

BRB No. 13-0333 BLA

WENDELL E. ROLLINS)
)
 Claimant-Petitioner)
)
 v.)
)
 MYSTIC, LLC) DATE ISSUED: 02/18/2014
)
 and)
)
 BRICKSTREET MUTUAL INSURANCE)
 COMPANY, INCORPORATED)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Revised Proposed Order Supplemental Award Fee for Legal Services of Kristi Long, Claims Examiner, Office of the District Director, Office of Workers' Compensation Programs, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant's counsel appeals the Revised Proposed Order Supplemental Award Fee for Legal Services (Revised Supplemental Fee Award) of Claims Examiner Kristi Long (the district director), on a petition for fees for legal services performed in securing an award of benefits on a miner's claim, filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The procedural history follows. Claimant was awarded federal black lung benefits by Administrative Law Judge Ralph A. Romano on April 20, 2011, and the award was affirmed by the Board. *Rollins v. Mystic, LLC*, BRB Nos. 10-0585 BLA and 10-0585 BLA-A (May 29, 2012) (unpub.). Employer did not appeal the Board's decision.¹ On February 8, 2013, claimant's counsel submitted an itemized fee petition requesting attorney fees in the amount of \$1,375.00, representing 5.5 hours of legal services performed at the hourly rate of \$250.00, while the case was pending before the district director.² Employer did not file any objection to the fee petition. The district director issued a Proposed Order Supplemental Award Fee for Legal Services on March 13, 2013, awarding \$1,375.00, the entire sum requested. Employer requested reconsideration, asserting that claimant's counsel failed to substantiate that \$250.00 was his customary rate in 2008. Employer indicated that it had no objection to the fee petition if the district director modified the award to reflect an hourly rate of \$200.00. Claimant's counsel responded, asserting that his hourly rate of \$250.00 was justified since "payment of the attorney fee in this claim was delayed for three years and ten months due to appeals by the employer." March 26, 2013 letter from claimant's counsel at 3.

On April 12, 2013, the district director issued a Revised Proposed Order Supplemental Award Fee for Legal Services, which reduced the hourly rate to \$200.00 for work performed in 2008, but approved an hourly rate of \$250.00 for work performed

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mining employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); see also *Rollins v. Mystic, LLC*, BRB Nos. 10-0585 BLA and 10-0585 BLA-A, slip op. at 3 n.4 (May 29, 2012) (unpub.).

² The fee petition sets forth counsel's qualifications and level of experience in federal black lung claims. The fee petition also includes the following: an itemized statement of the time spent on the claim; copies of three prior fee awards issued to claimant's counsel in 2010, for work performed before the district director, in which his hourly rate of \$250.00 was approved; copies of prior fee awards where counsel was awarded an hourly rate of \$250.00 for work performed before the Office of Administrative Law Judges; and an affidavit from Mr. Stephen Sanders, attesting that the hourly rate of \$250.00 is customary for counsel's geographical practice area.

in 2012. Consequently, the district director awarded a total fee of \$1,112.50, representing 5.25 hours of work performed from March 25, 2008 to August 26, 2008, at the hourly rate of \$200.00, and .25 hours of work performed on June 20, 2012, at the hourly rate of \$250.00.

On appeal, claimant's counsel contends the district director erred in reducing his hourly rate to \$200.00 for the work performed in 2008. Employer responds, asserting that the reduction in claimant's rate was not arbitrary or capricious and should be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal. Claimant's counsel has filed a reply brief, arguing that proper consideration should be given to his qualifications and market rate evidence in determining the reasonable hourly rate.

The amount of an award of an attorney 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 fee 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.

The United States Court of Appeals for the Fourth Circuit 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). Prior fee awards may also be considered as evidence of a prevailing market rate. *See E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572-74 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010).

In addition, the Fourth Circuit has authorized the enhancement of a fee to compensate for delay in payment, *i.e.*, the passage of time between when the services were rendered and when the fee award becomes enforceable. *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 805, 21 BLR 2-631, 2-638 (4th Cir. 1999). The Board has held that the fact-finder may adjust the fee by employing any reasonable means to compensate counsel for delay, including the use of the current hourly rate. *Nelson v. Stevedoring Services of America*, 29 BRBS 90, 97 (1995), *citing Missouri v. Jenkins*, 491 U.S. 274, 284 (1989).

Claimant's counsel asserts that the district director's fee award is deficient because it does not reflect how the hourly rate was calculated, does not address his qualifications, does not address his market rate evidence, and fails to address whether his fee should be enhanced due to the delay of payment of the fee award. We agree. 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 \$200.00 was "the usual and customary [rate] for work performed before the [d]istrict [d]irector" from December 12, 2007 to February 28, 2011 and 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." Revised Supplemental Fee Award at 1. The record, however, contains no specific evidence to support the district director's selection of \$200.00 as the appropriate hourly rate. Moreover, the district director did not discuss any of the evidence submitted by claimant's counsel to support his fee request. 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*. Alternatively, the district director should consider, in accordance with *Kerns*, whether

counsel is entitled to an hourly rate of \$250.00 for all work performed as enhancement for the delay in payment of the fees.³

Accordingly, the district director's Revised Proposed Order Supplemental Award Fee for Legal Services is vacated and the case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

³ If the district director is unable to determine the prevailing market rate, counsel should be permitted to amend his fee petition. *See Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1055 (9th Cir. 2009)