

BRB No. 12-0487 BLA

CASBY G. BOWMAN )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 BOWMAN COAL COMPANY, )  
 INCORPORATED )  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE COMPANY ) DATE ISSUED: 05/12/2014  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Order of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Order (05-BLA-5070) of Administrative Law Judge Pamela J. Lakes granting an attorney's fee in connection with a claim<sup>1</sup> filed pursuant to the

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<sup>1</sup> In a Decision and Order dated November 30, 2006, the administrative law judge awarded benefits. Upon review of employer's appeal, the Board affirmed the award of benefits. *C.B. [Bowman] v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008)

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

### **Background Information**

In an Order dated June 12, 2007, 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 assistants).

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. *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 \$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 assistants).<sup>2</sup>

Pursuant to employer's appeal, the Board held 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. *Bowman v. Bowman Coal Co.*, BRB No. 11-0438 BLA (Mar. 22, 2012) (unpub.). The Board, therefore, affirmed the administrative law judge's approval of the requested hourly rates, and

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(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.).

<sup>2</sup> In considering claimant's counsel's amended fee petition, the administrative law judge reduced Andrew Delph's requested hourly rate from \$250.00 to \$200.00. 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.

affirmed the administrative law judge's attorney's fee award in the total amount of \$10,637.50. *Id.*

### **The Administrative Law Judge's Current Fee Award**

This case involves claimant's counsel's fee request for additional legal services performed before the Office of Administrative Law Judges while the case was on remand from October 22, 2010 to February 16, 2011. Claimant's counsel requested a total fee of \$1,443.75, for 1.75 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 3.75 hours of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan), and 0.75 hours of legal services at an hourly rate of \$100.00 (legal assistants). By Order dated May 31, 2012, the administrative law judge disallowed compensation for 0.25 hours of the legal services provided by the legal assistants (\$25.00). The administrative law judge, therefore, awarded claimant's counsel a total fee of \$1,418.75.

On appeal, employer contends that the administrative law judge's attorney's fee award is excessive. Neither claimant's counsel nor the Director, Office of Workers' Compensation Programs, has filed a response brief.<sup>3</sup>

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 accord with applicable law.<sup>4</sup> *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (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).

Employer challenges the hourly rates awarded by the administrative law judge, contending that the rates are not supported by prevailing market evidence. Employer's

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<sup>3</sup> By Order dated September 12, 2012, the Board granted employer's motion to hold this case in abeyance pending the decisions in *Eastern Associated Coal Corp. v. Director, OWCP* [Gosnell], 724 F.3d 561 (4th Cir. 2013) and *Bowman Coal Co. v. Director, OWCP* [Bowman], No. 12-1642, 2013 WL 5228037 (4th Cir. Sept. 18, 2013) (unpub.). The Board lifted the abeyance on October 23, 2013. *Bowman v. Bowman Coal Co.*, BRB No. 12-0487 BLA (Oct. 23, 2013) (Order) (unpub.).

<sup>4</sup> 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).

Brief at 4-5. We disagree. In her previous attorney fee award in this case, the administrative law judge relied upon evidence of fees that claimant's counsel received in the past, as well as the attorneys' experience in litigating federal black lung cases, to determine their appropriate hourly rates. Order on Remand dated February 15, 2011. Based on the administrative law judge's proper analysis of the regulatory criteria, the Board held 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. *Bowman*, BRB No. 11-0438 BLA, slip op. at 4-5. The Board, therefore, affirmed the administrative law judge's approval of the requested hourly rates. *Id.*

In her May 31, 2012 Order, the administrative law judge relied upon these same factors in awarding the requested hourly rates, namely, evidence of fees received in the past, as well as the attorneys' experience in litigating federal black lung cases. May 31, 2012 Order at 2-3. For the same reasons set forth in our previous Decision and Order, 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. *See E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 571-72 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010). We, therefore, affirm the administrative law judge's award of the hourly rates in this case.

Employer also argues that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for legal services. Employer's Brief at 5-6. Specifically, employer contends that counsel's practice of billing in quarter-hour increments was unreasonable. We disagree. The United States Court of Appeals for the Fourth Circuit has held that attorneys may bill, and adjudicators may award fees, in quarter-hour increments in black lung cases.<sup>5</sup> *Gosnell*, 724 F.3d at 576. Consequently, we hold that the total number of hours awarded by the administrative law judge was reasonable and supported by the record. We, therefore, affirm the administrative law judge's fee award of \$1,418.75.

#### **Attorney Fee Request for Services Performed Before the Board**

Pursuant to 20 C.F.R. §802.203, claimant's counsel has filed a complete, itemized statement requesting a fee for services performed before the Board. Counsel requests a fee of \$3,750.00, for 6.75 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 7.00 hours of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan), and

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<sup>5</sup> In this case, the administrative law judge considered the work performed, and disallowed one quarter-hour for work that she found was duplicative. 2012 Order at 3-4.

1.50 hours of legal services at an hourly rate of \$100.00 (legal assistants), for work performed before the Board from July 31, 2008 to July 25, 2010, in BRB No. 07-0320 BLA, and from March 18, 2011 to March 29, 2012, in BRB No. 11-0438 BLA.

Employer contends that claimant's counsel has not provided sufficient information relevant to the applicable market rates of the persons providing legal services.<sup>6</sup> We disagree. In his fee petition, Mr. Wolfe submitted an extensive list of black lung cases in which he was awarded an hourly rate of at least \$300.00, as well as cases in which Mr. Gilligan was awarded an hourly rate of \$225.00.<sup>7</sup> See *Gosnell*, 724 F.3d at 571-72; *Cox*, 602 F.3d at 290, 24 BLR at 2-291. Counsel also provided evidence of the expertise and experience in the field of black lung litigation that he and Mr. Gilligan share. See *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664-65, 24 BLR 2-106, 2-124 (6th Cir. 2008); see also *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228, 43 BRBS 67, 71 (4th Cir. 2009). As claimant's counsel has provided sufficient evidence of a market rate in his geographic area for attorneys of his, and of Mr. Gilligan's, expertise and experience for appellate work before the Board, we approve the requested hourly rates of \$300.00 and \$225.00 for Mr. Wolfe and Mr. Gilligan, respectively. Furthermore, we approve the requested hourly rate of \$100.00 for work performed by claimant's counsel's legal assistants, as counsel has provided numerous examples of cases in which his legal assistants have received \$100.00 an hour for legal services. See 20 C.F.R. §802.203(d)(4).

Employer also objects to the number of hours requested by claimant's counsel. Employer initially contends that the 0.25 hour that claimant's counsel, Mr. Wolfe, spent on July 31, 2008, was unnecessary. We agree. Claimant's counsel has not provided any explanation for why it was necessary for him to forward a copy of the administrative law judge's June 12, 2007 attorney fee award to employer, considering that the service sheet accompanying the attorney fee award indicates that the administrative law judge served the fee order on employer's counsel. Director's Exhibit 98. Because Mr. Wolfe's 0.25 hour of work on July 31, 2008 was unnecessary, it is disallowed. *Lanning v. Director, OWCP*, 7 BLR 1-314, 316 (1984).

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<sup>6</sup> Alternatively, employer requests that the fee petition be held in abeyance to provide employer with an opportunity to conduct discovery relating to counsel's requested hourly rate. Employer's Response to Claimant's Fee Petition at 8-9. Employer's request is denied.

<sup>7</sup> Claimant's counsel also provided an affidavit from an attorney who knows Mr. Gilligan personally and is familiar with black lung legal practice, in support of Mr. Gilligan's hourly rate of \$225.00. See Attorney Fee Petition.

Employer objects to an additional 2.75 hours requested by claimant's counsel for legal services performed prior to 2011, arguing that they are related to a fee petition filed with the Board that was not awarded. Specifically, on September 22, 2008, claimant's counsel filed an itemized statement requesting a fee for services performed before the Board from December 20, 2006 to July 28, 2008, in BRB No. 07-0320 BLA. Director's Exhibit 112. By published Order dated April 15, 2010, the Board held that the fee petition was "incomplete on its face," and granted claimant's counsel thirty days in which to submit an amended fee petition. *Bowman v. Bowman Coal Co.*, 24 BLR 1-165, 1-170-71 (2010) (Order). The Board subsequently granted claimant's counsel a thirty-day extension to file the amended fee petition. However, to date, claimant's counsel has not submitted an amended fee petition. As a result, claimant's counsel has not yet been awarded a fee for the legal services he performed before the Board from December 20, 2006 to July 28, 2008. Consequently, claimant's counsel is not entitled to compensation for his time spent pursuing that fee petition. We, therefore, disallow the 2.50 hours spent by Mr. Wolfe, and the 0.25 hour spent by a legal assistant, related to that fee request.

Employer next contends that certain services should be disallowed as duplicative of other services performed. Specifically, employer asserts that the entry of April 8, 2011 is duplicative of the entry of April 7, 2011, that the entry of August 22, 2011 is duplicative of the entry of June 26, 2011, and that the entry of August 2, 2011 is duplicative of the entry of May 13, 2011. Employer's Response to Fee Petition at 8. We disagree. Contrary to employer's characterization, the legal services performed on these dates are distinct from one another, and are, therefore, not duplicative.<sup>8</sup> However, we agree with employer that the 0.25 hour spent by a legal assistant on April 30, 2011 answering a call from claimant, and taking a message, is a clerical, non-compensable service. See *Bentley*, 522 F.3d at 666-67, 24 BLR at 2-126-27; *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217-18 (1986). It is, therefore, disallowed. We find the remaining hours of services to be reasonably commensurate with the necessary work performed in the appeal before the Board, and award a fee for these services. 20 C.F.R. §802.203(e).

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<sup>8</sup> On April 7, 2011, Mr. Wolfe analyzed an April 4, 2011 letter from the Board. A day later, on April 8, 2011, a paralegal provided a separate legal service, reviewing the status of the appeal. On June 26, 2011, Mr. Gilligan reviewed employer's petition for review and brief, and placed the response due date on the calendar. Almost two months later, on August 22, 2011, Mr. Wolfe provided a separate legal service, analyzing employer's reply brief. Finally, on May 13, 2011, Mr. Wolfe reviewed employer's request for an extension of time. Over two months later, on August 2, 2011, a paralegal provided a separate legal service, reviewing the status of the case.

Therefore, we award claimant's counsel a fee of \$2,875.00, for 4.00 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 7.00 hours of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan), and 1.00 hour of legal services at an hourly rate of \$100.00 (legal assistants), to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Order awarding attorney fees is affirmed, and claimant's counsel is awarded a fee.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge