U.S. Department of Labor

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

BRB Nos. 17-0280 BLA and
17-0350 BLA
Case Nos. 2014-BLA-05143 and 2016-BLA-05368

LINDA KAY COLEMAN (Widow of and on behalf of JAMES EDWARD COLEMAN) Claimant-Respondent v. STUMP COAL COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/17/2018 ORDER on MOTION FOR RECONSIDERATION and MOTION FOR ATTORNEYS' FEES

Employer has filed a timely Motion for Reconsideration of the Board's Decision and Order issued on April 25, 2018, in the above captioned case. Employer asserts that, in its initial petition and brief, the Board "ignored" the issue it raised regarding the administrative law judge lacking authority to decide this case. Motion for Reconsideration at 3. We disagree.

Employer argued on appeal that it was deprived of a fair hearing based on the administrative law judge's view of the preamble. In a footnote, employer stated:

> This assumes that [administrative law judges (ALJs)] are even authorized to hear and resolve these types of cases without violating the Appointments Clause, a question that has been answered differently by the U.S. courts of appeals. Compare *Raymond J. Lucia Cos. Inc. v. SEC*, 832 F.3d 277, 283 (D.C. Cir 2016) (holding that [Securities and Exchange Commission (SEC)]

> ALJs are employees because they cannot lawfully render final decisions) with *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016) (finding SEC ALJs are inferior officers subordinate to SEC commissioners).

Employer's Brief at 14 n.2. Employer did not state that the administrative law judge in this case lacked the authority to decide the case or suggest that the Board take any action based on an alleged lack of authority. *See* 20 C.F.R. § 802.211(b) (petitioner must state issues with particularity, and must "stat[e] the precise result the petitioner seeks on each issue"). Therefore, there was no reason for the Board to address this footnote in the decision and order.[1] *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Additionally, the exception recognized in *Jones Brothers v. Sec'y of Labor*, No. 17-3483 (6th Cir. July 31, 2018) does not apply in this case, as unlike the Federal Mine Safety and Health Review Commission, it is clear that the Board has the ability to address the Appointments Clause issue if properly raised. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (concluding that Congress vested the Board with the statutory power to decide substantive questions of law); *Duck v. Fluid Crane and Constr. Co.*, 36 BRBS 120, 121 n.4 (2002) (stating that the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction"). Consequently, employer has forfeited its Appointments Clause challenge.

As no member of the panel has voted to vacate or modify the decision herein, the motion for reconsideration filed by employer is DENIED. 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(b), 802.407(a), 802.409.

In the fee petition filed by claimant's counsel, counsel seeks $2,175.00 for representation of claimant before the Board from March 9, 2017 to May 7, 2018, representing 2.50 hours at an hourly rate of $350.00 for Attorney Joseph E. Wolfe, 3.25 hours at an hourly rate of $200.00 for Attorney Brad A. Austin, and 6.50 hours at an hourly rate of $100.00 for legal assistants.

Employer objects, arguing that the requested hourly rates do not reflect the market rates for attorneys in southwestern Virginia and that claimant's counsel has not submitted sufficient evidence to support his requested rates. Employer maintains that claimant's counsel's hourly rates should be reduced to $200.00 for Mr. Wolfe, $100.00 for Mr. Austin,

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[1] The Director asserts that she "has responded in some fashion to any colorable argument raising the Appointment[s] Clause issue in cases pending before the Board. Here, the Director did not respond to Stump's appeal because she [like the Board] concluded the company raised no Appointments Clause challenge." Director's Brief at 2 n.2.

and $50.00 for the legal assistants. Employer also asserts that all of Mr. Wolfe's fee entries should be disallowed as unnecessary, duplicative, and excessive and that counsel's billing in quarter-hour increments results in excessive reimbursement. Further, employer alleges that all of the individuals identified as legal assistants are receptionists, document scanners, or secretaries, and therefore their work is considered overhead and thus not reimbursable. Employer's arguments are without merit.

An award of attorney fees pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), will be ordered if the requested fee reflects services necessary to the proper conduct of the case and the time requested for such work is reasonable. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). Claimant's counsel is entitled to an attorney's fee payable by employer for successfully prosecuting the claim. *See* 33 U.S.C. §928; *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); *see generally Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), *aff'd on recon.*, 13 BLR 1-56 (1989) (en banc); *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996).

In determining the amount of attorney's fees to award under a fee-shifting statute, 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. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). 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 burden falls on the fee applicant 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. Evidence of fees that counsel has received for work involving cases of similar complexity may be useful in establishing a reasonable hourly rate. *See B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 664 (6th Cir. 2008); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172, 1-175 n.5 (2010); *Bowman v. Bowman Coal Co.*, 24 BLR 1-167, 1-170 n.8 (2010).

In this case, claimant's counsel has submitted a list of seventy black lung cases in which the Office of Administrative Law Judges (OALJ), the Board, and the United States Court of Appeals for the Fourth Circuit have awarded fees to his firm. The list includes twenty cases in which Mr. Wolfe has been awarded the requested hourly rate of $350.00 from the OALJ, and eight cases in which he has been awarded $425.00 by the OALJ and the Fourth Circuit. The list also includes thirty-seven cases in which Mr. Austin has been awarded the requested hourly rate of $200.00 per hour, and forty-nine cases in which legal assistants at his firm have been awarded the requested hourly rate of $100.00 per

hour. Counsel has also provided evidence of his and Mr. Austin's expertise and experience in the field of black lung litigation, their professional status, their customary billing rate, and evidence of the rates charged by comparable attorneys in his geographic area. 20 C.F.R. §802.203(d)(2), (4); *see Bentley*, 522 F.3d at 663. Therefore, counsel has provided sufficient evidence of a market rate in his geographic area for attorneys of their expertise and experience, for appellate work before the Board. Counsel has also identified the training, education, and experience of the legal assistants. We therefore award counsel's requested hourly rates of $350.00 an hour for Mr. Wolfe, $200.00 an hour for Mr. Austin, and $100.00 an hour for the legal assistants.

We also reject employer's contention that all of Mr. Wolfe's billing entries should be disallowed as unnecessary, duplicative, and excessive. Employer states that "[v]irtually all of [Mr. Wolfe's] charges were for reviewing documents or correspondence. Mr. Wolfe did not write the response brief. His charges did not advance the prosecution of the claim when the time-keepers who actually did the work had to duplicate those efforts." Employer's Opposition to Fee Petition at 9. A review of the charges does not reveal overlap between tasks that Mr. Wolfe and his associates or legal assistants performed. Moreover, the disputed charges are neither excessive nor unreasonable and, thus, we reject employer's arguments to the contrary. *See Bentley*, 552 F.3d at 666-67 (quarter-hour billing is permissible, as long as the total amount of time is reasonable). We hold, therefore, that the work performed by Mr. Wolfe constituted compensable legal work that was not duplicative and we allow the 2.50 hours requested. *See* 20 C.F.R. §802.203(e); *Lanning*, 7 BLR at 1-316.

Finally, employer argues that the legal assistant entries, totaling 1.25 hours, dated March 17, 2017, May 9, 2017, July 19, 2017, August 31, 2017, and October 11, 2017 should be disallowed as clerical. We reject this contention because the calls with claimant reflected in these entries included compensable time, as the legal assistants were discussing the status of the case with claimant by telephone.

Accordingly, we award claimant's counsel a fee of $2,175.00, representing 2.50 hours at an hourly rate of $350.00 for Mr. Joseph E. Wolfe, 3.25 hours at an hourly rate of $200.00 for Mr. Brad A. Austin, and 6.50 hours at an hourly rate of $100.00 for the legal assistants, to be paid directly to 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge