

U.S. Department of Labor

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



BRB No. 18-0501 BLA

BOBBY S. WELCH)	
)	
Claimant-Respondent)	
)	
v.)	
)	
DOMINION COAL CORPORATION)	DATE ISSUED: 09/25/2019
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Granting In Part and Denying In Part Attorneys' Fees and Costs of William T. Barto, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Granting In Part and Denying In Part Attorneys' Fees and Costs (2013-BLA-05668) of Administrative Law Judge William T. Barto, rendered in connection with the successful prosecution of a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Claimant's counsel submitted a fee petition for legal services performed before the Office of Administrative Law Judges (OALJ) from April 19, 2013 to November 23, 2015 and from June 24, 2016 to April 12, 2018. Counsel's petition requested attorney fees in the amount of \$8,487.50, representing 16.5 hours of legal services performed by attorney Joseph E. Wolfe at an hourly rate of \$350.00 (\$5,775.00), 4.0 hours by attorney Brad A. Austin at an hourly rate of \$200.00 (\$800), 3.75 hours by attorney Rachel Wolfe at an hourly rate of \$150 (\$562.50), and 13.5 hours performed by legal assistants at an hourly rate of \$100.00 (\$1,350.00). Counsel's fee petition also requested expenses in the amount of \$3,350.18, for a total fee request of \$11,837.68.

After considering the fee petition and the objections employer filed, the administrative law judge reduced the requested hourly rate for the legal assistants from \$100.00 to \$80.00, and disallowed 0.25 hours of time for Mr. Wolfe as non-compensable because the task completed was clerical in nature. He further reduced the allowable amount of time for various entries Mr. Wolfe and Mr. Austin billed in quarter-hour increments. The administrative law judge determined that Mr. Wolfe was entitled to a fee for 12.5 hours of legal services at \$350.00 per hour; Mr. Austin was entitled to a fee for 3.7 hours at \$200.00 per hour; Ms. Wolfe was entitled to a fee for 3.75 hours at \$150.00 per hour; and the legal assistants were entitled to 13.5 hours at \$80.00. Accordingly, the administrative law judge awarded \$6,757.50 in attorney fees and \$3,350.18 in expenses, for a total fee of \$10,107.68.

On appeal, employer contends the administrative law judge's selection of an hourly rate of \$350.00 for Mr. Wolfe is conclusory and fails to satisfy the Administrative Procedure Act.¹ Employer also contends the administrative law judge erred in requiring it to reimburse the expenses claimant paid directly because 20 C.F.R. §725.366(c) allows only for the recovery of unreimbursed expenses that counsel incurred. Claimant's counsel responds, urging affirmance of the administrative law judge's award of attorneys' fees and

¹ The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

costs. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contention that it is not liable for payment of costs claimant paid directly.

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, or not in accordance with applicable law.² See *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989). An application seeking a fee for legal services performed on behalf of a claimant must indicate the customary billing rate for each person performing the services. 20 C.F.R. §725.366(a). The regulations further provide that a fee award must 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 the fee requested.

20 C.F.R. §725.366(b).

Hourly Rate

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.

Employer argues the administrative law judge's approved hourly rate of \$350.00 for Mr. Wolfe's legal services is arbitrary and that he failed to explain his findings as required by the APA.³ Employer's Brief at 3-5. We disagree. In support of his fee petition, counsel

² The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 6.

³ We affirm, as unchallenged, the administrative law judge's findings regarding the hourly rates for Mr. Austin, Ms. Wolfe and the legal assistants, and the number of hours

provided a list of his qualifications, rates from the National Law Journal’s 2014 Survey of Law Firm Economics (Survey), and sixty-five black lung cases in which the district director, OALJ, Benefits Review Board, and the United States Court of Appeals for the Fourth Circuit have awarded attorney fees to his firm. Fee Petition at 4-10.

The administrative law judge discussed the hourly rates reported in the Survey, acknowledged the “considerable expertise” counsel gained from thirty-eight years of experience in black lung law, and the numerous cases in which counsel was awarded an hourly rate of \$350.00 or more.⁴ Order at 3-4. Based on the administrative law judge’s analysis of the relevant criteria and his explanation of the factors he considered, we conclude that he did not abuse his discretion in determining that a \$350.00 hourly rate for Mr. Wolfe in this case was reasonable and reflected the applicable market rate.⁵ 20 C.F.R. §725.366(b); *see E. Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572-73 (4th Cir. 2013) (evidence of fees received in the past may be an appropriate consideration in establishing a market rate); Order at 4. Accordingly, the administrative law judge’s finding is affirmed.

Reimbursable Expenses

Employer further argues it cannot be compelled to reimburse counsel for expenses claimant paid directly, as 20 C.F.R. §725.366(c) explicitly allows reimbursement only for

for which the firm was entitled to compensation. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The administrative law judge noted that employer erroneously stated in its objections to the fee petition that Mr. Wolfe requested an hourly rate of \$425.00. Order at 3; Employer’s Objection to Fee Petition at 3 (unpaginated).

⁵ We reject employer’s assertion that the administrative law judge’s reliance on the National Law Journal’s 2014 Survey of Law Firm Economics was error in light of the Board’s decision in *Napier v. Star Fire Coals, Inc.*, BRB No. 17-0149 BLA (June 20, 2018) (unpub. Order). The Board in *Napier* rejected Mr. Wolfe’s requested rate of \$425.00 per hour and stated, “the Survey [he submitted] does not indicate the distribution of participating law firms and the Board is not persuaded that this chart sufficiently establishes the market rate for Mr. Wolfe.” Slip op. at 2 n.5. This language does not establish it was an abuse of discretion for the administrative law judge to rely on the Survey as one of several factors supporting an hourly rate of \$350.00 for Mr. Wolfe. *See Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

expenses claimant's representative incurred.⁶ Employer's Brief at 5-7. Employer maintains that to hold otherwise would result in the unjust enrichment of the law firm representing claimant. *Id.* at 6. The Director contends in response that employer's reliance on 20 C.F.R. §725.366(c) is a "red herring" because the applicable regulation is 20 C.F.R. §725.459(c), which does not refer to reimbursement of a representative and provides that the responsible operator can be charged with the cost of obtaining witnesses.⁷ Director's Letter Brief in Response at 1-2. The Director also contends reasonable unreimbursed expenses claimant incurred can be recovered under 20 C.F.R. §725.366(c). *Id.* at 2 n.1. We agree with both of the Director's assertions.

Consistent with 20 C.F.R. §725.459(c), the administrative law judge correctly noted that the medical examinations and x-ray interpretations claimant directly paid for constituted medical evidence obtained in support of his claim. 20 C.F.R. §725.459(c); Order at 8. He therefore permissibly determined these expenses can be assessed against employer. 20 C.F.R. §725.459(c); *see Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1, 1-4 (1994); Order at 8-9. Regarding the costs associated with claimant's travel to and from the medical examinations, the administrative law judge rationally applied 20 C.F.R. §725.366(c) to find them reasonable unreimbursed expenses, incurred in establishing claimant's case. *See Gosnell v. E. Assoc. Coal Corp.*, BRB No. 11-0131 BLA, slip op. at 8-9 (July 29, 2011) (unpub.) (reasonable unreimbursed expenses claimant paid can be recovered at 20 C.F.R. §725.366(c)), *aff'd on other grounds sub nom. E. Assoc. Coal Corp. v. Director, OWCP*, 724 F.3d 561 (4th Cir. 2013); Order at 8-9. Finally, we reject employer's allegation that reimbursing the law firm for expenses claimant paid is inappropriate because it results in "a windfall to the law firm." Employer's Brief at 6. The administrative law judge permissibly determined "[i]t is clear that Mr. Wolfe, as

⁶ Counsel paid \$100.00 for Dr. Alexander's reading of an x-ray dated May 13, 2012. Order at 8 n.4; Claimant's Exhibit 4 (copy attached to counsel's Fee Petition). Claimant directly paid the remaining \$3,250.18 of the \$3,350.18 in expenses counsel itemized in the fee petition. Fee Petition at 1; Claimant's Exhibit 1 (copy attached to counsel's Fee Petition).

⁷ Pursuant to 20 C.F.R. §725.459(c), "[i]f a claimant is determined entitled to benefits, there may be assessed as costs against a responsible operator, fees and mileage for necessary witnesses attending the hearing at the request of claimant." This provision applies to the costs associated with obtaining a medical report, regardless of whether the physician testifies at the hearing. *See Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 902 (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001); *Branham v. Eastern Assoc. Coal Corp.*, 18 BLR 1-1, 1-4 (1994).

[c]laimant's counsel, seeks reimbursement of the expenses incurred on [c]laimant's behalf."⁸ Order at 8; *see Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010).

Because employer has not demonstrated an abuse of discretion in the administrative law judge's award of expenses, we affirm the award of \$3,350.18 in expenses related to this claim. *See Jones*, 21 BLR at 1-108.

Accordingly, the administrative law judge's Order Granting In Part and Denying In Part Attorneys' Fees and Costs is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

⁸ In response to employer's argument, claimant's counsel states "[e]mployer is blatantly asking that *the miner* not be reimbursed for the expenses he incurred in the development of medical evidence for this claim." Claimant's Response Brief at 6 (emphasis added).