

U.S. Department of Labor

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



BRB Nos. 20-0506 BLA
and 20-0507 BLA

DONALD L. THROGMORTON, II)

Claimant-Petitioner)

v.)

WEBSTER COUNTY COAL)
CORPORATION)

and)

MAPCO, INCORPORATED c/o ALLIANCE)
RESOURCE PARTNERS, LP)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 12/29/2021

DECISION and ORDER

Appeals of the Proposed Order Supplemental Award Fee for Legal Services of Annette Goff, Claims Examiner, and 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 Claims Examiner Annette Goff's (the district director's) Proposed Order Supplemental Award Fee for Legal Services and Administrative Law Judge (ALJ) Jerry R. DeMaio's Supplemental Order Granting Attorney Fees (2018-BLA-05257). The awards of attorney's fees are in connection with fee petitions filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).¹ The ALJ awarded benefits on April 30, 2020, in a living miner's claim filed on November 8, 2016.

On June 1, 2020, counsel filed a complete, itemized fee petition requesting \$3,115.00 for legal services performed before the district director from March 22, 2017 to November 30, 2017. The total fee requested represents: \$1,650.00 for 6.6 hours of Attorney Vowels's services at an hourly rate of \$250.00; \$40.00 for 0.2 hour of Attorney Daniel Boling's services at an hourly rate of \$200.00; and \$1,425.00 for 9.5 hours of services performed by Paralegal Trisha Wright, at an hourly rate of \$150.00. District Director Fee Request at 1-2, 8-11. Employer did not file objections to the fee request before the district director. The district director awarded attorney's fees in the amount of \$2,402.50, representing: 6.6 hours of services at an hourly rate of \$250.00 for Attorney Vowels; 0.2 hour of services at an hourly rate of \$150.00 for Attorney Boling; and 9.5 hours of services at an hourly rate of \$75.00 for Paralegal Wright. In sum, she awarded the entire 16.3 hours requested, but reduced the hourly rates for Attorney Boling and Paralegal Wright. Counsel requested reconsideration, and the district director denied it.

On June 1, 2020, counsel also filed a complete, itemized fee petition requesting \$9,998.06 for legal services performed, and expenses incurred, before the Office of Administrative Law Judges from December 11, 2017 to May 28, 2020. The total fee requested represents: \$6,500.00 for 26.0 hours of Attorney Vowels's services at an hourly rate of \$250.00; \$460.00 for 2.3 hours of Attorney Boling's services at an hourly rate of \$200.00; \$1,935.00 for 12.9 hours of paralegal services performed by Paralegal Wright at an hourly rate of \$150.00; \$120.00 for 0.8 hour of paralegal services performed by Desire Smith at an hourly rate of \$150.00; \$90.00 for 0.9 hour of legal assistant services performed

¹ Claimant's counsel's appeal of the district director's fee award was assigned BRB No. 20-0506 BLA and his appeal of the ALJ's fee award was assigned BRB No. 20-0507 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only. *Throgmorton v. Webster Cnty. Coal Corp.*, BRB Nos. 20-0506 BLA and 20-0507 BLA (Oct. 23, 2020) (Order) (unpub.).

by Sarah Agnew at an hourly rate of \$100.00; and expenses in the amount of \$893.06. ALJ Fee Request at 1-2, 11-16.

Employer objected to the hourly rates of Attorney Boling, the paralegals, and the legal assistant, and to certain services and expenses. Employer's Objections at 2-6. The ALJ awarded the requested hourly rates of Attorney Vowels and the legal assistant, but reduced the hourly rates of Attorney Boling and the Paralegals Wright and Smith. He disallowed all legal services performed by Attorney Boling and certain paralegal services performed by Paralegal Wright on December 15, 2017, September 17, 18, and 24, 2018, and October 15, 2018. He awarded all other requested time and expenses. The ALJ fee award totaled \$8,593.06: 26.0 hours at \$250.00 for Attorney Vowels; 12.0 hours at \$100.00 for paralegal and legal assistant services; and the requested expenses.

On appeal, counsel contends the district director and the ALJ erred in reducing Attorney Boling's and the paralegals' requested hourly rates. He also argues the ALJ erred in disallowing certain services. Employer responds, urging affirmance of the fee awards, to which counsel replied, reiterating his contentions. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.²

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

² We affirm, as unchallenged on appeal, the district director's allowance of all 16.3 hours billed and her award of 6.6 hours billed by Attorney Vowels at an hourly rate of \$250.00. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We also affirm, as unchallenged on appeal, the ALJ's allowance of 26.0 hours billed by Attorney Vowels at an hourly rate of \$250.00, the hourly rate of \$100.00 awarded to the legal assistant, all time requested for Paralegal Smith and the legal assistant, and \$893.06 in expenses. *Id.*

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

information which may be relevant to the amount of the fee requested.” 20 C.F.R. §725.366(b).

In determining the amount of an attorney’s fee to be awarded under a fee-shifting statute, the United States Supreme Court has held 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. *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” comprises 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; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

For the reasons that follow, we vacate both Fee Awards and remand this case for further consideration.

District Director’s Fee Award - Hourly Rates

Counsel contends the district director erred in failing to consider all of the evidence that he submitted to support the hourly rates of Attorney Boling and Paralegal Wright and by not explaining how she weighed the evidence she did consider, thereby arbitrarily reducing their hourly rates. Petitioner’s Brief at 6-9. We agree.

The district director summarily stated she would reduce the hourly rate for counsel’s paralegal from \$150.00 to \$75.00 “after considering the complexity of the issues, the qualifications of the representative, and the level at which the claim was decided.” District Director’s Fee Award at 1. Further, the district director stated Attorney Boling’s “approved rate [was] comparable to that being charged by other highly qualified attorneys within the same geographical location . . .” *Id.* Because the district director did not explain how the factors supported reducing the requested hourly rates, we are unable to discern her rationale.

We also agree with counsel's argument that the district director did not address the evidence of prior fee awards submitted by counsel, or a survey submitted to show the appropriate market rate, prior to reducing the requested hourly rates.⁴ Given the cursory nature of the district director's award, and her failure to address the prior fee awards and survey referenced above, we vacate her reduction of the requested hourly rates for Attorney Boling and Paralegal Wright, and remand this case for further consideration. On remand, the district director should fully discuss counsel's arguments based on the criteria enumerated in 20 C.F.R. §725.366(b) and provide an adequate rationale for her findings consistent with law.⁵

⁴ To support a \$175.00 hourly rate for Attorney Boling, counsel submitted two prior orders awarding him that rate. *See* District Director Fee Request at 6; *Vincent v. Schoate Mining Co.*, Case No. 2016-BLA-05600 (Nov. 20, 2017) (Order Granting Attorney Fees) and *Estate of Virginia L. Mortis v. Kenamerican Res.*, Case No. 2017-BLA-05459 (Aug. 15, 2018) (Supplemental Order Granting Attorney Fees).

To support his requested hourly rate for Paralegal Wright, counsel submitted a fee award by the Sixth Circuit, from an opposed fee request, awarding a paralegal an hourly rate of \$150.00, four ALJ fee orders, and one district director fee order awarding that same rate. *See* District Director Fee Request at 7; *Advent Mining LLC v. Davis*, No. 16-4049 (6th Cir. Oct. 16, 2017) (Order); *Vincent v. Schoate Mining Co., LLC*, Case No. 2016-BLA-05600 (Nov. 20, 2017) (Order Granting Attorney Fees); *Lloyd v. Cumberland Coal Res., LP*, Case No. 2015-BLA-05218 (Feb. 16, 2017) (Order Granting Attorney Fees); *Lee v. Armstrong Coal Co.*, Case No. 2014-BLA-05683 (Feb. 16, 2017) (Order Granting Attorney Fees); *Estate of Virginia L. Mortis v. Kenamerican Res.*, Case No. 2017-BLA-05459 (Aug. 15, 2018) (Supplemental Order Granting Attorney Fees); *Foster v. Webster Cnty. Coal Corp.*, Case ID 2BHBJ-2019154 (May 15, 2020) (Proposed Order, Supplemental Award, Fee for Legal Services) (submitted on reconsideration).

Additionally, counsel submitted the 2016 and 2018 National Utilization & Compensation Survey Reports by the National Association of Legal Assistants (the NALA reports) to support the requested hourly rate for Paralegal Wright. District Director Fee Request at 8, 33-48.

⁵ The district director should consider the appropriateness of the NALA reports in light of their disclaimer that they are not to be used for market purposes. 2016 NALA Report at 2 n.2; 4; 2018 NALA Report at 2 n.2; 4 (both studies stating they are "specifically for market research purposes and not intended to price fix on the open market."). 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

ALJ's Fee Award - Hourly Rates

The ALJ awarded Attorney Vowels his requested hourly rate of \$250.00 and the requested hourly rate of \$100.00 for the legal assistant, but reduced Attorney Boling's requested hourly rate from \$200.00 per hour to \$175.00 per hour and the paralegals' requested hourly rate from \$150.00 to \$100.00. ALJ's Fee Award at 2. The ALJ stated he considered the qualifications of the representative and previous fee awards, and relied on his findings as to the hourly rates set out in his recently issued fee award in *Sutton v. Warrior Coal Co.*, Case No. 2018-BLA-05025 (July 31, 2020) (Supplemental Order Granting Attorney Fees).⁶ *Id.*

Attorney Boling's Hourly Rate

Counsel argues the ALJ did not properly consider the evidence introduced to show the appropriate market rate for Attorney Boling and erred in reducing his hourly rate from \$200.00 to \$175.00. Petitioner's Brief at 3-4. We agree.

Counsel submitted to the ALJ the same two prior fee awards he submitted to the district director to support a \$200.00 hourly rate for Attorney Boling. ALJ Fee Request at 6-7. Although these awards were \$175.00 per hour, counsel explained that in those prior cases Attorney Boling "spent part of his time working prior to being licensed," but in this case "he was licensed at all times during the work, and accordingly so, a slightly higher fee is requested for him in this claim." *Id.* at 7. Because there is no indication the ALJ considered counsel's explanation for his request of a higher hourly rate, we cannot affirm the ALJ's award of a \$175.00 hourly rate. Thus, we vacate the ALJ's award of this hourly rate and remand this case to the ALJ to explain his determination regarding the reasonable hourly rate awarded for Attorney Boling's services as the Administrative Procedure Act (APA) requires.⁷ See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

the amount their employer bills by region, size of firm, length of experience, and type of paralegal qualifications. District Director Fee Request at 33-48; ALJ Fee Request at 55-70.

⁶ The case of *Sutton v. Warrior Coal Co.*, Case No. 2018-BLA-05025 (July 31, 2020) (Supplemental Order Granting Attorney Fees) is pending before the Board, BRB No. 20-0492 BLA.

⁷ The APA requires every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion

Paralegals' Hourly Rate

Counsel argues the ALJ erred in not addressing evidence of prior fees awards of \$150.00 per hour to his paralegals, which includes a Sixth Circuit order and four ALJ fee orders, because that evidence constitutes inferential proof of the prevailing market rate.⁸ Petitioner's Brief at 4-6, 9-12. Counsel also argues the ALJ erred by failing to consider the NALA report and by relying on a decision that is pending on appeal at the Board. *Id.* at 10-11.

The ALJ stated he considered the "previous fee awards," the qualifications of the representatives, and his findings in his Supplemental Order Granting Attorney Fees in *Sutton*, Case No. 2018-BLA-05025, as to the hourly rates. ALJ's Fee Award at 2. However, he did not explain how the prior fee awards and the qualifications of the paralegals supported his reduction in the requested hourly rate of \$150.00 to \$100.00. An explanation is required because the prior fee awards may support an award of \$150.00 to the paralegals. ALJ Fee Request at 7-10.

Moreover, an ALJ must independently evaluate the evidence of record and not rely on a document outside the record to support his findings, as an ALJ's decision must "withstand scrutiny on the four corners of the document." *See Hall v. Director, OWCP*, 12 BLR 1-80, 1-81-82 (1988) (en banc). Here, the ALJ erred by relying on his Supplemental Order Granting Attorney Fees in *Sutton*, Case No. 2018-BLA-05025, without independently evaluating counsel's fee request. In light of the above, we vacate the ALJ's reduction of the paralegals' hourly rate and remand this case for further consideration of the issue. On remand, the ALJ must determine a reasonable hourly rate for the paralegals based on the evidence submitted in this case and explain the bases for his findings. *See Wojtowicz*, 12 BLR at 1-165.

presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

⁸ The prior fee awards include the awards counsel submitted to the district director: *Advent Mining LLC v. Davis*, No. 16-4049 (6th Cir. Oct. 16, 2017) (Order); *Vincent v. Schoate Mining Co., LLC*, Case No. 2016-BLA-05600 (Nov. 20, 2017) (Order Granting Attorney Fees); *Lloyd v. Cumberland Coal Res., LP*, Case No. 2015-BLA-05218 (Feb. 16, 2017) (Order Granting Attorney Fees); *Lee v. Armstrong Coal Co.*, Case No. 2014-BLA-05683 (Feb. 16, 2017) (Order Granting Attorney Fees); *Estate of Virginia L. Mortis v. Kenamerican Res.*, Case No. 2017-BLA-05459 (Aug. 15, 2018) (Supplemental Order Granting Attorney Fees).

ALJ's Fee Award - Disallowed Hours

“Clerical” Paralegal Charges

The ALJ summarily disallowed, as clerical paralegal charges, 0.4 hour of services on September 24, 2018 for “Preparation of claimant’s exhibits for hearing” and 0.2 hour of services on October 15, 2018 for “Preparation of cover page for exhibits, compilation of exhibits.” ALJ’s Fee Award at 2; ALJ Fee Request at 15; Employer’s Objections at 2-3. Counsel argues the ALJ improperly disallowed these services because the paralegals were “organizing exhibits” which 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.” Thus, counsel asserts this is compensable work. Petitioner’s Brief at 14; Petitioner’s Reply Brief at 7. Counsel explains the “organization/preparation of exhibits . . . [is] not a clerical act as subject-matter and case-specific knowledge is required for the process.” Petitioner’s Brief at 15. Employer responds, contending that organizing, copying, and tabbing exhibits is clerical, non-compensable work. Employer’s Brief at 6-7. Because the ALJ provided no rationale for disallowing this total of 0.6 hour of paralegal work, other than to summarily accept Employer’s objection to the entries, we vacate the ALJ’s disallowance of the time requested for these services. On remand, the ALJ must reconsider counsel’s request for the time for these services, Employer’s objections, and explain why he allows or disallows them. *See Bentley*, 522 F.3d at 666; *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217-18 (1986).

Attorney Boling’s and Paralegal Wright’s “Excessive” Charges

The ALJ sustained Employer’s objection to work that Attorney Boling performed on July 16, 2018 and Paralegal Wright performed on December 15, 2017, September 17, 2018, and September 18, 2018, as “excessive.” ALJ’s Fee Award at 2; Employer’s Objections at 4-5. We agree with counsel that the ALJ failed to provide an adequate rationale for disallowing these entries.

Attorney Boling billed 2.3 hours on July 16, 2018 for “Review of entire file to determine status of case and additional evidence needed, preparation of memorandum on evidence development needed.” ALJ Fee Request at 14. Counsel argues the ALJ erred in disallowing this time because it was reasonable and necessary for compensable “collaborative” work. Petitioner’s Brief at 15-16. He acknowledges that while Attorney Boling left the firm and did not perform any additional work on the case beyond the July 16, 2018 entry, the expectation at the time that Attorney Boling performed this work was that he needed to “get up-to-speed and keep working the file more.” *Id.* at 16. Counsel asserts that whether or not Attorney Boling performed any more work is irrelevant, as this

claim was litigated over three years, requiring periodic file reviews and strategic changes.⁹ *Id.* We agree.

Contrary to the ALJ's finding, reasonable time spent by a new attorney to get "up to speed" may be found to be necessary and compensable. *See Planned Parenthood of Cent. N.J. v. Atty Gen. of State of N.J.*, 297 F.3d 253, 271-72 (3d Cir. 2002) (affirming lower court's award of time to newly-assigned attorneys to get "up to speed" on the case by reviewing the facts and underlying documents). Periodic reviews of the file is a legitimate recurring activity in prolonged cases lasting three years, such as this one, and is thus compensable. *See McNulty v. Director, OWCP*, 4 BLR 1-128, 1-132 (1981). Moreover, a disallowance based on excessive time implies the existence of a compensable service for which some reasonable amount of time can be determined; therefore, the proper course is to reduce the time to a figure commensurate with the reasonable performance of the service. *Id.* We therefore vacate the ALJ's disallowance of 2.3 hours billed for Attorney Boling's services on July 16, 2018, and remand this case for the ALJ to determine whether the work and time that counsel requested was reasonable and necessary to establish Claimant's entitlement to benefits *at the time it was performed*. *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, at the time the work was performed, could reasonably regard the work as necessary to establish entitlement).

Paralegal Wright's charges were as follows: December 15, 2017 entry for 0.9 of an hour for review and summarization of the Director's Exhibits; September 17, 2018 entry for 0.3 of an hour for reviewing the Notice of Assignment and a telephone conference with the Claims Examiner regarding the x-rays, and a September 18, 2018 entry for 0.8 hour for preparation of certain documents. ALJ Fee Request at 14-15. Employer objected to all three entries as duplicative because they represented work that counsel and Paralegal Wright both performed. Employer's Objections at 4-5.

⁹ Employer responds, asserting that the ALJ properly disallowed the time because 2.3 hours is an excessive amount of time to review the file to "catch up" and prepare a memorandum without performing any additional work. Employer's Brief at 7-8. Alternatively, Employer contends that the requested time is clerical in nature and should be considered part of overhead costs, and Employer "should not be required to pay for a young, newly licensed attorney to catch up to speed." *Id.* at 8.

Counsel argues the entries are reasonable, compensable, and not duplicative, as review by counsel and his paralegal of the same documents were for different purposes. Petitioner's Brief at 16-19; Petitioner's Reply Brief at 9-10. Moreover, counsel asserts these entries include multiple activities and argues the ALJ erred in sustaining Employer's objections because he did not state why these activities were duplicative. Petitioner's Brief at 16-19.

Because the ALJ failed to provide any explanation as to why he disallowed the time requested for Paralegal Wright's work, other than to summarily state it was excessive, his decision does not comport with the APA. 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 30 U.S.C. §932(a). We therefore vacate the ALJ's finding and instruct him to reconsider whether the entries on December 15, 2017, September 17, 2018 and September 18, 2018, constitute compensable work and explain the basis for his findings. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the Proposed Order Supplemental Award Fee for Legal Services is affirmed in part and vacated in part, and the case is remanded to the district director for further consideration consistent with this opinion. The ALJ's Supplemental Order Granting Attorney Fees is affirmed 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