U.S. Department of Labor

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

BRB Nos. 17-0532 BLA and
17-0533 BLA

HILDA FAYE BAILEY (Widow of CHARLES BAILEY) Claimant-Petitioner v. INCOAL INCORPORATED COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/19/2018 DECISION and ORDER

Appeal of the Order Awarding Attorney Fee to Attorney Evan Smith, Esquire, of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Lois A. Kitts, James M. Kennedy, and Ryan M. Stratton (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

HALL, Chief Administrative Appeals Judge:

Claimant's co-counsel, Evan Smith, appeals the Order Awarding Attorney Fee to Attorney Evan Smith, Esquire, (2013-BLA-05416 and 2013-BLA-05542) of Administrative Law Judge Dana Rosen, 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 November 15, 2016, the administrative law judge issued a Decision and Order Awarding Benefits pursuant to the regulations at 20 C.F.R. Parts 718 and 725. Thereafter, claimant's co-counsel submitted a Motion for Award of Attorneys' Fees to the administrative law judge requesting $9,525.00 for legal services rendered before the Office of Administrative Law Judges from June 14, 2016 to November 16, 2016.[1] The total fee requested represents 31.00 hours of services performed by claimant's co-counsel at an hourly rate of $250.00 and 35.50 hours of services performed by a college student intern at an hourly rate of $50.00. On February 8, 2017, the administrative law judge issued a Notice of Attorney Fee Petition Deficiency for Attorney Smith, Order Granting Leave to Amend Attorney Fee Petition. The administrative law judge permitted co-counsel to address deficiencies concerning evidence supporting the hourly rate requested for the intern, billing for allegedly clerical work, the use of quarter-hour and block billing, the request for hours spent in consultation with unidentified individuals, and several vague billing entries. In response, claimant's co-counsel filed a Supplement for Motion for Award of Attorneys' Fees. Employer/carrier (employer) subsequently filed a Response and Objection to Claimant Attorney Revised Fee Petition, opposing counsel's requested hourly rate, his use of quarter-hour and block billing, and his request for fees for time billed by his unpaid intern and for clerical tasks.

After considering claimant's co-counsel's fee petition and employer's objections, the administrative law judge found that counsel's requested hourly rate is reasonable, but disallowed all of the intern's time because counsel did not provide evidence to support her market rate or show that it paid her for her work. The administrative law judge also disallowed all clerical time and reviewed each time entry, rather than accepting quarter-

[1] William Lawrence Roberts, also submitted a fee petition for his representation of claimant in this case. However, the only subject of this appeal is the fee petition submitted by the Appalachian Citizens' Law Center (ACLC).

hour increments and block billing, noting that claimant's co-counsel failed to revise his time entries as instructed. The administrative law judge further disallowed time spent consulting with others at the Appalachian Citizens' Law Center (ACLC). Accordingly, the administrative law judge awarded claimant's counsel a fee of $6,625.00.[2]

On appeal, claimant's co-counsel alleges that the administrative law judge erred in disallowing all work performed by the intern and in reducing the amount of time claimant's counsel billed for his own services.[3] Employer responds in support of the awarded fee. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Claimant's co-counsel filed a reply brief, reiterating his contentions on appeal.

I. 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.[4] *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).

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

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[2] The administrative law judge approved 26.75 hours of legal services performed by counsel at an hourly rate of $250.00 ($6,625.00).

[3] Claimant's co-counsel states that he does not challenge the administrative law judge's decision to disallow, as clerical, his time on June 15 and 21, 2016, for work on the Memorandum of Understanding with Attorney Roberts. Therefore, we affirm the administrative law judge's disallowance of 0.40 hours as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Because the miner's most recent coal mine employment occurred in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 663 (6th Cir. 2008).

II. Hourly Rate

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 prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); *see also Bentley*, 522 F.3d at 663. 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; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

Claimant's co-counsel presents a novel issue in arguing that the time billed for work performed by a college student intern is fully compensable, regardless of whether the intern was paid by ACLC. Counsel alleges that in disallowing all of the time billed for the intern, the administrative law judge erroneously focused on whether she was paid, when courts have held that fees may be awarded for services performed by a student, even if the student is unpaid. Claimant's Brief at 14, *citing Jordan v. U.S. Dep't of Justice*, 691 F.2d 514, 523-24 (D.C. Cir. 1982). Counsel also asserts that he provided sufficient evidence to support the market rate he identified for the student intern, including his explanation of her role and the basis for her rate, her résumé, and an unopposed prior fee award from another administrative law judge.[5] Employer responds, asserting that the case law counsel relies

[5] Claimant's co-counsel explained that:

> [The intern] did excellent work and saved at least two days (16 hours) of work in reviewing the box of documents that we had for [claimant] and drafting most of the fact sections of the brief. [The intern] is a very bright student who is likely going to become a lawyer. If she were on staff at [ACLC], we would bill her at $100 per hour – which is what we charge for our paralegal . . . and is in line with what most other firms bill paralegals at in the black lung benefits context. Our requested hourly rate of $50 per hour for [the intern] is a low rate and underestimates her true value.

on involves other fee shifting statutes and that the student intern in this case does not have the same legal knowledge, experience, or education as the law students in counsel's proffered case law. Employer also contends that the hours requested for the intern's work were excessive, as counsel spent a significant amount of time instructing the intern, and discussing, reviewing and revising her work.

In disallowing any payment for the intern, the administrative law judge stated "[t]here is no evidence submitted to support reimbursing [fifty dollars] per hour for the unpaid summer college intern. There is no evidence that the [ACLC] paid salary to the summer college intern." Order Awarding Attorney Fee at 5. In making this finding, the administrative law judge did not clearly state whether she rejected counsel's request because the intern was unpaid or because counsel failed to establish a market rate for the intern. In addition, the administrative law judge did not address counsel's arguments in support of receiving compensation for the intern's time, including the cited case law, or the evidence offered in support of the hourly rate of $50.00.[6] *See* Supplement to Motion for Award of Attorneys' Fees at 16-19 (unpaginated).

Because the administrative law judge did not address the arguments or evidence counsel presented, or adequately explain her complete disallowance of a fee for the services performed by the intern, she did not comply with the Administrative Procedure Act (APA).[7] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate the administrative law judge's finding regarding the fees for the services performed by the intern and remand the case to her for reconsideration of this issue. On remand, the administrative law judge is required to initially make a determination as to whether applicable law allows compensation for services performed by an unpaid college intern. Should she find that counsel is entitled to such fees, she must then address employer's objections to the amount of time billed by the intern and determine whether claimant's

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Claimant's Brief at 12.

[6] It is possible that the administrative law judge omitted these items because she did not consider counsel's Supplement to Motion for Award of Attorneys' Fees. *See* discussion, *infra*, slip op. at 8.

[7] 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).

counsel has submitted evidence sufficient to establish the requested hourly rate of $50.00.[8] The administrative law judge must identify the law and the evidence she considers in rendering her findings and set forth the underlying rationales in full, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

III. Allowable Hours

Claimant's counsel next argues that the administrative law judge erred in reducing his time by 4.10 hours. He asserts that the administrative law judge erroneously looked at the original time itemization instead of the revised version that claimant's counsel submitted with the supplement to his initial attorney fee petition.

This contention has merit. As claimant's counsel argues, the administrative law judge failed to consider the clarification of the group billing entries dated June 15, 24, and 27, 2016 included in counsel's supplement to the initial attorney fee petition. *See* Supplement to Motion for Award of Attorneys' Fees at 5-7. The supplement shows revisions in all three of these entries to specify how much time was spent on each task. *Id*. Therefore, the administrative law judge erred in saying that "[s]ince [c]laimant's counsel did not revise his time entries, the undersigned will review each entry for reasonableness rather than accepting a .25 billing and block billing method." Order Awarding Attorney Fee at 7. Consequently, the case must be remanded for the administrative law judge to consider an appropriate reduction in time, if any, based on the revised billing entries.

As counsel maintains, the administrative law judge must correct her error in calculating the reduction in time on June 23, 2016, as 0.50 hours for reviewing documents and 1.50 hours for starting to draft a brief equals 2.00 hours, instead of the 1.50 hours indicated by the administrative law judge.[9] *See* Order Awarding Attorney Fee at 8. Further, depending on the administrative law judge's finding on remand concerning the award of a fee and an hourly rate for the intern, she may need to re-examine her decision to disallow all of the time billed for work performed by the intern. The administrative law judge must also reconsider whether counsel's supplement to his initial fee petition provides

[8] As a general proposition, rates awarded in other cases do not set the prevailing market rate – only the market can do that. Rates from prior cases can, however, provide some inferential evidence of what the market rate is. *B&G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 664, 24 BLR 2-106, 2-122-23(6th Cir. 2008).

[9] The administrative law judge stated "June 23, 2016 is reduced to 1.50 hours which included .50 for reviewing documents and 1.50 for starting to draft brief." Order Awarding Attorney Fee at 8.

information sufficient to meet his burden of showing that conferences with coworkers and the intern were necessary to establish entitlement. *See Wade v. Director, OWCP*, 7 BLR 1-334(1984); Supplement to Motion for Award of Attorneys' Fees at 7-11. The administrative law judge is required to set forth her findings on remand in detail, including the underlying rationale, in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Order Awarding Attorney Fee to Attorney Evan Smith, Esquire, is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

The primary question in this case is whether the administrative law judge abused his discretion in denying attorney's fees for work performed by an undergraduate student-intern. Because counsel did not establish that it is a customary practice for law firms to separately bill for the work of such individuals, I would affirm the denial of these fees.

Under the Black Lung Benefits Act, and similar fee-shifting statutes, an attorney who prevails on behalf of a client is entitled to a "reasonable attorney's fee" paid by the opposing party. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). With respect to fees for non-attorneys, courts have generally drawn a distinction between paralegals, law clerks, and recent law school graduates whose services may be billed separately, *Missouri v. Jenkins by Agyei*, 491 U.S. 274 (1989), and legal secretaries and administrative assistants

whose services are considered overhead and thus must be subsumed as part of the attorney's fee,[10] *see, e.g., Wiegand v. Sullivan*, 900 F.2d 261 (6th Cir. 1990) (unpub.) (affirming denial of fees for "secretarial services" as "overhead"); *In re Gen. Motors Corp.*, 110 F.3d 1003, 1024 (4th Cir. 1997) (tasks performed by secretaries "are generally included as 'overhead'").

In determining whether a particular employee's services may be billed separately, the relevant inquiry is whether "it is the prevailing practice" in the relevant community to do so. *Jenkins*, 491 U.S. at 288-289. In *Jenkins*, the United States Supreme Court held that law firms are permitted under fee-shifting statutes to bill separately for the work of "paralegals, law clerks (generally law students working part-time), and recent law graduates" because it is "self-evident" that the term "reasonable attorney's fee" encompasses the work of those individuals and because the evidence reflected that "[s]uch separate billing" was common in the jurisdiction at-issue in the case and "appears to be the practice in most communities today."[11] *Id*. In response to concerns that its decision would create a windfall by allowing law firms to seek separate, market-rate fees for other types of non-attorney employees, such as legal secretaries, the Court reiterated its holding that "requesting separate compensation of such expenses" requires a showing that doing so is "the prevailing practice in the local community" and thus, "[t]he safeguard against the billing at a profit of secretarial services . . . is the discipline of the market." *Id*. at 287 n.9.

In the present case, claimant's counsel has not provided any evidence or cited any case law that would support a conclusion that it is the prevailing practice in the local community to bill clients separately for the work of undergraduate student-interns. Counsel's reliance on *Jordan v. U.S. Dep't of Justice*, 691 F.2d 514 (D.C. Cir. 1982), is

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[10] The "lodestar method," which is used to determine the amount of attorney's fees awarded under fee-shifting statutes, *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), "has its roots in accounting practices adopted in the 1940's to allow attorneys and firms to determine whether fees charged were sufficient to cover overhead and generate suitable profits[,]" *Gisbrecht v. Barnhart*, 535 U.S. 789, 800 (2002).

[11] The Court noted that "Missouri concedes that 'the local market typically bills separately for paralegal services,'" *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 288 (1989), and that "*Amicus* National Association of Legal Assistants reports that 77 percent of 1,800 legal assistants responding to a survey of the association's membership stated that their law firms charged clients for paralegal work on an hourly billing basis[,]" *Id.* at 289 n.11. The Court reasoned that billing such individuals' work at market rates "makes economic sense," because the use of "lower cost [paralegals, law clerks, and recent law graduates] rather than attorneys" is both efficient and cost-effective. *Id*. at 287.

unavailing. That case involved the award of attorney's fees under a fee-shifting statute for the work of *law students* who were providing services as part of their law school's legal clinic. The United States Court of Appeals for the District of Columbia Circuit reasoned that separate fees may be awarded for such services because the practice of using law students "to perform tasks that otherwise would fall to full-fledged attorneys" is both "commonplace" and explicitly condoned by a "tide of statutes and court rules." *Id*. at 522-523; *see, e.g.*, KY. Sup. Ct. Rule 2.540 (2018) (permitting limited practice of law by students who have completed at least two-thirds of their legal education); Oh. Sup. Ct. R. For Gov. Bar R. II §§ 2, 5, 6 (2018) (permitting limited practice of law by "legal interns" who have completed at least two-thirds of their legal education and permitting legal service organizations to seek fees for their work). Based on the evidence presented in this case, however, it cannot be said that the practice of using undergraduate student-interns to perform legal work, and separately billing clients for those services, is commonplace.

Counsel's characterization of the intern as being a "legal intern" or "legal assistant" may create the perception that she is similarly situated to the paralegals in *Jenkins* or law students in *Jordan*. Unlike law students, however, the intern in this case had neither received her undergraduate degree nor undergone any formal legal education as of the time she performed the work. Although counsel characterizes the intern's Political Science major as a "pre-law" degree, counsel has provided no explanation of the types of courses or training she has undertaken from which the administrative law judge could conclude that her experience (and thus ability to carry out legal tasks that otherwise would be performed by the attorney)[12] is equivalent to that of a law student or paralegal.[13] *See McAllister v. D.C.*, 794 F.3d 15, 19 (D.C. Cir. 2015) (plaintiffs did not establish that

[12] The Supreme Court noted that the types of services paralegals, law clerks, and law students "are capable of carrying out . . . under the supervision of an attorney" include: factual investigation; assistance with depositions, interrogatories, and document production; compilation of statistical and financial data; checking legal citations; and drafting correspondence. *Jenkins*, 491 U.S. at 287 n.10; *In re Busy Beaver Bldg. Centers, Inc.*, 19 F.3d 833, 851–52 (3d Cir. 1994) (paralegals are capable of handling "matters beyond the ken of the average legal secretary but not demanding the full education, experience, or skill of a licensed attorney").

[13] The American Bar Association defines "legal assistant or paralegal" as "a person, qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible." *See* Current Definition of Legal Assistant/Paralegal, available at: https://www.americanbar.org/groups/paralegals/resources/current_aba_definition_of_legal assistant_paralegal.html.

individual could be billed as a paralegal in part because her résumé provided no information "about legal training or paralegal experience").

It is counsel's burden to establish "that the requested rates are in line with those prevailing in the community." *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). Where fees have been denied, counsel must demonstrate that the administrative law judge's actions were arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). Because counsel did not put forward evidence from which the administrative law judge could conclude that it is "the prevailing practice in the local community" to separately bill clients for the services of undergraduate student-interns, *Jenkins*, 491 U.S. at 287 n.9, I would affirm the denial of attorney's fees for that individual.[14] In all other respects, I concur in the majority opinion.

GREG J. BUZZARD
Administrative Appeals Judge

[14] The intern received no compensation from the firm who seeks fees for her work. Rather, her internship was funded through a $2,500 scholarship from a program affiliated with her university. *See* Intern's Resume, attached to Supplemental Motion for Award of Attorney's Fees. Because counsel did not establish that his separate billing for the work of an undergraduate student-intern is consistent with the prevailing practice in the community, it is unnecessary for the Board to address whether the source of the intern's compensation is relevant to the firm's entitlement to seek a fee for her work.