

BRB Nos. 13-0053 BLA
and 13-0155 BLA

HASSIE SHORT)
(Widow of SAMUEL SHORT))
)
Claimant-Respondent)
)
v.)
)
SHORT TRUCKING COMPANY)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 10/31/2013
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Supplemental Decision and Order on Remand Awarding Attorney's Fees and the Second Supplemental Decision and Order on Remand Awarding Attorney's Fees of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer/carrier (employer) appeals the Supplemental Decision and Order on Remand Awarding Attorney's Fees and the Second Supplemental Decision and Order on Remand Awarding Attorney's Fees¹ (2003-BLA-6370) of Administrative Law Judge Robert B. Rae rendered in connection with a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case is before the Board for the second time.

Claimant's counsel initially submitted a fee petition to Administrative Law Judge Edward Terhune Miller, requesting \$14,142.50 for work performed from May 20, 2003 to April 18, 2008, representing 22.7 hours of legal services by Joseph E. Wolfe at an hourly rate of \$400; 0.25 hour of legal services by Bobby S. Belcher, Jr., at an hourly rate of \$250; 17.5 hours of legal services by W. Andrew Delph at an hourly rate of \$200; 15 hours of services by legal assistants at an hourly rate of \$100; plus expenses in the amount of \$1,886.16. In a Supplemental Decision and Order Awarding Attorney's Fees dated November 17, 2009, Judge Miller disallowed 2.5 hours requested by Mr. Wolfe without identifying all of the specific dates on which the disallowed services were performed, and disallowed 0.25 hour of legal services performed on June 18, 2003 by Mr. Belcher, while the case was before the district director. Judge Miller additionally reduced the hourly rate from \$400 to \$285 for services performed by Mr. Wolfe; reduced the hourly rate from \$100 to \$65 for services performed by the legal assistants; and allowed reimbursement of expenses in the amount of \$1,886. Accordingly, Judge Miller awarded claimant's counsel a fee of \$10,232.00 for 52.7 hours of legal services performed while the case was before the Office of Administrative Law Judges (OALJ), and \$1,886.00 for reimbursement of expenses, for a total award of \$12,118.00.

On appeal, the Board affirmed Judge Miller's determination that counsel's use of the quarter-hour billing method was reasonable; noted that the hours requested by Mr. Belcher were properly excluded by Judge Miller as work not performed before the OALJ; affirmed Judge Miller's allowance for the reimbursement of expenses in the amount of \$1886.00; but vacated his award of attorney's fees and remanded the case for reconsideration. The Board instructed Judge Miller, on remand, to consider all relevant evidence, setting forth the rationale underlying his determinations of reasonable hourly rates and reasonable expenditures of time, and identifying the evidence supportive of his rationale. *Short v. Short Trucking Co.*, BRB No. 10-0232 BLA (Dec. 23, 2010)(unpub.).

¹ On October 11, 2012, the administrative law judge issued a Supplemental Decision and Order on Remand Awarding Attorney's Fees. On October 16, 2012, employer filed a motion to strike or, in the alternative, to reply. On November 6, 2012, the administrative law judge issued his Second Supplemental Decision and Order, in which he denied employer's motion and reinstated his award of attorney's fees.

On remand, the case was reassigned to Judge Rae (the administrative law judge). In accordance with the administrative law judge's Order dated June 12, 2012, the parties submitted additional briefs, and claimant's counsel provided supplemental evidence in support of the fee petition. After considering counsel's fee petition, and employer's objections thereto, the administrative law judge approved hourly rates of \$300 for Mr. Wolfe; \$150 for Mr. Delph; and \$75 for the legal assistants, and disallowed 2.5 of the 22.7 hours requested by Mr. Wolfe; 0.25 of the 17.5 hours requested by Mr. Delph; and 1.25 of the 15 hours requested by the legal assistants,² as charges that were either clerical in nature, excessive, or not performed before the OALJ. Accordingly, the administrative law judge awarded claimant's counsel a fee of \$9,660.00³ for legal services performed while the case was before the OALJ.

In the present appeal, employer contends that the administrative law judge failed to comply with the Board's remand instructions to explain his rationale for awarding time charges and to require claimant to provide evidence of the prevailing market rate.⁴ Claimant responds in support of the fee award. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response. Employer has filed a reply brief in support of its position. In addition, claimant's counsel has filed a fee petition with the Board for services performed before the Board in this case, which employer opposes.

We first address employer's appeal of the administrative law judge's fee award. 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,

² Employer correctly notes that the administrative law judge miscalculated the number of hours approved for the legal assistants, stating that the "adjusted" charges for the legal assistants totaled 13.5 hours, rather than 13.75 hours. See Second Supplemental Decision and Order on Remand at 5; Employer's Brief at 3, n.6.

³ As the administrative law judge, in fact, approved 13.75 hours of services performed by the legal assistants, the attorney's fee award totals \$9,678.75, as corrected.

⁴ Employer's request to hold this case in abeyance pending decisions by the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, BLR (4th Cir. 2013), and in *Bowman Coal Co. v. Director, OWCP [Bowman]*, No. 12-1642 (4th Cir. 2013)(unpub.), *aff'g Bowman v. Bowman Coal Co.*, BRB No. 11-0438 BLA (March 22, 2012)(unpub.), is moot.

or not in accordance with applicable law.⁵ *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); see also *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(en banc).

The Act provides that when a claimant wins a contested case, 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 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).

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner’s coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director’s Exhibit 2.

Employer specifically challenges the hourly rates approved herein for Mr. Wolfe and the legal assistants,⁶ arguing that the administrative law judge failed to comply with the Board's instructions on remand to consider all relevant evidence. Employer maintains that the administrative law judge erred in relying on the Altman Weil "Survey of Law Firm Economics" (Altman Weil Survey); counsel's prior fee awards; and counsel's years of experience in determining the applicable market rate, while summarily rejecting employer's proffered evidence showing that claimant's counsel and other attorneys have been awarded lower hourly rates. Employer's arguments are without merit.

In reviewing counsel's requested hourly rate, the administrative law judge performed the requisite analysis set forth in Section 725.366(b); considered employer's objections and the evidence provided by both parties as to the prevailing market rate for black lung attorneys; and adequately explained his determination that the hourly rate of \$300 for work performed by Mr. Wolfe was "appropriate, reasonable and not excessive" in this instance. *See Jones*, 21 BLR at 1-108; *Abbott*, 13 BLR at 1-16. Specifically noting that he did not solely rely on any one factor in rendering his determination of the market rate, but that he relied instead on "the totality of the circumstances and evidence" presented, we find no abuse of discretion in his consideration of the average hourly billing rates for attorneys in the same region with similar experience, as cited in the Altman Weil Survey, when considered in conjunction with the other evidence of record. *See Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, BLR (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Maggard v. International Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010) (Order); *Bowman v. Bowman Coal Co.*, 24 BLR 1-165, 1-170 n.8 (2010)(Order); Second Supplemental Decision and Order on Remand at 6-7. Further, because the administrative law judge rationally considered the strength of the evidence presented by both claimant's counsel and employer regarding the appropriate market rate for the legal assistants, employer has failed to demonstrate that his determination of \$75 as the appropriate hourly rate was an abuse of discretion. *Abbott*, 13 BLR at 1-16. We affirm, therefore, the administrative law judge's finding of \$300 as the appropriate hourly rate for Mr. Wolfe and \$75 as the appropriate hourly rate for the legal assistants.

Employer next challenges the number of hours approved by the administrative law judge, asserting that he failed to explain his allowance of charges that employer contested

⁶ We affirm, as unchallenged on appeal, the administrative law judge's determination that \$150 is a reasonable hourly rate for Mr. Delph. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Supplemental Decision and Order on Remand at 6.

as clerical, and that he failed to require claimant to establish the reasonableness of the charges. Employer's Brief at 9-10. Employer's arguments lack merit.

The administrative law judge acknowledged that services performed by counsel and/or legal assistants that are clerical in nature are not compensable. Second Supplemental Decision and Order on Remand at 5; *see Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-218 (1986); *McKee v. Director, OWCP*, 6 BLR 1-233 (1983). With respect to the specific time entry challenges by employer, the administrative law judge disallowed 0.25 hour of time for Mr. Delph, 0.75 hour of time for Mr. Wolfe,⁷ and 1.25 hours of time for the legal assistants, as clerical in nature or excessive, but found that the remaining disputed entries were "reasonable and necessary and in furtherance of the successful prosecution of the claim." Second Supplemental Decision and Order on Remand at 5. The administrative law judge noted the necessity for regular file reviews, and observed that claimant's counsel is expected to provide accurate and timely advice to his client, and that he must be able to keep his client informed at all times of the status of the case and of any pending events. *Id.* Periodic review of the file for deadlines and briefing schedules is a legitimate recurring activity in prolonged cases, and is therefore compensable. *McNulty v. Director, OWCP*, 4 BLR 1-128 (1981). The administrative law judge acted within his discretion in finding that, with the exception of the disallowed entries, the services provided constituted compensable legal work. *See Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Abbot*, 13 BLR at 1-16; *Lanning*, 7 BLR at 1-316. As employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused his discretion, we affirm his approval of 20.2 hours of legal services by Mr. Wolfe; 17.25 hours of legal services by Mr. Delph; and 13.75 hours of services by the legal assistants, as reasonable under the circumstances of this case. Thus, we affirm his award of a total fee of \$9678.75, as modified to reflect the correct calculation of the attorney's fee for legal services performed while the case was before the OALJ, *see infra* at 3, n.3, plus costs previously approved in the amount of \$1,886.00.

We now address claimant's counsel's fee petition filed in connection with services performed before the Board, pursuant to 20 C.F.R. §802.203, from May 5, 2008 to June 6, 2008. Counsel requests a fee of \$287.50, representing 0.25 hour of legal services by Joseph E. Wolfe at an hourly rate of \$300; 0.50 hour of legal services by Ryan C. Gilligan at an hourly rate of \$225; and 1.00 hour of services by the legal assistants at an hourly rate of \$100.

⁷ The administrative law judge disallowed an additional 1.75 hours of services by Mr. Wolfe as work performed before the district director. Second Supplemental Decision and Order on Remand at 5.

Employer objects to the fee petition, and contends that the Board has no jurisdiction to award fees from 2008, when employer's appeal of the attorney's fee petition was not filed until December 2009. Employer's Brief at 1. We disagree.

All fee petitions must be filed with, and approved by, the adjudicating officer or tribunal before whom the services were performed. 20 C.F.R. §725.366(a); see *Helmick v. Director, OWCP*, 9 BLR 1-161 (1986); *Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). The Board has held, however, that in order to determine the jurisdictional cutoff date for an attorney's fee award, the issue is not whether the work was performed before or after a certain date, but rather, whether the work performed was reasonably integral to the proceedings before the tribunal in which the fee petition was filed. *Matthews v. Director, OWCP*, 9 BLR 1-184, 1-186-87 (1986). In his fee petition, the initial time charge on May 5, 2008, is for the review of a letter to the Board from employer's counsel advising that he will be representing employer while the appeal of the underlying award of benefits is pending before the Board. As the work performed by claimant's counsel was reasonably integral to an impending appeal, we reject employer's assertion that the Board does not have jurisdiction in this case.

Employer also objects to the total number of hours requested by claimant's counsel. Employer specifically challenges, as excessive, the 0.25 hour on May 5, 2008 performed by Mr. Wolfe reviewing correspondence. We disagree. Section 802.203(d)(3) provides that fee applications submitted to the Board shall set forth the number of hours of services performed in quarter-hour increments. See 20 C.F.R. §802.203. Accordingly, the 0.25 hour charge by Mr. Wolfe is allowed.

Employer also challenges specific entries that it contends represent charges for duplicative or unnecessary tasks, and/or for clerical services, which are not compensable. Employer contests the following itemized entries performed by the legal assistants: 0.25 hour on May 17, 2008, for taking a message from claimant's daughter; 0.25 hour on May 19, 2008, for taking a telephone call from claimant's daughter and advising her of the status of the appeal upon review of the file; 0.25 hour on June 5, 2008, documenting a telephone call from employer's counsel requesting a copy of the fee petition; and 0.25 hour on June 6, 2008, noting a telephone call from claimant's daughter-in-law checking on the status of the case. Employer further alleges that the 0.25 hour charge on June 4, 2008 by Mr. Gilligan, for receiving a telephone call from employer's office requesting a copy of the fee petition, is not reimbursable, as the fee petition should have been served on employer. Some of employer's arguments have merit. This Board has held that clerical services, whether performed by legal assistants or counsel, are considered part of overhead expenses and are figured into the hourly rate. See *Whitaker*, 9 BLR at 1-217-18. Consequently, we disallow a total of 0.5 hour of services by the legal assistants on May 17, 2008 and June 5, 2008, for answering the telephone, recording a message, or faxing the fee petition in response to a telephone call. We also agree with employer that

the 0.25 hour of work by Mr. Gilligan on June 4, 2008, receiving a telephone call from employer's office requesting a copy of the fee petition, is purely clerical in nature and is disallowed. However, we will allow the remaining two quarter-hour entries on May 19, 2008 and June 6, 2008, for work performed by the legal assistants reviewing the file and advising the client on the status of the appeal. We conclude, upon review of claimant's counsel's description of the services rendered, that the foregoing itemized entries comprise necessary and appropriate legal services. *See Bentley*, 522 F.3d at 665-666, 24 BLR at 2-124.⁸

Employer also generally objects to the hourly rates sought, arguing that claimant's counsel failed to provide reliable market support. Employer's Brief at 2. We disagree. In his fee petition, claimant's counsel provides an extensive list of black lung cases in which Mr. Wolfe was awarded an hourly rate of \$300, Mr. Gilligan was awarded an hourly rate of \$225, and the legal assistants were awarded an hourly rate of \$100. Claimant's counsel also provided evidence of counsel's expertise and experience in the field of black lung litigation; the Altman & Weil survey; the normal billing rate for each person who performed services and for whose work a fee is claimed; the training, education, and experience of the legal assistants as required by Section 802.203(d)(2); and an affidavit from a black lung attorney attesting to Mr. Gilligan's expertise and the reasonableness of \$225 as an hourly rate for Mr. Gilligan. *See Cox*, 602 F.3d at 289, 24 BLR at 2-291; *Bentley*, 522 F.3d at 665-666, 24 BLR at 2-124. We, therefore, conclude that claimant's counsel has provided sufficient evidence of a market rate in his geographic area for an attorney of his expertise and experience, for appellate work before the Board. Consequently, we approve the requested hourly rates of \$300 for Mr. Wolfe, \$225 for Mr. Gilligan, and \$100 for the legal assistants.

In summary, we award claimant's counsel a fee of \$181.25 for one hour of legal services performed before the Board, representing 0.25 hour of legal services rendered by Mr. Wolfe at an hourly rate of \$300; 0.25 hour of legal services rendered by Mr. Gilligan at an hourly rate of \$225; and 0.5 hour of services rendered by the legal assistants at an hourly rate of \$100.

⁸ Employer agrees that the 0.25 hour charge by Mr. Gilligan on June 6, 2008 is reimbursable. Employer's Brief at 1.

Accordingly, the Supplemental Decision and Order on Remand Awarding Attorney's Fees and the Second Supplemental Decision and Order on Remand Awarding Attorney's Fees of the administrative law judge are affirmed. We also award claimant's counsel an attorney's fee of \$181.25 for work performed before the Board, 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.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge