
and 09-0701 BLA

WILMA S. WILLIAMSON)	
(o/b/o and Widow of EARL WILLIAMSON))	
)	
Claimant-Respondent)	
)	DATE ISSUED: 05/12/2010
v.)	
)	
ROBERT COAL COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order (05-BLA-6056, 06-BLA-5944) of Administrative Law Judge Daniel F. Solomon granting attorney's fees in connection with claims¹ filed pursuant to the provisions of the Black Lung Benefits Act,

¹ In a Decision and Order dated January 30, 2009, the administrative law judge awarded benefits in both the miner's claim and the survivor's claim. Pursuant to employer's appeal, the Board vacated both awards and remanded the case to the

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 The administrative law judge awarded claimant’s counsel a total fee of \$8,937.50 for 32.5 hours of legal services at an hourly rate of \$275.00.

On appeal, employer contends that the administrative law judge’s attorney’s fee award is excessive. Claimant’s counsel responds in support of the 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.³

The 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). An attorney’s fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

The regulations provide 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).

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

administrative law judge for further consideration of the miner’s and survivor’s claims. *Williamson v. Robert Coal Co.*, BRB Nos. 09-0408 & 09-0416 BLA (Feb. 26, 2010) (unpub.).

² The recent 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’s fee award. Neither the merits of the miner’s claim, nor the merits of the survivor’s claim, is currently before the Board.

³ The record reflects that the miner’s last coal mine employment was in Kentucky. Director’s Exhibits 4, 7, 25. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

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).

Hourly Rate

Employer argues that the administrative law judge erred in awarding claimant's counsel an hourly rate of \$275.00 because claimant's counsel "did not submit anything establishing his usual billing rate." Employer's Brief at 5. We disagree. In determining counsel's "usual billing rate," the administrative law judge relied upon copies of several decisions that claimant's counsel attached to his response brief. These decisions document that claimant's counsel was awarded hourly rates from \$250.00 to \$275.00 in past federal black lung cases.⁴ Supplemental Decision and Order at 3. As a general proposition, rates awarded in other cases do not set the prevailing market rate. See *Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23. However, where there is only a small number of comparable attorneys, a tribunal may look to prior awards for guidance in determining a prevailing market rate. *Id.*

The administrative law judge further considered copies of three decisions attached to counsel's fee petition, documenting that Mr. Joseph E. Wolfe, an attorney with similar experience and whom the administrative law judge found practices in the same

⁴ In support of his usual billing rate, claimant's counsel attached copies of the following decisions to his response brief to the administrative law judge: (1) a 2009 award by a district director of an hourly rate of \$250.00 (encl. 4); (2) a 2009 Supplemental Decision and Order of Administrative Law Judge Edward Terhune Miller approving an hourly rate of \$250.00 (encl. 5); a 2009 Order of the Benefits Review Board awarding counsel an hourly rate of \$275.00 (encl. 3); and a published decision of the Sixth Circuit wherein the court affirmed an administrative law judge's award to counsel of an hourly rate of \$250.00. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

geographic area,⁵ has been awarded an hourly rate of \$300.00 in black lung cases before the Office of Administrative Law Judges.⁶ *Id.* at 3.

In awarding claimant's counsel an hourly rate of \$275.00 in this case, the administrative law judge also relied upon counsel's extensive experience in litigating federal black lung cases. Supplemental Decision and Order at 3. This is a relevant 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.

Although claimant's counsel requested an hourly rate of \$300.00, the administrative law judge reduced the hourly rate, explaining that counsel's submissions, including evidence of the hourly rates that he has been awarded in other cases, supported an hourly rate of \$275.00. Supplemental Decision and Order at 4.

We reject employer's contention that the administrative law judge did not have sufficient factual support for the hourly rate that he found to be established. In this case, the administrative law judge did not abuse his discretion in considering the rates awarded to claimant's counsel in past black lung benefits cases, which are in line with his requested rate.⁷ *See Bentley*, 522 F.3d at 666, 24 BLR at 2-126. We also find no error in the administrative law judge's consideration of decisions wherein an hourly rate of \$300.00 was awarded to a similarly qualified attorney in the same geographical area for

⁵ We note that Mr. Joseph E. Wolfe's law office, located in Norton, Virginia, is approximately fifty miles from Pikeville, Kentucky.

⁶ The administrative law judge also noted that he had previously awarded claimant's counsel an hourly rate of \$250.00 "in several other reported cases in the public domain." Supplemental Decision and Order at 3. The administrative law judge further noted that he had awarded another attorney an hourly rate of \$300.00 "in several reported cases from Eastern Kentucky." *Id.*

⁷ We agree with employer that the administrative law judge erred in not specifically identifying the cases in which he previously awarded claimant's counsel an hourly rate of \$250.00 and the cases in which he previously awarded "another attorney" an hourly rate of \$300.00. However, because the administrative law judge adequately supported his finding of an hourly rate of \$275.00 with reference to specific, identifiable decisions in the record, the administrative law judge's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

his work in black lung benefits cases.⁸ *Id.*

Based upon the facts of the case, we hold that the administrative law judge did not abuse his discretion in determining that claimant's counsel established that "his usual billing rate is \$275 per hour." Supplemental Decision and Order at 4; *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *Bowman v. Bowman Coal Co.*, BLR , BRB No. 07-0320 BLA (Apr. 15, 2010), slip op. at 5 n.8; *Maggard v. Int'l Coal Group, Knott County, LLC*, BLR , BRB No. 09-0271 BLA (Apr. 15, 2010), slip op. at 9 n.5.

Employer further argues that the administrative law judge erred by awarding claimant's counsel an hourly rate of \$275.00 based on a contingency enhancement. Risk of loss cannot be factored into the determination of the hourly rate. *City of Burlington v. Dague*, 112 S.Ct. 2638, 2641 (1992); *cf. Westmoreland Coal Co. v. Cox*, F.3d , 2010 WL 1409418 (4th Cir. 2010). However, in this case, there is no evidence that claimant's counsel enhanced his rate to reflect compensation for risk of loss. Similarly, although the administrative law judge recognized the contingent nature of federal black lung litigation, there is no indication that he relied upon this factor in determining counsel's usual billing rate. We, therefore, reject employer's contention that the administrative law judge improperly incorporated risk of loss into his determination of the hourly rate.

Because it is not arbitrary, capricious, or an abuse of discretion, we affirm the administrative law judge's approval of an hourly rate of \$275.00 in this case.

Allowable Hours

Employer also objects to the administrative law judge's calculation of allowable hours. Once a service has been found to be compensable, the adjudicating officer must

⁸ Employer submitted fee petitions from Mr. Mark Ford, Mr. James Hamilton, and Mr. Brent Yonts. The administrative law judge permissibly discounted the hourly rates of \$150.00 awarded to Mr. Yonts as unrepresentative of claimant's counsel's geographical area. *See Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126. The administrative law judge also noted that the hourly rates awarded to Mr. Ford and Mr. Hamilton were for work performed from 2002 through 2006, whereas claimant's counsel's work before the administrative law judge in this case occurred from 2006 through 2008.

Employer indicates that it also submitted fee petitions from "John Anderson." Employer's Brief at 12. We have reviewed employer's "Objection to Attorney Fee Petition" that it filed with the administrative law judge. We find no reference to "John Anderson" in employer's brief or any fee petitions from John Anderson in the record.

decide whether the amount of time expended by the attorney in performance of the service is excessive or unreasonable. *See Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

Employer specifically contends that the number of hours claimed in this case is excessive, based on counsel's use of the quarter-hour billing method. We disagree. In this case, the administrative law judge permissibly found that counsel's practice of billing in quarter-hour increments was reasonable. *See Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); 20 C.F.R. §802.203(d)(3); Supplemental Decision and Order at 4. Because employer does not specifically challenge any of the allowable hours, we affirm the administrative law judge's award of compensation for 32.5 hours of legal services.⁹

Because we have rejected all contentions of error raised by employer, we affirm the administrative law judge's attorney's fee award. As noted, this fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman*, 18 BLR at 1-17.

⁹ After reviewing employer's objections to the hours requested by counsel, the administrative law judge disallowed one hour of duplicate and undated entries. Supplemental Decision and Order at 4.

Accordingly, the administrative law judge's Supplemental Decision and Order awarding attorney's fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge