



BRB No. 17-0423 BLA  
Case No. 2016-BLA-05060

MARY VIRGINIA CLARK	)	
(o/b/o LARRY RONALD CLARK, deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN MINING COMPANY, INCORPORATED	)	DATE ISSUED: 01/07/2019
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	ORDER on
	)	RECONSIDERATION and
Party-in-Interest	)	AWARD of FEES

As no member of the panel has affirmatively voted to vacate or modify the decision herein, the motion for reconsideration filed by employer is DENIED.<sup>1</sup> 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(b); 802.407(a); 802.409.

---

<sup>1</sup> Employer argues for the first time on reconsideration that the manner in which Department of Labor administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer’s Motion for Reconsideration at 2-6. Because employer first raised the Appointments Clause issue only after the Board issued its decision on the merits, employer forfeited the issue. *See Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (requiring “a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party’s] case”); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256-57 (6th Cir. 2018) (holding that the employer forfeited its Appointments Clause challenge by failing to raise it in its opening brief); *Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed before the Board pursuant to 20 C.F.R. §802.203. Counsel requests a fee of \$3,562.50 for 2.75 hours of legal services at an hourly rate of \$350.00 (Joseph E. Wolfe) and 13.00 hours of legal services at an hourly rate of \$200.00 (Brad A. Austin). Employer objects that the hourly rates are not market based, and requests that the fees of Mr. Wolfe and Mr. Austin be reduced.

In support of his fee petition, counsel has provided a list of sixty-eight black lung cases in which the Office of Administrative Law Judges, the Board, and the United States Court of Appeals for the Fourth Circuit awarded attorney fees to his firm.<sup>2</sup>

Fifty-two of the cases include fees for Mr. Wolfe's work. In one case from August 2008, the Board affirmed an award from the Office of Administrative Law Judges where Mr. Wolfe received an hourly rate of \$400.00. In six cases, an administrative law judge awarded counsel an hourly rate of \$425.00, but noted that no objections were filed.<sup>3</sup> In two other cases, Mr. Wolfe was awarded an hourly rate of \$425.00 by the United States Court of Appeals for the Fourth Circuit. *Donaldson Mining Co. v. Hinzman*, No. 16-1185 (4th Cir. Apr. 13, 2016) (Order);<sup>4</sup> *S. Ohio Coal Co. v. Weaver*, No. 16-1580 (4th Cir. July

---

to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

<sup>2</sup> Counsel further argues that his requested rates are reasonable in light of the experience and qualifications of the representatives, their passion for their work, and the lack of attorneys taking similar cases.

<sup>3</sup> In a Supplemental Order Awarding Fees in *Hall v. Cody Mining Co.*, 2013-BLA-05449 (Jan. 26, 2016) (Order), the administrative law judge questioned Mr. Wolfe's requested hourly rate, and stated that he would carefully consider any objections to the hourly rate in any future fee petition from his firm. In the Orders Awarding Fees in *Young v. James River Coal Co.*, 2014-BLA-05168 (July 25, 2015) (Order), *Wright v. Shipyard River Coal Terminal Co.*, 2016-BLA-05166 (Nov. 7, 2016) (Order), *Muncy v. Dir., OWCP*, 2013-BLA-06086 (Jan. 17, 2017) (Order), *Lee v. Cody Mining Co., Inc.*, 2012-BLA-05365 (Jan. 20, 2017) (Order), and *Fortney v. Dir., OWCP*, 2014-BLA-00014 (Jan. 24, 2017) (Order), the administrative law judge noted that no objection was filed.

<sup>4</sup> Counsel inaccurately identifies the 2016 circuit court order as having been issued by the United States Court of Appeals for the Sixth Circuit. In fact, the United States Court of Appeals for the Fourth Circuit issued this Order. In that case, the Fourth Circuit noted that counsel's motion for attorney's fees was unopposed. *Donaldson Mine Co. v. Hinzman*, No. 16-1185 (4th Cir. Apr. 13, 2016) (Order).

11, 2016) (Order). Of the remaining cases submitted, Mr. Wolfe has been awarded an hourly rate of \$350.00 on twenty occasions, \$325.00 on three occasions, and \$300.00 on twenty occasions.

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.<sup>5</sup> See *E. Associated 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); see also *B & G Mining, Inc. v. Director, OWCP* [Bentley], 522 F.3d 657, 664 (6th Cir. 2008). Based on the documentation submitted in this case, counsel has demonstrated that he has been awarded the hourly rate of \$350.00 by the Office of Administrative Law Judges in twenty cases between August 2016 and March 2017. The Board notes that these fee awards are more recent than those in which counsel was awarded a lower rate, and are therefore more representative of the hourly rate that counsel is entitled to for the work performed during the time that this case was before the Board. The Board therefore finds the requested hourly rate of \$350.00 to be reasonable in light of the quality of representation, the complexity of the issues involved, and the area where the services were rendered.

In the thirty-seven listed cases in which Mr. Austin was awarded a fee, he was awarded an hourly rate of \$200.00. The Board finds that the hourly rate of \$200.00 for Mr. Austin is reasonable, based on the evidence submitted and the prevailing market rate in the area.

Employer also contends that the Board should disallow 2.00 hours billed by Mr. Wolfe and 0.25 of an hour billed by Mr. Austin for reviewing routine documents. Opposition to Fee Petition at 8-10. We decline to do so. Claimant's counsel reasonably billed 0.25 of an hour for each entry reviewing pleadings, as a quarter-hour increment is the minimum billing increment set forth in the applicable regulation. 20 C.F.R. §802.203(d)(3); see *Gosnell*, 724 F.3d at 576; *Bentley*, 522 F.3d at 666; *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984).

Employer challenges several time entries by Mr. Wolfe and Mr. Austin. Opposition to Fee Petition at 10. Employer objects to the combined 0.5 of an hour billed by Mr. Wolfe

---

<sup>5</sup> Counsel also submitted a one-page extract from The National Law Journal's 2014 Survey of Law Firm Economics, which purportedly shows that the average hourly billing rate for an attorney with thirty-one or more years of experience in the Atlantic Region is \$426.00. However, the extract does not indicate the distribution of participating law firms, and the Board is not persuaded that this chart sufficiently establishes the market rate for Mr. Wolfe.

and Mr. Austin for reviewing the Petition for Review, as duplicative. Opposition to Fee Petition at 10. We agree with employer that the 0.25 of hour billed by Mr. Wolfe on September 17, 2017 for reviewing and analyzing the Petition for Review is duplicative with the preceding 0.25 of an hour billed by Mr. Austin on August 3, 2017 for reviewing the Petition for Review and calendaring the time to file a response. We therefore disallow the 0.25 of an hour requested for Mr. Wolfe's services.<sup>6</sup> See *Bentley*, 522 F.3d at 663; *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-218 (1986). We also agree with employer that the services rendered by Mr. Austin on October 31, 2017 relating to conducting a conflicts check should be disallowed, as this service is considered overhead. Opposition to Fee Petition at 10. We therefore disallow the 0.75 of an hour requested for these services. See *Whitaker*, 9 BLR at 1-218; *McKee v. Director, OWCP*, 6 BLR 1-233 (1983).

We reject employer's argument that the services rendered by Mr. Wolfe on August 23, 2017, filing a motion for an extension of time to submit a response brief, and September 21, 2017, submitting claimant's response brief to the Board, were clerical in nature, as this work involved preparing or reviewing the pertinent pleadings. Opposition to Fee Petition at 10. We therefore allow the 0.50 of an hour requested for these services. See *Lanning*, 7 BLR at 1-316-17. We also reject employer's contention that the total 1.25 hours requested for legal services communicating with the claimant and providing her with a status update on July 24, 2017, March 13, 2018, and July 2, 2018 were unnecessary and excessive. Employer's Brief at 10. Communications between counsel and client are a reasonable and necessary service. *Lanning*, 7 BLR at 1-316-17. Because employer has not shown that these charges were unnecessary, we find the disputed charges neither excessive nor unreasonable. *Id.*

In all other respects, the Board finds the fees requested to be reasonable and commensurate with the necessary services performed in defending claimant's award of benefits. Therefore, we award claimant's counsel a total fee of \$3,325.00, representing 2.50 hours of legal services at an hourly rate of \$350.00 (Joseph E. Wolfe) and 12.25 hours of legal services at an hourly rate of \$200.00 (Brad A. Austin), to be paid directly to

---

<sup>6</sup> We reject employer's argument that the 0.25 hour billed by Mr. Austin for reviewing the Petition for Review should be disallowed because he also calendared the time for a response, and, employer argues, performed a clerical task. *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984); see Employer's Brief at 10.

claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a);  
20 C.F.R. §802.203.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge