U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0460 BLA

DAVID R. MADDOX	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LODESTAR ENERGY, INCORPORATED	)	DATE ISSUED: 05/16/2018
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Order Granting In Part Attorney Fees of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel, Austin Vowels, appeals the Supplemental Order Granting In Part Attorney Fees (2016-BLA-05461) of Administrative Law Judge Colleen A. Geraghty, in connection with a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). On March 22, 2017, the administrative law judge issued a Decision and Order Awarding Benefits pursuant to the regulations at 20 C.F.R. Parts 718 and 725. Thereafter, claimant's counsel submitted a fee petition to the administrative law judge, requesting $12,455.49 for legal services rendered before the Office of Administrative Law Judges from February 18, 2016 to March 27, 2017, and associated expenses. The total fee requested represents 38.0 hours of services performed by claimant's counsel at an hourly rate of $250.00, 16.30 hours of services performed by a paralegal at an hourly rate of $150.00, and expenses in the amount of $510.49. Employer objected to the hourly rates claimed for counsel and the paralegal.

After considering the fee petition and employer's objections to it, the administrative law judge found both requested hourly rates excessive. She determined that claimant's counsel is entitled to an hourly rate of $225.00 and that the paralegal is entitled to an hourly rate of $100.00. The administrative law judge also disallowed 1.95 hours of work performed by counsel and 0.90 hours of work performed by the paralegal because the service was clerical or the time requested was excessive. The administrative law judge further reduced the requested fee by $5.17 to reflect a reduced mileage rate for travel expenses. Accordingly, the administrative law judge awarded a fee of $10,156.57.[1]

On appeal, claimant's counsel alleges that the administrative law judge erred in reducing the requested hourly rates and in reducing the amount of time billed. Employer's counsel responds in support of the awarded fee. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Claimant's counsel filed a reply brief, reiterating his contentions on appeal.

I. The Board's Standard of Review

The amount of an attorney's fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion,

[1] The administrative law judge approved 36.05 hours of legal services performed by claimant's counsel at an hourly rate of $225.00 ($8,111.25) and 15.40 hours of legal services performed by the paralegal at an hourly rate of $100.00 ($1,540.00). The administrative law judge also approved expenses in the amount of $505.32.

or not in accordance with applicable law.[2] *See 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). An application seeking a fee for legal services performed on behalf of a claimant must indicate the customary billing rate of each person performing the services. 20 C.F.R. §725.366(a). The regulations provide that an approved fee must 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 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).

II. Hourly Rate

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); *see also Bentley*, 522 F.3d at 663, 24 BLR at 2-121. 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).

Claimant's counsel argues that the administrative law judge erred in not relying on the unopposed prior fee awards he submitted in support of his requested hourly rate of $250, as "the fact that such awards were unopposed, in and of itself, speaks to the reasonableness of the awards." Claimant's Brief at 11. We disagree. "Reasonableness" is not the only standard the administrative law judge is to apply in assessing a rate request. The rate must also be consistent with the prevailing market rate and counsel has not explained how the unopposed fee petitions establish this required fact. *See Geier*, 372 F.3d

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

at 791. Thus, claimant's counsel has not established that the administrative law judge abused her discretion in finding that the unopposed attorney fee petitions "are not indicative of the appropriate prevailing rate."[3] Supplemental Order at 8; *see Jones*, 21 BLR at 1-108.

We also reject counsel's assertion that the administrative law judge erred in finding that his reliance on two unpublished Board decisions was misplaced. In *Swan v. Midwest Coal Co.*, BRB Nos. 12-0105 BLA and 12-0106 BLA (Nov. 29, 2012) (unpub.), the Board affirmed the approval of a $300 hourly rate for Joseph Wolfe. In *Swiney v. Donald Swiney Mining*, BRB No. 12-0643 BLA (July 19, 2013) (unpub.), the Board affirmed a fee award for Thomas Johnson based on an hourly rate of $250.00. The administrative law judge reasonably found that because a description of the attorneys' experience is not included in these decisions, they are of limited value in drawing comparisons to counsel's requested hourly rate. *See Abbott*, 13 BLR at 1-16; Supplemental Order at 8.

In addition, the administrative law judge permissibly determined that the National Law Journal data for partners of law firms across the county is not useful in determining the prevailing market rate, as "this information is not broken down by the types of cases litigated, geographic area, or the amount of experience of the partners polled[.]" Supplemental Order at 8; *see Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172, 1-174 (2010). Similarly, the administrative law judge reasonably found that the United States Consumer Law Attorney Fee Survey Report was not helpful because it "only considered the rates of attorneys practicing consumer law in Kentucky, and Attorney Vowels has provided no basis for how this is relevant in the area of black lung claims." Supplemental Order at 8; *see Bentley*, 522 F.3d at 663, 24 BLR at 2-121. Further, we reject counsel's assertion that the Laffey Matrix should be considered as evidence by the Board because it corroborates the requested fee. Claimant's counsel did not submit this evidence before the administrative law judge and, therefore, we are precluded from considering it for the first time on appeal. *See Berka v. North American Coal Co.*, 8 BLR 1-183, 1-184 (1985). We therefore affirm the administrative law judge's designation of $225 as the appropriate hourly rate for claimant's counsel. *See Pritt v. Director, OWCP*, 9 BLR 1-159, 1-160 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330, 1-332 (1984).

[3] In his reply brief, claimant's counsel argues that because he was recently awarded the requested rates by the Sixth Circuit, the administrative law judge and the Board should award the requested rates as well. However, where different adjudicators are awarding the fees for work before them, reasonable differences in opinion about what constitutes the appropriate rate can be expected. *See B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 665, 24 BLR 2-106, 2-125 (6th Cir. 2008). The administrative law judge therefore was not bound by the fee awards made by the Sixth Circuit.

We also reject counsel's contentions concerning the administrative law judge's reduction of the paralegal's hourly rate from the $150.00 requested to $100.00. The administrative law judge did not abuse her discretion in declining to give controlling weight to the prior fee awards on the grounds that they were unopposed and involved different adjudicators, who could have reasonably differed about what constitutes the appropriate rate. *See Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23; Supplemental Order at 9. Additionally, the administrative law judge permissibly determined that the unpublished Board case cited by counsel, *Honeycutt v. Tammy Anne, Inc.*, BRB No. 10-0546 BLA (June 29, 2011) (unpub.), does not support the requested rate because the qualifications of the legal assistants in that case are not included in the decision and they were only awarded $100.00 an hour. *See Maggard*, 24 BLR at 1-175. Claimant's counsel has thus failed to establish that the administrative law judge abused her discretion in finding that he did not support the requested hourly rate. *See Bentley*, 522 F.3d at 661, 24 BLR at 2-117-18 (6th Cir. 2008). Consequently, we affirm the administrative law judge's determination that counsel's paralegal was entitled to an hourly rate of $100.00.

III. Allowable Hours

Claimant's counsel next argues that the administrative law judge erred in disallowing or reducing the time he and his paralegal billed for various tasks as clerical or excessive. Initially, counsel challenges the administrative law judge's disallowance of 0.50 hours of his October 20, 2016 entry of 1.30 hours because the phone call and email to the court reporter regarding a deposition involved the scheduling of an appointment, which is clerical in nature. Supplemental Order at 3. Counsel maintains that the phone call and the email are equivalent to reviewing and preparing correspondence, which is compensable. We disagree. As the administrative law judge permissibly found, scheduling is a clerical task that is not separately compensable. *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217-18 (1986) (clerical services are considered part of office overhead and are figured into the hourly rate).

Counsel also contests the administrative law judge's decision to strike 0.10 hours from the October 24, 2016 entry for ordering a transcript, and 0.15 hours from the combined entry of 0.20 hours for reviewing the file, invoices, and report from Dr. Kendall on November 14, 2016 and November 18, 2016, because these tasks are clerical. *Id.* Claimant's counsel asserts that preparation of a transcript order is the same as preparing correspondence, which is compensable. Concerning the second disallowance, counsel states that he is entitled to review documents and to be compensated for that time. Further, counsel argues that he received Dr. Kendall's invoice twice and had to review it to ensure that the first invoice had not been paid.

Counsel's allegations do not have merit. The administrative law judge acted within her discretion in determining that ordering a transcript is not the same as preparing

correspondence because it is a routine, clerical task. *See Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989); Supplemental Order at 4. Similarly, the administrative law judge permissibly disallowed the billing entries for reviewing an invoice from Dr. Kendall, as this task is also clerical. *See Bentley*, 522 F.3d at 666-67, 24 BLR at 2-127; Supplemental Order at 4. The administrative law judge also acted within her discretion in disallowing the 0.20 hours billed for time spent by the paralegal for "prepar[ing] letter to Dr. Kendall (mail and fax) regarding invoice and ILO" because it appeared to be related to a billing issue and is, therefore, clerical. Supplemental Order at 4, *quoting* Motion for Attorney's Fees and Expenses at 7; *see Brown v. Director, OWCP*, 3 BLR 1-95, 1-98 (1979).

Additionally, claimant's counsel objects to the administrative law judge's reduction, by 0.50 hours, of his entry of 0.80 hours on January 3, 2017 for "review[ing] file, review of email messages from [administrative law judge's] office and coal company's attorneys re: telephone conference." Supplemental Order at 6, *quoting* Motion for Attorney's Fees and Expenses at 7. Counsel further challenges the administrative law judge's decision to reduce his time by 0.70 hours and his paralegal's time by 0.70 hours for time billed for preparing Claimant's Exhibits 1-6 on June 27, 2016, September 16, 2016, September 30, 2016, November 11, 2016, and November 28, 2016, as well as two general entries for the preparation of exhibits on October 20, 2016 and October 25, 2016. Counsel states that the time claimed in the general entries was necessary to prepare the exhibits in a "special manner" for the hearing. Claimant's Brief at 18. We reject counsel's allegation of error.

As the administrative law judge noted, only three of the six exhibits were prepared prior to the hearing and there were individual entries for the preparation of each exhibit in addition to the general entries. Supplemental Order at 6. It was therefore within the administrative law judge's discretion to disallow the 0.70 hours spent by the paralegal for general exhibit preparation and to reduce by 0.70 hours the time spent by counsel in the general preparation of exhibits as excessive. *See E. Associated Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 578 (4th Cir. 2013).

Having rejected counsel's allegations of error, we affirm the administrative law judge's award of $8,111.25 for 36.05 hours of services performed by claimant's counsel at an hourly rate of $225.00, and her award of $1,540.00 for 15.40 hours of services performed by the paralegal at an hourly rate of $100.00. We also affirm the administrative law judge's award of expenses in the amount of $505.32,[4] for a total award of $10,156.57.

[4] We affirm the administrative law judge's reduction in expenses by $5.17 to reflect counsel's agreement to the use of the federal Internal Revenue Service mileage rate of $0.54, rather than the requested rate of $0.565. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Supplemental Order at 7.

Accordingly, the administrative law judge's Supplemental Order Granting In Part Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge