

BRB No. 97-0641 BLA

JOHN P. HIKES, SR.)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Supplemental Award of Fees for Legal Services of Jack Lewis Geller, District Director, United States Department of Labor.

Andrew C. Onwudinjo (Krasno, Krasno, & Quinn), Pottsville, Pennsylvania, for claimant.

Rita Roppolo (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Counsel for claimant (counsel) appeals the Supplemental Award of Fees for Legal Services (202-24-6902) of District Director Jack Lewis Geller, United States Department of Labor, on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Counsel requested approval of a fee of two thousand six hundred sixty dollars (\$2,660.00) for 19.00 hours of legal services rendered on claimant's behalf at an hourly rate of \$140.00. The district director issued a supplemental award granting a fee of one thousand four hundred seventeen dollars and fifty cents(\$1,417.50) for 15.75 hours of legal services provided at an hourly rate of \$90.00. Counsel specifically challenges the district director's reduction in the hourly rate from the \$150.00 requested to the \$90.00 awarded. The

Director, Office of Workers' Compensation Programs (the Director), has submitted a Motion to Remand, requesting that the case be remanded to the district director for further review.

An award of an attorney fee is discretionary and will be sustained by the Board unless it is arbitrary, capricious, an abuse of discretion, or not in accordance with law. See *Bennett v. Director, OWCP*, 17 BLR 1-72 (1992); *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). In reducing the hourly rate to \$90.00, the administrative law judge considered all the factors in the applicable regulatory criteria provided at 20 C.F.R. §725.366(b), Supplemental Award at 2, and also provided the rationale for his reduction in the hourly rate as stated below:

The representative entered the proceedings at the District Director level. The case did not involve any unusual aspects or a responsible operator. The services performed by the representative consisted of review and preparation of routine correspondence, gathering of medical evidence, and attendance at an informal conference. The approved rate is felt to be reasonable for services performed. The prevailing rate for attorneys handling black lung cases in the service area is \$90.00 per hour.

Id.

While an attorney's experience and expertise must be considered by the decision maker in fixing the attorney's hourly rate, if raised by the attorney, see *generally Allen v. Director, OWCP*, 7 BLR 1-330 (1984), counsel did not raise this issue before the district director. Moreover, the Board may not consider counsel's curriculum vitae, which is attached as Exhibit B, as it was not before the district director when he issued his attorney fee award. 20 C.F.R. §802.301; *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985). However, in the instant case, the district director addressed as factors "the fees charged by highly qualified attorneys within the same geographical location with considerable expertise in the handling of black lung claims as well as the contingency nature of the claim." Supplemental Award at 2. Counsel has also included with his brief on appeal, as Exhibit A, a portion of a 1993 survey of law firms published by Altman, Weil and Pensa. Because the Board may not consider new evidence on appeal, see 20 C.F.R. §802.301; *Berka, supra*, we decline to address arguments raised by counsel and the Director regarding that study.¹

¹Exhibits A and B, attached to claimant's brief, are hereby returned to claimant with this Decision and Order. See 20 C.F.R. §802.301(b); *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985).

Inasmuch as the district director considered the factors set forth in the applicable regulatory criteria at Section 725.366, explained the rationale for his reduction in the hourly rate, and because claimant failed to show that the district director's reduction was arbitrary, capricious or an abuse of his discretion, we affirm the district director's hourly rate of \$90.00 and further affirm the district director's fee award of \$1,417.50. See *Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986); *Pruitt v. Director, OWCP*, 9 BLR 1-159 (1986).

Accordingly, the district director's Supplemental Award of Fees for Legal Services is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge