

BRB No. 10-0590 BLA

NADINE M. BRACKENRICH	)	
(Widow of LABURN W. BRACKENRICH)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAFAYETTE SPRINGS ENTERPRISES	)	DATE ISSUED: 04/15/2011
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS'	)	
PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Fee Award of Matthew Skidmore, District Director, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel appeals the Supplemental Fee Award of District Director Matthew Skidmore, granting an attorney's fee in connection with a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended* by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C.

§§921(c)(4) and 932(l))(the Act).<sup>1</sup> Counsel filed a fee petition with the district director, requesting a total fee of \$700.00 for 3.50 hours of legal services at an hourly rate of \$200.00. No objections to the fee petition were submitted. The district director reduced the hourly rate to \$150.00, and awarded counsel a total fee of \$525.00.

On appeal, counsel argues that the district director erred in reducing his hourly rate to \$150.00. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.<sup>2</sup>

The 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. *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 services performed on behalf of a claimant must indicate the customary billing rate of each person performing the services. 20 C.F.R. §725.366(a). The regulations provide that an approved fee shall 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).

In determining the amount of an attorney's fee 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. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The Supreme Court has held that 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.

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<sup>1</sup> Claimant filed a survivor's claim on March 12, 2009. By letter dated December 22, 2009, employer accepted liability for the payment of benefits.

<sup>2</sup> Because the appeal in this case addresses only the award of an attorney's fee, the recent amendments to the Act, which became effective on March 23, 2010, do not affect this appeal.

The United States Court of Appeals for the Fourth Circuit<sup>3</sup> has provided the following guidance for determining a reasonable hourly rate:

In the usual case, we have said that an attorney identifies the appropriate hourly rate by demonstrating what similarly situated lawyers would have been able to charge for the same service. *See Depaoli v. Vacation Sales Assocs., L.L.C.*, 489 F.3d 615, 622 (4th Cir. 2007). Typically, this means an attorney will demonstrate the market rate for services in the geographic jurisdiction of the litigation. *See Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 244 (4th Cir. 2009).

*Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 227 (4th Cir. 2009). A market rate should be established with evidence of earnings that attorneys received from paying clients for similar services in similar circumstances. *See Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 244 (4th Cir. 2009).

After the issuance of the district director's fee award in this case, the Fourth Circuit held that the fee applicant bears the burden of producing specific evidence of the prevailing market rate. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-290 (4th Cir. 2010). Claimant's counsel failed to provide the district director with this necessary information.<sup>4</sup> Specifically, counsel did not indicate his customary billing rate for cases similar to this one, or submit any evidence of the prevailing market rate. At a minimum, these defects must be cured before the district director can address counsel's fee petition.<sup>5</sup>

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<sup>3</sup> The record indicates that claimant's last coal mine employment was in West Virginia. Unmarked Exhibit. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

<sup>4</sup> Counsel, in his Petition for Review and brief, indicates that two attorneys who practice federal black lung law in his geographical area informed him that they charge an hourly rate of \$250.00 for their legal services. Counsel's Brief at 2. Because this evidence was not before the district director, 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).

<sup>5</sup> Counsel may submit evidence of the fees he has received in the past, as well as affidavits of other lawyers who might not practice black lung law, but who are familiar both with the skills of the fee applicant and, more generally, with the type of work in the relevant community. Further, in determining a reasonable prevailing rate, the district director is not limited to consideration of fees granted in black lung cases; rather,

Moreover, in *Cox*, the Fourth Circuit held that, in the absence of satisfactory specific evidence of the prevailing market rate, an adjudicatory tribunal could not itself determine the reasonable hourly rate. *Cox*, 602 F.3d at 290, 24 BLR at 2-291; *see also Holiday*, 591 F.3d at 228. In this case, the district director stated that a reduced hourly rate of \$150.00 was “comparable to that being charged by other highly qualified attorneys within the same geographical area who also have considerable expertise in the handling of Federal Black Lung claims.” Supplemental Fee Award at 1. However, the record contains no specific evidence to support this finding. Consequently, we vacate the district director’s fee award and remand this case for the district director to determine a reasonable hourly rate in accordance with the Court’s guidance in *Cox*.

Because claimant’s counsel did not submit a complete fee application, on remand, the district director must provide him with an opportunity to submit an amended fee petition. *See Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1055 (9th Cir. 2009) (recognizing that fee applicants should be provided a chance to cure defects if they could not be reasonably anticipated). The amended fee petition must include, *inter alia*, counsel’s customary billing rate, 20 C.F.R. §725.366(a), and evidence of the applicable market rate.

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consideration of the fees granted in other administrative proceedings of similar complexity would also yield instructive information. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 245 (4th Cir. 2009); *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994); *see also Bowman v. Bowman Coal Co.*, 24 BLR 1-165 (2010); *Maggard v. Int’l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010).

Accordingly, the district director's Supplemental Fee Award is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge