BRB No. 13-0044 BLA

BOBBY J. ESTEP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COAL BRANCH COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	DATE ISSUED: 11/25/2013
	)	
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 on Remand Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Award of Benefits (2008-BLA-05989) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim, filed on December 26, 2006, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] This case is before the Board for the second time. In the prior Decision and Order, the Board affirmed the administrative law judge's determination that claimant established at least fifteen years of underground coal mine employment and that claimant's usual coal mine work required heavy manual labor. *Estep v. Coal Branch Coal Co.*, BRB No. 11-0245 BLA, slip op. at 3 n.4, 5 (Dec. 21, 2011) (unpub.). The Board, however, vacated the administrative law judge's finding that the newly submitted medical evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and invocation of the presumption set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[2] *Id.* at 7, 9. The Board further vacated the award of benefits, and the administrative law judge's date of onset determination, and instructed the administrative law judge that, if he again found claimant entitled to benefits, he must reconsider the date of onset of total disability, based on all of the relevant evidence. *Id*. at 10.

On remand, the administrative law judge found that the newly submitted medical evidence was sufficient to establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further determined, therefore, that claimant demonstrated a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d). Considering the merits of the claim, the administrative law judge found that the evidence of record, as a whole, was sufficient to establish that claimant is totally disabled. The administrative law judge further found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) and that employer did not rebut

[1] Claimant's prior claim, filed on October 14, 1988, was finally denied on October 9, 1992, because claimant did not establish any element of entitlement. Decision and Order at 1; Director's Exhibit 1.

[2] Relevant to this claim, Section 1556 of the Patient Protection and Affordable Care Act revived Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305), which provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis if he establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

the presumption. Accordingly, the administrative law judge awarded benefits as of December 2006, the month in which claimant filed his subsequent claim.

Employer argues that the administrative law judge erred in finding that the newly submitted evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2) and, thus, incorrectly found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). In addition, employer argues that the administrative law judge erred both in finding that employer failed to rebut the amended Section 411(c)(4) presumption and in determining the date for the commencement of benefits. Claimant responds in support of the award of benefits and claimant's counsel has filed a fee petition, requesting payment for services performed before the Board in conjunction with the prior appeal; employer has filed an opposition to the fee petition. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response. Employer has filed a reply brief, reiterating its contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. When a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final."[4] 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(4). Claimant's prior claim was denied because he

[3] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The language set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59102, 59118 (Sept. 25, 2013).

failed to establish that he had pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(c)(4).

I. Total Disability at 20 C.F.R. §718.204(b)(2)

Employer initially argues that, in concluding that claimant established that he is totally disabled, the administrative law judge failed to follow the Board's instructions to determine whether the medical opinions of Drs. Agarwal, Rasmussen and Baker were reasoned and documented. Employer further contends that the administrative law judge "failed to comply with the basic requirements" of the Administrative Procedure Act (APA),[5] as he did not provide an adequate rationale for crediting these opinions in light of the physicians' failure to identify the specific bases for their conclusions. Employer's Brief in Support of Petition for Review at 16. Employer's arguments lack merit.

On remand, the administrative law judge, as directed by the Board, reconsidered the opinions of Drs. Agarwal, Rasmussen and Baker and found that they "are reasoned as their examination results show a breathing deficit, their understanding of the physical requirements of claimant's usual coal mine work was heavy, and the objective studies they administered are consistent." Decision and Order on Remand at 5; Director's Exhibits 14, 17; Claimant's Exhibits 1, 2. We affirm the administrative law judge's credibility determination with respect to these opinions as being within his discretion as fact-finder, as the physicians based their diagnoses of total respiratory disability on several factors, including their examination results, their understanding of the physical requirements of claimant's usual coal mine work, and the objective studies they administered. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

We also reject employer's contention that the administrative law judge erred in determining that the opinions of Drs. Jarboe and Dahhan supported a finding of total disability at 20 C.F.R. §718.204(b)(2). On remand, the administrative law judge reconsidered Dr. Jarboe's initial opinion, in which he stated that claimant does not have a totally disabling respiratory impairment, and his subsequent opinion, based on his review

[5] The Administrative Procedure Act 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).

of a pulmonary function study, that claimant does not retain the respiratory capacity to return to his usual coal mine work. Decision and Order on Remand at 3-4; Employer's Exhibits 1, 5. The administrative law judge reasonably determined that Dr. Jarboe's initial opinion was "undermined" by his understatement of the exertional requirements of claimant's usual coal mine employment. Decision and Order on Remand at 4; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). However, the administrative law judge also reasonably found that Dr. Jarboe's later diagnosis of total pulmonary disability, based on the results of a pulmonary function study revealing an obstructive impairment, "ultimately substantiates the opinions that [c]laimant cannot perform heavy work." Decision and Order on Remand at 5; *see Cornett*, 227 F.3d at 576, 22 BLR at 2-121. Similarly, the administrative law judge acknowledged the Board's directive to clarify his findings regarding Dr. Dahhan's opinion and rationally concluded that Dr. Dahhan's diagnosis of a significant respiratory impairment and disability, "substantiates the opinions of Drs. Agarwal, Rasmussen and Baker," although Dr. Dahhan did not explicitly state that claimant is unable to perform his usual coal mine work. Decision and Order on Remand at 5; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Employer's Exhibits 2, 4, 7, 10.

Employer next asserts that the administrative law judge erred in discrediting Dr. Broudy's opinion, that claimant is totally disabled by severe heart disease, but retains the respiratory capacity to perform his usual coal mine work. Contrary to employer's allegation of error, the administrative law judge acted within his discretion in finding that the reasoned medical opinions of Drs. Agarwal, Baker and Rasmussen, as substantiated by the opinions of Drs. Jarboe and Dahhan, outweighed the contrary opinion of Dr. Broudy. *See Groves*, 277 F.3d at 836, 22 BLR at 2-330; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Because the administrative law judge's credibility findings on remand satisfy the requirements of the APA, we affirm them. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Lastly, we hold that there is no merit to employer's assertion that the administrative law judge did not weigh all of the contrary probative evidence prior to finding that claimant established total disability. The administrative law judge noted that he was required to weigh all of the evidence relevant to the issue of total disability together and acted within his discretion in concluding that the medical opinions diagnosing a totally disabling respiratory impairment were reasoned and sufficient to establish total disability at 20 C.F.R. §718.204(b)(2). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon*, 9 BLR 1-236 (1987) (en banc). Accordingly, we affirm, as rational and supported by substantial evidence, the administrative law judge's finding that the medical opinions of Drs. Agarwal, Baker and Rasmussen, as supported by the opinions of Drs. Jarboe and Dahhan, were sufficient to

establish that claimant is totally disabled at 20 C.F.R. §718.204(b).[6] *See Groves*, 277 F.3d at 836, 22 BLR at 2-325; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. We also affirm, therefore, the administrative law judge's findings that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R §725.309 and invoked the amended Section 411(c)(4) presumption.

II. Rebuttal of the Amended Presumption

The administrative law judge stated that, to rebut the amended Section 411(c)(4) presumption, employer was required to "rule out any connection between the miner's impairment and his coal mine employment." Decision and Order on Remand at 5, citing *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). The administrative law judge determined that the opinions of Drs. Broudy, Jarboe and Dahhan "could not rule out legal pneumoconiosis"[7] or disprove the presumed causal connection between coal dust exposure and claimant's disabling impairment. Decision and Order on Remand at 5-7. Thus, the administrative law judge concluded that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. *Id*. at 7.

Employer alleges that the administrative law judge's rebuttal findings must be vacated, as he mischaracterized both the relevant evidence and the applicable case law and relied on improper grounds to discredit the opinions of employer's experts. We hold that, contrary to employer's contentions, the administrative law judge provided valid rationales for determining that the opinions of Drs. Broudy, Jarboe and Dahhan were insufficient to establish the absence of a causal connection between coal mine employment and claimant's totally disabling obstructive impairment.

The administrative law judge permissibly discounted Dr. Broudy's opinion, that claimant's obstructive impairment is unrelated to coal mine employment because coal mine dust exposure usually causes a restrictive impairment, as contrary to the medical science accepted by the Department of Labor (DOL) when it amended the definition of pneumoconiosis to include both chronic obstructive and restrictive diseases arising out of

[6] We reject employer's allegation that the administrative law judge substituted his opinion for that of a medical expert by relying on claimant's use of supplemental oxygen to find that he has a totally disabling respiratory or pulmonary impairment. The administrative law judge stated, "I accept that the [c]laimant needs oxygen," but did not base his ultimate finding at 20 C.F.R. §718.204(b)(2) on this observation. Decision and Order on Remand at 5.

[7] "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).

coal mine employment. *See* 20 C.F.R. §718.201(a)(2), *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 F. App'x 757 (6th Cir. 2007); Decision and Order on Remand at 6. With respect to the opinions in which Drs. Jarboe and Dahhan stated that coal dust exposure did not play a role in causing claimant's disabling obstructive impairment, the administrative law judge observed correctly that both Drs. Jarboe and Dahhan indicated "that the significant loss of FEV1 was much greater than could possibly be attributed to his exposure to coal mine dust." Decision and Order on Remand at 6. The administrative law judge further accurately noted that this view is contrary to scientific evidence endorsed by the DOL, which recognizes that coal mine dust can cause clinically significant obstructive lung disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio. *Id.*; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

The administrative law judge also determined correctly that, although Drs. Jarboe and Dahhan indicated that the Attfield and Hodous study cited by the DOL in the preamble to the 2001 regulations supports their opinions, they also disagreed with the major tenet of the study that "smokers who mine have an additive risk for developing significant airway obstruction." Decision and Order on Remand at 6, citing 65 Fed. Reg. 79,940 (Dec. 20, 2000). The administrative law judge further accurately found that neither physician explained why coal dust exposure could not have been at least a contributing cause of claimant's respiratory disability. Decision and Order on Remand at 7. Based on these findings, the administrative law judge acted within his discretion in determining that the opinions of Drs. Jarboe and Dahhan were entitled to little weight and were, therefore, insufficient to satisfy employer's burden of establishing that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment.[8] *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-22.

Finally, we reject employer's argument that the administrative law judge erred in failing to separately consider whether it rebutted the amended Section 411(c)(4) presumption by disproving the existence of clinical and legal pneumoconiosis. Because employer failed to establish that claimant's disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal dust exposure, employer is

[8] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Broudy, Jarboe and Dahhan, we need not address employer's remaining arguments regarding the additional reasons he provided for discounting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

precluded from establishing that claimant does not have legal pneumoconiosis. *See Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-22; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

In sum, substantial evidence supports the administrative law judge's finding that the opinions of employer's experts were insufficient to establish that the miner's disabling impairment did not arise out of, or in connection with, his coal mine employment. Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Broudy, Jarboe and Dahhan, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. Moreover, because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

III. Attorney Fee Petition

Claimant's counsel has filed a fee petition in connection with the legal services performed before the Board in BRB No. 11-0245 BLA between December 15, 2010 and December 27, 2011, pursuant to 20 C.F.R. §802.203. Claimant requests a fee of $3,850.00, representing 4.5 hours of legal services at an hourly rate of $300.00 for attorney Joseph E. Wolfe, 10.0 hours of legal services at an hourly rate of $225.00 for attorney Ryan C. Gilligan, and 2.5 hours of services at an hourly rate of $100.00 for the legal assistants.

Employer filed an Opposition to Fee Petition, objecting to the hourly rates requested. Employer asserts that claimant's counsel failed to support the hourly rates requested with market evidence, *i.e.*, what fee-paying clients pay counsel or similarly-qualified attorneys by the hour in a comparable case. Employer maintains that more reasonable hourly rates would be $200.00 for Mr. Wolfe, $150.00 for Mr. Gilligan and $50.00 for the legal assistants. Employer's Opposition to Fee Petition at 7. Employer further objects to the number of hours for which a fee is requested and also asserts that the practice of charging in one-quarter hour increments results in excessive fees. Employer also challenges several of the itemized time entries charged by claimant's counsel, his associate and the legal assistants, maintaining that these entries should be reduced or excluded because they are excessive, are not described sufficiently, relate to clerical work, or are unnecessary. *Id*. at 8-9. Employer argues that claimant's counsel's fee should be reduced to no more than $1,509.00, representing 1.35 hours at an hourly rate of $200.00 for Mr. Wolfe, 8.7 hours at an hourly rate of $150.00 for Mr. Gilligan and 0.3 hours at an hourly rate of $50.00 for the legal assistants. *Id*. at 9.

In determining the amount of attorney's fees to award under a fee-shifting statute, the United States 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. *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (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). The prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). The fee 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). The United States Court of Appeals for the Sixth Circuit has held that, in some circumstances, such as where there is no clear market rate against which to compare the attorney's requested rate, it is appropriate to look to prior awards for guidance in determining a prevailing market rate. *Bentley*, 522 F.3d at 663, 24 BLR at 2-121. The court specifically stated that reliance upon prior awards is appropriate in determining a prevailing market rate where, as in the case before it, which arose in Kentucky, "there is only a relatively small number of comparable attorneys . . . ." *Bentley*, 522 F.3d at 664, 24 BLR at 2-123. Because the court's ruling is directly applicable to this case, which involves attorneys practicing in Kentucky, the Board will consider the evidence of prior awards submitted by counsel in support of the requested hourly rates.

In support of the requested hourly rates of $300.00 for Mr. Wolfe, $225.00 for Mr. Gilligan and $100.00 for the legal assistants, claimant's counsel provided a list of black lung cases from 2006 to 2012 in which the Office of Administrative Law Judges, the Board, and the Sixth Circuit have awarded the requested hourly rates to claimant's counsel and his associate. Claimant's counsel also provided evidence of the rates charged by comparable attorneys in his geographic area, as well as evidence of the expertise and experience in the field of black lung litigation he and his associate possess, and the professional status of both attorneys. 20 C.F.R. §802.203(d)(2), (4); *see Bentley*, 522 F.3d at 663, 24 BLR at 2-123.

Based on the documentation provided by claimant's counsel, the Board has determined that the referenced black lung awards support claimant's counsel's requested hourly rates for Mr. Wolfe and Mr. Gilligan, given their experience and the complexity of

this case. *See E. Associated Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 25 BLR 2- (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *see also Bowman v. Bowman Coal Co.*, 24 BLR 1-167, 1-170 n.8 (2010) (Order), *petition for review denied*, *Bowman Coal Co. v. Director, OWCP* [*Bowman*], No. 12-1642, 2013 WL 5228037 (4th Cir. Sept. 18, 2013) (unpub.); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010). Thus, notwithstanding employer's contentions, we decline to reduce the hourly rates of Mr. Wolfe and Mr. Gilligan, as requested by employer. Consequently, we award Mr. Wolfe his requested hourly rate of $300.00 and Mr. Gilligan his requested hourly rate of $225.00.

We also reject employer's contention that the legal assistants' requested hourly rate of $100.00 is unreasonable and should be reduced to $50.00. Claimant's counsel has identified the training, education, and experience of the legal assistants. In addition, the list of prior fee awards provided by claimant's counsel includes several cases awarding the hourly rate of $100.00 for the work of the legal assistants in those cases. Given the supporting evidence in claimant's counsel's fee petition, we approve the requested hourly rate of $100.00 for the work performed by the legal assistants in BRB No. 11-0245 BLA. *See* 20 C.F.R. §802.203(d)(2); *Gosnell*, 724 F.3d at 574, 25 BLR at 2- .

Employer further contends that 0.25 hour of Mr. Gilligan's time spent "calculating [a] deadline" and 0.5 hour of services performed by the legal assistants "calculating and calendaring dates" should be disallowed as clerical, and thus non-compensable. Employer's Opposition to Fee Petition at 8, 8 n.7. *Id*. Employer's contentions are without merit.

It is true that 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 (1986); *McKee v. Director, OWCP*, 6 BLR 1-233 (1983); *Childers v. Director, OWCP*, 2 BLR 1-1198 (1980); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). Upon review of the challenged itemized time entries, however, we conclude that each one-quarter hour of work performed by Mr. Gilligan on July 30, 201, and by legal assistants on June 8, 2011 and August 15, 2011, analyzing the file, reviewing documents and placing relevant dates regarding the briefing schedule on the calendar, is compensable. Because work performed by an attorney and a legal assistant reviewing the case file and placing relevant dates on the calendar is not clerical, and as counsel has sufficiently documented that these services were reasonably necessary in the pursuit of benefits, we reject employer's argument. *Bentley*, 522 F.3d at 663, 24 BLR at 2-121; *Whitaker*, 9 BLR at 1-127-28. Thus, we approve the 0.75 hours requested. *See* 20 C.F.R. §802.203(e); *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984).

Employer next specifically challenges the two 0.25 hour entries for work performed by Mr. Wolfe on February 5, 2011 and November 24, 2011, 0.25 hour of work by Mr. Gilligan on September 20, 2011, and 0.25 hour of work by a legal assistant on May 5, 2011, for analyzing and reviewing the file for the status of the case. Employer contends that these tasks are inadequately described and unnecessary. Employer's Opposition to Fee Petition at 8. Periodic review of the file for deadlines and briefing schedules is a legitimate recurring activity in prolonged cases, and is therefore compensable. *McNulty v. Director, OWCP*, 4 BLR 1-128 (1981). A review of the fee petition reveals that, while Mr. Wolfe, his associate and a legal assistant performed similar tasks on these dates, the disputed charges are neither excessive nor unreasonable as they were for the minimum one-quarter hour. Thus, we reject employer's arguments to the contrary. We therefore conclude that the work performed by Mr. Wolfe and Mr. Gilligan and a legal assistant constituted compensable legal work and we allow the 0.75 hour requested. *See* 20 C.F.R. §802.203(e); *Lanning*, 7 BLR at 1-316.

Employer next objects to seven itemized entries for work performed by Mr. Wolfe and two legal assistants on July 6, 2011, August 11, 2011, August 12, 2011 and August 15, 2011, pertaining to preparing and filing motions for extensions of time to file briefs. Employer asserts these tasks were unnecessary and did not advance the claim. Employer's Opposition to Fee Petition at 8. A review of the fee petition reveals that these charges are neither unreasonable nor excessive, and that claimant's counsel may reasonably have deemed the work necessary in furtherance of claimant's case.[9] Consequently, the Board rejects employer's objections with respect to the services rendered in these itemized entries. Thus, we allow this 1.75 hours.

Employer further objects to the amount of time identified in several entries as unreasonable. Specifically, employer contends that the Board should not award full payment for 3.25 hours of work by Mr. Wolfe, 9.5 hours of work by Mr. Gilligan and 0.75 hours of work by legal assistants, itemized in one-quarter hour increments. Employer's Opposition to Fee Petitions at 8. Contrary to employer's contention, claimant's counsel's practice of billing in minimum one-quarter hour increments is reasonable, as it is the billing increment set forth in the applicable regulation. 20 C.F.R. §802.203(d)(3); *see Bentley*, 522 F.3d at 666, 24 BLR at 2-127. Consequently, we deny employer's request to disallow 0.15 hour of the 0.25 hour requested in several itemized time entries.

[9] Contrary to employer's contention, the 0.25 hour of services rendered by Mr. Wolfe on August 15, 2011, pertain to analyzing the Board's Order dated August 10, 2011, wherein the Board granted claimant's counsel ten days from receipt of the Order to file a response brief.

In sum, we find the requested fee to be reasonable in light of the necessary services performed. Therefore, we award a fee of $3,850.00, representing 4.5 hours of legal services at an hourly rate of $300.00 for Mr. Wolfe, 10.0 hours of legal services at an hourly rate of $225.00 for Mr. Gilligan and 2.5 hours of services at an hourly rate of $100.00 for the legal assistants in BRB No. 11-0245 BLA, to be paid directly to claimant's counsel by employer. 20 C.F.R. §802.203(e).

Accordingly, the administrative law judge's Decision and Order on Remand Award of Benefits is affirmed. Claimant's counsel is awarded a fee of $3,850.00 for services performed before the Board in BRB No. 11-0245 BLA.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge