



BRB No. 14-0334 BLA

JEFFREY ENDICOTT )  
(o/b/o MOSCOE ENDICOTT, deceased) )

Claimant-Respondent )

v. )

VANDYKE BROTHERS COAL )  
COMPANY, INCORPORATED )

DATE ISSUED: 05/28/2015

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 Decision and Order Awarding Attorney's Fees of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

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

Before: HALL, Chief Administrative Appeals Judge, McGRANERY and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Attorney's Fees (2009-BLA-05753) of Administrative Law Judge Christine L. Kirby in connection with a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). On February 24, 2014, the administrative law judge issued a Decision and Order Awarding Augmented Benefits pursuant to the regulations at 20 C.F.R. Parts 718 and 725.<sup>1</sup> Thereafter, claimant's counsel, Joseph E. Wolfe, submitted a fee petition to the administrative law judge requesting \$6,031.25 for legal services performed from October 22, 2012 to February 28, 2014, representing 10.75 hours of services performed by Mr. Wolfe at an hourly rate of \$300.00 (\$3,225.00); 4.75 hours of legal services performed by Ryan C. Gilligan, at an hourly rate of \$225.00 (\$1,068.75), 6.75 hours of legal services performed by Brad Austin, at an hourly rate of \$150.00 (\$1,012.50) and 7.25 hours of services performed by legal assistants at an hourly rate of \$100.00 (\$725.00).

After considering claimant's counsel's fee petition and employer's objections thereto, the administrative law judge found that the requested hourly rates were reasonable. The administrative law judge disallowed, however, 1.35 hours of the 10.75 hours requested for work performed by Mr. Wolfe and 0.3 hours of the 4.75 hours requested for work performed by Mr. Gilligan, finding that these services were clerical in nature, duplicative, excessive and/or unnecessary. The administrative law judge also disallowed 3.75 hours of the 7.25 hours requested for work performed by the legal assistants, finding that the itemized entries represented tasks that were clerical in nature. Accordingly, the administrative law judge awarded claimant's counsel a fee of \$5,183.75 for legal services performed while the case was before the Office of Administrative Law Judges from October 22, 2012 to February 28, 2014.<sup>2</sup>

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<sup>1</sup> On March 12, 2014, employer appealed the administrative law judge's February 24, 2014 Decision and Order Awarding Augmented Benefits to the Board. In a Decision and Order issued on October 20, 2014, the Board affirmed the administrative law judge's award of augmented benefits. *Endicott v. VanDyke Bros. Coal Co.*, BRB No. 14-0182 BLA (Oct. 20, 2014) (unpub.).

<sup>2</sup> The administrative law judge approved 9.4 hours of legal services performed by Mr. Wolfe at an hourly rate of \$300.00 (\$2,820.00), 4.45 hours of legal services performed by Mr. Gilligan at an hourly rate of \$225.00 (\$1,001.25), 6.75 hours of legal services performed by Mr. Austin at an hourly rate of \$150.00 (\$1,012.50) and 3.5 hours of services performed by legal assistants at an hourly rate of \$100.00 (\$350.00).

On appeal, employer contends that the administrative law judge erred in denying its request for discovery related to claimant's counsel's market rate. Employer also alleges that the administrative law judge's attorney's fee award is excessive and argues that the administrative law judge erred in determining both the hourly rates and the number of hours approved in calculating the fee. Claimant's counsel responds in support of the awarded fee. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer has filed a reply brief, reiterating its contentions on appeal.

## **I. Rejection of Discovery Request**

While the case was before the administrative law judge, employer filed a motion to compel discovery, seeking information from claimant's counsel regarding the applicable market rates. The administrative law judge denied employer's discovery request in her Decision and Order, stating:

[B]ecause I find that Mr. Wolfe provided ample documentation and [employer's counsel] had the opportunity to object, which he did, there is no need to conduct discovery or produce further evidence regarding the prevailing market rate in Wise County, Virginia.

Decision and Order at 4. An administrative law judge is granted broad discretion in resolving evidentiary issues. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 620, 23 BLR 2-345, 2-358 (4th Cir. 2006). Accordingly, the party seeking to overturn an administrative law judge's resolution of an evidentiary issue must prove that his or her action represented an abuse of discretion. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting). In the present case, the administrative law judge reasonably determined, over employer's objection, that "based on the amount [sic] of cases [counsel] has cited, the hourly rates are . . . representative of the prevailing market rates for successful representation of black lung disability claimants." Decision and Order at 4. We hold, therefore, that the administrative law judge did not abuse her discretion in denying employer's discovery request, because claimant's counsel provided adequate documentation of the relevant market rates. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

## II. Attorney Fee Petition

### A. The Board's Standard of Review

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.<sup>3</sup> 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 of each person performing the services. 20 C.F.R. §725.366(a). 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).

### B. Hourly Rate

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). According to the Court, 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); see generally *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008) (defining "reasonable hourly rate" as "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record."). 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 contends that the administrative law judge erred in approving the hourly rates requested, arguing that the administrative law judge failed to require claimant's counsel to provide market evidence establishing hourly rates for the legal services provided. Employer argues that the administrative law judge's reliance on rates awarded

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner's coal mine employment was in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

in prior cases is not sufficient to set a prevailing market rate. Employer further contends that the administrative law judge erred in discrediting the prior fee awards proffered by employer as evidence of a lower prevailing market rate.

The administrative law judge found that claimant's counsel's fee petition included citations to "numerous" recent cases in which Mr. Wolfe was awarded an hourly rate of at least \$300.00 and Mr. Gilligan was awarded an hourly rate of \$225.00. Decision and Order at 3; see March 26, 2014 Fee Petition at 3-6. These cases also include awards of an hourly rate of \$100.00 for work performed by claimant's counsel's legal assistants. The United States Court of Appeals for the Fourth Circuit has held that reliance on prior awards is permissible to use as guidance in calculating the lodestar amount. See *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572, 25 BLR 2-359, 2-375-76 (4th Cir. 2013) ("[P]rior fee awards constitute evidence of a prevailing market rate that may be considered in fee-shifting contexts, including those prescribed by [the Act]."); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010). We affirm, therefore, the administrative law judge's determination that claimant's counsel's requested hourly rates for attorneys Wolfe and Gilligan, and the legal assistants, were reasonable and reflected the applicable market rates. 20 C.F.R. §725.366(b); see *Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *Gosnell*, 724 F.3d at 572, 25 BLR at 375-76; *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010); Decision and Order at 3.

Regarding the requested hourly rate for Mr. Austin, however, employer correctly argues that the fee petition does not contain any evidence of Mr. Austin's qualifications, expertise, or experience in the field of black lung litigation, nor did claimant's counsel provide citations to any cases in which Mr. Austin was awarded an hourly rate of \$150.00 for performing legal services.<sup>4</sup> The administrative law judge acknowledged claimant's counsel's omission and employer's objection thereto, but did not specifically identify her bases for concluding that Mr. Austin's legal services warranted at least the \$150.00 hourly rate requested. Decision and Order at 4. While the amount of an attorney's fee award by an administrative law judge is discretionary, the fee applicant bears the burden of producing specific evidence of the prevailing market rate. See *Gosnell*, 724 F.3d at 570; *Cox*, 602 F.3d at 289, 24 BLR at 2-290. Moreover, while 20 C.F.R. §725.366(a) requires only that counsel "indicate the professional status (e.g. attorney, paralegal, law clerk, lay representative or clerical)" of the persons performing the work for which fees are requested, 20 C.F.R. §725.366(a), the regulation further provides that the approved fee "shall take into account . . . the qualifications of the representative." 20 C.F.R. §725.366(b). Because the administrative law judge did not address employer's objection,

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<sup>4</sup> Mr. Austin was not identified as having performed legal services in any of the black lung cases listed by Mr. Wolfe.

or explain her finding that the appropriate hourly rate for Mr. Austin is \$150.00, she did not comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a).<sup>5</sup> *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Accordingly, we must vacate the award of fees for legal services provided by Mr. Austin, and remand this case to the administrative law judge for reconsideration.

### C. Allowable Hours

Employer next argues that the administrative law judge “erred by ignoring most of [employer’s] objections to specific time charges,” which employer contended were clerical, unnecessary, excessive, or duplicative. Employer’s Brief at 9. Contrary to employer’s contention, the administrative law judge reviewed “the time claimed on behalf of the paralegals,” which included each entry objected to by employer. Decision and Order at 5. In addition, the administrative law judge acted within her discretion in disallowing fifteen one-quarter hour time entries, totaling 3.75 hours of services, as they represented non-compensable clerical work, and in finding that the remaining services, totaling 3.50 hours, were allowable because they were not purely clerical, unnecessary, excessive, or duplicative. *See Jones*, 21 BLR at 1-108; *Abbott*, 13 BLR at 1-16; Decision and Order at 5. We affirm, therefore, the administrative law judge’s award of \$350.00 for 3.50 hours of services performed by legal assistants at an hourly rate of \$100.00.

Upon reviewing the itemized time entries for work performed by attorneys Wolfe and Gilligan, the administrative law judge also acted within her discretion in disallowing 1.65 hours of the time requested for each attorney on the ground that it was “excessive.”<sup>6</sup> Decision and Order at 5-6; *see Gosnell*, 724 F.3d at 578. Consequently, we affirm the administrative law judge’s award of \$2,820.00 for 9.4 hours of services performed by Mr.

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<sup>5</sup> The Administrative Procedure Act provides that every adjudicatory decision must 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).

<sup>6</sup> Specifically, the administrative law judge reduced each one-quarter of an hour time entry by Mr. Wolfe, for legal services performed on February 4, 2013, March 21, 2013, May 22 and 30, 2013, August 25, 2013, September 20, 2013, October 7, 2013, November 29, 2013 and January 22, 2014, to 0.15 hours. Decision and Order at 5-6. Similarly, the administrative law judge reduced each one-quarter of an hour time entry by Mr. Gilligan, for work performed on December 4, 2013 and February 4, 2014, to 0.15 hours. *Id.* at 6.

Wolfe at an hourly rate of \$300.00. We also affirm her award of \$1,001.25 for 4.45 hours of legal services performed by Mr. Gilligan at an hourly rate of \$225.00.<sup>7</sup>

In sum, we affirm the administrative law judge's award of a total of \$4,171.25 for 9.4 hours of services performed by Mr. Wolfe at an hourly rate of \$300.00; \$1,001.25 for 4.45 hours of legal services performed by Mr. Gilligan at an hourly rate of \$225.00; and \$350.00 for 3.50 hours of services performed by legal assistants at an hourly rate of \$100.00. We vacate the administrative law judge's determination that an hourly rate of \$150.00 was reasonable for Mr. Austin and remand the case to the administrative law judge to reconsider her finding. Whether the administrative law judge allows claimant's counsel to file an amended fee petition, to cure the defects related to the hourly rate requested for Mr. Austin, is a matter committed to her discretion. *See Williams*, 453 F.3d at 620, 23 BLR at 2-358; *see also Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1055 (9th Cir. 2009) (It is within the Board's discretion to give claimant's counsel an opportunity to correct flaws in his or her initial fee petition by filing an amended fee petition). In rendering her findings on remand, the administrative law judge must identify the supporting evidence and set forth the underlying rationale, in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

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<sup>7</sup> We affirm, as unchallenged on appeal, the administrative law judge's full crediting of 6.75 hours of services performed by Mr. Austin. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). However, the administrative law judge must make a finding on remand as to the proper hourly rate for Mr. Austin's services in order to calculate his fee.

Accordingly, the administrative law judge's 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.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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GREG J. BUZZARD  
Administrative Appeals Judge