

U.S. Department of Labor

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



BRB No. 21-0445 BLA

ROBERT TOCYLOSKI)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MALLARD CONTRACTING COMPANY,)	
INCORPORATED)	
)	
and)	
)	
ROCKWOOD CASUALTY INSURANCE)	DATE ISSUED: 9/27/2022
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney's Fees of Lystra A. Harris, Administrative Law Judge, Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for Claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant's counsel (counsel), Helen M. Koschoff, appeals Administrative Law Judge (ALJ) Lystra A. Harris's Supplemental Decision and Order Granting Attorney's Fees (2019-BLA-05282) issued in connection with the successful prosecution of a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

For work performed before the ALJ, counsel requested \$20,719.59 in fees and expenses, representing \$20,100 for 60 hours of legal services at an hourly rate of \$335.00 and \$619.59 in expenses. In support of her fee petition, counsel attached an itemized statement describing the work she performed and the expenses incurred in the proceedings before the ALJ between April 24, 2017 and February 20, 2020. Attorney's Fee Petition at 5-24. Employer filed no objections to the fee petition.

The ALJ found counsel's hourly rate to be reasonable and allowed all requested expenses. Decision and Order at 2, 4-5. The expenses awarded included counsel's mileage costs for traveling 114.06 miles to and from the hearing. *Id.* at 5. While the ALJ allowed the majority of the time requested, she disallowed sixteen itemized entries amounting to 7.75 hours on the basis that the entries were clerical in nature.¹ *Id.* at 3-4. Based on these findings, the ALJ awarded \$17,587.50 in fees for legal services. *Id.* at 4.

On appeal, counsel alleges the ALJ erred in disallowing the hours requested. Employer responds in support of the awarded fee.² The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

¹ The ALJ and counsel both indicate the disallowed hours total \$2,512.50 in fees. Decision and Order at 4 n.1; Claimant's Brief at 3. This appears to be an error in arithmetic, as 7.75 hours at an hourly rate of \$335.00 totals \$2,596.25. In addition, even assuming the ALJ permissibly excluded the entire 7.75 hours, her award of \$17,587.50 in fees for legal services was based on incorrect arithmetic, as 52.25 hours at an hourly rate of \$335.00 totals \$17,503.75. *See* Decision and Order at 5.

² We affirm, as unchallenged by the parties, the ALJ's approval of counsel's hourly rate of \$335.00 and \$619.59 in requested expenses. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

discretion, 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). A request for attorneys' fees must be "reasonably commensurate with the necessary work done." 20 C.F.R. §725.366(b). Work is considered necessary if an attorney, at the time he or she performs the service, could reasonably regard the work as necessary to establish entitlement. See *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984).

Counsel argues the ALJ erred in disallowing her entry of 4.0 hours on June 27, 2019, for "[t]ravel to/from and attendance at hearing, etc.," as clerical. Claimant's Brief at 5. We agree. Counsel's attendance and representation of Claimant at the hearing before the ALJ is not a clerical task but essential to client representation and clearly necessary to establish entitlement. See, e.g., *Branham v. E. Assoc. Coal Corp.*, 19 BLR 1-1, 1-3-4 (1994); Counsel's Brief at 2, 5-6. The ALJ's disallowance of the time required to attend the hearing was thus inconsistent with applicable law. See *Jones*, 21 BLR at 1-108; *Branham*, 19 BLR at 1-3-4; *Lanning*, 7 BLR at 1-316. We therefore reverse the ALJ's disallowance of that time.

Employer and the ALJ both also acknowledge reasonable and necessary travel time and expenses to attend a hearing may be compensable. See 20 C.F.R. §§725.366(b), (c), 725.459(a); *Branham*, 19 BLR at 1-4; *Bradley v. Director, OWCP*, 4 BLR 1-241, 1-245 (1981); Employer's Brief at 3; Decision and Order at 4. Employer, suggests the ALJ may have excluded the entire June 27, 2019 entry as too vague to determine its reasonableness because it combined both travel time and attendance at the hearing with undescribed "miscellaneous items identified as 'etc.'" Employer's Response at 4 (quoting counsel's fee petition). However, the ALJ did not make this finding. Further, we note that a number of counsel's time entries ended with a general "etc." Counsel's Fee Petition. The ALJ allowed many of these entries. In addition, because Employer raised no objections to the fee petition before the ALJ, to the extent it now objects that the time entry is vague, its objection is not properly before the Board. See *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Abbott*, 13 BLR at 1-16 (all objections to the fee petition must be raised prior to the fee award); *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987).

³ The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

Here, the ALJ awarded counsel mileage costs for driving 114.06 miles to and from the hearing, finding those costs reasonable and necessary.⁴ Decision and Order at 4-5. Her disallowance of counsel's travel time to drive those miles on the grounds that it was a clerical task was an abuse of discretion. See *Abbott*, 13 BLR at 1-16; Decision and Order at 4-5; Counsel's Fee Petition.

The hearing transcript reflects that the hearing took one hour and seven minutes. Hearing Tr. at 1, 46. Employer does not suggest that counsel could have driven 114 miles in any time less than the approximately 3 hours remaining in counsel's June 27, 2019 time entry. We therefore reverse the ALJ's disallowance of 4.0 hours on June 27, 2019 for counsel's travel time to and from, as well as participating in, the hearing.

Counsel further argues the ALJ erred in disallowing the remaining 3.75 hours of time entries as clerical when counsel performed the work and not any clerical staff.⁵ We disagree.

Clerical duties, whether performed by employees or counsel, are not compensable and 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). Whether a task is clerical does not depend on the individual performing the work, but on the nature of the work performed. See *Whitaker*, 9 BLR at 1-217-18; *McKee*, 6 BLR at 1-238. Because counsel fails to otherwise explain how the ALJ erred in excluding 3.75 hours of time as clerical in nature, these findings are affirmed. See *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987) (the appealing party must identify alleged errors with specificity); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Based on our holdings, and to correct the ALJ's calculation errors, we modify the fee award by adding four hours to the time that the ALJ granted, resulting in 56.25 hours, and multiplying those total hours by counsel's approved hourly rate of \$335.00. We therefore modify the fee for counsel's legal services from \$17,587.50 to \$18,843.75.

⁴ As we noted above, Employer does not challenge the award of counsel's mileage costs for driving to and from the hearing. *Supra*, n.2.

⁵ The dates of the excluded time entries are June 6, 2017, June 7, 2017, June 12, 2017, June 19, 2017, July 2, 2017, July 10, 2017, August 8, 2018, August 9, 2018, April 12, 2019, May 7, 2019, September 26, 2019, September 30, 2019 (three separate time entries), and October 1, 2019. Decision and Order at 3-4.

Accordingly, we affirm in part and reverse in part the ALJ's Supplemental Decision and Order Granting Attorney's Fees, and modify the award to reflect a fee of \$18,843.75 and expenses of \$619.59.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge