U.S. Department of Labor

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

BRB Nos. 20-0558 BLA and
21-0065 BLA

JUAN MARTINEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY NEW MEXICO SERVICES, LLC	)	
	)	
	)	
and	)	DATE ISSUED: 9/28/2022
	)	
PEABODY ENERGY CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and the Attorney Fee Order of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Christian P. Barber and 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal[1] Administrative Law Judge (ALJ) Christopher Larsen's Decision and Order (2019-BLA-05598) awarding benefits in a claim filed on January 13, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Employer also appeals the ALJ's Attorney Fee Order granting Claimant's counsel fees and expenses.

The ALJ found Claimant established 13.5 years of coal mine employment, and therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering Claimant's entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established he is totally disabled due to pneumoconiosis and awarded benefits. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. The ALJ subsequently awarded Claimant's counsel attorney fees in the amount of $10,362.50 and $3,737.60 in expenses.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the

[1] The Benefits Review Board accepted Employer's September 21, 2020 appeal of the ALJ's Decision and Order as timely after Employer explained that its original notice of appeal, dated August 28, 2020, was returned as undeliverable. *Martinez v. Peabody N.M. Service*, BRB Nos. 20-0558 BLA and 21-0065 BLA (Oct. 22, 2020) (Order) (unpub.). After Employer's appeal of the ALJ's Attorney Fee Order, the Board consolidated the two appeals for purposes of decision only. *Martinez v. Peabody N.M. Service*, BRB Nos. 20-0558 BLA and 21-0065 BLA (Nov. 23, 2020) (Order) (unpub.). The Board subsequently denied Claimant's Motion for Reconsideration of its Order accepting Employer's appeal of the ALJ's Decision and Order. *Martinez v. Peabody N.M. Service*, BRB Nos. 20-0558 BLA and 21-0065 BLA (Mar. 17, 2021) (Order) (unpub.).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had 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.

Constitution, Art. II § 2, cl. 2.[3] It further asserts the removal provisions applicable to the ALJ rendered his appointment unconstitutional. On the merits, it argues the ALJ erred in finding Claimant entitled to benefits. Finally, it challenges the ALJ's attorney fee award as excessive. Claimant responds in support of the award of benefits and asserts the attorney fee order is reasonable. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject Employer's constitutional challenges to the ALJ's appointment and its challenge to the ALJ's use of the preamble when evaluating the experts' opinions. Employer filed a reply reiterating its arguments.[4]

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.

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[3] 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.

[4] We affirm as unchallenged on appeal the ALJ's determination that Claimant had 13.5 years of coal mine employment. Decision and Order at 17; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, as Claimant performed his coal mine employment in New Mexico. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18.

Ct. 2044 (2018).[6] Employer's Brief at 19-20; Employer's Reply at 1-2. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 20-25; Employer's Reply at 1-2. The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Response at 4-6. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Response at 5 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*

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[6] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). 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)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[7] 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 ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Larsen. The ALJ took no action in this case until the issuance of his Notice of Hearing and Prehearing Order on June 29, 2019. Employer acknowledges that the matter was heard "following the ratification" by the Secretary. Employer's Brief at 20.

Servs. E., Inc. v. NLRB, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress 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. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Larsen and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Larsen. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Larsen "as an [ALJ]." *Id.* In so doing, the Secretary unequivocally accepted responsibility for the ALJ's prior appointment.

Employer does not assert the Secretary had no "knowledge of all the material facts" or did not make a "detached and considered judgement" when he ratified Judge Larsen's appointment.[8] Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals was valid because the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier invalid actions was proper). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

[8] While Employer notes the Secretary's ratification letter was signed "by a robo-pen" and the ALJ's ratification was unaccompanied by any ceremony, Employer's Brief at 24-25, Employer's Reply Brief at 2, these facts do not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 20; Employer's Reply at 2-4. 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 in *Lucia*. Employer's Brief at 20, 22; Employer's Reply at 3-4. It also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020). Employer's Brief at 20, 22.

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, 1137-1138 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in rejecting a similar argument regarding the removal provisions applicable to Federal Deposit Insurance Corporation (FDIC) ALJs, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, noted that in Free Enterprise[9] the Supreme Court "took care to omit ALJs from the scope of its holding." *Calcutt v. FDIC*, 37 F.4th. 293, 319 (6th Cir. 2022) (citing *Free Enter. Fund*, 561 U.S. at 507 n.10.). The Sixth Circuit further explained that a party challenging the constitutionality of removal provisions must set forth how the protections in question "specifically caused an agency action in order to be entitled to judicial invalidation of that action." *Calcutt*, 37 F.4th at 315. Vague, generalized allegations of harm, including the "possibility" that the agency "would have taken different actions" had the ALJ not been "unconstitutionally shielded from removal," are insufficient to establish necessary harm. *Id.* at 315-16. Employer in this case has not alleged any harm whatsoever.

Nor does *Seila Law* support Employer's argument. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau

[9] 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*. at 507 n.10. Further, the majority in Lucia declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1.

(CFPB) infringed upon the President's authority to oversee the Executive Branch, where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[10] 140 S. Ct. at 2201. It did not address ALJs.

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 a congressional 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. Fla. 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 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.

Part 718 Entitlement

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions,[11] Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[10] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

[11] There is no evidence of complicated pneumoconiosis in the record; thus, Claimant cannot invoke the presumption at Section 411(c)(3). 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304; Decision and Order at 7.

Legal Pneumoconiosis

To establish legal pneumoconiosis,[12] Claimant must prove he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[13] 20 C.F.R. §718.201(b). The ALJ considered the medical opinions of Drs. Sood, Raj, Nader, Tuteur, and Farney. Decision and Order at 8-17. Dr. Sood diagnosed legal pneumoconiosis in the form of restrictive lung disease due to coal mine dust exposure, obesity, and congestive heart failure. Director's Exhibits 12, 83. Similarly, Dr. Raj diagnosed restrictive lung disease due to coal mine dust exposure. Claimant's Exhibit 1. Dr. Nader diagnosed restrictive lung disease with chronic bronchitis and chronic hypoxemia due to cigarette smoking and coal mine dust exposure. Claimant's Exhibit 2.

Dr. Tuteur opined Claimant does not have legal pneumoconiosis, but instead diagnosed restrictive lung disease due to cardiac dysfunction and obesity. Director's Exhibits 28, 32, 79. Finally, Dr. Farney opined Claimant does not have legal pneumoconiosis, but instead has restrictive lung disease and hypoxemia due to obesity. Employer's Exhibit 11 at 35-37. The ALJ found the opinions of Drs. Sood, Raj, and Nader to be well-reasoned and documented and that they established legal pneumoconiosis. Decision and Order at 17. He accorded less weight to the opinions of Drs. Tuteur and Farney as insufficiently explained and inconsistent with the regulations. *Id.* at 16-17.

Employer argues the ALJ erred in his weighing of the medical opinion evidence. Employer Brief at 27-30, 32-36. We agree with Employer's argument, in part.

As Employer asserts, the ALJ did not consider relevant evidence in finding the medical opinion evidence supports a diagnosis of legal pneumoconiosis. Employer's Brief at 32-36. Specifically, in considering Dr. Tuteur's reasons for disagreeing with Dr. Sood's diagnosis of legal pneumoconiosis, the ALJ declined to credit his opinion because Dr.

[12] "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).

[13] Employer also argues the Section 411(c)(4) presumption does not apply and contends its experts' opinions support rebuttal. Employer's Brief at 18-19. However, the ALJ did not find the presumption invoked as Claimant had less than fifteen years of coal mine employment. Decision and Order at 7. We therefore decline to address these arguments.

Tuteur was directly addressing a deposition of Dr. Sood that the ALJ stated is not of record. Decision and Order at 12, n.7. However, the transcripts of Dr. Sood's deposition testimony, taken on two different occasions, are of record. Director's Exhibits 77, 83. The ALJ also did not consider Dr. Tuteur's deposition testimony. Director's Exhibit 79. Similarly, the ALJ provided no analysis of the treatment records, which Employer argues do not support Claimant's entitlement. Employer's Brief at 26-37; Employer's Exhibits 8-11. Because the ALJ failed to consider the depositions of Drs. Sood and Tuteur and the treatment records, remand is required. *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Moreover, while the ALJ provided an extensive analysis of whether Employer's experts adequately explained their rationales, he summarily concluded the opinions of Claimant's experts were well-reasoned, documented, and sufficient to establish legal pneumoconiosis. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-140 (1999) (en banc) (an ALJ must apply the same level of scrutiny in determining the credibility of the medical opinion evidence); Decision and Order at 15-17; Employer's Brief at 38-40. Here, the ALJ did not explain how Drs. Sood's, Raj's, and Nader's opinions are sufficient to meet Claimant's burden to establish legal pneumoconiosis. 20 C.F.R. §§718.201(a)(3), 718.202(a)(4). Because the ALJ did not explain the bases for his crediting of the opinions of Drs. Sood, Raj, and Nader, his findings do not comply with the APA.[14] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Thus, we must vacate the ALJ's finding that the medical opinion evidence establishes legal pneumoconiosis.[15] Decision and Order at 17.

However, we affirm the ALJ's determination that Dr. Farney's opinion that Claimant does not have legal pneumoconiosis is not well-reasoned. Decision and Order at 16-17. Specifically, the ALJ found that Dr. Farney opined Claimant does not have legal pneumoconiosis based, in part, on his opinion that Claimant's risk of developing pneumoconiosis was very low as he worked at surface mines. Decision and Order at 16-

[14] The Administrative Procedure Act, 5 U.S.C. §§500-591, 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[15] Employer argues it appears the ALJ impermissibly "counted heads" to find more physicians found legal pneumoconiosis than not and thus found it established. Employer's Brief at 30. While this theory is possible, it is not the only explanation given the ALJ's findings.

17. The ALJ found this opinion contrary to DOL's regulations. Decision and Order at 16-17; Employer's Exhibit 11. In addition, the ALJ found Dr. Farney's explanation that a miner who is sensitive to coal mine dust exposure would generally need thirty years of coal mine employment to develop legal or clinical pneumoconiosis is contrary to the regulations.[16] *See N. Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); Decision and Order at 16, *citing* 20 C.F.R. §§718.203, 718.305; Employer's Exhibit 11. As Employer has not challenged these determinations, we affirm the ALJ's conclusion that Dr. Farney's opinion that Claimant does not have legal pneumoconiosis is entitled to little weight.[17] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15-16.

Clinical Pneumoconiosis

The ALJ determined Claimant established clinical pneumoconiosis[18] based on the medical opinion evidence.[19] The ALJ considered the medical opinions of Drs. Raj and Nader diagnosing clinical pneumoconiosis and the contrary opinions of Drs. Sood, Tuteur, and Farney. Decision and Order 8-9; Director's Exhibits 12, 28, 32; Claimant's Exhibits

[16] Employer also contends the ALJ erred in relying on the preamble in discrediting the medical evidence. Employer's Brief at 25-26. However, as the Director notes, the ALJ's only use of the preamble was to find that Dr. Farney's opinion that obstruction is uncommon in above-ground workers is inconsistent with the DOL's recognition that coal mine dust exposure is associated with obstructive lung disease and cigarette smoke adds to that risk. Decision and Order at 17. As this principle is irrelevant to the consideration of Dr. Farney's opinion because he did not find obstruction in this case, we decline to address it.

[17] We decline to address, as premature, the ALJ's credibility findings regarding Dr. Tuteur's opinion given his failure to consider the entirety of Dr. Tuteur's opinion. *See* Employer's Brief; Director's Exhibit 79.

[18] "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).

[19] The ALJ determined the x-ray evidence did not establish clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 7. There is no biopsy evidence of record; thus, Claimant cannot establish clinical pneumoconiosis under 20 C.F.R. §718.202(a)(2). *Id.* at 7.

1-2; Employer's Exhibit 11; Hearing Testimony at 33-93. The ALJ credited the opinions of Drs. Sood, Raj, and Nader over those of Drs. Tuteur and Farney, whose opinions he found were not well-reasoned or documented. Decision and Order at 17. He therefore determined the medical opinion evidence established clinical pneumoconiosis. *Id*.

The ALJ simultaneously considered whether the medical opinion evidence established clinical and legal pneumoconiosis. Decision and Order at 17. Thus, the same errors he made when considering legal pneumoconiosis are present in his analysis of clinical pneumoconiosis. Specifically, he did not consider the depositions of Drs. Tuteur and Sood and the treatment records.[20] Director's Exhibits 77, 79, 83; Employer's Exhibits 8-11. Because the ALJ failed to consider relevant evidence, remand is required. *McCune*, 6 BLR at 1-998.

Furthermore, we agree with Employer's argument that the ALJ erred in failing to explain his reliance on Drs. Nader's and Raj's opinions. Employer's Brief at 27, 37. Specifically, the ALJ offered no basis for determining their opinions are well-reasoned and documented and did not address their diagnoses of clinical pneumoconiosis in the context of the negative x-ray evidence.[21] *Wojtowicz*, 12 BLR at 1-165. We further note the ALJ did not explain how Dr. Sood's opinion, which did not diagnose clinical pneumoconiosis, supported a finding of pneumoconiosis. Decision and Order at 17; Director's Exhibit 12.

Nonetheless, we affirm the ALJ's discrediting of Dr. Farney's opinion regarding the absence of clinical pneumoconiosis. Decision and Order at 16. As the ALJ indicated, Dr. Farney opined that more than thirty years of coal mine employment is generally required for a sensitive individual to develop either form of pneumoconiosis, a finding which the ALJ found contrary to the regulations. Decision and Order at 16. Employer does not specifically challenge this finding; thus, it is affirmed. *See Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370; *see also Skrack*, 6 BLR at 1-711.

Further, as Employer argues, the ALJ did not consider Dr. Meyer's negative interpretation of a June 16, 2017 CT scan. Employer's Brief at 32; Employer's Exhibit 14; 20 C.F.R. § 718.107. While the ALJ summarized Dr. Meyer's interpretation, he made no finding regarding whether this evidence weighed against a finding of clinical

[20] We decline to address as premature the ALJ's credibility findings regarding Dr. Tuteur's opinions given his failure to consider the entirety of Dr. Tuteur's opinions. *See* Employer's Brief; Director's Exhibit 79.

[21] A physician's opinion which is merely a restatement of an x-ray interpretation is not a reasoned medical opinion. 20 C.F.R. §§718.202(a)(1), (4), 725.414(a).

pneumoconiosis, nor did he weigh it with the other evidence on the issue. *McCune*, 6 BLR at 1-998; Decision and Order at 6, 17.

We therefore vacate the ALJ's finding that the evidence establishes clinical pneumoconiosis and remand this case for further consideration. *See* 30 U.S.C. §923(b); *Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998.

Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by qualifying pulmonary function studies or arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant established total disability based on the medical opinion evidence. Decision and Order at 18; 20 C.F.R. §718.204(b)(2)(iv).

The record contains five pulmonary function studies conducted on May 6, 2014, September 16, 2014, September 24, 2014, October 12, 2018, and on October 14, 2018. Director's Exhibits 12, 28, 31; Claimant's Exhibits 1-2. The ALJ determined the May 6, 2014, October 12, 2018, and October 14, 2018 studies were qualifying[22] while the September 16, 2014 and September 24, 2014 studies were non-qualifying. Decision and Order at 5. Employer contends the ALJ erred in failing to address the validity of the pulmonary function studies. Employer's Brief at 7-9, 27-28, 33-34. We agree.

The ALJ failed to determine whether the pulmonary function study evidence supported a finding of total disability. 20 C.F.R. §718.204(b)(2)(i). He also did not consider medical opinion evidence relevant to the validity of the studies.[23] *See* Appendix

[22] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[23] Dr. Renn opined the May 6, 2014 pulmonary function study was invalid. Director's Exhibit 18. Dr. Sood agreed it is not technically valid. Director's Exhibit 82. Dr. Farney opined the October 12, 2018 and October 14, 2018 pulmonary function studies

B to 20 C.F.R. Part 718; *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984) (the party challenging the validity of a study has the burden to establish the results are suspect or unreliable). Consequently, we cannot affirm his determination that the evidence establishes total disability.[24] *See* 30 U.S.C. §923(b); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *McCune*, 6 BLR at 1-998. We must remand the case for consideration of whether the pulmonary function study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i).

The record also contains five arterial blood gas studies conducted on May 6, 2014, September 16, 2014, September 24, 2014, October 12, 2018, and on October 14, 2018. Director's Exhibits 12, 28, 31; Claimant's Exhibits 1, 2. The ALJ determined the September 24, 2014 study was non-qualifying, but the remaining four studies were qualifying. Decision and Order at 6. Employer contends the ALJ erred in not considering evidence relevant to the validity and reliability of these studies.[25] Employer's Brief at 8-9, 27-28, 33-34. We agree.

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and their associated diffusion capacity testing are invalid. Employer's Exhibits 1-2. Dr. Farney also opined the September 24, 2014 pulmonary function study would not demonstrate total disability as it did not take into account Claimant's ethnicity. Employer's Exhibit 5.

[24] To avoid repetition of error on remand, we note that the ALJ appears to have averaged Claimant's ages at the time of his examination instead of his heights in determining which of the pulmonary function studies are qualifying and non-qualifying. Decision and Order at 5 n.5. On remand, the ALJ should first determine Claimant's actual height and then determine which of the studies are qualifying for total disability, if any. See *Protopappas v. Director*, OWCP, 6 BLR 1-221, 1-223 (1983); *see also Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 n.6 (4th Cir. 1995) (noting the Office of Workers' Compensation Programs Procedure Manual specifically mandates using the closest greater height when a miner's actual height falls between heights listed in the table).

[25] Dr. Renn opined the May 6, 2014 arterial blood gas study showed deficiency in quality control of the equipment used. Director's Exhibit 18. Dr. Tuteur opined that when corrected for the barometric pressure and altitude the May 6, 2014 study is absolutely normal. Director's Exhibit 32. Dr. Sood agreed that based on the alveolar-arterial gradient the May 6, 2014 study does not demonstrate total disability. Director's Exhibit 83 at 54-55. Dr. Farney questioned the reliability of the values at Appendix C when considering each of the arterial blood gas studies, as they were "just qualifying," a laboratory will have

The ALJ did not determine if the arterial blood gas studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii). He also failed to determine whether the studies are valid and reliable for establishing total disability. *See* 30 U.S.C. §923(b); *Rowe*, 710 F.2d at 255; *McCune*, 6 BLR at 1-998. As the ALJ failed to consider relevant evidence we must remand for determination of whether the arterial blood gas study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii).

In considering the medical opinion evidence, the ALJ considered the opinions of Drs. Raj, Nader, and Sood that Claimant has a totally disabling respiratory impairment; Dr. Tuteur's opinion that Claimant has a totally disabling cardiac impairment; and Dr. Farney's opinion that Claimant is totally disabled from performing strenuous labor due to hypoxia arising from non-pulmonary conditions. Director's Exhibits 12, 28, 32; Claimant's Exhibits 1-2; Employer's Exhibit 11; Hearing Transcript at 33-93. The ALJ concluded the opinions of Drs. Raj, Nader and Sood establish total disability. Decision and Order at 18. Employer argues the ALJ erred in his weighing of the medical opinion evidence. Employer's Brief at 36-38. We agree.

In addition to failing to explain how the opinions of Drs. Raj, Nader and Sood establish total disability, the ALJ found that Dr. Farney's opinion was based on the erroneous conclusion that Claimant's coal mine employment required only "minimal" physical activity. Decision and Order 18. However, while the ALJ found Claimant's usual coal mine employment was as a coal hauler, a determination we affirm as unchallenged, he did not determine the exertional requirements of that job. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19 (6th Cir. 1996); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Skrack*, 6 BLR at 1-711; Decision and Order at 3. Specifically, the ALJ disagreed with Dr. Farney's characterization that Claimant's coal mine employment required only "minimal" physical activity, citing Claimant's testimony that he had to "climb in and out of his tractor-trailer; had to pre-check his tractor trailer before crawling beneath it; and sometimes had to assist in repair of the tractor trailer."[26] Decision and Order at 14 n. 9. He also noted Drs. Raj's

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a 1-2 mmHg variance in testing, and Appendix C is not corrected for exercise or age and is only grossly corrected for elevation. Employer's Exhibits 1, 2, 11.

[26] Claimant also testified that he carried nothing heavier than his lunch bucket, walked alongside his equipment but did no "long distance" walking, climbed about nine steps to get into his equipment, and would sometimes help fix "minor stuff." Hearing Transcript at 13-14, 22.

and Nader's indication that Claimant's coal mining job required "moderate" exertion[27] and Dr. Sood's statement that it required "85% light exertion and 15% heavy exertion." *Id.* However, he did not resolve the conflicting accounts and make a finding of the actual exertional requirements.[28] Furthermore, he did not determine if the physicians who found total disability understood these requirements.[29] *See Lane*, 105 F.3d at 172; *Ward*, 93 F.3d at 218-19; *McMath*, 12 BLR at 1-9.

Again, the ALJ did not consider the depositions of Drs. Sood and Tuteur and the treatment records. *McCune*, 6 BLR at 1-998; Director's Exhibits 77, 79, 83. As the ALJ failed to consider all relevant evidence and resolve the conflicting evidence, we must vacate his finding that Claimant established total disability and remand for further consideration of the evidence. 20 C.F.R. §718.204; *Wojtowicz*, 12 at 1-165; *Eagle v. Armco, Inc*, 943 F.2d 509, 512 n.4 (4th Cir. 1991); *McCune*, 6 BLR at 1-998. Because we have vacated the ALJ's findings regarding pneumoconiosis[30] and total disability, we must

[27] Drs. Raj and Nader indicated that Claimant's job required him to pull and carry "20 pounds of high-pressure hoses for clearing and shoveling the tracks of equipment." Claimant's Exhibits 1-2.

[28] Also of record regarding this issue is Claimant's CM-913 from his application for benefits under the Act. Director's Exhibit 4.

[29] As the ALJ found, Dr. Farney indicated that Claimant would be unable to do strenuous work but did not specifically testify that Claimant could perform his usual coal mine employment. Decision and Order at 14, *citing* Hearing Transcript at 35-36; Employer's Exhibit 11 at 38.

[30] Employer also argues that Claimant failed to establish his legal pneumoconiosis arose out of his coal mine employment as the presumption at 20 C.F.R. §718.203(b) that is invoked with ten years of coal mine employment applies only to clinical pneumoconiosis. Employer's Brief at 37. Employer is correct that the presumption under 20 C.F.R. §718.203(b) does not apply to legal pneumoconiosis; however, that is because a finding of legal pneumoconiosis necessarily subsumes that inquiry. 20 C.F.R. §718.201; *Andersen v. Director, OWCP*, 455 F.3d 1102, 1105-06 (10th Cir. 2006) (Section 718.203(b) rebuttable presumption does not extend to claims of legal pneumoconiosis); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999) (a separate determination of etiology at Section 718.203 is unnecessary with a finding of legal pneumoconiosis at Section 718.202(a)(4)). If on remand the ALJ again finds legal pneumoconiosis established, Claimant will have established his pneumoconiosis arose out of his coal mine employment. *Id.*

also vacate his determinations regarding disability causation and the award of benefits. Decision and Order at 18-19; 20 C.F.R. §718.204(c).

Remand Instructions

On remand, the ALJ must first reconsider whether Claimant has established legal pneumoconiosis, considering all relevant evidence. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4). The ALJ must determine if the medical opinions are adequately reasoned, taking into consideration the physicians' credentials, explanations for their conclusions, understanding of Claimant's work history,[31] documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Gunderson v. United States Department of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Pickup*, 100 F.3d at 873. The ALJ should then weigh all relevant evidence to determine whether it establishes clinical pneumoconiosis. 20 C.F.R. §718.201(a)(1).

If the ALJ finds either or both forms of pneumoconiosis established, he must then determine if Claimant has established total disability. 20 C.F.R. §718.204(b)(2). The ALJ should first determine if the objective testing establishes total disability at 20 C.F.R. §718.204(b)(2)(i), (ii), including resolving any questions as to the validity of the individual tests.[32] The ALJ must undertake a quantitative and qualitative analysis of the evidence in reaching his conclusions. *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 149 n.23 (1987) (ALJ must "weigh the quality, and not just the quantity, of the evidence").

Prior to reconsidering whether the medical opinion evidence establishes total disability, the ALJ must determine the exertional requirements of Claimant's usual coal mine employment. *See Lane*, 105 F.3d at 172; *Ward*, 93 F.3d at 218-19; *McMath*, 12 BLR at 1-9. He must then determine if the medical opinion evidence and treatment records

[31] Employer argues the ALJ did not consider that Drs. Nader and Raj believed that Claimant worked as a coal miner for fifteen years rather than the ALJ's finding of 13.5 years. Employer's Brief at 35. While the ALJ notes his finding of the length of coal mine employment differs "slightly" from those in the medical reports, he does not address how such differences affect the credibility of the physicians' opinions, if at all. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993) (where a discrepancy exists between the ALJ's findings and a physician's assumption regarding the length of a miner's coal mine work history, he must explain how it affects the credibility of the physician's opinion); Decision and Order at 17 n.13.

[32] The ALJ must also consider whether the evidence establishes Claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); *see* Director's Exhibit 79 at 72-73.

support a finding of total disability, taking into consideration the physician's understandings of the exertional requirements of Claimant's usual coal mine employment. *See Gunderson*, 601 F.3d at 1024; *Pickup*, 100 F.3d at 873. If the ALJ finds the pulmonary function studies, blood gas studies, or medical opinions support a finding of total disability, he must weigh all the relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

The ALJ must then reconsider whether Claimant has established his pneumoconiosis arose out of his coal mine employment, and whether his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.201(1), 718.204(c)(1). In making his determinations, the ALJ must set forth his findings and conclusions as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Attorney Fee Order

On August 25, 2020, Claimant's counsel filed an itemized fee petition requesting $17,162.60 for legal services performed, and expenses incurred, before the Office of Administrative Law Judges from June 28, 2018 to August 11, 2020. The total fee requested represents: $7,700.00 for 22 hours of legal services by Attorney Joseph E. Wolfe at an hourly rate of $350.00; $2,650.00 for 13.25 hours of legal services by Attorney Brad A. Austin at an hourly rate of $200.00; $150.00 for one hour of legal services by Attorney Rachel Wolfe at an hourly rate of $150.00; $2,925.00 for 29.25 hours of services by legal assistants at an hourly rate of $100.00; and expenses in the amount of $3,737.60. ALJ Fee Request at 1, 11.

Employer objected to Mr. Wolfe's hourly rate, and certain services and expenses. Employer's Objections at 2-8. The ALJ awarded the requested hourly rates and expenses, but disallowed certain time entries. Attorney Fee Order at 4, 7-9. The ALJ awarded a total of $14,100.10 for fees and costs. *Id.* at 8.

On appeal, Employer contends the ALJ erred in approving Mr. Wolfe's hourly rate of $350.00, allowing quarterly billing, allowing clerical entries and entries by counsel which should have been delegated to paralegals, and finding all of Claimant's counsel's expenses compensable.[33] Employer's Brief at 40-47. Claimant urges affirmance of the

[33] Employer also objects to entries for thirteen hours of work performed when the case was before the district director. Employer's Brief at 43. However, the ALJ considered this argument and excluded the time before the district director, including six hours of

ALJ's findings regarding legal services and expenses. Claimant's Response at 31-35. The Director did not respond to Employer's appeal of the ALJ's fee award.[34]

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. *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 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). Fees are, of course, dependent upon Claimant's being successful in this litigation. In the event that should be the case, we make the following determinations for purposes of judicial economy.

Hourly Rates

Employer first argues the ALJ erred in approving an hourly rate of $350.00 for Mr. Wolfe. Employer's Brief at 41. We disagree.

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 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

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Attorney Joseph Wolfe's time, 1.75 hours of Attorney Austin's time, and 5.25 hours of legal assistant time. Attorney Fee Order at 4-5. Thus, Employer's argument is moot.

[34] We affirm, as unchallenged on appeal, the ALJ's approval of the hourly rates of Attorney Austin, Attorney Rachel Wolfe, and the legal assistants, as well as $150.00 in costs for the hearing transcript. *See Skrack*, 6 BLR at 1-711; Attorney Fee Order at 7-8; Employer's Brief at 41, 47.

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). Employer contends Mr. Wolfe failed to support the hourly rate he requested with market evidence and argues that "rates that the Board or ALJ's [*sic*] approved, in this case, are not controlling." Employer's Brief at 42.

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. Mr. Wolfe submitted a list of sixty-eight prior fee awards in support of his requested hourly rate. The ALJ considered these as well as Employer's submission of two fee petitions from other attorneys who practice black lung law in different states requesting an hourly rate of $275.00. However, he permissibly found the sixty-eight fee awards that Claimant's counsel submitted "speak much more directly" to the question of a reasonable hourly rate for Claimant's counsel than do the fee petitions of different attorneys practicing in different locations, and as to whom Employer submitted no evidence of their experience or qualifications. Attorney Fee Order at 4 & n.2; *see Bentley*, 522 F.3d at 666. Therefore, we affirm the ALJ's approval of Mr. Wolfe's hourly rate of $350.00 for services performed in this case. *Id.*

Billable Hours

Employer challenges counsel's use of quarter-hour billing. Employer's Brief at 44-46. Contrary to Employer's contention, an ALJ may permissibly award a fee based on quarter-hour minimum increments. *See Gosnell*, 724 F.3d at 576; *Bentley*, 522 F.3d at 666. Moreover, the ALJ considered each time entry and further determined the overall fee was reasonable under the circumstances. Attorney Fee Order at 5-6. Accordingly, we reject Employer's argument that the ALJ erred in permitting quarter-hour billing.

Employer also challenges certain entries as clerical in nature, although it does not specify which time entries fall into this category. Employer's Brief at 46-47. Traditional clerical duties, whether performed by clerical employees or counsel, are not properly compensable services for which separate billing is permissible, but rather must be included as part of overhead in setting the hourly rate. *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217-18 (1986); *McKee v. Director, OWCP*, 6 BLR 1-233, 1-238 (1983). The ALJ considered the time entries to determine if they involved clerical work. Attorney Fee Order at 6-7. He reduced Mr. Wolfe's time by 0.25 of an hour for an entry dated July 22, 2019, which he found to be clerical in nature. *Id.* at 7. As Employer points to no other specific entries that it claims should be reduced as clerical in nature and we discern no abuse of

discretion by the ALJ in reducing the time entries by this amount, we affirm the ALJ's determination. *Bentley*, 522 F.3d at 666; *Jones*, 21 BLR at 1-108.

Employer further argues the ALJ should have reduced the fee because Claimant's counsel did not properly utilize legal assistants and thereby limit the fee amount. Employer's Brief at 45. Employer argues that many tasks Mr. Wolfe performed could have been done by someone with a lower hourly rate. *Id.* at 46. The ALJ declined to pass judgment on counsel's management of his office and thus allowed the challenged time entries. Attorney Fee Order at 5, 7.

As the ALJ concluded, the question in determining a compensable fee 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."). Rather, it is whether the work and time that counsel requested were reasonable and necessary to establish Claimant's entitlement to benefits at the time the work was performed. *See Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999). Because Employer has not shown the ALJ abused his discretion, we affirm his determination to allow the challenged time entries.[35] *See Bentley*, 522 F.3d at 666-67; *Whitaker*, 9 BLR at 1-217.

Finally, Employer objects to what it alleges is duplicate time spent by a paralegal. Employer's Brief at 46 n.19. Specifically, Employer argues that time spent by paralegal Roman G. Williams on November 6, 2019 and November 8, 2019, for obtaining Director's exhibits, was unnecessary given Mr. Wolfe's previously billed time for reviewing the Director's exhibits. *Id.* We disagree. On March 1, 2019, Mr. Wolfe reviewed and analyzed a copy of the Director's exhibits from Denver. ALJ Fee Request at 16. On November 6, 2019, Mr. Williams requested a new copy of the CD storing the Director's exhibits as the firm did not have the necessary password to access the original copy of the Director's exhibits. *Id*. at 22. After receiving the password and discovering the file was corrupted, a

[35] Employer also generally argues that Mr. Wolfe sets forth block-billed time. Employer's Brief at 45. However, Employer has not identified which entries it alleges include block-billed time or explained how the use of block billing prevented the ALJ from determining whether the requested time was reasonable. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 316 (1984). Thus, we decline to address this argument as inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

week before the hearing, Mr. Williams drove to Pikeville, Kentucky to obtain an uncorrupted copy of the CD. *Id.* We see no abuse of discretion in the ALJ's determination that while the task might not have been necessary "under some circumstances," that did not mean it was unnecessary under the "actual circumstances." *See Murphy*, 21 BLR at 1-120; *Bentley*, 522 F.3d at 666-67; Attorney Fee Order at 7. We therefore affirm his decision to allow Mr. Williams's time entries on November 6, 2019 and November 8, 2019. Attorney Fee Order at 7.

Expenses

Employer contends the ALJ erred in approving expenses for Claimant's travel to, and attendance at, his two independent medical examinations (IMEs) "clear across the country" in Norton, Virginia. Employer's Brief at 47-48. Additionally, Employer argues that the cost of obtaining medical records should have been disallowed as part of office overhead. *Id.* Claimant responds that the expenses for travel from his residence in New Mexico and attendance at IMEs in Norton, Virginia were necessary and cost-effective given the lack of qualified pulmonary experts in the western United States. Claimant's Response at 34-35.

The ALJ allowed the costs incurred for Claimant's travel to and attendance at the examinations in Norton, Virginia, finding Claimant's counsel provided a "satisfactory explanation" for his decision to do so. Attorney Fee Order at 7. Claimant's explanation to the ALJ was similar to that made in his response here: because only one physician in the western United States performs IMEs in black lung claims, traveling to Virginia for IMEs was the most cost-effective option to obtain them. *See* October 2020 Meet and Confer Letter. We detect no abuse of discretion in the ALJ's determination that these expenses were reasonable under the circumstances. *See* 20 C.F.R. §725.366(c).

However, the ALJ did not address Employer's objection to the $50.00 spent to obtain medical records, which it alleges should be excluded as office overhead. Employer's Brief at 47. Thus, we vacate the ALJ's granting of this expense, and on remand the ALJ should consider Employer's objection.

Because Employer has not demonstrated an abuse of discretion regarding the attorneys' fees, we affirm the ALJ's award of $10,362.50. *See Jones*, 21 BLR at 1-108. We further affirm $3,687.60 in expenses but vacate $50.00 in expenses. On remand, the ALJ should consider if the $50.00 for requesting medical records was reasonable and

necessary to establish entitlement to benefits or merely part of ordinary office overhead. *See Murphy*, 21 BLR at 1-120; *Whitaker*, 9 BLR at 1-217; *see also Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989) (Order) (to the extent certain expenses are found reasonable and necessary, they will not be automatically disallowed on the ground such expenses are a part of office overhead).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Awarding Benefits and Attorney Fee Order and remand the case for further consideration consistent with this decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge