

BRB Nos. 12-0548 BLA
and 12-0549 BLA

HELEN L. TAYLOR)
(Widow of and o/b/o the Estate of KIRK L.)
TAYLOR))
)
Claimant-Respondent)
)
v.)
)
HAWKINS COAL COMPANY) DATE ISSUED: 05/30/2013
)
and)
)
AMERICAN BUSINESS & MERCANTILE)
INSURANCE MUTUAL INCORPORATED)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Supplemental Decision and Order Awarding Attorney Fees (2008-BLA-5191 and 2010-BLA-5407) of Administrative Law Judge Larry S. Merck rendered in connection with a subsequent miner's claim and a survivor's claim, both filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ Claimant's counsel submitted a fee petition to the administrative law judge requesting a total of \$20,229.50, representing \$19,937.50 for 72.5 hours of legal services performed between March 21, 2008 and February 15, 2012, at an hourly rate of \$275.00, and \$292.00 for reimbursement of mileage expenses and costs associated with x-ray readings. After considering the fee petition and employer's objections, the administrative law judge denied employer's request for discovery and approved claimant's counsel's requested hourly rate. The administrative law judge further approved the payment of \$18,081.25 in attorney's fees for 65.75 hours of the requested 72.5 hours of legal services performed by claimant's counsel,² disallowing 3.75 hours of services as clerical in nature. In addition, the administrative law judge approved claimant's counsel's request for reimbursement of \$292.00 in expenses. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$18,373.25 for legal services performed, and expenses incurred, while the claims were before the Office of Administrative Law Judges from March 21, 2008 to February 15, 2012.

On appeal, employer contends that the administrative law judge abused his discretion in finding that the hourly rate requested was reasonable, as there was no evidence provided by claimant's counsel regarding the prevailing market rate. Employer asserts that, because the administrative law judge did not rely on market proof when approving the requested hourly rate, he failed to comply with applicable legal authority on fee-shifting. Employer maintains that the administrative law judge erred in relying on past fee awards to establish the prevailing market rate and improperly rejected its proffered market rate evidence. Employer further argues that the administrative law

¹ The Board affirmed the awards of benefits in the miner's claim and the survivor's claim. *Taylor v. Hawkins Coal Co.*, BRB Nos. 12-0275 BLA and 12-0276 BLA (Feb. 21, 2013) (unpub.).

² The administrative law judge found that claimant's counsel's itemized time entries totaled 69.5 hours of legal services, rather than the 72.5 hours requested. Supplemental Decision and Order Awarding Attorney Fees at 2; *see* Time Itemization of Counsel and Calculation of Attorney Fees and Expenses at 1-4. After factoring in the requested rate, the administrative law judge determined that the amount requested for itemized hours of legal services actually totaled \$19,112.50. *Id.*

judge improperly considered claimant’s counsel’s “experience, the specialized nature of the work and his personal assessment of claimant’s counsel’s work to justify the rate that he awarded.” Employer’s Brief at 3. In addition, employer contends that the administrative law judge did not properly consider whether the amount of time billed for specific services was appropriate.

Claimant’s counsel responds in support of the administrative law judge’s fee award. The Director, Office of Workers’ Compensation Programs, has declined to file a substantive response brief in this appeal.

An award of attorney fees by an administrative law judge 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.³ *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). After consideration of employer’s contentions on appeal, we hold that employer has not met its burden in this case.

Employer’s central argument is that the Order awarding attorney fees must be vacated because counsel failed to provide evidence of a prevailing market rate and the administrative law judge erred in using prior fee awards to determine the rate awarded. Employer relies on the United States Court of Appeals for the Sixth Circuit’s statement in *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-122 (6th Cir. 2008), that “[a]s a general proposition, rates awarded in other cases do not set the market rate – only the market can do that.” *Id.*; see Employer’s Brief in Support of Petition for Review at 4. Employer, however, overlooks the court’s specific holding that reliance upon prior awards is appropriate in determining a prevailing market rate where, as in the case before it, which arose in Kentucky, “there is only a relatively small number of comparable attorneys” *Bentley*, 522 F.3d at 664, 24 BLR at 2-123. The court’s ruling is equally applicable to this case, which also arises in Kentucky. Thus, the administrative law judge’s consideration of prior awards in this Sixth Circuit case was not error.

Similarly, employer urges the Board to vacate the administrative law judge’s attorney fee award in light of his citation as authority the Board’s decision in *A.C. [Cox] v. Westmoreland Coal Co.*, BRB No. 08-0313 BLA (Jan. 27, 2009) (unpub.), which was vacated by the United States Court of Appeals for the Fourth Circuit in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010). Again, employer

³ Because the miner’s coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director’s Exhibit 3.

overlooks the substance of the appellate court's decision. The Fourth Circuit in *Cox* vacated the attorney fee award because counsel failed to provide evidence of the prevailing market rate, but the court added that counsel has a range of sources from which to obtain the requisite information, including evidence of fees he has received in the past. *Cox*, 602 F.3d at 290, 24 BLR at 2-291. Accordingly, the law cited by employer does not support its contention that the administrative law judge erred in relying on counsel's prior fee awards to determine the rate awarded.

The administrative law judge performed the requisite analysis set forth in 20 C.F.R. §725.366(b) and considered employer's objections and the evidence provided by both parties as to the prevailing market rate for black lung attorneys, and adequately explained his determination that the hourly rate of \$275.00 for work performed by claimant's counsel was reasonable. *Jones*, 21 BLR at 1-108; *Abbott*, 13 BLR at 1-16. The administrative law judge specifically noted employer's position that "Mr. Sanders' hourly rate should be reduced to \$165.00 per hour," and referenced the portion of employer's Objection to Fee Petition listing its market rate evidence. Supplemental Decision and Order Awarding Attorney Fees at 3. The administrative law judge then acted within his discretion in considering the nature of the issues involved in the miner's claim and the survivor's claim; the qualifications of claimant's counsel; the nature of the services rendered; evidence of fees claimant's counsel has received in the past, based on a list of cases in which the requested rate was awarded as reasonable, and the ultimate benefit to claimant. 20 C.F.R. §725.366(c); *Bentley*, 522 F.3d at 664, 24 BLR at 2-123; *Abbott*, 13 BLR at 1-16; Supplemental Decision and Order Awarding Attorney Fees at 4-5. We affirm, therefore, the administrative law judge's approval of the hourly rate of \$275.00. *Id.*

Regarding the number of hours of services approved by the administrative law judge, we reject employer's contention that the administrative law judge erred in approving claimant's counsel's use of quarter-hour billing. Contrary to employer's contention, quarter-hour billing is permissible, as long as the total amount of time is reasonable. *See Bentley*, 522 F.3d at 666-67, 24 BLR at 2-127. Furthermore, the administrative law judge permissibly disallowed 3.75 hours, or twenty-five percent of the time billed in quarter-hour increments, as involving clerical services.⁴ *See Whitaker v.*

⁴ Contrary to employer's assertion, the administrative law judge did not find that the fifteen hours of time billed by claimant's counsel was for clerical services. Rather, the administrative law judge observed that claimant's counsel billed a total of fifteen hours of time for reviewing or drafting letters and "other routine tasks." Supplemental Decision and Order at 6. He explained that the fifteen hours were reduced by "25 [percent] or 3.75" hours to reflect those services that appeared to be clerical in nature. *Id.* Employer does not identify any specific error in this determination. *See Cox v. Benefits*

Director, OWCP, 9 BLR 1-216 (1986); *Abbott*, 13 BLR at 1-16; Supplemental Decision and Order Awarding Attorney Fees at 5.

With respect to the entries for work related to the two continued hearings in this case, claimant's counsel requested a total of seven and one-half hours to review records, speak with claimant by telephone, drive to and from the hearings, and attend the hearings. Time Itemization of Counsel and Calculation of Attorney Fees and Expenses at 2-3. The administrative law judge disagreed with employer that claimant's counsel was not entitled to compensation for time spent in regard to the continued hearings, stating that claimant's counsel "still had to prepare for the hearings as if they would be held as scheduled" and that at the second hearing, "Mr. Sanders had to present argument as to why the hearing should be continued because of [c]laimant's illness." Supplemental Decision and Order Awarding Attorney Fees at 6. We affirm the administrative law judge's allowance of these itemized time entries as within his discretion. *See Abbott*, 13 BLR at 1-16.

Lastly, we reject employer's assertion that the administrative law judge erred in approving 24.25 hours spent by claimant's counsel preparing a post-hearing brief in which both claims were addressed. Because employer has advanced no basis for its assertion that the amount of time claimed by counsel is excessive, employer has not established that the administrative law judge abused his discretion in determining that the hours spent preparing the post-hearing brief were reasonable. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Abbott*, 13 BLR at 1-16; Supplemental Decision and Order Awarding Attorney Fees at 6. We affirm, therefore, the administrative law judge's finding.

In light of our rejection of employer's allegations of error, we affirm the administrative law judge's award of a fee in the amount of \$18,373.25, representing 65.75 hours of legal services at an hourly rate of \$275.00, and \$292.00 in expenses, in Case Nos. 2008-BLA-5191 and 2010-BLA-5407.

Review Board, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge