U.S. Department of Labor

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

BRB Nos. 21-0150 BLA
and 21-0433 BLA

BOBBY R. BONDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 8/29/2022
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Granting, in Part, Petition for Attorney Fees of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

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

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor).

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Granting, In Part, Petition for Attorney Fees (2016-BLA-05148)[1] of Administrative Law Judge (ALJ) Lauren C. Boucher rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent miner's claim filed on April 22, 2014[2] and an attorney fee order granting Claimant's counsel Employer-paid fees and costs.

The ALJ credited Claimant with thirty-eight years of qualifying coal mine employment, consistent with the parties' stipulation, and determined he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), and that

[1] Employer's appeal of the ALJ's Decision and Order Awarding Benefits was assigned BRB No. 21-0150 BLA and its appeal of the ALJ's Order Granting, In Part, Petition for Attorney Fees was assigned BRB No. 21-0433 BLA. The Board consolidated these appeals for purposes of decision only. *Bonds v. Mingo Logan Coal Co*., BRB Nos. 21-0150 BLA and 21-0433 BLA (June 10, 2021) (unpub. Order).

[2] Claimant filed a prior claim on August 24, 2006. ALJ Richard T. Stansell-Gamm denied benefits on February 12, 2009, finding Claimant established total disability but not the existence of pneumoconiosis. Director's Exhibit 1. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant's prior claim was denied for failure to establish pneumoconiosis, Claimant had to submit evidence establishing this element in order to obtain a review of the merits of his current claim. *Id*. Claimant may establish a change in an applicable condition of entitlement if he invokes the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305

Employer did not rebut it. Further, she found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309, and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It also argues the removal provisions applicable to ALJs rendered her appointment unconstitutional. On the merits, it asserts the ALJ erred in relying on the preamble when weighing the medical opinions and in finding it did not rebut the Section 411(c)(4) presumption.[5] Finally, Employer raises several challenges to the ALJ's award of attorney fees. Claimant responds in support of the awards of benefits and attorney fees. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's constitutional challenges and its arguments that the ALJ improperly utilized the preamble and erred in finding Employer failed to rebut the presumption.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[5] We affirm, as unchallenged, the ALJ's findings that Claimant established thirty-eight years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment and therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 21, 46.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See*

Appointments Clause

This case was initially assigned to ALJ Lystra A. Harris, who conducted an August 24, 2017 hearing and issued a Decision and Order Awarding Benefits on April 13, 2018. Employer appealed, requesting reassignment to a different ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[7] On May 10, 2019, the Board granted Employer's request, vacated the award of benefits, and ordered the case be remanded for reassignment to a new ALJ. *Bonds v. Mingo Logan Coal Co.*, BRB No. 18-372 BLA (unpub. Order). On August 8, 2019, the case was reassigned to ALJ Boucher (the ALJ) for adjudication.

Employer argues the ALJ in this case was not properly appointed. Employer's Brief at 10-16. Further, it argues the Secretary's subsequent ratification of her appointment on December 21, 2017, was insufficient to "cure the underlying unconstitutional appointment." *Id*. at 11. Employer's assertions are based on an inaccurate characterization of the ALJ's appointment.

Consistent with the Appointments Clause, Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105; Director's Brief at 4. As the Director correctly notes, on December 21, 2017, the Secretary appointed the ALJ outright and did not ratify any prior appointment.[8] Director's

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 31-32; Decision and Order at 4 n.3.

[7] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

[8] The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017 stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby appoint you as an Administrative Law Judge in the Office of Administrative Law Judges. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective March 19, 2018.

Brief at 4; *see* Employer's Brief at 12, 14. This appointment occurred well before this case was assigned to the ALJ pursuant to the Board's remand of this case for a new hearing in compliance with *Lucia*.[9] *See* Employer's Brief at 1, 11-16. We therefore reject Employer's argument that this case should be remanded for yet another hearing before another ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 10, 12-16. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* It also relies on the holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010). *Id*.

Employer's arguments are not persuasive as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. U.S. at 507 n.10. Moreover, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1.

Finally, in *Arthrex, Inc. v. Smith & Nephew, Inc*., 594 U.S. , 141 S. Ct. 1970, 1988 (2021), the Supreme Court explained "the *unreviewable authority* wielded by [Administrative Patent Judges] during inter partes review is incompatible with their

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Secretary's December 21, 2017 Letter to ALJ Boucher**.**

[9] For this reason, we also reject Employer's additional *Lucia* argument that the ALJ took significant action in this case before she was properly appointed. Employer's Brief at 10, 13. As the Director notes, the ALJ was assigned this case in August 2019, long after her appointment became effective in March 2018. Director's Brief at 4 n.4.

appointment by the Secretary to *an inferior office*." 141 S. Ct. at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988), *quoting Hooper v. California*, 155 U.S. 648, 657 (1895). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (a reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-38.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he had neither legal nor clinical pneumoconiosis,[10] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[11]

[10] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[11] Although the ALJ found Employer failed to disprove clinical pneumoconiosis, which precludes a rebuttal finding that Claimant does not have pneumoconiosis, we address

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on Dr. Rosenberg's opinion to disprove legal pneumoconiosis. He attributed Claimant's obstructive impairment to cigarette smoking and not coal mine dust exposure.[12] Director's Exhibit 45; Employer's Exhibits 1, 16. Employer asserts the ALJ did not properly calculate Claimant's smoking history and erred in evaluating Dr. Rosenberg's opinion in relation to the preamble to the revised 2001 regulations and finding it inconsistent with the science the DOL credits there. Decision and Order at 42-44; Employer's Brief at 16-19. We disagree.

Initially, we reject Employer's assertion that the ALJ erred in finding Claimant has a forty-three pack-year smoking history. Employer's Brief at 19. The ALJ noted there are some conflicts in the record regarding the rate at which Claimant smoked but she permissibly credited Claimant's testimony that he "smoked one pack per day from 1963 through 2007, and quit for approximately two years in between," for a total of "a forty-three pack-year smoking history." Decision and Order at 6-7, citing January 9, 2020 Hearing Transcript at 26, August 24, 2017 Hearing Transcript at 27-29; *see Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Even if we were to agree with Employer that Claimant had a greater smoking history, it

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Employer's arguments on legal pneumoconiosis as they affect the ALJ's conclusion on disability causation.

[12] Employer asserts that "[i]n a Social Security Disability claim, if a claimant's smoking history is found to be conflicting, the claim is often denied as the witness is found 'not credible.'" Employer's Brief at 19. Employer believes this standard should apply in federal black lung claims and that the ALJ erred in finding Claimant's testimony credible. *Id*. Despite being a general contention that is not adequately briefed, it is well established in federal black lung claims that the ALJ has discretion to assess the credibility of witness testimony. *See* 20 C.F.R. §802.211(b); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

has not explained why that variance would require remand. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The ALJ's finding on the length and rate of Claimant's smoking history is generally consistent with (and in fact greater than) Dr. Rosenberg's reliance on Claimant having smoked less than a pack of cigarettes a day for approximately twenty-five to thirty years. Employer's Exhibit 1 at 2-3; 16 at 2. Moreover, as discussed below, the ALJ did not discredit Dr. Rosenberg's opinion based on his understanding of Claimant's smoking history; rather, she found the rationale underlying his opinion lacked credibility. Decision and Order at 42-44.

Further, the ALJ permissibly consulted the preamble in assessing Dr. Rosenberg's opinion. An ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the Department of Labor's (DOL) resolution of questions of scientific fact relevant to the elements of entitlement. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1127 (9th Cir. 2014); *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1225 (10th Cir. 2018). The ALJ accurately characterized the scientific evidence that the DOL relied upon when it revised the definition of legal pneumoconiosis to include obstructive impairments arising out of coal mine employment and she permissibly evaluated the medical opinions of record in light of the DOL's interpretation of those studies.[13] *See Looney*, 678 F.3d at 313; Decision and Order at 43, citing 65 Fed. Reg. 79,920, 79,938-43 (Dec. 20, 2000). Thus, contrary to Employer's contention, the ALJ's permissible citation to the preamble did not transform it into a legislative ruling requiring notice and comment. *Looney*, 678 F.3d at 315 (rejecting similar argument because the ALJ "cited the preamble not to imbue it with the force of law or to transform it into a legislative rule, but simply as a source of explanation as to the

[13] We also reject Employer's general assertion that "the medical literature in the Preamble has been superseded and/or called into question by more recent literature." Employer's Brief at 16-17. The Fourth Circuit, within whose jurisdiction this case arises, has held that medical literature more recent than the preamble is only significant if it addresses "scientific innovations that archaized or invalidated the science underlying the Preamble." *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013). Employer has not identified any such literature.

Department's rationale in amending the regulations"); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990); Employer's Brief at 16-19.

As the ALJ observed, Dr. Rosenberg opined that Claimant's chronic obstructive pulmonary disease (COPD) in the form of chronic bronchitis and emphysema is entirely due to smoking because Claimant's pulmonary function studies showed a reduced FEV1/FVC ratio. Dr. Rosenberg indicated that this pattern of impairment is consistent with smoking but not coal mine dust exposure. Decision and Order at 13-17, 43; Director's Exhibit 45; Employer's Exhibits 1 at 4-7, 16 at 3-7. The ALJ permissibly found his rationale inconsistent with the medical science that the DOL relied on in the preamble showing "that coal mine dust exposure may cause COPD with decrements in 'certain measures of lung functions, especially FEV1 and the ratio of FEV1/FVC.'" Decision and Order at 43, citing 65 Fed. Reg. at 79,943; *Stallard*, 876 at 671-72; *see* 20 C.F.R. §718.204(b)(2)(i)(C). Further, in light of the DOL's recognition that the effects of smoking and coal mine dust can be additive, the ALJ permissibly found Dr. Rosenberg failed to adequately explain why Claimant's history of coal mine dust exposure did not significantly contribute, along with his cigarette smoking, to his obstructive lung disease.[14] *See* 65 Fed. Reg. at 79,940; *Looney*, 678 F.3d at 313; Decision and Order at 42-43.

Additionally, we reject Employer's contention that Dr. Rosenberg's opinion was sufficient to "rule out" any contribution from coal dust exposure to Claimant's respiratory impairment. Employer's Brief at 20-21. The ALJ applied the correct standard in determining Dr. Rosenberg's opinion was not adequately explained and thus insufficient to prove Claimant's respiratory impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 43; 20 C.F.R. §718.201(a)(2), (b); 718.305(d)(1)(i)(A).

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ adequately explained her credibility

[14] Employer also argues Dr. Rosenberg must be credited based on his credentials. Employer's Brief at 20. We disagree. The ALJ found Dr. Rosenberg "well qualified to offer an opinion on the issue of legal pneumoconiosis" but nevertheless permissibly found his opinion on legal pneumoconiosis inadequately reasoned and unpersuasive. Decision and Order at 42-44; *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-20 (2003) (where the ALJ considered a physician's credentials in pulmonary medicine but determined the opinion was undermined by defective reasoning, the ALJ adequately considered the physician's qualifications in weighing the medical report).

findings in accordance with the APA,[15] we affirm her determination that Employer did not disprove Claimant has legal pneumoconiosis.[16] *See Looney*, 678 F.3d at 316-17; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 45. Thus, we affirm the ALJ's conclusion that Employer did not rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i) and that Claimant therefore established a change in an applicable condition of entitlement, 20 C.F.R. §725.309.

Disability Causation

The ALJ next considered whether Employer rebutted the presumption by establishing "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ rationally discounted Dr. Rosenberg's disability causation opinion because he did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 45. Employer raises no specific allegations of error regarding the ALJ's findings other than its assertion that Claimant does not have legal pneumoconiosis, which we have rejected. Thus, we affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711; Decision and Order at 45. We therefore affirm the ALJ's finding Employer did not rebut the Section 411(c)(4) presumption and the award of benefits.

Attorney Fee Order

On November 19, 2020, counsel filed a complete, itemized fee petition requesting $30,699.83 for legal services performed, and costs incurred, before the Office of the Administrative Law Judges from December 30, 2016 to October 29, 2020. The total fee

[15] The Administrative Procedure Act provides that every adjudicatory decision must include "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).

[16] We need not address Employer's arguments regarding the ALJ's consideration of Drs. Zaldivar's, Rasmussen's, and Cohen's opinions diagnosing legal pneumoconiosis because they do not assist Employer in satisfying its burden of proof. Employer's Brief at 19-21, 26.

requested represents: $27,675.00 for 92.25 hours of legal services by Attorney Leonard Stayton at an hourly rate of $300.00 and costs in the amount of $3,024.83. ALJ Fee Request at 1, 5-29. Employer objected to counsel's requested hourly rate and certain services. Employer's Opposition to Fee Petition at 1-8.

The ALJ awarded the requested hourly rate but disallowed 3.5 hours of Counsel's legal services as vague, clerical, or excessive. ALJ Fee Order at 2-3, 4-6. She found the requested costs reasonable and therefore approved $26,625.00 in attorney fees for 88.75 hours of work by Attorney Stayton at the hourly rate of $300.00 and $3,024.83 in costs,[17] for a total award of $29,649.83. *Id.* at 6-7.

On appeal, Employer contends the ALJ erred in approving Counsel's hourly rate of $300.00. It also objects to Counsel's use of quarter-hour billing and his failure to use paralegals or other assistants to reduce fees and costs. Further, Employer contends certain services must be disallowed as clerical work. Claimant responds, urging the Board to reject Employer's arguments and affirm the award of fees. The Director did not file a response regarding Employer's appeal of the ALJ's fee award.

The amount of an ALJ's attorney 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. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 568-69 (4th Cir. 2013)*; Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010)*; Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc). The regulations provide that an approved fee must account for "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 Rates

Employer initially argues the ALJ erred in approving Claimant's counsel's hourly rate of $300.00 but indicated it would support an award of $295.00 an hour. Employer's Brief at 22-23. We reject Employer's argument.

Under fee-shifting statutes, the United States Supreme Court has held that courts must determine the number of hours reasonably expended in preparing and litigating a case

[17] We affirm, as unchallenged, the ALJ's determination that the costs claimed are reasonable and compensable, and therefore affirm her award of costs in the amount of $3,024.83. *See Skrack*, 6 BLR at 1-711; ALJ Fee Order at 1, 6-7.

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.

An attorney's reasonable hourly rate is "calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). "[T]he rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record" is the market rate. *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; *Cox*, 602 F.3d at 288-90; *Gonter v. Hunt Valve Co.*, 510F.3d 610, 617 (6th Cir. 2007).

Employer contends Claimant's counsel failed to support the hourly rates requested with market evidence, i.e., what fee-paying clients pay counsel or similarly-qualified attorneys charge by the hour in comparable cases. Employer's Brief at 22-23. It also argues Claimant's counsel inflated his overall fee request by failing to "push down" duties to clerical assistants and utilize paralegals. *Id*. at 25.

Contrary to Employer's argument, evidence of fees received in other black lung cases may be an appropriate consideration in establishing a market rate. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010); *Bentley*, 522 F.3d at 664. Noting counsel "has extensive experience litigating black lung claims since 1982[,]" the ALJ considered Claimant's Counsel's fee awards from other ALJs as market rate evidence[18] and found they support an hourly rate of $300.[19] ALJ Fee Order at 2-3. Further, the proper

[18] The ALJ noted other ALJs "have recently and consistently found that $300.00 is a reasonable hourly rate for [counsel's] black lung work." ALJ Fee Order at 3, citing *Stigers v. Roxcoal, Inc.*, ALJ No. 2020-BLA-05391 (Jan. 4, 2021); *Tolliver v. Cannelton Industries, Inc.*, ALJ No. 2017-BLA-06098 (Dec. 17, 2020); *Parsley v. Excel Mining LLC*, ALJ No. 2018-BLA-05992 (Nov. 17, 2020); *DeRaimo v. Selah Corp.*, ALJ No. 2018-BLA-05413 (Jun. 24, 2020); *Collins v. Shamrock Processing Co.*, ALJ No. 2016-BLA-05078 (May 27, 2020).

[19] The ALJ also relied on affidavits counsel submitted from Stephen A. Sanders, a Kentucky attorney who indicated his current hourly rate in black lung claims is $325.00 and that counsel's requested fee is reasonable, and Sandra M. Fogel, an Illinois attorney whose current hourly rate in black lung claims is $295.00 and who stated counsel's

inquiry in determining a compensable fee is whether the work and time that counsel requests were reasonable and necessary to establish the claimant's entitlement to benefits. *See Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999) (standard test for the ALJ to consider in determining whether the services an attorney performs were necessary is whether the attorney could reasonably regard the work as necessary to establish entitlement). The question is not whether it would have been cheaper for counsel to delegate his work to paralegals or legal assistants. *See, e.g., Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008) ("The court may permissibly look to the hourly rates charged by comparable attorneys for similar work, but may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests."). Thus, as the ALJ permissibly found, Counsel is entitled to bill for the work he performed and his hourly rate should not be reduced on the grounds that he could have hired a paralegal or more junior attorney. ALJ Fee Order at 3; *see* Employer's Brief at 23-25.

Therefore, we affirm the ALJ's approval of Counsel's hourly rate of $300.00 for services performed in this case. 20 C.F.R. §725.366(b); *see Gosnell*, 724 F.3d at 575; *Bentley*, 522 F.3d at 666; ALJ Fee Order at 2-4.

Billable Hours

Regarding the compensability of the legal services performed, Employer challenges Counsel's use of quarter-hour billing. Employer's Brief at 23-25. Contrary to Employer's contention, an ALJ may permissibly award a fee based on quarter-hour increments. *See Gosnell*, 724 F.3d at 576; *Bentley*, 522 F.3d at 666; ALJ Fee Order at 4.

Employer also lists eighteen dates on which it asserts compensation should be reduced because the quarter-hour expended was not needed for the routine or clerical duties performed.[20] Employer's Brief at 24-25. Employer did not challenge these specific entries before the ALJ. Employer's Opposition to Fee Petition before the ALJ at 3, 4; Employer's Surresponse to Claimant's Reply to Employer's Opposition to Fee Petition before the ALJ. Moreover, none of these dates appear in Claimant's request for legal services performed

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requested rate is reasonable. Affidavits from attorneys who are familiar with both the skills of a fee applicant and the type of work involved in federal black lung cases are appropriate to consider in establishing a market rate. *Cox*, 602 F.3d at 290.

[20] Employer contends "one-quarter hour shouldn't be needed for the following tasks and entries: 4/30/18; 5/9/18; 5/26/18; 8/10/18; 8/14/18; 8/21/18; 10/25/18; 10/30/18; 11/1/18; 11/10/18; 11/21/18; 12/1/18; 12/21/18; 12/28/18; 1/6/19; 1/11/19; 2/7/19; 5/11/19." Employer's Brief at 25.

before the ALJ.[21] ALJ Fee Petition at 6-15. Thus, we decline to address these arguments on appeal. *See Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986).

Based on the foregoing, we conclude that after she conducted a thorough review of the fee petition, the ALJ reached a conclusion supported by the record and that the total number of hours claimed, with the exception of the entries she reduced, was reasonable. *Gosnell*, 724 F.3d at 577-78*; Bentley*, 522 F.3d at 666; *Abbott*, 13 BLR at 1-16. Because Employer has not shown the ALJ abused her discretion, we affirm her approval of $26,625.00 for 88.75 hours of attorney services. *See Bentley*, 522 F.3d at 666-67; *Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986). We therefore affirm her decision to award fees and costs totaling $29,649.83.

[21] The dates Employer cites are from Counsel's request for legal services from April 30, 2018 to May 11, 2019, when the case was previously before the Board. December 3, 2020 Board Fee Request at 6-8. Employer responded to that request on December 14, 2020, and the Board awarded fees. *Bonds v. Mino Logan Coal Co.*, BRB Nos. 18-372 BLA and 18-0372 BLA-A (June 4, 2021) (unpub. Order); Employer's Opposition to Claimant's December 3, 2020 Fee Petition. In its current brief, it clearly states it is only appealing the ALJ's "Order Granting, in Part, Petition for Attorney Fees dated April 30, 2021." Employer's Brief at 1.

Accordingly, the ALJ's Decision and Order Awarding Benefits and her Order Granting, In Part, Petition for Attorney Fees are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge