

BRB Nos. 13-0089 BLA, 13-0090 BLA,
13-0576 BLA and 13-0577 BLA

LINDA BELCHER)
(o/b/o and Widow of JOHNNY BELCHER))
)
Claimant-Respondent)
)
v.)
) DATE ISSUED: 09/25/2013
HARMAN MINING COMPANY,)
INCORPORATED)
)
and)
)
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 Pamela J. Lakes, 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, DC, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Order (08-BLA-5012 and 08-BLA-5013) of Administrative Law Judge Pamela J. Lakes 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 (Supp. 2011) (the Act). Claimant's counsel requested a total fee of \$9,162.50, for 12.75 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 0.25 hours of legal services at an hourly rate of \$250.00 (Bobby S. Belcher), 2.0 hours of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan), 10.50 hours of legal services at an hourly rate of \$200.00 (W. Andrew Delph, Jr.), and 27.25 hours of legal services at an hourly rate of \$100.00 (legal assistants).

In her Order, the administrative law judge disallowed compensation for 2.25 hours of the legal services provided by the legal assistants (\$225.00). The administrative law judge, therefore, awarded claimant's counsel a total fee of \$8,937.50.

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 attorney's fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its contentions.¹

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). 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).

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).

¹ The miner's most recent coal mine employment was in Virginia. See *Belcher v. Harman Mining Co.*, BRB Nos. 12-0313 BLA and 12-0430 BLA, slip op. at 3 n.3 (Feb. 28, 2013) (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).

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 contends that the administrative law judge's fee award should be vacated because the administrative law judge, in awarding the requested hourly rates, "failed to identify the evidence she relied on and explain how it supported her findings." Employer's Brief at 4. We disagree. The administrative law judge found that the requested hourly rates "constituted the prevailing rates for the representation of Black Lung claimants for the pertinent experience levels in the geographic market in which Mr. Wolfe's firm practices at the time at which the services were provided." Order at 4. We note that counsel's fee petition includes citations to thirty-five cases where Mr. Wolfe was awarded hourly fees of at least \$300.00. *See* Claimant's Counsel's Fee Petition. In many of these cases, Mr. Belcher, Mr. Gilligan, and Mr. Delph were awarded their requested hourly rates of \$250.00, \$225.00 and \$200.00. These cases also include awards of an hourly rate of \$100.00 for work performed by counsel's legal assistants. 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 take into account when establishing a market rate. In awarding the respective hourly rates of \$300.00, \$250.00, \$225.00, and \$200.00 to Mr. Wolfe, Mr. Belcher, Mr. Gilligan, and Mr. Delph, the administrative law judge also relied upon the attorneys' knowledge and experience.² Order at 2. This is a relevant factor that an administrative law judge may 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 regulatory criteria, we hold that the administrative law judge did not abuse her discretion in determining that claimant's counsel's requested hourly rates for Mr. Wolfe, Mr. Gilligan, Mr. Belcher, Mr. Delph, and his legal assistants were reasonable, and reflected the applicable market

² In his fee petition, claimant's counsel noted that attorneys in his law firm "are very experienced" in the area of black lung law. Counsel further noted that he knows of "no other firms in Virginia and very few across the nation taking new [black lung] cases." Claimant's Counsel's Fee Petition.

rates. Order at 2; *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *see also See E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, BLR (4th Cir. 2013); *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010), *petition for review denied*, *Bowman Coal Co. v. Director, OWCP [Bowman]*, No. 12-1642, 2013 WL 5228037 (4th Cir. Sept. 18, 2013) (unpub.)³; *Maggard v. Int’l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010). We, therefore, affirm the administrative law judge’s approval of these requested hourly rates.⁴

Finally, the Board acknowledges receipt of employer’s Notice of Appeal of the administrative law judge’s “Erratum to Decision and Order Granting Benefits” (Erratum) issued on April 19, 2013, wherein the administrative law judge addressed an error in her Decision and Order awarding benefits issued on February 23, 2012. Employer’s Appeal in the miner’s claim (2008-BLA-5012) is assigned the Board’s docket number, BRB No. 13-0576 BLA, and the widow’s claim (2008-BLA-5013) is assigned the Board’s docket number, BRB No. 13-0577 BLA. However, because the Board affirmed the administrative law judge’s 2012 Decision and Order on February 28, 2013, *see Belcher v. Harman Mining Co.*, BRB Nos. 12-0313 BLA and 12-0430 BLA (Feb. 28, 2013) (unpub.), and the administrative law judge’s Erratum did not change the determination that there is no basis for the augmentation of benefits, employer is not aggrieved.⁵ We, therefore, dismiss employer’s appeals in BRB Nos. 13-0576 BLA and 13-0577 BLA.

³ Employer’s request to hold this case in abeyance, pending the Fourth Circuit’s disposition of appeals in *Gosnell* and *Bowman* is moot. *See E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, BLR (4th Cir. 2013); *Bowman Coal Co. v. Director, OWCP [Bowman]*, No. 12-1642, 2013 WL 5228037 (4th Cir. Sept. 18, 2013).

⁴ In its “Opposition to Fee Petition,” filed with the administrative law judge, employer attached claimant’s counsel’s discovery responses in other cases, purporting to show that the requested hourly rates in the current case are not market based. The responses relied upon employer to support its argument related to counsel’s admission that ninety-nine percent of his legal work focuses on cases that are contingency based. Employer contends that the administrative law judge failed to adequately address this “relevant proof.” Employer’s Brief at 7. The administrative law judge, however, considered employer’s submission and found that the discovery responses “do not support [e]mployer’s arguments.” Order at 5 n.9. Because employer has not demonstrated that the administrative abused her discretion in determining that counsel’s discovery responses failed to undermine the significance of the hourly rates awarded to counsel in previous black lung cases, this finding is affirmed. *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

⁵ In light of our disposition of employer’s appeal, we need not address whether the administrative law judge had authority to issue the Erratum.

Accordingly, the administrative law judge's Order awarding attorney fees is affirmed (BRB Nos. 13-0089 BLA, 13-0090 BLA). Employer's appeal of the administrative law judge's Erratum is dismissed (BRB Nos. 13-0576 BLA, 13-0577 BLA).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge