**U.S. Department of Labor**

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

BRB Nos. 18-0612 BLA
and 18-0613 BLA

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| JUDY CAROL TAYLOR<br>(Widow of WALTER H. TAYLOR)<br><br>Claimant-Respondent<br><br>v.<br><br>NATS CREEK MINING COMPANY<br><br>and<br><br>OLD REPUBLIC INSURANCE COMPANY<br><br>Employer/Carrier-<br>Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 12/16/2019<br><br>DECISION and ORDER |

Appeal of the Attorney Fee Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

BUZZARD, Administrative Appeals Judge:

Employer appeals the Attorney Fee Order (2013-BLA-05748 and 2016-BLA-05358) of Administrative Law Judge Joseph E. Kane granting claimant's counsel (counsel) an attorney's fee in connection with a miner's claim and a survivor's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

For work performed before the administrative law judge, counsel requested $10,587.50 for forty-five hours of legal work in the miner's claim, $200.00 for 0.75 hour of legal work in the survivor's claim, and $3,035.65 in expenses, for a total of $13,823.15. Counsel requested $350.00 per hour for services by Joseph Wolfe, $300.00 per hour for Andrew Delph, Jr., $200.00 per hour for Brad Austin, $225.00 per hour for Ryan Gilligan, $150.00 per hour for Rachel Wolfe, and $100.00 per hour for the legal assistants. The administrative law judge rejected employer's objections and awarded the requested attorney's fee and costs in full. Attorney Fee Order (Order) at 2-3.

Employer appeals the fee award. Counsel responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging the Board to reject employer's Appointments Clause argument but does not take a position on the merits of the fee award. Employer filed a reply brief.

When an attorney prevails on behalf of a client, the Act provides that the employer, its insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to the claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The amount of an attorney fee award by an administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989) (citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980)); *see also Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

**Appointments Clause**

Employer contends the administrative law judge's fee award should be vacated because he was not properly appointed under the Appointments Clause of the United States Constitution, Art. II, §2, cl. 2, and lacked the authority to adjudicate the fee request. *See Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018). Employer also challenges the Secretary's

ratification of the administrative law judge's appointment and the limitations applicable to removing administrative law judges. Employer thus urges remand for a different, properly appointed administrative law judge to rule on the fee request. The Director responds, asserting the Appointments Clause challenge was not timely raised because it was not raised while this claim was being decided on the merits. Claimant's counsel also urges the Board to reject employer's argument. Employer replies that its argument is timely because it raised the issue before the administrative law judge in its objections to counsel's fee request and before the Board in its opening brief. We reject employer's arguments and deny the relief requested.

In April 2018, the administrative law judge issued separate decisions in which he awarded miner's and survivor's benefits. Employer appealed the administrative law judge's decision in the miner's claim, but eventually withdrew its appeal. *Taylor v. Nats Creek Mining Co.*, BRB No. 18-0363 BLA (June 29, 2018) (Order dismissing appeal). In May 2018, claimant's counsel filed a fee petition with the administrative law judge, to which employer filed objections on June 4, 2018.[1] On August 30, 2018, the administrative law judge issued the Order awarding fees and costs for work performed in both the miner's and survivor's claims.

The Act's regulations require the administrative law judge before whom the legal services were rendered to determine the attorney's fee petition if he or she is available to do so. 20 C.F.R. §702.132; *see Ayers Steamship Co. v. Bryant*, 544 F.2d 812 (5th Cir. 1977) (administrative law judge who heard the merits is in the best position to award a fee for the attorney's work); Director's Response at 4. The determination of the amount of an attorney's fee is ancillary to proceedings on the merits of the case. The Appointments Clause issue is "non-jurisdictional," and, thus, is subject to the doctrines of waiver and forfeiture. *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009). A party who fails to properly preserve a challenge to the administrative law judge's authority on the merits of entitlement cannot raise such challenge in an ancillary attorney's fee proceeding. *Aguilar v. Navy Exch. Serv. Command*, BRB No. 18-0327, slip op. at 3 (Dec. 20, 2018) (unpub.). Employer first raised its Appointments Clause argument in its objections to the fee request before the administrative law judge, but did not challenge his authority to hear

[1] At the time employer filed objections to claimant's counsel's fee petition, the Supreme Court had not yet issued its decision in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018). Employer therefore referenced the circuit court's decision in *Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd on reh'g*, (June 26, 2017), *petitions for cert. granted*, U.S. No. 17-130 (Jan. 12, 2018). Opposition to Fee Petition at 1 n.1.

and decide the case at any time during the proceedings on the merits. Therefore, employer forfeited its opportunity to raise the Appointments Clause issue with regard to those decisions and the current, ancillary proceeding on attorney's fees.[2] *See Lucia*, 138 S. Ct. at 2055; *Aguilar*, slip op. at 3.

**Attorney Fee**

Employer also challenges the amount of the administrative law judge's fee award.[3] It contends the administrative law judge failed to apply the correct standard of proof because he required counsel to establish only the "reasonableness" of the requested hourly rates and not the prevailing market rates. Employer's Brief at 8. Employer also argues the hourly rate awarded to Mr. Wolfe is not supported by prevailing market rate evidence, and the administrative law judge failed to explain, as required by the Administrative Procedure Act,[4] what evidence he relied upon in determining the appropriate hourly rate. Further,

[2] To the extent employer seeks to equate filing objections to the attorney fee petition as an "opening brief to the Board" for purposes of raising *Lucia* issues in its appeal of the merits, such equation is rejected, especially as employer withdrew its appeal. We also reject any suggestion that employer's forfeiture should be excused in light of *Jones Bros.*, 898 F.3d at 669, and we reject employer's assertion that *Aguilar* is inapplicable. Employer's Reply Brief at 3-4. It is irrelevant which party filed the appeal and challenged the administrative law judge's fee order.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1 at 299; *see Taylor v. Nats Creek Mining Co.*, 2013-BLA-05748, slip op. at 5 (April 18, 2018). In the decision appealed here, the administrative law judge identified the United States Court of Appeals for the Sixth Circuit as controlling. *See* Order at 2. Because the Fourth Circuit also utilizes the lodestar analysis in determining attorney fees, *see E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 572 (4th Cir. 2013), the administrative law judge's inadvertent error is harmless.

[4] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "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).

employer challenges the administrative law judge's denial of its request for discovery on the issue of market rates. Employer's Brief at 11; *see* Order at 2.

In determining the amount of an attorney's fee to award under a fee-shifting statute, the Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case, and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *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); *accord B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 663 (6th Cir. 2008). 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). In order to identify the prevailing market rate, the fee applicant must produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *see Gosnell*, 724 F.3d at 571; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007). Further, the regulation states: "[a]ny fee approved under . . . this section shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested." 20 C.F.R. §725.366(b).

Initially, we reject employer's discovery challenge. An administrative law judge has broad discretion in procedural matters, *see generally Consolidation Coal Co. v. Williams*, 453 F.3d 609 (4th Cir. 2006), and he properly observed that fee requests should not result in a second major litigation. Order at 2; *see Hensley v. Eckerhart*, 461 U.S. 424 (1983). There is no provision in the Act or regulations for requesting admissions, interrogatories, or the production of documents regarding hourly rates from counsel, and employer has not demonstrated prejudicial error or an abuse of discretion in the administrative law judge's denial of its discovery requests. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Moreover, contrary to employer's assertion, the administrative law judge appropriately recognized claimant's counsel bears the burden of producing sufficient evidence to show his requested fee is reasonable and market-based. Order at 2. In determining the prevailing market rate, the administrative law judge considered counsel's itemized statement of services, examples of fee awards where Mr. Wolfe was paid $325.00

and $425.00 per hour for his legal services in the past, and a summary of his experience and qualifications.[5] *Id*. Evidence of fees received in the past provides some guidance as to what the market rate is and is appropriately included within the range of sources from which to ascertain a reasonable rate. *See Gosnell*, 724 F.3d at 572; *Cox*, 602 F.3d at 290; *Bentley*, 522 F.3d at 664. Additionally, the administrative law judge properly identified the quality of the representation, the attorney's qualifications, and the complexity of the litigation as relevant factors in determining the reasonableness of the requested hourly rate for counsel. 20 C.F.R. §725.366(b); *see Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228 (4th Cir. 2009); *see also Bentley*, 522 F.3d at 664-65; Order at 2.

The administrative law judge took into account the appropriate factors, including counsel's prior fee awards, in determining counsel's hourly rate. *See Blum*, 465 U.S. at 895; *Cox*, 602 F.3d at 289; *see also Bentley*, 522 F.3d at 663-65. Moreover, he recognized the fee applicant has the burden to produce satisfactory evidence. *Blum*, 465 U.S. at 896 n.11; *Gosnell*, 724 F.3d at 571; *see Gonter*, 510 F.3d at 617. Because the administrative law judge acted within his discretion in analyzing the relevant criteria and explaining the factors he considered, we affirm his approval of Mr. Wolfe's requested hourly rate. 20 C.F.R. §725.366(b); *see Gosnell*, 724 F.3d at 572; *see also Bentley*, 522 F.3d at 663-64. We also affirm the remaining rates as employer raises no specific objections to the rates awarded to Messrs. Delph, Austin, and Gilligan, Ms. Wolfe, and the legal assistants.

Employer next contends the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for legal services. Employer's Brief at 11-12. The administrative law judge permissibly found that claimant's counsel's billing in quarter-hour increments was appropriate. Order at 2-3. He also rationally rejected employer's argument that all of Mr. Wolfe's work was unnecessary because Mr. Wolfe did not "advance the prosecution of the claim" by attending the hearing or writing the closing brief. *Id*. at 3; Employer's Opposition to Fee Petition at 11. Moreover, he considered and permissibly rejected employer's objections to various entries as clerical, excessive, or vague. *Id*. Addressing case law and the regulation, he fairly characterized employer's arguments, and sufficiently explained his reasons for rejecting these objections and approving the requested hours. *Id.*; *see* 20 C.F.R. §725.366(c); *Gosnell*, 724 F.3d at 576; *Bentley*, 522 F.3d at 666-67; *see generally Jones*, 21 BLR at 1-109. Specifically, in rejecting employer's objections, he noted he "reviewed all the entries" and found them

[5] We note counsel also submitted a portion of the 2014 Survey of Law Firm Economics.

"recoverable" because they "are reasonable and not excessive, vague, or clerical in nature." Order at 3.

As to employer's contention that claimant's counsel sought reimbursement for clerical tasks, the administrative law judge acted within his discretion in allowing these entries, most of which involved sending correspondence to, reviewing correspondence from, or otherwise communicating with opposing counsel; reviewing pleadings; submitting evidence or pleadings to the Office of Administrative Law Judges by letter; and communicating with claimant or the Department of Labor. While employer sought to characterize many of these tasks as clerical, the administrative law judge accurately stated that non-ministerial tasks such as reviewing legal documents, drafting correspondence, communicating with clients and opposing counsel about the case, and responding to discovery constitute compensable legal work. *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984) (concluding "it is an abuse of discretion to disallow all time spent advising claimant of the status of his claim"); *Marcum*, 2 BLR at 1-899 (drafting of legal memoranda and letters, legal research, preparing pleadings and interrogatories is compensable whether performed by a clerical employee or an attorney). Moreover, employer's argument that several entries were excessive hinged primarily on its objection to counsel's billing in fifteen minute increments. Employer's Opposition to Fee Petition at 12-13. As noted above, however, the administrative law judge permissibly found quarter-hour billing appropriate. *Gosnell*, 724 F.3d at 576-77; *Bentley*, 522 F.3d at 666-67. Tellingly, on appeal, employer does not identify any specific entry it believes the administrative law judge erroneously approved. *See* Employer's Brief at 12 ("Finally, the [administrative law judge's] decision to overrule the objections to the clerical, excessive and vague time entries lacks any explanation."). In light of the above, the administrative law judge complied with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), and employer has failed to demonstrate he abused his discretion in allowing these itemized entries. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the administrative law judge did and why he did it, the duty of explanation under the APA is satisfied).

As employer has not shown the administrative law judge acted arbitrarily or capriciously, or abused his discretion, we affirm his fee award of $10,787.50 for legal services performed while the miner's and survivor's claims were before the Office of Administrative Law Judges, plus expenses in the amount of $3,035.65.[6]

[6] We affirm, as unchallenged on appeal, the administrative law judge's allowance of $3,035.65 for costs incurred. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Order at 1, 4.

Accordingly, the Attorney Fee Order is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of my colleagues to affirm the administrative law judge's Attorney Fee Order. Instead, I would vacate the administrative law judge's Attorney Fee Order and remand the case for further consideration of employer's specific objections to entries it alleges are clerical, excessive, and vague. On remand, the administrative law judge should consider and address these objections.

The amount of an attorney fee award by an administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989) (citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980)). Still, an administrative law judge must adequately explain his findings in accordance with the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "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).

While the administrative law judge set forth the appropriate standard in addressing whether claimant's counsel's requested expenses are reimbursable, he did not adequately apply that standard to the facts presented in this case. *See* Order at 4 ("I have reviewed all the entries by the counsels listed and the legal assistants. I find that the entries are reasonable and not excessive, vague, or clerical in nature. I find that they are recoverable."). Moreover, as employer raised specific objections to numerous entries before the administrative law judge, it was entitled to a reasoned analysis and explanation

from the administrative law judge for his complete allowance of the entries to which it objected. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989) (concluding review of the administrative law judge's order "is impossible because the administrative law judge has not provided an adequate explanation of his summary conclusion").

Because the administrative law judge did not adequately explain his allowance of the entries to which employer objected, he did not comply with the Administrative Procedure Act. Therefore, I would vacate the administrative law judge's findings regarding the fees to which employer has objected as clerical, excessive, and vague and remand the case to him for reconsideration of employer's objections. On remand, the administrative law judge should fully set forth the underlying rationales for his findings as required by the Administrative Procedure Act. *See Wojtowicz*, 12 BLR at 1-165. In all other respects, I agree with my colleagues.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge