

BRB Nos. 12-0105 BLA
and 12-0106 BLA

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| JOELLA SWAN |) | |
| (Widow of and on behalf of HARRY |) | |
| EDWARD SWAN) |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| MIDWEST COAL COMPANY |) | DATE ISSUED: 11/29/2012 |
| |) | |
| Employer-Petitioner |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Attorney Fee Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

Scott A. White (White & Risse, L.L.P.), Arnold, Missouri, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Attorney Fee Order (2008-BLA-5902 and 2008-BLA-5903) of Administrative Law Judge Alice M. Craft, rendered in connection with an award of benefits on a miner's claim and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant's counsel submitted a fee petition to the administrative law judge, requesting a total fee in the amount of \$54,812.43 for work performed from June 23, 2008 to May 20, 2011, representing 182.73 hours of legal services by Thomas E. Johnson at an hourly rate of \$250.00; 14.10 hours of legal services by Anne Megan Davis at an hourly rate of

\$250.00; 7.55 hours of legal services by a paralegal at an hourly rate of \$100.00 and reimbursement for computer-related research fees totaling \$359.14 and miscellaneous costs totaling \$4,479.78.

Employer objected to the hourly rates requested for Attorneys Johnson and Davis, the number of hours requested and the reimbursement for fees and costs. Employer also argued that the fee petition was premature. Claimant's counsel filed a reply memorandum in support of the fee petition, wherein claimant's counsel responded to employer's objections to the hourly rates and some of the requested fees. Claimant's counsel agreed to deduct six hours of legal services provided by Attorney Johnson, reducing the total number of hours performed by Attorney Johnson to 176.73. Claimant's counsel also agreed to deduct \$112.79 in travel-related costs, deduct \$160.21 in hearing transcript fees and deduct \$11.00, based on a miscalculation of the total amount of fees requested for work performed by a paralegal. However, claimant's counsel requested an additional \$2,062.50 in fees for work associated with drafting the reply memorandum and defending the fee petition. Consequently, the fee petition was amended to reflect a total fee request of \$55,090.93. Employer filed a response to the claimant's counsel's reply memorandum, contending that claimant's counsel failed to obtain leave to file a reply memorandum and, therefore, was not entitled to fees associated with preparing the memorandum.

After considering the fee petition and employer's objections thereto, the administrative law judge rejected employer's argument that the fee petition was premature, and found that there was good cause for allowing claimant's counsel to file a reply memorandum in support of the fee petition. The administrative law judge also found that the requested hourly rates for Attorneys Johnson and Davis were reasonable, and sufficiently documented, but disallowed 0.22 hours of services performed by Attorney Davis as excessive or duplicative. Regarding the employer's objections to the expenses for which counsel sought reimbursement, the administrative law judge disallowed \$14.97 for a hotel charge incurred for "watching a movie and playing a video game[.]" Attorney Fee Order at 15. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$ \$55,020.95 for costs incurred and legal services performed while the case was before the Office of Administrative Law Judges.

On appeal, employer contends that the administrative law judge failed to consider appropriate market rate evidence and did not apply the correct standard in approving counsel's requested hourly rates. Employer also challenges the number of hours approved and the expenses allowed. Claimant responds in support of the award of attorney fees. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

The amount of an attorney fee award 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 accordance with applicable law.¹ *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); see also *Jones v. Badger v. Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

When a claimant wins a contested case, the Act provides that the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a “reasonable attorney’s fee” to claimant’s counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The regulation governing fees provides, in part, that:

Any fee approved . . . 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 fee requested.

20 C.F.R. §725.366(b); see *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986).

In challenging the hourly rates approved by the administrative law judge, employer contends that the administrative law judge failed to require claimant’s counsel to produce market evidence to support the requested rates for the relevant geographic area. Employer argues that the administrative law judge erred in basing her decision on counsel’s experience and past fee awards, and in summarily rejecting evidence proffered by employer indicating that other attorneys in the area were awarded lower hourly rates. Employer’s Brief at 2-4. Employer’s arguments are without merit.

In reviewing counsel’s requested hourly rate, the administrative law judge performed the requisite analysis set forth in 20 C.F.R. §725.366(b) by considering employer’s objections and the evidence provided by both parties as to the prevailing market rate for black lung attorneys, and adequately explaining her determination that the hourly rates awarded for work performed by the attorneys and legal assistants were reasonable under the facts of this case. Within a proper exercise of her discretion, the administrative law judge relied on the following considerations: past hourly rates awarded to claimant’s counsel; the necessity of increasing the hourly rate to account for prevailing market rate and increased costs; the affidavits of other practitioners in the

¹ The record reflects that the miner’s coal mine employment was in Indiana and Illinois. Director’s Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

relevant geographic market; the nature and complexity of the legal issues involved; the quality of the representation; and the qualifications and expertise of the attorneys. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008); Attorney Fee Order at 3-5.

Further, because counsel provided documentation of past hourly rates awarded and affidavits from other practitioners, the administrative law judge rationally determined that counsel provided sufficient evidence supporting the hourly rates requested as reasonable for work performed before the Office of Administrative Law Judges. *See generally Robinson v. Equifax Information Services, LLC*, 560 F.3d 235, 245 (4th Cir. 2009), *citing Plyler v. Evatt*, 902 F.2d 273, 277 (4th Cir. 1990) (fee applicant must produce satisfactory specific evidence of the prevailing market rates in the relevant community for the type of work for which he seeks an award). Accordingly, we reject employer's assertion that claimant's counsel failed to produce any specific evidence of the prevailing market rates for legal services. As employer has demonstrated no abuse of the administrative law judge's discretion, we affirm the administrative law judge's determination that hourly rates of \$250.00, for work performed by Attorneys Johnson and Davis, and \$100.00, for work performed by a legal assistant, were reasonable under the facts of this case.

Employer next asserts that the administrative law judge "provided no reason for awarding" a number of hours charged by Attorneys Johnson and Davis that employer maintains should have been denied or reduced. Employer's Brief at 4. Employer's argument has no merit, as the administrative law judge sufficiently discussed and rejected all of the challenges to the fee petition that employer now raises before the Board, as related to Attorneys Johnson and Davis. Specifically, the administrative law judge noted employer's argument that twenty-five time entries for work performed by Attorney Johnson between January 21, 2009 and February 17, 2010² could have been performed by paralegals and, therefore, should have been disallowed or reduced to a lower rate.³

² Employer identified charges from January 21, 2009, February 4, 13 and 24, 2009, March 10, 17, 18, 20-23 and 25, 2009, April 13 and 23, 2009, May 27-29, 2009, August 23, 2009, October 9 and 27, 2009, December 18 and 31, 2009, January 19 and 25, 2010 and February 2, 3 and 17, 2010. Employer's Brief at 5.

³ In addressing employer's argument, the administrative law judge noted that these time entries involved "corresponding with potential medical experts, responding to discovery requests, obtaining medical evidence, analyzing medical records, corresponding with the Department of Labor, and preparing exhibits." Attorney Fee Order at 8-9.

Attorney Fee Order at 8-9; Employer's Brief at 5. The administrative law judge also discussed employer's contention that 3.38 hours of charges by Attorney Johnson for reviewing evidence, reviewing medical records, reviewing and considering the opinions of experts, and creating a summary of the evidence should have been reduced.⁴ Attorney Fee Order at 9-11; Employer's Brief at 6-7. Moreover, the administrative law judge summarized employer's argument that Attorney Johnson's charge of 4.5 hours for preparing and designating evidence was excessive, that his charge of two hours to confer with Attorney Davis about the post-hearing brief was unnecessary,⁵ and that his total charges of 47.5 hours for preparing and drafting the post-hearing brief should have been reduced to twenty-five hours.⁶ Attorney Fee Order at 11, 13; Employer's Brief at 5, 6, 8-9. Contrary to employer's arguments on appeal, the administrative law judge permissibly found that, "[g]iven the complexity of the combined [m]iner's and [s]urvivor's claim[s] in this case," these charges were valid, as "these are all tasks properly performed by an attorney" and are "reasonably 'necessary to successfully prosecute [the claimant's] case.'" Attorney Fee Order at 8-9, 11, quoting *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894 (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001); see *Bentley*, 522 F.3d at 665-66, 24 BLR at 2-124; *Abbott*, 13 BLR at 1-16.

The administrative law judge also sufficiently discussed and rejected all of the challenges to the fee petition that employer now raises before the Board, as related to Attorney Davis. Employer specifically argues that Attorney Davis's total charge of six hours for researching the effect that a prior withdrawn claim has on a case, researching and drafting a "413(b)" examination motion, and revising a "Motion for Submission of

⁴ Employer specifically identifies charges that occurred on June 30, 2008, July 1, 2008, February 22 and 24, 2009, March 24 and 25, 2009, April 28, 2009 and January 14, 2010. Employer's Brief at 5-6.

⁵ The administrative law judge cited approvingly the position of Attorney Johnson, that the "post-hearing brief was 49 pages and was 'extremely complex.'" Attorney Fee Order at 11. The administrative law judge stated that the miner's claim "was a subsequent claim that required analysis of evidence from three prior claims for benefits, including extensive treatment records and numerous chest x-ray interpretations, pulmonary function studies and arterial blood gas tests." *Id.* The administrative law judge further observed that "a number of Attorney Johnson's time entries involved tasks other than brief writing." *Id.*

⁶ These charges were incurred on January 14, 2010, and from August 3 to August 26, 2010. Employer's Brief at 9

'413(b)' exam as Director's Exhibit,"⁷ were all excessive and should have been reduced. Employer's Brief at 6. The administrative law judge acted within her discretion in finding that these charges were not excessive and were "reasonably 'necessary to successfully prosecute [the claimant's] case.'" Attorney Fee Order at 13-14, *quoting Hawker*, 326 F.3d at 902; *see Bentley*, 522 F.3d at 665-66, 24 BLR at 2-124; *Abbott*, 13 BLR at 1-16.

The administrative law judge also addressed employer's assertion that a number of hours charged by Attorneys Johnson and Davis were "block-billed," and lacked the necessary specificity for the administrative law judge to determine if the charges were excessive. Employer's Brief at 8; Attorney Fee Order at 7-8. The administrative law judge stated that she "carefully reviewed each of the 16 time entries that [e]mployer has identified as 'block-billing[.]'" and found that each of the time entries correspond to hours worked on specific tasks, and are "credible and reasonable for the tasks performed."⁸ Attorney Fee Order at 7-8; *see Bentley*, 522 F.3d at 665-66, 24 BLR at 2-124; *Abbott*, 13 BLR at 1-16. As the administrative law judge stated, employer does not identify any specific "block-billing" that is excessive for the sources identified. Attorney Fee Order at 7-8.

We also reject employer's argument that the administrative law judge erred in awarding 8.25 hours to claimant's counsel for defending the Attorney Fee Petition. Employer's Brief at 9-10. The administrative law judge properly found that claimant's counsel is entitled to request reasonable fees incurred in litigating an award of attorney's fees. *See Hawker*, 326 F.3d at 902; *Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 22 BLR 2-283 (4th Cir. 2001).

As employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused her discretion, we affirm her finding that a total of 198.86 hours

⁷ The administrative law judge stated that issues related to a "Section 413(b)" examination were issues of first impression for both the administrative law judge and claimant's counsel. Attorney Fee Order at 13-14. Section 413(b) of the Act, 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406, requires that the Department of Labor provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate his claim. These charges were incurred on June 5, 10, 11, 14 and 15, 2009. Employer's Brief at 6.

⁸ The administrative law judge stated that "[f]or example, Attorney Johnson's time charge of [three] hours from April 6, 2010 to April 7, 2010, involved research on the impact of the Patient Protection and Affordable Care Act," and a "review of the Department of Labor's instructions regarding the new law." Attorney Fee Order at 7-8.

of legal services at an hourly rate of \$250.00 and 7.55 hours of legal services at an hourly rate of \$100.00 was reasonable under the circumstances of this case. *See* 20 C.F.R. §725.366; *Jones*, 21 BLR at 1-108; *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Thus, we affirm the award of \$50,470.00 for attorney's fees.

Finally, we reject employer's assertion that the administrative law judge erred in ordering reimbursement of claimant's counsel's expenses. Employer contends that counsel double-billed for expenses related to the hearing that took place in Evansville, Indiana. Employer's Brief at 7. Employer contends that because counsel attended a second hearing in an unrelated matter at the same time, charges for a rental car and hotel room should be reduced by one-half. *Id.* In addition, employer asserts that because two formal hearing transcripts were ordered for this matter, charges for obtaining hearing transcripts should be reduced by one-half. However, as claimant's counsel correctly responds, this issue is moot since claimant's counsel agreed to reduce the \$225.58 spent on a car rental and hotel room by one-half to \$112.79 and reduce the \$320.42 spent on obtaining hearing transcripts by one-half to \$160.21. *See supra* at 2; Attorney Fee Order at 15.

We also reject employer's argument that the administrative law judge erred in allowing computer-related research expenses in this case, as she was convinced by claimant's counsel's position that the computer-assisted research "reduced the number of hours otherwise needed for more time-consuming manual research." Attorney Fee Order at 14. It is within the administrative law judge's discretion to determine whether expenses should be considered compensable or disallowed as overhead. *See Hawker v. Zeigler Coal Co.*, 22 BLR 1-168, 1-175 (2000); *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989). The administrative law judge correctly stated that the Board and the United States Court of Appeals for the Seventh Circuit have held that such costs are compensable. Attorney Fee Order at 14, *citing Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991); *Bradley v. Director, OWCP*, 4 BLR 1-241, 1-243 (1981). Because employer has not demonstrated an abuse of discretion in the administrative law judge's award of expenses, we affirm the award of \$359.14 for computer-related expenses and \$4,191.81 for other expenses related to this claim. *See Jones*, 21 BLR at 1-108.

Thus, we affirm the administrative law judge's award of a total fee of \$55,020.95 for legal services performed and expenses incurred while the case was before the Office of Administrative Law Judges.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge