

U.S. Department of Labor

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



BRB No. 21-0200 BLA

CHRIS MEZO)
(o/b/o ROBBIE J. MEZO (deceased)))

Claimant-Petitioner)

v.)

KERR MCGEE COAL)
CORPORATION/AMERICAN COAL)
COMPANY)

DATE ISSUED: 12/29/2021

Employer-Respondent)

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

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney's Fees of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Stone Piper Law, LLC), Birmingham, Alabama, for Claimant.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Awarding Attorney's Fees (2018-BLA-06098) in

connection with the successful prosecution of a miner's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Claimant's counsel requested a fee of \$18,720.00, representing 62.4 hours of legal services performed before the ALJ at an hourly rate of \$300.00.

In support of her fee petition, Claimant's counsel noted her thirty-six years of litigation experience, including handling black lung cases for the last ten years. Attorney's Fee Petition at 2 (unpaginated). Claimant's counsel represented that based on her experience and "the customary hourly rate for attorneys regularly handling black lung cases in Alabama," she had been awarded an hourly rate of \$300.00 previously. *Id.* She also submitted a list of eight prior fee awards in support of her requested hourly rate. *Id.* at 2-3 (unpaginated). Additionally, she attached an itemized statement describing work she performed in the proceedings before the ALJ between October 10, 2019 and September 8, 2020. *Id.* at 6-8 (unpaginated). Employer filed no objections to the fee petition.

The ALJ observed that Claimant's counsel cited seven prior fee awards² granted by the district director, various ALJs, the Benefits Review Board, and the United States Court of Appeals for the Eleventh Circuit. Decision and Order 3. The ALJ, however, noted that "several of the fee awards cited do not support an hourly rate of \$300." *Id.* Additionally, she found "several of the rates were not verified." *Id.* Noting Claimant's counsel's experience, the ALJ found an hourly rate of \$275.00 reasonable. *Id.* With respect to the 62.40 hours of services, the ALJ found several unspecified charges "excessive . . . and/or unreasonable for an attorney with 36 years of practice." *Id.* Having "reduced and removed" the unspecified charges, the ALJ awarded Claimant's counsel a total fee of \$3,946.25. *Id.*

On appeal, Claimant's counsel contends the ALJ erred in reducing her hourly rate and in disallowing the hours requested. Neither Employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The amount of an attorney's fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion,

¹ The ALJ issued a Decision and Order Granting Benefits on May 29, 2020. Claimant is the Miner's son, who pursued the Miner's claim on her behalf after her death. Notice of Appeal at 1; Attorney's Fee Petition at 6, 7 (unpaginated).

² It is unclear why the ALJ stated Claimant's counsel listed seven rather than eight fee awards.

or not in accordance with applicable law.³ See *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). The regulations provide that an approved fee must take into account “the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested.” 20 C.F.R. §725.366(b).

In determining the amount of a fee to be awarded under a fee-shifting statute, the United States Supreme Court has held a tribunal 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, 564 (1986).

Hourly Rate

An attorney’s reasonable hourly rate is “to be calculated according to the prevailing market rates in the relevant community.” *Blum v. Stenson*, 465 U.S. 886, 895 (1984). 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 by lawyers of comparable skill, experience, and reputation.” *Blum*, 465 U.S. at 896 n.11; see *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 894 (7th Cir. 2002). Evidence of fees received in other black lung cases may be an appropriate consideration in establishing a market rate. See *Chubb*, 312 F.3d at 895; *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672 (7th Cir. 2002).

The ALJ found Claimant’s counsel did not establish that an hourly rate of \$300.00 was reasonable because several fee awards she listed did not support that rate or the “rates were not verified.” Decision and Order at 3. Claimant’s counsel argues the ALJ did not adequately explain the basis for her determination of counsel’s hourly rate. Claimant’s Brief at 3 (unpaginated). We agree.

The ALJ did not specify which of the fee awards listed do not support an hourly rate

³ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because the Miner performed her coal mine employment in Illinois. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibits 2, 3.

of \$300.00 or what she meant by stating that several of the hourly rates “were not verified.”⁴ Decision and Order at 3. Moreover, although the ALJ cited counsel’s experience as a factor to be considered in determining her hourly rate, *see* 20 C.F.R. §725.366(b), she did not explain how that factor led her to determine that an hourly rate of \$275.00 was reasonable. *Id.* at 2-3. Therefore, her analysis does not comply with the Administrative Procedure Act (APA).⁵ *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Allowable Hours

Claimant’s counsel next contends the ALJ did not adequately explain her reasons for disallowing most of the time for which counsel billed for work she performed. We agree.

The test for determining whether an attorney’s work was necessary is whether counsel, at the time that she performed the work in question, could have reasonably regarded the work as necessary to establish entitlement to benefits. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 316 (1984). Once a service is found to be compensable, the adjudicating officer must decide whether the amount of time the attorney expended in performance of the service is excessive or unreasonable. *Id.*

The ALJ stated that upon review of counsel’s itemized time charges, she reduced or removed several charges as either excessive or unreasonable. Decision and Order at 3. However, she did not indicate which itemized charges she reduced, indicate which ones she removed, or explain specifically why she found any particular charge excessive or

⁴ In the six listed fee awards that the Board granted or are publicly available, of which we take official notice, Claimant was awarded an hourly rate of \$300.00 in two cases, *Barnes v. Cowin & Co.*, BRB No. 16-0119 BLA (Dec. 9, 2016) (unpub. Order) and *Hubbard v. U.S. Steel Mining Co.*, 2016-BLA-05637, 2017-BLA-05217 (Mar. 13, 2018), and an hourly rate of \$275.00 in one case, *Martin v. Jessie Branch Coal Co.*, 2013-BLA-05642 (Nov. 13, 2019). In three other cases, the orders do not specify the hourly rate granted. *Drummond Co. v. Director, OWCP [Allred]*, No. 15-13584 (11th Cir. Sept. 14, 2016); *Davis v. Walter Energy/Warrior Met Coal LLC*, 2018-BLA-05511 (Jan. 9, 2020); *Dozier v. U.S. Steel Mining Co.*, 2017-BLA-05511 (Dec. 14, 2018). On appeal, Claimant’s counsel avers that she increased her hourly rate to \$300.00 as of June 1, 2016. Claimant’s Brief at 2 (unpaginated). This contention was made before the ALJ.

⁵ 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).

unreasonable.⁶ Absent adequate explanation for why the ALJ disallowed the time requested, we cannot discern the basis for her reduction in the number of hours approved. Her analysis therefore fails to comport with the APA. *See Wojtowicz*, 12 BLR at 1-165. On remand, the ALJ must address the specific time entries for which counsel has billed and set forth her findings in sufficient detail to permit review of her rationale in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the ALJ's Decision and Order Awarding Attorney's Fees is vacated, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

⁶ Although the ALJ noted Claimant's counsel did not appear at the November 5, 2019 hearing, review of her fee petition reflects that she did not request a fee for any services on that date. Attorney's Fee Petition at 6-8 (unpaginated). Further, while the ALJ also noted that she issued her decision awarding benefits on May 29, 2020, a possible reference to two six-minute entries on September 4 and September 8, 2020 for work that Claimant's counsel performed, she did not address counsel's statement in the fee petition that she did not receive the ALJ's decision until September. *Id.* at 1-2, 8 (unpaginated).