

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 23-0037 BLA

BRUCE N. ARP)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEABODY NEW MEXICO SERVICES)	
)	DATE ISSUED: 07/17/2024
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Attorney Fee Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for Claimant.

Scott A. White (White & Risse, LLC), Arnold, Missouri, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Richard M. Clark's Supplemental Attorney Fee Order (2018-BLA-05424) rendered on a claim filed on September 25, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ awarded benefits on May 18, 2021, having found Claimant invoked the Section 411(c)(4) presumption and Employer did not rebut it. The Board subsequently affirmed the award. *Arp v. Peabody New Mexico Services*, BRB Nos. 21-0464 BLA, 22-0221 BLA, 22-0221 BLA-A, 22-0117 BLA, and 22-0117 BLA-A, slip op. at 6-12 (Feb. 9, 2023) (unpub.). In addition, the Board affirmed the district director's fee order and supplemental fee order awarding Claimant's counsel (counsel or Attorney Bramwell) and his paralegal (Paralegal Brester) the hourly rates of \$290.00 and \$100.00, respectively. *Id.* at 14-16.

ALJ's Attorney's Fee Awards

On August 6, 2021, counsel filed a fee petition for legal services performed before the ALJ from January 23, 2018 to May 19, 2021.¹ He requested \$50,614.05, representing \$29,232.00 for 100.80 hours of his services at an hourly rate of \$290.00, \$19,080.00 for 127.20 hours of services performed by his paralegal at an hourly rate of \$150.00, and \$2,302.05 in expenses.² With this initial fee request, counsel submitted the affidavits or

¹ The fee petition counsel submitted sets forth his qualifications and level of experience in federal black lung claims as well as the qualifications and experience of his paralegal. Counsel stated his "usual and customary fee ranges between \$250.00 and \$300.00 per hour in non-black lung cases" and "\$290.00 per hour in federal black lung cases." August 6, 2021 Fee Petition at 17. To support the requested hourly rates, counsel submitted affidavits of experienced black lung attorneys practicing within the jurisdictions of the United States Court of Appeals for the Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits attesting to the reasonableness of his and Paralegal Brester's requested hourly rates for black lung services. *See* Exhibit A to August 6, 2021 Fee Petition.

He also submitted affidavits of experienced Utah attorneys practicing in the areas of corporate law, family law, immigration, business transactions, civil litigation, criminal law, personal injury, and estate planning attesting to the reasonableness of an hourly rate of \$250.00 to \$350.00 for attorney services and of \$90.00 to \$125.00 for paralegal services in the Utah market. *See* Exhibit B to August 6, 2021 Fee Petition. Counsel additionally submitted examples of the hourly rates Greenberg Traurig LLP in Washington, D.C. charges employers in defending against black lung claims (\$305.00 or less for federal black lung litigation; \$350.00 to \$750.00 for services in a coal mine operator's bankruptcy proceedings). *See* Exhibit D to August 6, 2021 Fee Petition.

² Counsel itemized \$2,609.85 in expenses but excluded reimbursement for photocopies and postage, and thus only requested \$2,302.05 in expenses. August 6, 2021 Fee Petition at 38-40.

declarations of attorneys who either practice federal black lung law or practice in Utah where counsel practices. Both sets of attorneys attested to the reasonableness of the requested hourly rates for both counsel and his paralegal. *See* n.1, *supra*.

On August 27, 2021, Employer objected to Attorney Bramwell's and Paralegal Brester's hourly rates, counsel's use of minimum billing increments in quarter-hours, Paralegal Brester's "block-billing" (billing for time spent on multiple tasks instead of time spent on a specific task), and certain expenses. On September 13, 2021, counsel replied to Employer's objections.

After considering counsel's initial fee request, Employer's objections, and counsel's reply to Employer's objections, the ALJ issued an Attorney Fee Order on June 24, 2022 (ALJ's June 24, 2022 Attorney Fee Order or initial fee award), awarding Attorney Bramwell's and Paralegal Brester's requested hourly rates. He found the relevant community for determining the reasonable hourly rates was in Utah where counsel practices because there were no attorneys practicing federal black lung law in New Mexico, where Claimant resides. The ALJ overruled Employer's objections to quarter-hour billing, but reduced the hours requested by counsel and his paralegal by ten percent each (which he characterized as a "haircut") and so awarded Attorney Bramwell 90.80 hours of the 100.80 hours he requested and awarded Paralegal Brester 114.50 hours of the 127.20 hours she requested. The ALJ also overruled Employer's objections to block billing and awarded all costs requested.

Thus, the ALJ awarded a total fee of \$45,809.05, representing \$26,332.00 for 90.80 hours of attorney services at a rate of \$290.00 per hour, \$17,175.00 for 114.50 hours of paralegal services at a rate of \$150.00 per hour, and \$2,302.05 in costs.

On July 18, 2022, counsel filed a supplemental fee petition for work performed from August 31, 2021 to September 10, 2021, defending his initial fee petition. He requested an additional \$930.00, representing \$217.50 for .75 hour of attorney services at the hourly rate of \$290.00 and \$712.50 for 4.75 hours of paralegal services at the hourly rate of \$150.00. Counsel incorporated by reference the evidence he submitted in support of the requested hourly rates in his initial fee request.

On July 27, 2022, Employer objected to the hourly rates but not the time charged. It asserted the hourly rates of \$270.00 or \$275.00³ and \$125.00 were reasonable for counsel

³ Employer inconsistently asserted that counsel's hourly rate should be \$270.00 or \$275.00. Employer's Objections dated July 27, 2022 at 1, 3.

and his paralegal, respectively. Counsel replied to Employer's objections on August 9, 2022.

Upon consideration of counsel's supplemental fee petition, Employer's objections, and counsel's response to the objections, the ALJ issued a Supplemental Attorney Fee Order on October 3, 2022 (ALJ's Supplemental Attorney Fee Order or supplemental fee award), awarding all requested time for attorney services at the requested hourly rate of \$290.00 and for paralegal services at the requested hourly rate of \$150.00. In doing so, the ALJ "fully adopt[ed] and incorporate[d] by reference" the reasons he provided for awarding the same hourly rates in his initial fee award. He thus awarded a total supplemental fee of \$930.00 representing \$217.50 for .75 hour of counsel's services at the requested hourly rate of \$290.00 and \$712.50 for 4.75 hours of paralegal services at the requested hourly rate of \$150.00.⁴

Appeal of ALJ's Supplemental Fee Order

In its appeal of the ALJ's Supplemental Attorney Fee Order, Employer states the ALJ's fee award must be vacated because he was not properly appointed to hear this matter. On the merits, it contends his award of \$290.00 per hour to Attorney Bramwell is unsupported and should be reduced to \$270.00, Paralegal Brester's hourly rate is unsupported, and counsel improperly billed in quarter-hour increments and for blocks of tasks.⁵ Employer's Brief at 1-6. Counsel urges affirmance of the hourly rate awarded him,

⁴ On October 31, 2022, Employer filed an appeal of the ALJ's October 3, 2022 Supplemental Attorney Fee Order. The Board acknowledged that appeal on November 7, 2022, and assigned it the docket number BRB No. 23-0037 BLA. Prior to that, however, Employer had filed an appeal of the ALJ's June 24, 2022 Attorney Fee Order with the Board. Due to an inadvertent oversight, the Board did not acknowledge that appeal until March 8, 2024, assigning it the docket number BRB No. 24-0039 BLA. At that time, the Board also consolidated both appeals for purposes of decision only. *Arp v. Peabody New Mexico Services*, BRB Nos. 23-0037 BLA and 24-0039 BLA (Mar. 8, 2024) (Order) (unpub.). Thereafter, upon Employer's motion, the Board dismissed its appeal of the June 24, 2022 Attorney Fee Order in BRB No. 24-0039 BLA; thus, the only appeal now before the Board is of the ALJ's October 3, 2022 Supplemental Attorney Fee Order in BRB No. 23-0037 BLA. *Arp v. Peabody New Mexico Services*, BRB No. 24-0039 BLA (May 22, 2024) (Order) (unpub.)

⁵ Despite Employer's challenge to the ALJ's Supplemental Fee Order, it concludes that \$930.00 should be awarded counsel (\$217.50 for .75 hour of attorney services at an

pointing to the Board's affirmation of the district director's award of \$290.00 per hour for his work in this claim. *See Arp*, BRB Nos. 21-0464 BLA, 22-0221 BLA, 22-0221 BLA-A, 22-0117 BLA, and 22-0117 BLA-A, slip op. at 14-16. He also asserts the Board should reject Employer's challenge to his billing in minimum quarter-hour increments. Counsel's Brief at 2-5.

Appointments Clause Challenge

Employer states the ALJ was not properly appointed to hear this matter. Employer's Brief at 1. The Board rejected this challenge in its previous decision affirming the ALJ's award of benefits in this claim. *Arp*, BRB Nos. 21-0464 BLA, 22-0221 BLA, 22-0221 BLA-A, 22-0117 BLA, and 22-0117 BLA-A, slip op. at 4-6. Because Employer has not shown the Board's decision was clearly erroneous or established any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989-90 (1984).

Merits of the Fee Challenge

The amount of an attorney's fee award is discretionary and must be upheld unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.⁶ *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661 (6th Cir. 2008); *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 902 (7th Cir. 2003); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

When attorneys prevail on behalf of a claimant under the Act, they are entitled to a "reasonable attorney's fee" paid by the responsible party. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a) of the Longshore and Harbor Workers' Compensation Act. 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).

hourly rate of \$290.00, and \$712.50 for 4.75 hours paralegal services at an hourly rate of \$150.00), exactly what the ALJ awarded. Employer's Brief at 5-6.

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, as Claimant performed his coal mine work in New Mexico. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 49.

Under federal fee-shifting statutes, the United States Supreme Court has held that adjudicators must determine the number of hours reasonably expended in preparing and litigating a 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 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *Bentley*, 522 F.3d at 663.

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). To identify the prevailing market rate, the fee applicant must 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; *see Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 894 (7th Cir. 2002). Evidence of fees received in other black lung cases may be an appropriate consideration in establishing a market rate. *See Chubb*, 312 F.3d at 895; *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672 (7th Cir. 2002).

Attorney Bramwell’s Hourly Rate

Employer contends counsel did not show that his requested hourly rate of \$290.00 is in line with the prevailing market rate of similarly experienced counsel in New Mexico. Employer’s Brief at 1-4. It argues the location of Claimant’s residence in New Mexico, as opposed to the location of counsel’s practice in Utah, is the “proper” relevant community for purposes of determining a lodestar rate because the formal hearing was held telephonically. *Id.* We reject Employer’s argument.

The relevant community for determining a reasonable market rate under the Act is the location “where the litigation took place.” *See Shirrod v. Director, OWCP*, 809 F.3d 1082, 1087 (9th Cir. 2015). In making that determination, adjudicators must look to a variety of factors, or “other indicia” of where the litigation took place, including where the hearing was held and where the claimant’s and the employer’s counsel maintain their offices. *Id.* Thus, contrary to Employer’s argument, the location of Claimant’s residence is not dispositive of the issue and thus does not mandate a finding that New Mexico is the relevant community for determining counsel’s hourly rate. Employer’s Brief at 2 n.1.

Moreover, even if the location of the litigation was determined solely by the location of Claimant’s residence in New Mexico, such a finding does not foreclose awarding counsel hourly rates based on the market in Utah where he practices. As Employer acknowledges, if local counsel is not available to Claimant, he is entitled to secure non-local counsel who, in turn, is entitled to fees based on the location of the market where he or she practices. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d

219, 229 (4th Cir. 2009); Employer’s Brief at 2-3. Under those circumstances, adjudicators must consider whether non-local counsel’s services were available in the “visited” market and whether the non-local counsel charged a reasonable fee. *Holiday*, 591 F.3d at 229.

Here, the ALJ considered counsel’s assertion that the relevant community is Salt Lake City, Utah, because he practices in a suburb of that city, he is the only attorney representing claimants in federal black lung matters west of the Mississippi River, and to his knowledge, no attorney in New Mexico, where Claimant lives, represents claimants in black lung claims. Counsel’s August 9, 2022 Reply at 2; Counsel’s September 13, 2021 Reply at 3-4, 6; August 6, 2021 Fee Petition at 17, 19.

In his initial fee award, which he incorporated into his supplemental fee award, the ALJ concluded that there was no “common” location where the litigation took place because counsel practices in Utah, Claimant resides in New Mexico, Employer’s counsel practices in Missouri, and the ALJ was located in California when the telephonic hearing took place. ALJ’s June 24, 2022 Attorney Fee Order at 4; ALJ’s Supplemental Fee Order at 1-2. Accepting counsel’s uncontradicted representation that no attorneys practice federal black lung law in New Mexico where claimant lives, the ALJ permissibly found Claimant acted reasonably in obtaining non-local counsel, and determined the relevant community is Utah, where counsel practices. *Id.*; see *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 426 F.3d 694, 699 (3d Cir. 2005), as amended (Nov. 10, 2005) (where local counsel is unavailable, non-local counsel is entitled to a fee based on the prevailing rates in the community where he practices). As the ALJ’s decision is rational, supported by substantial evidence, and in accordance with law, we affirm it.⁷

Moreover, Employer fails to explain or support its alleged distinction between market rates in New Mexico and Utah and otherwise does not explain why the ALJ’s award to counsel of \$290.00 per hour is arbitrary, capricious, or an abuse of discretion. See *Bentley*, 522 F.3d at 661 (ALJs’ fee awards reviewed under abuse of discretion standard); *Hawker*, 326 F.3d at 902 (same); *Interfaith Cmty. Org.*, 426 F.3d at 699-700 (affirming trial court’s award of fees to non-local counsel based on prevailing Washington, D.C. market rates); *Guam Society of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 702

⁷ In this regard, we note the record contains no evidence regarding attorney services in the New Mexico market and both Employer and Claimant’s counsel indicate there are no practitioners in New Mexico that regularly represent coal miners in federal black lung benefits claims. See July 27, 2022 Employer’s Objections at 2; August 9, 2022 Counsel’s Reply to Objections at 3. Further, as Employer points out, New Mexico and Utah are both located within the jurisdiction of the Tenth Circuit whose law applies to this claim. Employer’s Brief at 2.

(9th Cir. 1996) (affirming trial court’s discretionary ruling to award non-local counsel their New York rates); *Jones*, 21 BLR at 1-110 (the employer’s assertion that the hourly rate awarded is excessive did not establish the ALJ abused his discretion). We therefore affirm the ALJ’s award of \$290.00 per hour for Attorney Bramwell’s services.

Paralegal Brester’s Hourly Rate

We further affirm the ALJ’s award of \$150.00 per hour to Paralegal Brester as Employer raises no specific error with regard to it. *See* 20 C.F.R. §802.211(b); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); Employer’s Brief at 4.

Billing Increments of Quarter-Hours and Block Billing

Finally, we reject Employer’s challenges to counsel’s use of quarter-hour billing increments and alleged block billing. Employer’s Brief at 4-5. A party challenging an ALJ’s fee award forfeits objections not first raised to the ALJ. *Braenovich v. Cannelton Indus., Inc.*, 22 BLR 1-236, 1-251 (2003). In its objections to counsel’s supplemental fee petition, Employer did not challenge the time charged or complain of counsel’s use of quarter-hour increments or alleged block billing. Employer’s July 27, 2022 Objections at 1 (stating that although Employer challenges the hourly rates of counsel and his paralegal, it does not object to the time they requested). We thus decline to address Employer’s challenges to counsel’s use of billing increments of quarter-hours and alleged block billing as they were not first raised before the ALJ with regard to counsel’s supplemental fee petition. *See Braenovich*, 22 BLR at 1-251.

In any event, the black lung regulations allow billing increments in quarter-hours.⁸ 20 C.F.R. §802.203(d)(3); *E. Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 576-78 (4th Cir. 2013); *Bentley*, 522 F.3d at 666-67; *see also Carter v. Sedgwick County Kansas*, 929 F.2d 1501, 1506-07 (10th Cir. 1991) (counsel’s “detailed itemization of time,” including billing in quarter-hour increments, among the factors supporting the trial judge’s fee award under Title VII’s fee-shifting statute).

⁸ Employer did not object to the billed hours in the supplemental fee petition. Employer’s July 27, 2022 Objections at 1.

Accordingly, we affirm the ALJ's Supplemental Attorney Fee Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge