

VIRGINIA CITIZENS FOR BETTER RECLAMATION  
VIRGINIA D. HILL

IBLA 84-838

Decided August 2, 1985

Petition for payment of costs and expenses including attorney's fees under 43 CFR 4.1290 and 4.1294.

Granted in part.

1. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

In computing an award for attorney's fees under the Surface Mining Control and Reclamation Act of 1977 and Departmental regulations, the Board is guided by the standards set forth by the United States Court of Appeals for the District of Columbia Circuit in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). Under Copeland, the Board must first establish the "lodestar," i.e., the number of hours expended times a reasonable hourly rate. In order to establish market value for services of attorneys who do not have hourly rates set by the marketplace, it is necessary to look to rates charged by comparable attorneys litigating similar matters who have such rates.

2. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

The burden of proving that upward adjustment of an award for attorneys' fees is appropriate is on the applicant for the award. No upward adjustments are warranted for factors such as risk of success where the case is not exceptional, and delay in payment where delay is not inordinate.

APPEARANCES: Suellen T. Keiner, Esq., Washington, D.C., for petitioners; Stuart A. Sanderson, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Virginia Citizens for Better Reclamation (VCBR) and Virginia D. Hill (petitioners) seek an award of costs and expenses, including attorneys' fees, from the Office of Surface Mining Reclamation and Enforcement (OSM), for their contribution to the determination of the issues in Virginia Citizens for Better Reclamation, 82 IBLA 37 (1984).

The above appeal arose when petitioners, on March 16, 1983, filed a citizens' complaint against Moose Coal Company, asserting that the company was conducting mining operations without a valid permit. The Director of the Virginia Field Office, OSM, denied the complaint for enforcement action against the company, and petitioners appealed to this Board. After reviewing the matter, the Board concluded "that Moose Coal had not filed a materially complete application for a permanent program permit with [Virginia Department of Mined Land Reclamation] on August 15, 1982, and, therefore, that its mining operations after that date were conducted without a valid permit." Id. at 44. (Emphasis in original; footnote omitted). In its decision reversing OSM, the Board directed the agency to issue a cessation order to the company because it had mined without a permit, and to assess a civil penalty in accordance with the provisions of 30 CFR Part 845. The Board also directed OSM to ensure that the company's reclamation operations met the performance standards of Virginia's permanent program regulations and were covered by a bond calculated in accordance with those regulations.

The petition for award of costs and expenses now before us was filed pursuant to 43 CFR 4.1290 and 4.1294. These regulations provide in pertinent part as follows:

Sec. 4.1290 Who may file.

(a) Any person may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in --

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(2) A final order being issued by the Board.

Sec. 4.1294 Who may receive an award.

Appropriate costs and expenses including attorneys' fees may be awarded --

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(b) To any person other than a permittee or his representative from OSM, if the person initiates or participates in any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues.

These regulations implement section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 1/ 30 U.S.C. § 1275(e) (1982), providing for award of costs and expenses by the Secretary:

Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.

That petitioners are entitled to an award of attorneys' fees under the above statutory and regulatory authority is not disputed. We note, however, that subsequent to the filing of this petition, the Board issued a decision in Donald St. Clair, 84 IBLA 236, 92 I.D. 1 (1985), in which the proper standard for the award of attorneys' fees was discussed at length in a majority and several separate opinions. Based on the Supreme Court's holding in Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983), which prohibited an award of attorneys' fees under the Clean Air Act absent "some degree of success on the merits," the majority in St. Clair, supra, tacked the foregoing standard onto the regulatory requirement of section 4.1294 for "substantial contribution to a full and fair determination of the issues" in an effort to reconcile the decision of the Supreme Court with Departmental policy.

Here, it is evident from the record that petitioners did achieve "some degree of success on the merits" and, as a collateral matter, made a "substantial contribution to a full and fair determination of the issues." The prevailing standard for the award of attorneys' fees as set forth in St. Clair is therefore satisfied. 2/

Although OSM concedes that petitioners are entitled to an award in this case, it contends the amount of the award sought is excessive.

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1/ Section 525 (30 U.S.C. § 1275 (1982)) provides for Secretarial review of notices and orders issued pursuant to the enforcement provisions of SMCRA.

2/ After the Board's decision in St. Clair, the Office of Hearings and Appeals published proposed rules in the Federal Register that would among other things, amend existing regulations governing the award of attorneys' fees in a manner deemed consistent with the Supreme Court's decision in Ruckelshaus, supra. See 50 FR 21470 (May 24, 1985). The proposed revision of 43 CFR 4.1294(b) deletes reference to "substantial contribution to a full and fair determination of the issues" and substitutes therefor as the single condition of award "that the person shall have prevailed in whole or in part, achieving at least some degree of success on the merits." Final action on this proposed rule has not yet been taken.

The necessary components of an award petition are set forth at 43 CFR 4.1292. A petition must be supported by:

(1) An affidavit setting forth in detail all costs and expenses including attorneys' fees reasonably incurred for, or in connection with, the person's participation in the proceeding;

(2) Receipts or other evidence of such costs and expenses; and

(3) Where attorneys' fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area, and the experience, reputation and ability of the individual or individuals performing the services.

[1] In Council of the Southern Mountains v. OSM, 3 IBSMA 44, 88 I.D. 394 (1981), it was held that the Office of Hearings and Appeals adheres to the fee computation standards set out by the United States Court of Appeals for the District of Columbia Circuit in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). Under Copeland, the Board must first establish the "lodestar," *i.e.*, the number of hours expended times a reasonable hourly rate. This requires that petitioner document the amount of work performed, the status of the attorney performing the work, and a reasonable hourly rate prevailing in the community for similar work. Council of the Southern Mountains, *supra* at 53-54, 88 I.D. at 399. In order to establish market value for services of attorneys who do not have hourly rates set by the marketplace, it is necessary to look to rates charged by comparable attorneys litigating similar matters who have such rates.

Petitioners have furnished evidence showing that a total of 29.4 hours were expended on this case by two attorneys. The experience and qualifications of both counsel are fully described in the petition. Petitioners represent, and we agree, that based on their professional background "the customary commercial rate of payment for their services would be considerably higher than the average rate for the lowest paid associate" in the Washington, D.C., area. <sup>3/</sup> Accordingly, they seek compensation at the rate of \$95 per hour.

[2] The "lodestar" as submitted by petitioners is therefore: 29.4 hours x \$95 an hour = \$ 2,793. To this figure petitioners offer two upward adjustments, one to reflect the risk of no fee recovery and the other to compensate for delay in receipt of payment.

OSM suggests that we accept the fee limitation contained in the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (administrative proceedings) and 28 U.S.C. § 2412(d) (court proceedings), which restricts recovery to \$75

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<sup>3/</sup> Petition at 8-9. Based on profiles of 17 Washington, D.C., law firms contained in the American Lawyer Guide 1983-84 (AM Law Publishing Corporation, 1983), petitioners submit that the average rate per hour charged by lowest paid associates in 1982 equaled \$ 68.05. The average rate per hour charged by highest paid partners was \$ 207.78. Petition at 8.

per hour. 4/ No attempt is made to urge the applicability of the EAJA to this proceeding as a matter of law; 5/ rather, the fee limitation of that Act appears to be cited to the Board as indicative of a sense of Congress that \$ 75 per hour is reasonable compensation from the Government. Thus, OSM also points to the proposed Legal Fees Equity Act introduced in 1984:

In addition, legislation has been introduced to provide for comprehensive reform and to achieve greater equity in the compensation of attorney fees in all civil litigation and administrative actions. The Legal Fees Equity Act, S.2802, 98th Cong. 2d Sess., introduced by Senator Thurmond on June 27, 1984; Hearing held July 11, 1984. The proposed Legal Fees Equity Act limits the hourly rate for the recovery of attorney fees to \$75 per hour.

Answer at 4.

OSM has not responded on the merits to petitioners' claim that their services in this case are appropriately valued at \$ 95 per hour based on consideration of objective criteria set forth in Copeland v. Marshall, *supra*. We are not persuaded by reference to inapplicable, expired or mere draft legislation that an arbitrary rate of \$ 75 per hour should be applied in determining petitioners' award, particularly where the uncontradicted evidence of record shows the actual value of petitioners' legal services to be \$ 95 per hour. The Board therefore accepts petitioners' requested hourly rate. 6/

The remaining question is whether petitioners "lodestar" entitlement of \$ 2,793 for attorneys' fees warrants upward adjustment as petitioners claim. The burden of justifying deviation from the lodestar rests on the

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4/ The EAJA expired in October 1984. On Nov. 8, 1984, the president vetoed H.R. 5479, a bill to amend and reauthorize the Act. 130 Cong. Rec. H12292 (daily ed. Nov. 14, 1984). Legislation that would revive the EAJA is before the President for signature as of the date of this decision. See H.R. 2378, 99th Cong., 1st Sess., 131 Cong. Rec. 9997 (1985).

5/ Such an argument would necessarily fail. As implemented by the Department in regulations published at 43 CFR 4.603, the only proceedings covered by the EAJA are those required by statute to be conducted under 5 U.S.C. § 554, the adversary adjudication section of the Administrative Procedure Act. See Kaycee Bentonite Corp., 79 IBLA 182, 91 I.D. 138 (1984); In re Attorney's Fees Request of DNA -- Peoples Legal Services, Inc., 11 IBIA 285, 90 I.D. 389 (1983). Because there is no statutory requirement that a citizen's claim for enforcement action under SMCRA be conducted in accordance with 5 U.S.C. § 554 (1982), such proceedings are not covered by EAJA. Cf. Citizens for Responsible Resource Development v. Watt, 579 F. Supp. 431, 445-46 (D. Ala. 1983). (EAJA applicable to suit under SMCRA even though SMCRA authorizes costs and expenses.) (Under H.R. 2378, proceedings before agency boards of contract appeals are also covered by the EAJA.)

6/ The hours claimed as worked, 29.4, is also accepted as sufficiently documented. OSM has posed no challenge to this part of the claim.

party proposing the deviation. Blum v. Stenson, \_\_ U.S. \_\_, 104 S. Ct. 1541, 1548 (1984). Here, citing Copeland v. Marshall, petitioners seek an upward adjustment of 25 percent to reflect the increased risk of no fee recovery should the Board apply the "prevailing party" standard enunciated in Ruckelshaus, supra (Statement of Reasons at 14-15).

OSM responds as follows:

The contingency for risk of recovery is inapplicable in this proceeding because the factors involved are not sufficient to invoke the Copeland standards which apply in extraordinary cases or where very complex and novel issues are involved. Copeland, p. 890. This case entailed the filing of a notice of appeal and a statement of reasons which was answered by OSM. The amount of time claimed is less than 25 hours [7/] and the brevity of the pleadings filed demonstrate that the underlying proceeding lacked complexity. In addition Copeland provides that if the hourly rate underlying the "'lodestar' fee itself comprehends any allowance for the contingency nature" no further adjustment duplicating that allowance will be made. Copeland, supra p. 893.

Answer at 4.

In this case, the Board found it fairly easy to arrive at petitioners' conclusion that Moose Coal Company had been conducting surface mining and reclamation activities without a proper permit. As noted by OSM:

The proceeding before the Board did not involve any discovery, oral argument, or complex brief writing; rather, it entailed only the filing of a notice of appeal and statement of reasons by VCBR which was answered by OSM. VCBR's appeal resulted in an order by this Board which required OSM to take enforcement action.

Answer at 2.

In light of the above, petitioners' request for adjustment of the lodestar based on contingency of success is denied. 8/

Nor is the Board favorably disposed to petitioners' contention that its fee should be increased by 5 percent "to compensate for the delay in obtaining an award" (Statement of Reasons at 15). Adjustment for delay is to compensate for differences in the worth of the award between the date the services were rendered and the date of receipt of the award. The court in Copeland, supra, addressed the subject as follows:

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7/ As previously noted, petitioners actually claimed 29.4 hours. OSM has not sought to show the foregoing figure to be in error or excessive.

8/ Upward adjustment of awards based on contingency of success faces rigid scrutiny by the courts. See, e.g., Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984).

The delay in receipt of payment for services rendered is an additional factor that may be incorporated into a contingency adjustment. The hourly rates used in the "lodestar" represent the prevailing rate for clients who typically pay their bills promptly. Court-awarded fees normally are received long after the legal services are rendered. That delay can present cash-flow problems for the attorneys. In any event, payment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable. A percentage adjustment to reflect the delay in receipt of payment therefore may be appropriate.

641 F.2d 880, 893 (footnote omitted). Here petitioners offer no justification for the 5 percent increase sought. The Board does not regard this adjudication as so inordinately delayed that additional compensation should be made to petitioners.

In addition to attorneys' fees, petitioners seek reimbursement for mailing and copying costs in the amount of \$ 45.65. Such costs are granted.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, petitioners are awarded \$ 2,838.65, for their costs and expenses.

Wm. Philip Horton  
Chief Administrative Judge

We concur:

Gail M. Frazier  
Administrative Judge

Will A. Irwin  
Administrative Judge

