

BRB Nos. 14-0136 BLA, 14-0136 BLA-A,
14-0156 BLA and 14-0156 BLA-A

MAE ANN SHARPE (on behalf of)	
and Widow of WILLIAM A. SHARPE))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	DATE ISSUED: 11/06/2014
)	
WESTMORELAND COAL COMPANY)	
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney's Fees and Costs of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

John A. Bednarz, Jr., Wilkes-Barre, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant's counsel appeals, and employer cross-appeals, the Decision and Order Awarding Attorney's Fees and Costs (2001-BLA-00398 and 2001-BLA-00399) of Administrative Law Judge Lystra A. Harris, rendered in conjunction with the successful prosecution of a miner's claim and a survivor's claim filed pursuant to the provisions of

the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).¹ The miner's claim and the survivor's claim have a lengthy procedural history and were before the Office of Administrative Law Judges (OALJ) on three separate occasions.² Claimant's counsel submitted three fee petitions dated October 1, 2012, for work

¹ Claimant's counsel's appeal and employer's cross-appeal in connection with the award of attorney's fees in the miner's claim, BRB Nos. 14-0136 BLA and 14-0136 BLA-A, respectively, and in the survivor's claim, BRB Nos. 14-0156 BLA and 14-0156 BLA-A, respectively, were consolidated for purposes of decision only. *Sharpe v. Westmoreland Coal Co.*, BRB Nos. 14-0136 BLA-A and 14-0156 BLA-A (April 18, 2014)(unpub. Order).

² The miner filed a claim on March 2, 1989, which was granted by Administrative Law Judge Julius A. Johnson, based on his finding that the miner invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The miner died on April 18, 2000, and the miner's widow filed a claim for survivor's benefits. The district director issued an initial finding of entitlement in the survivor's claim. Employer contested the district director's finding and requested modification of the award in the miner's claim. Administrative Law Judge Robert D. Kaplan denied employer's request for modification and awarded survivor's benefits. Pursuant to employer's appeal, the Board vacated the denial of employer's request for modification, and the award in the survivor's claim, and remanded the case for reconsideration. *Sharpe v. Westmoreland Coal Co.*, BRB No. 02-0810 BLA (Aug. 22, 2003)(unpub.). On remand, Judge Kaplan concluded that Judge Johnson made a mistake in a determination of fact in finding complicated pneumoconiosis established in the miner's claim, and denied benefits in both claims. Pursuant to claimant's appeal, the Board affirmed the denials. *Sharpe v. Westmoreland Coal Co.*, BRB No. 04-0723 BLA (June 13, 2005) (unpub.). Upon consideration of claimant's appeal, the United States Court of Appeals for the Fourth Circuit held that Judge Kaplan erred in granting employer's request for modification and remanded the case for reconsideration. *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007). On remand, Judge Kaplan determined again that Judge Johnson made a mistake in finding complicated pneumoconiosis established in the miner's claim, and denied both claims. Pursuant to claimant's appeal, the Board reversed Judge Kaplan's findings and remanded the case to the district director for reinstatement of the award in the miner's claim and for the entry of an award in the survivor's claim. *M.A.S. [Sharpe] v. Westmoreland Coal Co.*, BRB No. 08-0563 BLA (July 14, 2009) (unpub.)(Smith, J., dissenting). The Board denied employer's subsequent motion for reconsideration. *M.A.S. [Sharpe] v. Westmoreland Coal Co.*, BRB No. 08-0563 BLA (Oct. 25, 2010)(en banc)(unpub.)(Smith and Boggs, JJ., dissenting). Pursuant to employer's appeal, the Fourth Circuit held that the Board had properly reversed Judge Kaplan's findings. *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317, 25 BLR 2-157 (4th Cir. 2012), *cert.denied*, 133 S.Ct. 2852 (2013).

performed before the OALJ in these claims. For work performed before the OALJ between January 25, 2001 and December 17, 2002, claimant's counsel requested a total fee of \$29,130.00 for 97.1 hours of legal services at an hourly rate of \$300.00, as well as \$85.00 for expenses. For work performed before the OALJ between November 20, 2003 and May 24, 2004, claimant's counsel requested a total fee of \$8,125.00 for twenty-five hours of legal services at an hourly rate of \$325.00. For work performed before the OALJ between October 22, 2007 and March 31, 2008, claimant's counsel requested a total fee of \$20,568.75 for 54.85 hours of legal services at an hourly rate of \$375.00. Additionally, claimant's counsel requested an enhancement of his fees in light of the lengthy litigation of these claims.

On October 17, 2012, employer filed objections to the fee petitions with the OALJ, contesting the hourly rates requested. Employer also objected to claimant's counsel's request for an enhancement of his fees. In addition, employer alleged that certain itemized entries for services performed by claimant's counsel were excessive, inadequately described, or represented clerical tasks and, thus, argued that they should be disallowed.

Claimant's counsel filed a response to employer's objections dated August 23, 2013, in which he answered employer's objections to the hourly rates requested and the request for enhancement for the delay in the awarding of attorney fees. Claimant's counsel also submitted amended fee requests for the work performed before the OALJ between November 20, 2003 and May 3, 2004, and between October 22, 2007 and March 31, 2008. For work performed before the OALJ between November 20, 2003 and May 3, 2004, claimant's counsel's amended fee petition requested a total fee of \$7,800.00 for twenty-six hours of legal services at an hourly rate of \$300.00. For work performed before the OALJ between October 22, 2007 and March 31, 2008, claimant's counsel's amended fee petition requested a total fee of \$18,200.00 for fifty-six hours of legal services at an hourly rate of \$325.00. In addition, claimant's counsel proffered the Supplemental Decision and Order Granting Attorney Fees dated January 3, 2003, in which Administrative Law Judge Robert D. Kaplan awarded \$17,140.00 for 85.7 hours of legal services performed before the OALJ at an hourly rate of \$200.00 between January 21, 2001 and December 17, 2002. Claimant's counsel stated that the parties had accepted the terms of the award and, accordingly, requested that the administrative law judge adopt Judge Kaplan's disposition in lieu of the fee petition submitted in October 2012 that covered the same time period. Employer did not file a reply.

After considering the fee petitions and employer's objections, the administrative law judge initially determined:

As both parties have adopted the fees outlined in the January 3, 2003 Supplemental Decision and Order Granting Attorney Fees (for services

rendered between January 25, 2001 and December 17, 2002, i.e. Fee Petition I), I find that Claimant's counsel is entitled to fees in the amount of \$17,140.00 (85.7 hours at \$200.00 per hour) for professional services rendered between January 25, 2001 and December 17, 2002.

Decision and Order Awarding Attorney's Fees and Costs at 2. With respect to the fees requested for work performed between November 20, 2003 and May 3, 2004, the administrative law judge found that the requested hourly rate of \$300.00 was reasonable, but disallowed .25 hours for work performed on March 22, 2004, as clerical in nature. *Id.* at 4. She also disallowed 8.5 hours for work performed between March 17, 2004 and March 29, 2004, in connection with preparing and writing the brief on remand from the Board. *Id.* at 6. Accordingly, the administrative law judge awarded a fee of \$5,175.00 for 17.25 hours of work at an hourly rate of \$300.00. *Id.* at 7. Regarding the fees requested for work performed between October 22, 2007 and March 31, 2008, the administrative law judge found that an hourly rate of \$300.00 was reasonable, instead of the \$325.00 hourly rate requested. *Id.* at 4. Additionally, the administrative law judge disallowed 2.5 hours for work performed on November 2, 2007, November 15, 2007, February 6, 2008, February 13, 2008, February 15, 2008 and February 22, 2008, as clerical in nature, and also disallowed 13.75 hours of the 23.75 hours requested for work performed between February 19, 2008 and February 22, 2008, in connection with preparing and writing the brief on remand from the United States Court of Appeals for the Fourth Circuit. *Id.* at 6. Accordingly, the administrative law judge awarded a fee of \$11,925.00 for 39.75 hours of work at an hourly rate of \$300.00. *Id.* at 7.

On appeal, claimant's counsel challenges the administrative law judge's disallowance of 22.25 hours for preparation of the remand briefs, her disallowance of 2.75 hours for tasks she found were clerical in nature, and her determination that an hourly rate of \$300.00 was reasonable for work performed before the OALJ between October 22, 2007 and March 31, 2008, instead of the requested hourly rate of \$325.00. Employer responds in support of the fee awards. Employer also cross-appeals, asserting that if the Board determines claimant's counsel's arguments on appeal have merit, and if the matter is remanded to the administrative law judge for further consideration, the administrative law judge should be instructed to provide a more detailed rationale for rejecting several of the objections employer raised below. Claimant's counsel has not responded to employer's cross-appeal. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in either claimant's appeal or employer's cross-appeal, unless specifically requested to do so by the Board.

The amount of an attorney fee award 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. *Abbott v. Director, OWCP*, 13 BLR 1-15

(1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); see also *Jones v. Badger v. Coal Co.*, 21 BLR 1-102, 1-108 (1998)(en banc).

In challenging the administrative law judge's reduction of the requested hourly rate of \$325.00 to \$300.00 for work performed before the OALJ between October 22, 2007 and March 31, 2008, claimant's counsel contends that the administrative law judge failed to consider previous fee awards and the lengthy history of these claims. These arguments are without merit.

When a claimant wins a contested case, the Act provides that the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The regulation governing fees provides, in part, that:

Any fee approved . . . 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; see *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); see also *Velasquez v. Director, OWCP*, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988). Failure to discuss and apply the regulatory criteria requires remand. *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984).

In reviewing claimant's counsel's requested hourly rate of \$325.00 for work performed before the OALJ between October 22, 2007 and March 31, 2008, the administrative law judge performed the requisite analysis set forth in 20 C.F.R. §725.366(b) by considering employer's objections and the evidence provided by both parties as to the prevailing market rate for black lung attorneys, and adequately explained her determination that the hourly rate of \$300.00, instead of the requested hourly rate of \$325.00, for work performed by claimant's counsel, was reasonable under the facts of this case. See *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 25 BLR 2-359 (4th Cir. 2013). The administrative law judge stated:

Claimant's counsel provided no evidence to support my awarding him an hourly rate of \$325: no evidence to show (1) such a rate has been charged in the community for comparable attorneys for similar services or (2) he had been awarded \$325.00 per hour in the past

Decision and Order Awarding Attorney's Fees and Costs at 3. Thus, the administrative law judge acted within her discretion in determining that claimant's counsel provided insufficient evidence to support the reasonableness of the hourly rate requested for work performed before the OALJ between October 22, 2007 and March 31, 2008. See *Robinson v. Equifax Information Services, LLC*, 560 F.3d 235, 245 (4th Cir. 2009), citing *Plyler v. Evatt*, 902 F.2d 273, 277 (4th Cir. 1990) (fee applicant must produce satisfactory specific evidence of the prevailing market rates in the relevant community for the type of work for which he seeks an award). We affirm, therefore, the administrative law judge's determination that claimant's counsel was not entitled to an hourly rate of \$350.00 in this case. See *Gosnell*, 724 F.3d at 571-72, 25 BLR at 2-374-75 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

We next address claimant's counsel's assertions of error with respect to the administrative law judge's disallowance of 2.75 hours for work performed on March 22, 2004, November 2, 2007, November 15, 2007, February 6, 2008, February 13, 2008, February 15, 2008 and February 22, 2008, as clerical in nature. Claimant described these activities as "fax correspondence" to the administrative law judge and/or opposing counsel, along with a notation of the subject matter. See Decision and Order Awarding Attorney's Fees and Costs at 4-5. Although claimant's counsel notes correctly that "reviewing correspondence can constitute legal work," claimant's counsel acknowledges that these entries are, "in essence[,] the same as mailing correspondence." Claimant's Brief in Support of Petition for Review at 14; see *Jones*, 21 BLR at 1-108; *Abbott*, 13 BLR at 1-16. 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*, 2 BLR at 1-897. Consequently, the administrative law judge's finding that 2.75 hours for faxing correspondence is purely clerical in nature was rational, and her disallowance of the requested fee for these services is affirmed.

Claimant's counsel further argues that the administrative law judge erred in disallowing 22.25 hours of the 42.25 hours requested in connection with researching and writing briefs on remand, following the Board's Decision and Order vacating Judge Kaplan's 2003 award of benefits, *Sharpe v. Westmoreland Coal Co.*, BRB No. 02-0810 BLA (Aug. 22, 2003)(unpub.), and the decision of the United States Court of Appeals for the Fourth Circuit in *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007). In support of his fee requests, claimant's counsel referred to "the complexity of the legal issues involved in this matter," i.e., modification requests, offensive non-mutual

collateral estoppel, complicated pneumoconiosis, finality, accuracy and justice under the Act. August 23, 2013 Fee Petition at [2] (unpaginated).

The administrative law judge observed that employer had objected to the amount of time claimant's counsel spent researching and writing the briefs on remand and determined that claimant's counsel spent 18.5 hours preparing the 2004 brief on remand from the Board, and 23.75 hours preparing the 2008 brief on remand from the Fourth Circuit.³ Decision and Order Awarding Attorney's Fees and Costs at 5. The administrative law judge stated, "I find that Employer's objection has merit. Accordingly I limit [claimant's counsel's] entries for researching and drafting the 2004 and 2008 briefs to 10 hours per brief." Decision and Order Awarding Attorney's Fees and Costs at 6. The administrative law judge did not elaborate on the rationale underlying her disallowance of the hours claimed by claimant's counsel, nor did she set forth the basis for her determination that the hours requested were excessive. The administrative law judge also omitted an explanation for her decision to accept employer's suggestion that allowing ten hours for each brief was more appropriate. Absent adequate explanations, the Board cannot discern the basis for the administrative law judge's reduction in the number of hours she approved. Thus, we must vacate this portion of the Decision and Order Awarding Attorney's Fees and Costs and remand this case to the administrative law judge for reconsideration. See *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). On remand, the administrative law judge must set forth her findings on this issue in detail, including the underlying rationale, as required by the Administrative Procedure Act.⁴ See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In the interest of judicial economy, and to avoid any repetition of error on remand, we also address employer's contentions on cross-appeal.⁵ We reject employer's

³ In employer's October 17, 2012 Opposition to Fee Petition, employer identified itemized entries from March 16, 2004 to March 29, 2004, totaling eighteen hours that were related to the 2004 remand brief and 15.25 hours of itemized entries from January 9, 2008 to February 22, 2008, related to the 2008 remand brief, as "excessive." October 17, 2012 Opposition to Fee Petition at 13. Employer suggested that ten hours for each brief was "more appropriate." *Id.*

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).

⁵ On cross-appeal, employer reiterates its objections to numerous entries for work performed in 2001 and 2002, but these objections were rendered moot in light of

allegation that the administrative law judge erred in finding that the hourly rate of \$300.00 is reasonable, despite claimant's counsel's consultation with outside counsel on several occasions. In support of his fee petition, claimant's counsel submitted an affidavit referencing his thirty-five years of experience at all stages of the adjudication process, his rating as high to very high in Martindale-Hubbell, his professional associations, and two cases in which he had been awarded an hourly rate of \$300.00. Claimant's counsel also submitted a copy of a page from the 2006 Survey of Law Firm Economics published by Altman & Weil. The administrative law judge considered this information, and the factors set forth at 20 C.F.R. §725.366, and acted within her discretion in finding that the hourly rate of \$300.00 was reasonable, given the complexity of the claim and "[i]n light of [claimant's counsel's] qualifications, as well as the recent cases he cited and submitted which approved a \$300.00 hourly rate." Decision and Order Awarding Attorney's Fees and Costs at 3; *see* 20 C.F.R. §725.366(b); *Gosnell*, 724 F.3d at 572-74, 25 BLR at 2-375-76; *Pritt*, 9 BLR at 1-160.

Employer also alleges that the administrative law judge erred in failing to resolve whether the two hours spent engaging in telephone conferences with the OALJ between 2003 and 2007, were excessive. The administrative law judge noted employer's argument with respect to the telephone consultations with the OALJ and rejected employer's contention that claimant's counsel's fee petition did not provide any description of the content of the phone calls. Decision and Order Awarding Attorney's Fees and Costs at 5; *see* Employer's October 17, 2012 Opposition to Fee Petition at 13; Employer's Petition for Review on Cross-Appeal at 10-11. Contrary to employer's argument, the administrative law judge permissibly found that it was "not necessary for Claimant's counsel to provide a further detailed statement with regard to these entries," rationally finding them to be "self-explanatory." *See Jones*, 21 BLR at 1-108; *Abbott*, 13 BLR at 1-16; Decision and Order Awarding Attorney's Fees and Costs at 5. Consequently, we affirm the administrative law judge's denial of employer's request to disallow the time requested for these services.

Employer also challenges the administrative law judge's approval of twelve entries, totaling thirteen hours for consultations with outside counsel from January 21, 2008 to March 31, 2008. Employer's contention is without merit. The administrative law judge found that claimant's counsel presented a persuasive argument for engaging outside counsel, crediting claimant's counsel's assertion that he consulted with outside counsel because "the complexity of the legal issues in the case were significant, as shown by the fact that the case was argued twice before the Fourth Circuit." Decision and Order

employer's agreement with respect to Judge Kaplan's January 3, 2003 Supplemental Decision and Order Granting Attorney Fees. *See* Employer's Petition for Review on Cross-Appeal at 10-13; Decision and Order Awarding Attorney's Fees and Costs at 2.

Awarding Attorney's Fees and Costs at 6. The administrative law judge acted within her discretion in finding that claimant's counsel "met his burden of establishing the necessity of associating with outside counsel." *Id.*; see *Jones*, 21 BLR at 1-108. Therefore, employer has demonstrated no abuse of discretion by the administrative law judge in overruling employer's objection to the thirteen hours claimant's counsel requested for consultations with outside counsel.

In sum, we affirm the administrative law judge's findings that: claimant's counsel is entitled to be reimbursed at an hourly rate of \$300.00; 2.75 hours of time must be disallowed for work performed that was clerical in nature; claimant's counsel was entitled to reimbursement for the two hours spent holding telephone conferences with the OALJ; and claimant's counsel established the necessity of the thirteen hours of consultations with outside counsel. We vacate, however, the administrative law judge's reduction by 22.25 hours of the time counsel expended preparing briefs on remand from the Board and the Fourth Circuit.

Accordingly, the administrative law judge's Decision and Order Awarding Attorney's Fees and Costs is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge