

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 16-0098 BLA

ROSE JUNE STILTNER)
(Widow of ALFRED L. STILTNER))
)
 Claimant-Petitioner)
)
 v.)
)
 HARMAN MINING CORPORATION)
)
 and)
) DATE ISSUED: 11/10/2016
 OLD REPUBLIC INSURANCE COMPANY)
)
 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Order (07-BLA-5384) of Administrative Law Judge Joseph E. Kane granting an attorney's fee in connection with a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant's counsel requested a total fee of \$22,311.25, for 43.75 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 1.50 hours of legal services at an hourly rate of \$250.00 (Bobby J. Belcher), 12.50 hours of legal services at an hourly rate of \$200.00 (Andrew Delph), 15.75 hours of legal services at an hourly rate of \$175.00 (Ryan C. Gilligan), 3.50 hours of legal assistant services at an hourly rate of \$100.00 (full-time legal assistants), and 1.75 hours of legal assistant services at an hourly rate of \$60.00 (part-time legal assistants).¹

In his Attorney Fee Order, the administrative law judge found that claimant's counsel's fee petition revealed that Mr. Delph performed only 12.25 hours of legal services, as opposed to the 12.50 hours requested. The administrative law judge further noted that, while claimant's counsel requested a fee for 3.50 hours of services performed by his full-time legal assistants, the fee petition revealed that they actually performed 35.25 hours of compensable work. Taking into account these adjustments, the administrative law judge awarded claimant's counsel a total fee of \$22,366.25.²

On appeal, employer contends that the administrative law judge's attorney's fee award is excessive. Claimant's counsel responds in support of the administrative law judge's award. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its contentions.³

¹ In challenging the fee petition, employer accurately noted that claimant's counsel's individual requests for legal services totaled \$19,211.25, not \$22,311.25. Motion to Deny Petition at 1.

² The administrative law judge appears to have miscalculated counsel's fee award by \$30.00, as the number of hours credited to claimant's counsel, multiplied by the rates awarded, totals \$22,336.25.

³ The miner's coal mine employment was in Virginia. *See Stiltner v. Harman Mining Corp.*, BRB No. 10-0702 BLA, slip op. at 3 n.3 (Sept. 30, 2011) (unpub.). Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

The amount of an 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). 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).

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).

Employer challenges the hourly rates awarded by the administrative law judge, contending that the rates are not supported by prevailing market evidence. We disagree. In determining the prevailing market rate, the administrative law judge considered evidence of fees received in the past by Mr. Wolfe, Mr. Belcher, Mr. Delph, and Mr. Gilligan. Order at 3. Specifically, counsel's fee petition includes citations to twenty-one cases in which Mr. Wolfe was awarded an hourly rate of \$300.00. See Claimant's Counsel's Fee Petition. In several of these cases, Mr. Belcher, Mr. Delph, and Mr. Gilligan were awarded their requested hourly rates of \$250.00, \$200.00, and \$175.00. *Id.* In *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010), the United States Court of Appeals for the Fourth Circuit recognized that evidence of fees received in the past is an appropriate factor to consider when establishing a market rate. Additionally, in awarding the respective hourly rates of \$300.00, \$250.00, \$200.00, and \$175.00 to Mr. Wolfe, Mr. Belcher, Mr. Delph, and Mr. Gilligan, the administrative law judge relied upon the attorneys' experience. Order at 3. This, too, is a relevant factor that an administrative law judge should consider in determining a reasonable hourly rate for claimant's counsel. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228, 43 BRBS 67, 71 (CRT) (4th Cir. 2009); *Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124.

Based on the administrative law judge's proper analysis of the relevant criteria, we hold that the administrative law judge did not abuse his discretion in determining reasonable hourly rates for claimant's counsel that reflected the applicable market rates.⁴ Order at 3; *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *see also E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 25 BLR 2-359 (4th Cir. 2013); *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010). We, therefore, affirm the administrative law judge's award of the hourly rates in this case.⁵

Next, employer argues that the administrative law judge erred in determining the number of hours for which claimant's counsel is entitled to fees. Employer's Brief at 13. Employer specifically contends that the administrative law judge failed to address its objections to individual billing entries. We agree.

In his Order, the administrative law judge stated that employer "did not allege objections regarding the individual billing entries by [c]laimant's [c]ounsel." Order at 4. Contrary to the administrative law judge's characterization, employer raised specific objections to counsel's individual billings. *See Employer's Motion to Strike Untimely Admissions* (Feb. 16, 2011) at 5-8. Employer argued that 28.75 hours of the work sought for counsel's legal assistants was for non-compensable clerical work. *Id.* at 5. Employer also objected to the hours sought by Mr. Wolfe, Mr. Belcher, Mr. Delph, and Mr. Gilligan, arguing, *inter alia*, that the hours charged were duplicative, unnecessary, clerical, or excessive. *Id.* at 5-8. Although employer raised these objections, the

⁴ Because employer has not alleged any specific error in regard to the administrative law judge's awarded hourly rates of \$60.00 and \$100.00 for work performed by counsel's part-time and full-time legal assistants, these rates are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ While the case was before the administrative law judge, employer filed a motion to compel discovery, seeking information from claimant's counsel regarding the basis for his requested hourly rates. In his Order, the administrative law judge denied employer's discovery request. Order at 2. Employer contends that the administrative law judge erred in denying its discovery request. However, because employer has not demonstrated prejudicial error or an abuse of discretion on the part of the administrative law judge in denying its request, the administrative law judge's decision to deny employer's motion to compel discovery is affirmed. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

administrative law judge did not address them in his Order. The administrative law judge's failure to provide sufficient reasoning to support an award of fees for the hours challenged by employer renders his decision arbitrary. *See Marcum v. Director, OWCP*, 2 BLR 1-894, 1-897 (1980). Therefore, we must vacate the administrative law judge's award of fees for the disputed hours. *Id.* On remand, the administrative law judge must address employer's specific objections to the hours billed by claimant's counsel and set forth the reasoning underlying his findings. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the administrative law judge's Order awarding attorney's fees is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge