

U.S. Department of Labor

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



BRB No. 20-0492 BLA

WILLIAM A. SUTTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WARRIOR COAL, LIMITED LIABILITY)	
COMPANY)	
)	
and)	
)	
MAPCO, INC. c/o ALLIANCE RESOURCE)	DATE ISSUED: 12/29/2021
PARTNERS, LP)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Order Granting Attorney Fees of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC) Pikeville, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Claimant's counsel (counsel), Austin P. Vowels, appeals Administrative Law Judge (ALJ) Jerry R. DeMaio's Supplemental Order Granting Attorney Fees (2018-BLA-05025) issued in connection with the successful prosecution of a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

For work performed before the ALJ, counsel requested \$18,899.23 in fees and expenses as follows: 1) \$7,975.00 for 31.9 hours of attorney services provided by Austin P. Vowels at a rate of \$250.00 per hour; 2) \$2,840.00 for 14.2 hours of attorney services provided by Daniel Boling at a rate of \$200.00 per hour; 3) \$5,130.00 for 34.2 hours of paralegal services provided by Trisha Wright at a rate of \$150.00 per hour; 4) \$30.00 for 0.2 of an hour of paralegal services provided by Desire Smith at a rate of \$150.00 per hour; 5) \$680.00 for 6.8 hours of legal assistant services provided by Sarah Agnew at a rate of \$100.00 per hour; and 6) \$2,244.23 in expenses. Employer objected to the hourly rates of Attorneys Vowels and Boling, and Paralegals Wright and Smith, and to certain time entries as excessive, duplicative, or clerical.

After considering the fee petition and Employer's objections, the ALJ found the hourly rates requested for Attorney Boling and Paralegals Wright and Smith excessive. He determined Attorney Boling is entitled to an hourly rate of \$175.00 and Paralegals Wright and Smith are entitled to an hourly rate of \$100.00. The ALJ also disallowed a total of one hour of work performed by Attorney Vowels and four and one-half hours of work performed by the paralegals because the services are clerical or duplicative, or the time requested is excessive. Based on these findings, the ALJ awarded \$16,949.23 for fees and expenses.

On appeal, counsel alleges the ALJ erred in reducing the hourly rate requested for Paralegals Wright and Smith and in reducing the amount of time billed.¹ Employer responds in support of the awarded fee. The Director, Office of Workers' Compensation Programs (OWCP), has not filed a response brief. Counsel filed a reply brief, reiterating his contentions on appeal.

When an attorney prevails on behalf of a client, the Act provides the employer, its insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to the claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The amount of an attorney fee award by an ALJ is discretionary and will be upheld on appeal unless

¹ We affirm, as unchallenged on appeal, the ALJ's reduction of Attorney Boling's hourly rate to \$175.00. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.² See *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661 (6th Cir. 2008); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989) (citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980)); see also *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

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 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. *Bentley*, 522 F.3d at 663; *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).

Paralegal Hourly Rate

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). In order 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 . . . of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; see *Gosnell*, 724 F.3d at 571. Further, any fee

shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested.

20 C.F.R. §725.366(b).

The ALJ acknowledged that counsel relied on prior fee awards to support the \$150.00 hourly rate for Paralegals Wright and Smith. Attorney Fee Order at 2. But he found the cases "counsel used to support a paralegal fee rate of \$150.00 per hour [are]

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

unconvincing because they were also unopposed attorney fee petitions.” *Id.* Citing a single Office of Administrative Law Judges (OALJ) decision by ALJ Jonathan C. Calianos, the ALJ “reduced the hourly rate for a paralegal from \$150.00 to \$100.00.”³ *Id.*

We agree with counsel’s argument that the ALJ erred by failing to consider all relevant evidence when reducing the paralegals’ hourly rate. Claimant’s Counsel’s Brief at 5-9. Counsel submitted an employer-opposed fee petition in which the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, awarded counsel’s paralegal a \$150.00 hourly rate.⁴ *See Advent Mining LLC v. Davis*, No. 16-4049 (6th Cir. Oct. 16, 2017) (Order); Motion for Fees and Expenses for Work Performed Before the ALJ at 8, 11. Thus, contrary to the ALJ’s analysis, not all the prior fee petition awards counsel submitted were unopposed. Claimant also submitted a National Association of Legal Assistants (NALA) National Compensation & Utilization Survey Report,⁵ which counsel argued supported the \$150.00 hourly rate. Motion for Fees and Expenses for Work Performed Before the ALJ at 10-12. The ALJ erred by failing to address this evidence. 30 U.S.C. §923(b); *Bentley*, 522 F.3d at 664; *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (ALJ has duty to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for her decision); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); Attorney Fee Order at 2.

Further, the ALJ summarily stated he considered the qualifications of the paralegals. Attorney Fee Order at 2-3. But he did not explain how the qualifications of the paralegals supported his reduction in the requested hourly rate of \$150.00 to \$100.00. Therefore his Order does not comply with the explanatory requirements of the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. 932(a); *see Rowe*, 710 F.2d at 255; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); 20 C.F.R.

³ The ALJ cited the decision in *Burnett v. Midwest Coal Co.*, 2016-BLA-05349 (Oct. 25, 2019) (unpub.).

⁴ In *Advent Mining LLC v. Davis*, No. 16-4049 (6th Cir. Oct. 16, 2017) (Order), the Sixth Circuit awarded a paralegal an hourly rate of \$150.00 over an employer’s objection.

⁵ The ALJ should consider the appropriateness of the NALA report in light of the disclaimer that it is not to be used for market purposes. 2016 NALA Report at 2 n.2; 4; 2018 NALA Report at 2 n.2; 4. The NALA report records market research data from the responding paralegals about their demographic background, where they work and their duties, how much they are paid, and the amount their employer bills by region, size of firm, length of experience, and type of paralegal qualifications. *Id.*

§725.366(b). In light of the foregoing errors, we vacate his finding that Paralegals Wright and Smith are entitled to an hourly rate of \$100.00 and remand this case for further consideration of this issue.⁶

Time Entries

The ALJ scrutinized counsel's fee petition in light of Employer's objections that the hours requested were excessive, included clerical work, or were duplicative. Attorney Fee Order at 3-6. He sustained Employer's objections to a number of entries. *Id.* Counsel challenges these findings.

The ALJ disallowed, as clerical, 0.1 of an hour billed for Attorney Vowels to review a telephone message from Claimant and leave a telephone message to Claimant on December 5, 2017. Attorney Fee Order at 3. Counsel did not identify the topic of the message. Motion for Fees and Expenses for Work Performed Before the ALJ at 14. Although counsel asserts in this appeal that "[t]ime spent advising a claimant as to the status of his or her claim is compensable," he does not dispute the ALJ's finding that he failed to identify the subject of the message. Claimant's Counsel's Brief at 11. Contrary to counsel's argument, the ALJ permissibly disallowed this entry as "telephone messages that do not identify the topic of discussion are clerical in nature because it is not clear from the description of work that the messages are discussing legal work, and [the ALJ] cannot presume that it is without further detail."⁷ Attorney Fee Order at 3; *see Bentley*, 522 F.3d at 666-67; *Ball v. Director, OWCP*, 7 BLR 1-617, 1-619 (1984) (affirming disallowance of a requested fee where "repeated entries involving communications with the client do not, for the most part, explain either the purpose or necessity of the particular communication"). Therefore, we affirm the ALJ's disallowance of this entry.

⁶ We decline counsel's invitation to modify the ALJ's hourly rate award for paralegal work from \$100.00 to \$150.00 to reflect the hourly rate requested on his fee petition. *Director, OWCP, v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (Board lacks the authority to render factual findings to fill in gaps in the ALJ's opinion).

⁷ To the extent counsel argues the ALJ should have allowed him to further clarify any unexplained time entries, we find no merit to the argument. There is no indication in the record that counsel requested reconsideration of the ALJ's Order or requested an opportunity to provide further clarification. Thus he waived this argument by raising it for the first time to the Board. *Joseph Forrester Trucking v. Director, OWCP [Mabe]*, 987 F.3d 581, 588 (6th Cir. 2021); *Ball v. Director, OWCP*, 7 BLR 1-617, 1-619 (1984) (claimant's counsel could have presented verifying evidence upon a request for reconsideration to the deputy commissioner).

The ALJ next disallowed half of the 0.2 of an hour requested for work that Attorney Vowels performed on August 13, 2018. Attorney Fee Order at 5. The work involved reviewing a voicemail from Claimant and a Department of Labor (DOL) letter regarding an x-ray. *Id.* The ALJ awarded the requested fee for reviewing the letter from the DOL, but disallowed the review of Claimant’s voicemail because “review of [a] voicemail without further clarification is clerical.” *Id.*

Counsel contends the ALJ “mischaracterized this entry” because “[t]he time recorded was for reviewing correspondence” and then leaving a voicemail for Claimant. Claimant’s Counsel’s Brief at 15-16. Contrary to counsel’s assertion, he requested a fee for two separate tasks: reviewing correspondence and reviewing a voicemail. *See* Motion for Fees and Expenses for Work Performed Before the ALJ at 15. Similar to his reasoning regarding the December 5, 2017 entry, the ALJ noted that, without further clarification regarding the topic, the review of a voicemail is clerical. Attorney Fee Order at 5. Thus, he permissibly disallowed this entry as clerical because it is not clear the message involved legal work. *See Bentley*, 522 F.3d at 666-67; *Ball*, 7 BLR at 1-619.

The ALJ disallowed three entries on June 1, 2019, December 26, 2019, and January 16, 2020 because the work Attorney Vowels performed involved an overpayment matter before the district director. Attorney Fee Order at 5-6. In challenging these findings, counsel argues the ALJ should approve these entries because the case was pending before OWCP and OALJ at the same time. Claimant’s Counsel’s Brief at 17. Contrary to counsel’s argument, the ALJ properly disallowed these entries. An ALJ is only authorized to award fees for services rendered while the case was pending before the OALJ. *See Matthews v. Director, OWCP*, 9 BLR 1-184, 1-186 (1986) (appropriate inquiry is whether the work done was “reasonably integral to preparation for the hearing” before OALJ); *Vigil v. Director, OWCP*, 8 BLR 1-99, 1-102 (1985); 20 C.F.R. §725.366(a). Counsel concedes these entries “were billing for time related to an overpayment dispute . . . at the [d]istrict [d]irector level.” Claimant’s Counsel’s Brief at 17. The ALJ properly disallowed this work because it was not integral to preparation for the hearing before the ALJ.⁸ *See* 20 C.F.R. §725.366(a); *Matthews*, 9 BLR at 1-186; *Vigil*, 8 BLR at 1-102.

⁸ Counsel further challenges the ALJ’s decision to disallow 0.1 of an hour of paralegal work for “[f]urther review of expenses, preparation of exhibits to submit with expense list” on January 15, 2020. Attorney Fee Order at 4; Claimant’s Counsel’s Brief at 13. Although the ALJ disallowed this entry as clerical, we need not address counsel’s argument that this is an erroneous finding. *Id.*; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Counsel conceded in his reply to Employer’s objections that this entry “[was] actually related to an overpayment determination from the [d]istrict [d]irector and preparing a response to such.” Reply to Response/Objections to Motion for Attorney’s

The ALJ partially disallowed a requested fee for work done on July 23, 2018. This work involved Attorney Vowels reviewing the file, issuing a letter to the parties regarding a Kentucky state workers' compensation award, uploading the award to the district director's website, and reviewing a letter from the claims examiner regarding an x-ray. Attorney Fee Order at 5. The ALJ disallowed 0.1 of an hour for the task of uploading the state award to the district director's website. *Id.* Contrary to counsel's argument, the ALJ acted within his discretion in determining that uploading a document is a routine, clerical task. *See Bentley*, 522 F.3d at 666-67 ("While reviewing correspondence can constitute legal work, receiving and filing correspondence presumably constitutes clerical work."); *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989); Attorney Fee Order at 5. Thus we affirm his disallowance of this entry.

We next hold the ALJ acted within his discretion in disallowing a number of requested entries as duplicative. *Bentley*, 522 F.3d at 666-67. Although counsel challenges the ALJ's findings, we conclude they are supported by substantial evidence.

The ALJ disallowed 0.1 of an hour of paralegal services on July 16, 2009. Attorney Fee Order at 4. He rationally found the paralegal work of leaving a telephone message with the DOL claims examiner regarding the appeal of benefits is "duplicative given the conference" with the claims examiner occurred "the same day regarding the same subject matter." Attorney Fee Order at 4; *see Bentley*, 522 F.3d at 666; *Ball*, 7 BLR at 1-619. Thus we affirm his disallowance of this entry.

The ALJ also disallowed 0.2 of an hour a paralegal spent preparing a "letter to Workers' Compensation re: request for file" on February 22, 2018. Attorney Fee Order at 6. The ALJ found this entry duplicative of a similar entry for work performed on February 16, 2018. *Id.*

We reject Claimant's argument that the ALJ abused his discretion in making this finding. Claimant's Counsel's Brief at 17. The February 16, 2018 entry identifies the task performed as "[p]reparation of open records request to Kentucky Workers' Compensation," and the February 22, 2018 entry denotes "[p]reparation of letter to Workers' Compensation office re: request for file." Motion for Fees and Expenses for Work Performed Before the ALJ at 19. In light of the fact that counsel did not provide

Fees and Expenses for Work Performed before the ALJ at 2. Thus substantial evidence supports the ALJ's disallowance of this entry because it was not integral to preparation for the hearing before the ALJ. *See* 20 C.F.R. §725.366(a); *Vigil*, 8 BLR at 1-99.

additional detail or specify that the letters were sent to different offices,⁹ the ALJ permissibly disallowed one of these two entries. *Bentley*, 522 F.3d at 666; *Ball*, 7 BLR at 1-619.

The ALJ next disallowed 0.1 of an hour of services that Attorney Vowels performed on December 6, 2018. Attorney Fee Order at 5. He found the entry for work to “[r]eview [] letter from DOL re: x-ray” duplicative of a December 4, 2018 entry. *Id.* Both entries are identical and counsel did not identify any letter date, any specific x-ray reading, or other pertinent information to allow the ALJ to differentiate between the two entries. Although counsel now elaborates before the Board, an ALJ’s decisions must be based upon the record before him. 20 C.F.R. §725.477. Thus we conclude substantial evidence supports the ALJ’s disallowance of the December 6, 2018 duplicative time entry. *Bentley*, 522 F.3d at 666; *Lane*, 105 F.2d at 174; *Ball*, 7 BLR at 1-619.

We agree with counsel, however, that the ALJ erred in disallowing entries involving exhibit preparation. Claimant’s Counsel’s Brief at 11-12, 18-19. Work performed reviewing the file, traveling, organizing exhibits, and preparing briefs may be found to be necessary and reasonable. *See Jones*, 21 BLR at 1-109.

The ALJ disallowed 1.5 hours a paralegal spent on September 24, 2018, preparing and compiling exhibits for a hearing, and 2.6 hours of paralegal time on June 26, 2018, preparing records and exhibits for a medical expert’s review. Attorney Fee Order at 3-7. He generally stated the “[o]rganization of exhibits is clerical work.” *Id.*

Counsel argues the ALJ improperly disallowed these services because the paralegals “organizing exhibits” required “the manipulation of documents electronically and otherwise to include requested documentation, and reflect preferences of the court, including such things as redaction and organization.” Claimant’s Counsel’s Brief at 11-12, 14, 18-19. Thus counsel asserts this work is compensable. *Id.* Because the ALJ provided no explanation for disallowing this total of 4.1 hours of services other than incorrectly stating that preparation of exhibits is clerical work, we reverse his disallowance of the time requested for these services. 30 U.S.C. 932(a); *Rowe*, 710 F.2d at 255; *Jones*, 21 BLR at 1-109; *Wojtowicz*, 12 BLR at 1-165.

⁹ Counsel conceded in his brief that both letters were sent to the same office, the Kentucky Department of Workers’ Claims. Claimant’s Counsel’s Brief at 17.

Accordingly, the ALJ's Supplemental Order Granting Attorney Fees is affirmed in part, reversed in part, and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge