



BRB No. 18-0548 BLA

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| ROBERT W. BAKER |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| WYOMING POCAHONTAS LAND |) | |
| COMPANY |) | |
| |) | DATE ISSUED: 09/26/2019 |
| Employer-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Attorney Fee Order of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

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

PER CURIAM:

Claimant's counsel appeals the Attorney Fee Order (2015-BLA-05928) of Administrative Law Judge Drew A. Swank granting an attorney's fee in connection with a claim¹ filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944

¹ In a Decision and Order dated February 21, 2018, the administrative law judge awarded benefits.

(2012) (the Act). Claimant’s counsel requested a total fee of \$22,829.11, for 52.1 hours of legal services at an hourly rate of \$250.00, 0.6 hours of legal services at an hourly rate of \$175.00, 47.8 hours of paralegal work at an hourly rate of \$150.00, and \$2,529.11 in expenses.

Noting no objections to the fee petition from employer or the Director, Office of Workers’ Compensation Programs (the Director), the administrative law judge found the requested fees for the legal services the attorneys provided to be reasonable. He similarly awarded claimant’s counsel his requested expenses. However, the administrative law judge reduced the paralegal’s requested hourly rate to \$100.00. Thus, the administrative law judge awarded a total fee of \$20,439.11.

On appeal, claimant’s counsel contends the administrative law judge erred in reducing the paralegal’s hourly rate. Neither employer nor the Director has filed a response brief.²

The amount of an attorney fee award is discretionary and will be upheld unless shown to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); see *B & G Mining, Inc., v. Director, OWCP [Bentley]*, 522 F.3d 657, 661 (6th Cir. 2008). The regulations provide that an approved fee 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); *U.S. Dep’t. of Labor v. Triplett*, 494 U.S. 715, 718 (1990).

In determining the amount of a fee to be awarded under a fee-shifting statute, the United States Supreme Court has held a tribunal 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. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 564 (1986).

Paralegal’s Hourly Rate

A 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

² We affirm, as unchallenged on appeal, the administrative law judge’s approval of legal services of 52.1 hours at an hourly rate of \$250.00, and 0.6 hours at an hourly rate of \$175.00. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We similarly affirm his unchallenged award of \$2,529.11 in expenses. *Id.*

on the fee applicant to produce satisfactory evidence that the requested rates are in line with those for similar services by persons of comparable skill, experience, and reputation. *Id.* at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

The administrative law judge found claimant's counsel did not establish that an hourly rate of \$150.00 was "an appropriate rate or market-based fee for the services of his paralegal." Order at 3. "Based on the complexity of the work performed and her qualifications," the administrative law judge reduced the paralegal's hourly rate to \$100.00. *Id.*

Claimant's counsel argues the administrative law judge erred in not addressing the significance of four prior fee awards he submitted or cited in which his paralegal was awarded \$150.00 per hour,³ asserting these fee awards constitute "direct, inferential proof of the prevailing market rate."⁴ Claimant's Counsel's Brief at 5. We agree. An administrative law judge is required to consider all relevant evidence in the record. 30 U.S.C. §923(b). Consequently, the administrative law judge erred in not considering the prior fee awards. *See Bentley*, 522 F.3d at 664 (prior fee awards can provide guidance in determining a prevailing market rate).

Moreover, although the administrative law judge cited valid factors to be considered in determining a paralegal's appropriate hourly rate, i.e., "the qualifications of the representative [and] the complexity of the legal issues involved," 20 C.F.R. §725.366(b), he did not address what aspects of her work and qualifications led him to reduce her hourly

³ Claimant's counsel attached a fee order issued by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, awarding the paralegal an hourly rate of \$150.00. Claimant's Counsel's Brief at 4; Motion for Attorney's Fees at 5. Additionally, claimant's counsel cited three fee orders administrative law judges issued awarding the paralegal an hourly rate of \$150.00. *Id.* Claimant's counsel also cited an administrative law judge's 2012 fee order awarding a paralegal an hourly rate of \$100.00. *Id.* Claimant's counsel asserts his paralegal "is more educated than the traditional paralegal," having earned a Bachelor of Science in Political Science and Legal Studies and a Master's Degree in Public Service Administration. Claimant's Counsel's Brief at 4.

⁴ Claimant's Counsel, in his Petition for Review and brief, requests he be permitted "to file the outcome" of a case he appealed to the Sixth Circuit. Claimant's Counsel's Brief at 5. Because this evidence was not before the administrative law judge, the Board is precluded from considering it on appeal. *See* 20 C.F.R. §802.301(b); *Berka v. North Am. Coal Corp.*, 8 BLR 1-183 (1985).

rate to \$100.00. Consequently, his analysis does not comport with the Administrative Procedure Act (APA), which 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 on the record.” 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). We must therefore vacate the administrative law judge’s determination and remand the case for further consideration of an appropriate hourly rate for the paralegal. *See Director, OWCP, v. Rowe*, 710 F.2d 251, 255 (6th Circ. 1983) (The Board lacks the authority to render factual findings to fill in gaps in the administrative law judge’s opinion). We instruct the administrative law judge on remand to set forth his findings in sufficient detail to permit review of his rationale in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge’s Attorney Fee Order awarding attorney 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.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge