

BRB No. 13-0521 BLA

LOUIS A. WILLIAMS)
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 Claimant-Petitioner)
)
 v.)
)
 PEABODY COAL COMPANY) DATE ISSUED: 05/29/2014
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Second Supplemental Decision and Order on Reconsideration – Denial of Reconsideration Request of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

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

PER CURIAM:

Claimant appeals the Second Supplemental Decision and Order on Reconsideration – Denial of Reconsideration Request (2009-BLA-5800) of Administrative Law Judge Richard T. Stansell-Gamm, regarding claimant’s counsel’s

attorney fee petition filed in connection with a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). On October 9, 2012, claimant's counsel submitted a fee petition to the administrative law judge for 72.65 hours of legal services performed before the Office of Administrative Law Judges between January 18, 2012 and September 7, 2012, at an hourly rate of \$240, and reimbursement of costs of \$1,275.60, for a total fee of \$18,711.60.¹ In support of the hourly rate requested, counsel attached affidavits from four attorneys practicing in the same geographic area who also represent clients in federal black lung claims. On October 18, 2012, employer filed a motion objecting to the fee petition, and requesting that the administrative law judge allow discovery concerning the requested hourly rate and expenses. Claimant's counsel replied to employer's motion on October 25, 2012, urging the administrative law judge to deny employer's discovery request and referring to a list of cases in which counsel was awarded fees at the hourly rate of \$240. In a letter dated November 5, 2012, claimant's counsel acknowledged that she had inadvertently omitted from her response the list of cases to which she had referred and enclosed a copy to cure this defect.

On November 28, 2012, the administrative law judge issued a Partial Approval of Discovery Request directing claimant's counsel to submit copies of the cases that she cited in support of the requested hourly rate to employer, as attorney fee award determinations are not available online. The administrative law judge also ordered claimant's counsel to submit copies of the invoices and receipts for the litigation expenses claimed.

Claimant's counsel provided employer with copies of the cases she listed as supporting the requested hourly rate, with the exception of two misfiled cases and ten cases involving employer's counsel's law firm. In his Supplemental Decision and Order – Partial Award of Attorney's Fees, issued on February 15, 2013, the administrative law judge determined that, under the circumstances, claimant's compliance with the discovery request was sufficient. The administrative law judge also found that the requested hourly rate of \$240 was supported by the more than twenty cases that claimant's counsel submitted to employer in which the same rate had been previously awarded. However, the administrative law judge reduced the hours requested for obtaining the depositions of Drs. Houser and Repsher from 15.25 hours to 11.25 hours. The administrative law judge stated:

¹ Claimant's counsel, Sandra M. Fogel, requested fees for: 54.15 hours billed by her at a rate of \$240 an hour and 18.50 hours billed by Attorney Bruce Wissore at a rate of \$240 an hour.

For preparation of, and participation in, the two depositions, [claimant's counsel] allocated 6.75 hours for Dr. Houser, and 9.50 hours for Dr. Repsher. And, according to [employer's counsel] the actual duration of Dr. Houser's deposition was 1.5 hours; whereas, Dr. Repsher's deposition lasted 3.5 hours. Based on the duration of those two depositions, [claimant's counsel] took 5.25 hours to prepare for Dr. Houser's deposition and 6.00 hours to prepare for the deposition with Dr. Repsher, a total of 11.25 hours. Since I consider three hours to be sufficient to prepare for a deposition, particularly considering that [claimant's counsel] completed the preparation of, and participation in, Dr. Tuteur's deposition in a total of 3.5 hours, I will approve no more than six additional hours for preparation time for . . . the depositions of Dr. Houser and Dr. [Repsher]." *Id.* In other words, considering that [claimant's counsel] only actually charged 5.50 hours, rather than 6.75 hours, for Dr. Houser's deposition, the actual reduction in [claimant's counsel's] claimed time charges for the depositions is four hours.

Supplemental Decision and Order at 4. Consequently, the administrative law judge awarded a fee of \$17,751.60, representing 68.65 hours of service at an hourly rate of \$240.00, and expenses in the amount of \$1,275.60. Claimant did not appeal this order.

Claimant filed a supplemental fee application on March 5, 2013, requesting \$1,056.00 for 4.40 hours spent defending the initial fee request, billed at an hourly rate of \$240. On March 26, 2013, the administrative law judge issued a Second Supplemental Decision and Order – Partial Award of Attorney's Fees, in which he reduced the requested hours by the 2.10 hours that counsel charged for identifying, reviewing, and providing copies of some of the twenty-six cases supporting her requested hourly rate. The administrative law judge approved the remaining 2.30 hours for a total supplemental fee of \$552.00.

Claimant filed a motion for reconsideration, asserting that the initial fee petition was sufficient to establish the reasonableness of the requested hourly rate so "[t]here was no rational basis for requiring counsel to submit more, unnecessary proof" and "[c]ounsel should not be penalized for complying with the [administrative law judge's] instruction and submitting the additional information," in the form of copies of the fee determinations on the list provided. Claimant's Motion for Reconsideration at 6. Claimant also noted, "[f]or the record," that the administrative law judge relied on mistaken information in reducing the number of hours related to taking the depositions of Drs. Houser and Repsher in his Supplemental Decision and Order – Partial Award of

Attorney's Fees.² *Id.* at 2 n.1. Employer did not respond to claimant's reconsideration request.

On July 16, 2013, the administrative law judge issued a Second Supplemental Decision and Order on Reconsideration – Denial of Reconsideration Request. The administrative law judge indicated that, because the 2.10 hours related to gathering information that should have been provided in the initial fee petition pursuant to 20 C.F.R. §725.366, it was not compensable. The administrative law judge further stated that he was not going to address claimant's arguments concerning the reduction in hours related to the depositions of Drs. Houser and Repsher, as claimant's counsel did not timely file a request for reconsideration on this issue, and counsel had ample opportunity to respond to employer's objections as to the number of hours that counsel claimed because employer raised them in response to claimant's counsel's initial fee petition.

On appeal, claimant argues that the administrative law judge erred in reducing the number of hours allowed to prepare for, and take, the depositions of Drs. Houser and Repsher. In addition, claimant asserts that the administrative law judge's disallowance of the time spent complying with the discovery request was irrational. Employer responds, urging the Board to uphold the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, has not responded to claimant's appeal.

The amount of an award of an attorney fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

Claimant initially contends that the administrative law judge erred in reducing the hours billed for the depositions of Drs. Houser and Repsher, as he relied on inaccurate information from employer's counsel to determine the actual time spent preparing for, and attending, the depositions. Claimant further maintains that the administrative law judge did not dispute the errors when they were brought to his attention in claimant's motion for reconsideration of his Second Supplemental Decision and Order – Partial Award of Attorney's Fees, but decided not to alter his decision, as he found that claimant should have raised the issue prior to his ruling on the initial fee request. Claimant also

² Claimant's counsel asserted that, contrary to employer's allegation, Dr. Houser's deposition lasted 3.75 hours, rather than 1.50 hours, while Dr. Repsher's deposition lasted 1.50 hours, rather than 3.50 hours. Claimant's Motion for Reconsideration at 2 n.1. With respect to the relative brevity of Dr. Repsher's deposition, counsel stated that it, nevertheless, involved eight hours of preparation, because it required review of five medical reports, including attachments totaling many hundreds of pages. *Id.*

asserts that the administrative law judge's finding, that three hours is a sufficient amount of time to prepare for a deposition, is arbitrary and irrational, as he did not explain his determination.

We reject claimant's contentions regarding the administrative law judge's reduction in the number of hours allowed for obtaining the depositions, as counsel did not timely file a request for reconsideration, or appeal, the administrative law judge's decision to the Board. The administrative law judge issued his Supplemental Decision and Order on February 15, 2013. Counsel did not take any action challenging the administrative law judge's ruling, but rather, filed a supplemental fee application on March 5, 2013. Pursuant to 20 C.F.R. §725.479(b), a party has thirty days after the filing of a decision and order to request reconsideration by the administrative law judge. Alternatively, pursuant to 20 C.F.R. §§725.479, 725.481, a party dissatisfied with an administrative law judge's Decision and Order may appeal to the Board prior to it becoming final. Because claimant's counsel took neither of these actions, claimant has waived this issue. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995).

Claimant also argues that the administrative law judge's disallowance of 2.10 hours for the time spent copying cases in order to comply with the discovery request was irrational, as the administrative law judge did not provide a consistent explanation for why the evidence contained in claimant's initial fee petition was insufficient to meet the criteria established in *Bowman v. Bowman Coal Co.*, 24 BLR 1-165, 1-170 n.8 (2010), *petition for review denied sub nom. Bowman Coal Co. v. Director, OWCP [Bowman]*, No. 12-1642, 2013 WL 5228037 (4th Cir. Sept. 18, 2013) (unpub.). Claimant contends that attorney affidavits are routinely accepted by the United States Court of Appeals for the Seventh Circuit, the Board, and administrative law judges and have been credited as supporting evidence for the hourly rate in approximately thirty-three previous cases. Further, claimant states that the list of prior fee awards granting the same requested hourly rate provided prior to the administrative law judge's order granting partial discovery, had been credited as supporting evidence in ten previous cases. Claimant contends that requiring counsel to copy the cases contained on the list was duplicative and unnecessary. These allegations of error are without merit.

The administrative law judge indicated in his Partial Approval of Discovery Request that, "since generally neither the Benefits Review Board nor the Office of Administrative Law Judges provide[s] online access to their attorney fee award determinations, [claimant's counsel] is directed to provide to Employer's counsel copies of the cited cases supporting the claimed hourly rate." Partial Approval of Discovery Request at 3. Then, in his Second Supplemental Decision and Order on Reconsideration – Denial of Reconsideration Request, the administrative law judge cited a second rationale for granting employer's discovery request – that he "determined that the affidavit evidence [claimant's counsel] submitted was insufficient on its face to establish

a reasonable hourly rate based on the prevailing market rate for an attorney with [claimant's counsel's] level of experience in the geographic area in which she practices." Second Supplemental Decision and Order on Reconsideration at 3. The administrative law judge found that "the 2.10 hour charge relates to information [claimant's counsel] should have provided in her initial fee petition under the requirements of 20 C.F.R. §725.366 and *Bowman*, for which a time charge would not have been awarded," because counsel cannot be compensated for time spent preparing a fee application. *Id.*

Contrary to claimant's contentions, the administrative law judge did not abuse his discretion in reducing the requested number of hours by 2.10 for the time spent complying with the discovery order. *See Jones*, 21 BLR at 1-108. Although the administrative law judge did not specifically state in his discovery order that he found claimant's initial fee petition to be insufficient, it was implicit in his instruction directing claimant to provide copies of previous cases that the administrative law judge found that neither the list of cases, nor the supporting affidavits, was sufficient. As the fee applicant bears the burden of producing specific evidence of prevailing market rates, it was not unreasonable for the administrative law judge to disallow the time that he deemed necessary to provide information to establish the prevailing market rate that he determined should have been provided in the initial fee petition. *See Blum v. Stenson*, 465 U.S. 886 (1984); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Plyler v. Evatt*, 902 F.2d 273 (4th Cir. 1990); *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007); *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002). Consequently, we affirm the administrative law judge's decision to disallow 2.10 hours for the time spent complying with the discovery order. We further affirm, therefore, the administrative law judge's decision to award attorney's fees in the amount of \$18,303.60 for 70.95 hours of service, billed at an hourly rate of \$240.00, and expenses in the amount of \$1,275.60.³

³ The administrative law judge awarded attorney's fees in the amount of \$17,751.60 for 68.65 hours of service, billed at an hourly rate of \$240.00, and expenses in the amount of \$1,275.60 in response to claimant's counsel's October 9, 2012 fee petition, which reflects a reduction of 4.00 hours in the time claimed for obtaining the depositions of Drs. Houser and Repsher. The administrative law judge subsequently awarded an additional \$552.00 for 2.30 hours of service, billed at an hour rate of \$240.00, in response to claimant's counsel's March 5, 2013 fee petition, which reflects a reduction of 2.10 hours for the time spent complying with the discovery order.

Accordingly, the administrative law judge's Second Supplemental Decision and Order on Reconsideration – Denial of Reconsideration Request is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge