U.S. Department of Labor

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

BRB No. 17-0044 BLA

PHILIP R. NEWTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG RIDGE COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	DATE ISSUED: 10/24/2017
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Allman Law LLC), Indianapolis, Indiana, for claimant.

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

Before: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order (2014-BLA-05358) of Administrative Law Judge Larry S. Merck granting an attorney's fee in connection with a claim[1] filed pursuant to

[1] In a Decision and Order dated February 22, 2016, the administrative law judge awarded benefits. Upon review of employer's appeal, the Board affirmed the award of

the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant's counsel requested a total of fee of $29,240.93, for 6.80 hours of legal services at an hourly rate of $300.00, 67.65 hours of legal services at an hourly rate of $350.00,[2] 5.95 hours of paralegal work at an hourly rate of $125.00, and $2,779.68 in expenses.

In his attorney fee order, the administrative law judge disallowed 0.75 hours of legal services performed on June 4, 2014 ($225.00) because it was not connected to this case. The administrative law judge also disallowed $405.87 in overhead expenses (postage, courier fees, photocopying costs, and computer research). Taking into account these adjustments, the administrative law judge awarded claimant's counsel a total fee of $28,610.06.

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.

The amount of an attorney's fee award by an administrative law judge 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 accord with applicable law.[3] *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989). An attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

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). 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

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benefits. *Newton v. Big Ridge Coal Co.*, BRB No. 16-0285 BLA (Mar. 31, 2017) (unpub.).

[2] Claimant's counsel increased his hourly rate from $300.00 to $350.00 in October of 2014. Order at 1 n.1.

[3] Claimant's coal mine employment was in Indiana. *See Newton*, BRB No. 16-0625 BLA, slip op. at 2 n.1. 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, 1-202 (1989) (en banc).

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 to claimant's counsel, contending that the rates are not supported by prevailing market evidence. Employer specifically contends that the administrative law judge failed to adequately address the relevance of affidavits that it submitted. We agree. Employer submitted affidavits from attorneys setting forth the hourly rates charged by attorneys who litigate black lung cases in Illinois. As employer notes, those rates are lower than the rates approved by the administrative law judge.[4] Because the administrative law judge failed to consider all relevant evidence in the record, 5 U.S.C. §557(c)(3)(A); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989), we vacate the administrative law judge's determinations regarding the hourly rates awarded to claimant's counsel,[5] and remand the case for further consideration.

[4] Employer submitted five affidavits wherein attorneys state that Sandra Fogel's hourly rate of $265.00 is reasonable for the litigation of black lung cases in Illinois. Employer's Opposition to Fees and Expenses, Exhibits A-E. Thomas E. Johnson, an attorney practicing in Illinois, also indicates that he and his partner, Ann Megan Davis, charge an hourly rate of $275.00 in black lung cases. *Id.*

[5] Because employer has not alleged any specific error in regard to the administrative law judge's awarded hourly rate of $125.00 for work performed by counsel's paralegal, this rate is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer next argues that hours approved by the administrative law judge for work performed from October 25, 2013 to July 7, 2014 should be disallowed because it was for work that was performed while the case was before the district director. Employer's Brief at 3. We disagree. The administrative law judge accurately noted that this case was transferred from the district director to the Office of Administrative Law Judges (OALJ) on November 13, 2013. Order at 5. The administrative law judge permissibly found that claimant's counsel's work after this date was work before the OALJ. *Matthews v. Director, OWCP*, 9 BLR 1-184, 1-186 (1986).

Employer also challenges the 0.75 hour approved by the administrative law judge for work performed by claimant's counsel before the case was actually transferred to the OALJ. Fees are awarded for services that are reasonably integral to the preparation for the OALJ hearing. *See Matthews*, 9 BLR at 1-187. Because the services involved matters related to preparation for presenting the case to an administrative law judge,[6] the administrative law judge did not abuse his discretion in approving a fee for these services. *Id.*; Order at 5.

Employer also argues that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for legal services. Employer's Brief at 3-5. Specifically, employer contends that counsel's practice of billing in quarter-hour increments was unreasonable. We disagree. Contrary to employer's contention, the administrative law judge did not err in finding that counsel's practice of billing in quarter-hour increments was reasonable. The administrative law judge considered the work performed, and found that the entries "were reasonable for the time requested." Order at 6; *see Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993).

Employer also challenges the fee awarded to claimant's counsel for travel time to and from the hearing. Reasonable and necessary travel time and expenses are compensable. *See* 20 C.F.R. §§725.366(a),(c), 725.459(a); *Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1, 1-4 (1994); *Bradley v. Director, OWCP*, 4 BLR 1-

[6] After the district director awarded benefits in a Proposed Decision and Order, employer's counsel sent a September 17, 2013 letter to the district director, wherein he requested that the case be transferred to the Office of Administrative Law Judges for a formal hearing unless there was a "timely revision." Director's Exhibit 55. Claimant's counsel noted that claimant first contacted him in October of 2013 "for assistance in prosecuting his claim for black lung benefits at an upcoming hearing." Fee Petition at 1. Claimant's counsel reviewed correspondence from employer's counsel on October 25, 2013 (0.25), and had a conference with claimant on November 6, 2013 (0.50). Fee Petition, Exhibit A.

241, 1-245 (1981). Employer has failed to demonstrate that the administrative law judge's decision to approve claimant's counsel 5.50 hours for claimant's counsel's travel expenses was arbitrary, capricious, or an abuse of discretion.[7] *Abbott*, 13 BLR at 1-16.

We also find no merit in employer's contention that the administrative law judge erred in finding that the deposition fees charged by non-testifying expert witnesses ($1,500.00) were compensable. Employer's Brief at 7. Section 28 of the Longshore Act, as incorporated into the Act by 30 U.S.C. §932(a), does not limit expert fee-shifting to only those fees incurred by a claimant when the expert appears at the formal hearing and testifies before the administrative law judge. 33 U.S.C. §928(d). Rather, Section 28 refers to a "witness" who may provide written testimony by deposition or by medical opinion. *See e.g.*, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a) (the testimony of any witness may be taken by deposition or interrogatories); *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 (7th Cir. 2003).

Employer next contends that certain services should be disallowed as duplicative of other services performed. Specifically, employer asserts that the 5.0 hours spent on December 26, 2015 reviewing and analyzing employer's exhibits is duplicative of the earlier entries on January 5, 2015 (1.0 hour), February 16, 2015 (0.50 hour), April 13, 2015 (1.0 hour), April 16, 2015 (1.0 hour), April 22, 2015 (1.0 hour), and August 12, 2015 (4.0 hours). Employer's Brief at 7. Taking into account the "sheer number" of employer's exhibits," the administrative law judge found that the time spent by claimant's counsel reviewing and analyzing them, whether a first or second review, was necessary for a successful prosecution of the case. Order at 6. The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that the question of the reasonableness of time spent by a lawyer on a particular task in the course of litigation is reviewed "under a highly deferential version of the 'abuse of discretion' standard." *Hawker*, 326 F.3d at 902. The Seventh Circuit has further explained that "'not only is the [ALJ] in a much better position than the appellate court to make this determination, but neither the stakes nor the interest in uniform determination are so great as to justify microscopic appellate scrutiny.'" *Id.*, *quoting Ustrak v. Fairman*, 851 F.2d 983, 987 (7th Cir. 1988) (brackets in original). We hold that the administrative law judge did not abuse his discretion in allowing these entries. *Abbott*, 13 BLR at 1-16.

[7] Employer also challenges the costs associated with photocopying, postage, courier expenses, and computer-assisted research. The administrative law judge, however, disallowed these costs. Order at 7.

Employer finally contends that the administrative law judge failed to address its objection to the 20.5 hours spent by claimant's counsel in the preparation of a post-hearing brief. Employer's Brief at 7. We agree. The administrative law judge did not address employer's contention that the time sought for preparing the post-hearing brief was excessive. 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 20.5 hours billed by claimant's counsel, and set forth the reasoning underlying his findings, as required by the Administrative Procedure Act. 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.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge