PART XI

ATTORNEY FEES

A. BOARD REVIEW OF ATTORNEY FEE AWARDS MADE BELOW

7. ISSUES ON APPEAL OF ATTORNEY FEE AWARDS

b. Counsel's Appeal of Substantial Reductions in the Requested Fee

In cases in that claimant's counsel has appealed substantial reductions in the requested fee, the Board has held that the amount of an attorney fee award is discretionary and will be set aside only if counsel demonstrates that the award is arbitrary, capricious, or an abuse of discretion. ***Lenig v. Director, OWCP***, 9 BLR 1-147 (1986), *citing* ***Marcum v. Director, OWCP***, 2 BLR 1-894 (1980).

The adjudication officer determines the appropriate fee award by considering the regulatory criteria found at Section 725.366(b). These factors include the quality of representation, qualifications of the representatives, complexity of the legal issues involved, level of proceedings to which the claim was raised, and the level at which counsel entered the proceedings. 20 C.F.R. §725.366(b); ***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); ***Marcum***, ***supra***; ***Allen v. Director, OWCP***, 7 BLR 1-330 (1984).

Basically, an attorney fee request may be reduced by either or both of the following two methods: by reducing the length of time claimed for each service or by reducing the hourly rate. Thus, the two principal attorney fee issues encountered by the Board on appeal are whether the adjudication officer acted unreasonably or abused her/his discretion by either disallowing or reducing time spent for services or by reducing the requested hourly rate. Occasionally, the issue of reduced or eliminated miscellaneous expenses also arises on appeal. The order awarding the fee must contain a rationale for any substantial reduction of the amount requested. ***Barr v. Director, OWCP***, 7 BLR 1-367 (1984); ***Robel v. Director, OWCP***, 7 BLR 1-358 (1984); ***Marcum***, ***supra***.

The amount of a claimant's benefits may also be relevant to a fee award, but it is not a separate item for consideration, as the amount of benefits is set by law and does not vary according to the quality or amount of work performed by counsel. ***Simmons v. Director, OWCP***, 7 BLR 1-175 (1984). Counsel must demonstrate the relevance of the amount of benefits awarded to the attorney fee for it to be considered as a factor. ***Simmons***, ***supra***;

Allen v. Director, OWCP, 7 BLR 1-330 (1984); ***Helton v. Director, OWCP***, 6 BLR 1-176 (1983).

Unlike the mandatory factors listed in Section 725.366(b), risk of loss is a constant factor in black lung litigation and is deemed incorporated into the hourly rate and, therefore, is not evaluated separately by the adjudication officer. ***Gibson v. Director, OWCP***, 9 BLR 1-149 (1986); ***Allen***, ***supra***; ***Simmons***, ***supra***; *see also* ***Pennsylvania v. Delaware Valley Citizens' Council for Clean Air***, 107 S.Ct. 3078 (1987); *cf.* ***Gillman v. Director, OWCP***, 9 BLR 1-7 (1986).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.366(b), pertaining to attorney's fees, is consistent with the holding of the United States Supreme Court in ***Burlington v. Dague***, 505 U.S. 557, 562 (1992), that attorney fees be calculated according to the "lodestar" method, as the regulation requires consideration of no factors not already included in the lodestar analysis. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 874-875, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The case listings and digests are seperated for convience of the reader into the following categories:

b. Counsel's Appeal of Substantial Reductions in the Requested Fee:

(1) The Hourly Rate
(2) The Number of Hours
(3) Miscellaneous Expenses

(a) Travel
(b) Overhead Expenses

7. ISSUES ON APPEAL OF ATTORNEY FEE AWARDS

b. Counsel's Appeal of Substantial Reductions in the Requested Fee

(1) The Hourly Rate

<u>CASE LISTINGS</u>

[adjudicator may inquire of local bar association as to reasonable hourly rate in area in determining appropriate hourly rate] ***Budinski v. Director, OWCP***, 6 BLR 1-541 (1983).

[where the Board declined to remand the fee order to the district director for the second

time because the district director neglected to follow the Board's instructions on remand to reconsider the criteria at Section 725.366(b)] ***Allen v. Director, OWCP***, 7 BLR 1-330 (1984).

[attorney experience and expertise must be considered by adjudicator in fixing attorney's hourly rate if raised by attorney, but burden is on attorney to demonstrate expertise] ***Allen v. Director, OWCP***, 7 BLR 1-330, 1-332 (1984); ***Maloney v. Director, OWCP***, 4 BLR 1-711 (1982); ***Sherrick v. Director, OWCP***, 4 BLR 1-117 (1981); ***Charles v. Director, OWCP***, 3 BLR 1-80 (1980).

[argument that counsel cannot justify number of hours claimed if expert in field and cannot justify hourly rate claimed if he does not, rejected] ***Jones v. Kaiser Steel Corp.***, 8 BLR 1-339 (1985); *see also* ***Schneider v. Director, OWCP***, 2 BLR 1-918 (1979)[discussion of Catch-22 effect of relying solely on attorney experience to reduce fees].

DIGESTS

The Board approved the district director's consideration of numerous factors, including the complexity of the case, the level of the proceedings, the skill of the attorney, the usual and customary fee in the area, and risk of loss, in reducing the requested hourly rate. ***Gillman v. Director, OWCP***, 9 BLR 1-7 (1986).

When an attorney fee petition does not specify an hourly rate, the adjudicating officer may properly compute a requested hourly rate by dividing the total fee requested by the number of hours requested and predicate the award on this rate. This method of calculation is not arbitrary, capricious or an abuse of discretion, even when the resulting hourly rate may be so low that the Board has held it to be manifestly inadequate previously. ***Helmick v. Director, OWCP***, 9 BLR 1-161 (1986), *overruling*, ***Coffey v. Director, OWCP***, 4 BLR 1-405 (1982).

An order by a U.S. District Court Judge awarding attorney fees at a certain hourly rate in another case is not binding precedent for determining the hourly rate at which a fee will be awarded to counsel in the present case. ***Whitaker v. Director, OWCP***, 9 BLR 1-216 (1986).

Upon review of the case according to the criteria of Section 725.366(b), the adjudication officer may choose to reduce the hourly rate requested to one more commensurate with the complexity of the case, the level of the proceedings, and the quality of the representation. *See* ***Pritt v. Director, OWCP***, 9 BLR 1-159 (1986); ***Allen v. Director, OWCP***, 7 BLR 1-330 (1984); *see also* ***Velasquez v. Director, OWCP***, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988).

In a Longshore case, the Board held that claimant's counsel was not entitled to interest or any other type of augmentation of the hourly rate based on delay in receiving payment.

The Board stated that the hourly rate should be based upon the customary rate in effect at the time the services were rendered. ***Hobbs v. Stan Flowers Co., Inc.***, 18 BRBS 65 (1986).

The Board has consistently held, however, that an hourly rate of $50 is manifestly inadequate. *See e.g.* ***Gibson v. Director, OWCP***, 9 BLR 1-149 (1986). In contrast, the Board has routinely affirmed fees based on an hourly rate of $75, ***Gillman v. Director, OWCP***, 9 BLR 1-7 (1986), and frequently modifies previously reduced hourly rates to $75, ***Kiwall v. Director, OWCP***, 9 BLR 1-142 (1986); ***Gibson v. Director, OWCP***, 9 BLR 1-149 (1986), ***Whitaker v. Director, OWCP***, 9 BLR 1-216 (1986). In addition, in the Longshore area, the Board has approved $125 per hour in light of inflation. ***Powell v. Nacirema Operating Co., Inc.***, 19 BRBS 124 (1986).

The Supreme Court held that "multipliers or other enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee shifting statutes." ***Pennsylvania v. Delaware Valley Citizens' Council for Clean Air***, 107 S.Ct. 3078 (1987).

The Board has held that nothing in the Act or its implementing regulations precludes the use of the same factor to reduce both hourly rate and the number of compensable hours. *See* ***Parker v. Director, OWCP***, 12 BLR 1-98 (1987), *overruling*, ***Knight v. Director, OWCP***, 3 BLR 1-757 (1981).

The Board has approved hourly rates of $150.00. *See generally* ***Goodloe v. Peabody Coal Co.***, 19 BLR 1-91 (1995).

7. ISSUES ON APPEAL OF ATTORNEY FEE AWARDS

b. Counsel's Appeal of Substantial Reductions in the Requested Fee

(2) The Number of Hours

Review of an attorney fee petition involves a two-tiered analysis: whether, at the time the attorney performed the service, the attorney could reasonably regard it as necessary to establish entitlement; and whether the amount of time expended was excessive or unreasonable. If so, the adjudication office may reduce the fee to a figure commensurate with the service. ***Lanning v. Director, OWCP***, 7 BLR 1-314 (1984). In ***Lanning***, the Board held that the adjudication officer abused his discretion in disallowing all time spent on research based on the theory that it could be applied to other clients' claims. Even an experienced attorney must be allowed an appropriate time for research. ***Spencer v. Director, OWCP***, 6 BLR 1-971 (1984); ***Wiggins v. Director, OWCP***, 4 BLR 1-439 (1982); *see also* ***Pritt v. Director, OWCP***, 9 BLR 1-159 (1986); ***Matulevich v. Director, OWCP***, 9 BLR 1-152 (1986)(where the Board affirmed the district director's reduction of

research time as within his discretion); ***Velasquez v. Director, OWCP***, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988).

In contrast, where the attorney requested compensation for services for general research attributable to all Black Lung Act cases handled over a 5-6 year period, but failed to provide information of apportionment of the appropriate research time for this case, after the Board had already remanded the case for the same deficiency, the district director did not abuse his discretion by denying the entire time request for general research. ***Snyder v. Director, OWCP***, 9 BLR 1-187 (1986).

The adjudication officer also may not disallow all time spent by counsel advising his client as to the status of his claim. ***Lanning***, ***supra***. Time spent writing status letters or placing status telephone calls may be included in the fee application, absent a finding of excessive status inquiries. Status inquiry letters may be justified by inordinate delays in processing the miner's claim. ***Miller v. Director, OWCP***, 4 BLR 1-640 (1982); ***Hill v. Director, OWCP***, 4 BLR 1-280 (1981); ***Atchison v. Director, OWCP***, 2 BLR 1-699 (1979).

In addition, periodic review of a file is a legitimate recurring activity in prolonged cases and is, therefore, compensable. ***McNulty v. Director, OWCP***, 4 BLR 1-128 (1981). The Board has, however, upheld the disallowance of time spent reviewing a file three months after the award. ***Parker v. Director, OWCP***, 4 BLR 1-453 (1982).

All work claimed by counsel need not be reflected in the administrative agency file in order to be compensable. The fact that a letter to claimant from counsel is not contained in the record is not grounds for disallowing the time spent writing it. ***Gibson v. Director, OWCP***, 9 BLR 1-149 (1986); ***Cox v. Director, OWCP***, 7 BLR 1-810 (1985). If a letter between counsel and claimant is protected by the attorney-client privilege, a description of the length and the content of the letter provides a sufficient basis for awarding a fee for the time spent preparing the letter. With regard to exchanges of correspondence between co-counsel, the work-product immunity rule does not apply. Counsel is not, however, required to submit copies of all correspondence, but must merely provide a sufficient description for the adjudicator to evaluate the work performed. ***Bash v. Director, OWCP***, 6 BLR 1-419 (1983).

CASE LISTINGS

[activities involving Black Lung legislation, including attending DOL hearings on proposed regulations and drafting comments on them, do not constitute necessary services in prosecution of a claim] ***Miller v. Director, OWCP***, 2 BLR 1-841 (1980); ***Mitchell v. Director, OWCP***, 2 BLR 1-717 (1979).

[contention that showing of fraud is only rational justification for cutting hours on fee petition rejected; within discretion of adjudicator to determine reasonable fee] ***Childers v. Director, OWCP***, 2 BLR 1-1198 (1980).

[time spent preparing attorney fee petition and correcting billing errors excluded since not related to establishing entitlement] ***Brown v. Director, OWCP***, 3 BLR 1-95, 1-98 (1979); ***Hamby v. Director, OWCP***, 2 BLR 1-889 (1980).

[time spent preparing cover letter to accompany fee petition not compensable] ***Calhoun v. Director, OWCP***, 3 BLR 1-812 (1981).

[abuse of discretion for district director to disallow time requested for letter drafted by attorney to claimant after award is made to explain benefits to him. Explanation of an award is necessary part of attorney's function] ***Brown v. Director, OWCP***, 3 BLR 1-95 (1979); ***Marcum v. Director, OWCP***, 2 BLR 1-894 (1980); within adjudicator's discretion to disallow some time claimed] ***Morgan v. Director, OWCP***, 4 BLR 1-103 (1981).

[attorney cannot receive compensation for time used to seek legislator's assistance or intervention in claim process] ***Morgan v. Director, OWCP***, 4 BLR 1-103 (1981); *see also* ***Miller v. Director, OWCP***, 2 BLR 1-841 (1980); ***Mitchell v. Director, OWCP***, 2 BLR 1-717 (1979).

[disallowance based on excessive time implies existence of compensable service for which reasonable amount of time can be determined; proper course for adjudicator is to reduce time to figure commensurate with reasonable performance of service] ***McNulty v. Director, OWCP***, 4 BLR 1-128 (1981).

[error for adjudicator to *totally disallow* claimed services merely because simple and easy for counsel to perform] ***Bradley v. Director, OWCP***, 4 BLR 1-241 (1981).

[error to disallow time claimed on basis that exceeded "normal" amount of time or that work not "actual work in support of a favorable determination"] ***Billingsley v. Director, OWCP***, 4 BLR 1-420 (1982).

[necessary travel time is compensable; attorney must submit pertinent information regarding trip, such as date, purpose of trip, activities related to claim, and results of trip] ***Bradley v. Director, OWCP***, 4 BLR 1-241 (1981).

[not abuse of discretion for adjudicator to disallow spent in initial conference with claimant, when attorney advertised free initial consultations; it was deceptive and questionable practice for attorneys to advertise free initial consultation for claimants and then charge claimant, employer or Trust Fund, for initial conference once claimant is found entitled to benefits] ***Spencer v. Director, OWCP***, 6 BLR 1-971 (1984).

[burden of showing attorney's office conference with staff regarding further actions to be taken on case is on claimant's counsel to show conference necessary to establish entitlement] ***Wade v. Director, OWCP***, 7 BLR 1-334 (1984).

DIGESTS

The Board affirmed the district director's reduction of the time for counsel's initial interview with claimant from three hours to one and one-half hours as it was within the district director's discretion to find the time billed excessive. ***Whitaker v. Director, OWCP***, 9 BLR 1-216 (1986); *see also* ***Childers v. Director, OWCP***, 2 BLR 1-1198 (1980).

The Board held that an expert need not testify at an administrative hearing in order for claimant's counsel to be reimbursed for the costs of obtaining a physician's opinion. *See* 33 U.S.C. §§924, 925; ***Branham v. Eastern Associated Coal Corp.***, 19 BLR 1-1 (1994).

The administrative law judge properly awarded claimant's counsel a requested supplemental fee for 2.9 hours of time billed in defense of counsel's original application for a fee for legal services rendered when the claim was previously before the administrative law judge. ***Hawker v. Zeigler Coal Co.***, 22 BLR 1-168 (Aug. 23, 2000), *aff'd on recon.*, 22 BLR 1-177 (July 2, 2001).

7. ISSUES ON APPEAL OF ATTORNEY FEE AWARDS

b. Counsel's Appeal of Substantial Reductions in the Requested Fee

(3) Miscellaneous Expenses

(a) Travel

Travel expenses are compensable, but the attorney must include in the fee petition pertinent information concerning the trip. ***Bradley v. Director, OWCP***, 4 BLR 1-241 (1981). Counsel should provide dates, the purpose of the trip, activities relating to the claim, and results of the trip. When a district director reduces the attorney's requested travel expenses, he must indicate that the counsel's travel expenses were determined in accordance with 20 C.F.R. §725.459(a), as required by 20 C.F.R. §725.366(c). Failure to consider the appropriate regulations renders an award both arbitrary and an abuse of discretion. ***Bradley***, ***supra***; ***Cavote v. Director, OWCP***, 2 BLR 1-1052, 1-1060 (1980).

CASE LISTINGS

DIGESTS

The Board affirmed the district director's disallowance of travel expenditures and reduction of travel time because he determined that the medical records were obtainable by

telephone correspondence. ***Matulevich v. Director, OWCP***, 9 BLR 1-152 (1986).

The Board affirmed the administrative law judge's finding that employer was liable for mileage costs claimant's counsel incurred when attending depositions as these costs were travelling expenses necessary in establishing claimant's case. ***Branham v. Eastern Associated Coal Corp.***, 19 BLR 1-1 (1994).

7. ISSUES ON APPEAL OF ATTORNEY FEE AWARDS

b. Counsel's Appeal of Substantial Reductions in the Requested Fee

(3) Miscellaneous Expenses

(b) Overhead Expenses

To the extent that the Board finds a request for photocopying expenses to be reasonable and necessary to the work performed before the Board, they will not be automatically disallowed as part of office overhead. ***Picinich v. Lockheed Shipbuilding***, 23 BRBS 128 (1989). In ***Picinich***, the Board found the requested expenses reasonable and necessary given the complexity of the case and the number of parties involved and appeals pursued. Thus, it appears that the Board will employ the same general standard, *i.e.*, whether expenses are reasonable and necessary to the work performed before the Board, to determine the compensability of miscellaneous expenses, as well as time spent. In a footnote in ***Picinich***, the Board noted that a request for reimbursement of photocopying expenses may be challenged as unnecessary, unreasonable, or for failure to itemize and identify the reason for those costs with specificity.

CASE LISTINGS

DIGESTS

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); ***Marcum***, ***supra***; ***Childers v. Director, OWCP***, 2 BLR 1-1198 (1980).

It remains within the discretion of the district director or administrative law judge to determine whether, in any given case based on the record evidence, photocopying costs or other miscellaneous expenses are reasonable and necessary or merely part of ordinary office overhead. Consequently, the Board will affirm such findings unless they are shown

to be arbitrary, capricious, or an abuse of discretion. ***Picinich v. Lockheed Shipbuilding***, 23 BRBS 128 (1989).

7. ISSUES ON APPEAL OF ATTORNEY FEE AWARDS

b. Counsel's Appeal of Substantial Reductions in the Requested Fee

(3) Miscellaneous Expenses

(c) Enhancement of Fees

CASE LISTINGS

DIGESTS

The Act does not bar shifting the expenses of fees of non-testifying witnesses to employer, and the administrative law judge acted within his discretion in finding that the expenses requested by claimant's counsel for physicians' fees were necessary and reasonable for claimant to successfully prosecute his claim. ***Hawker v. Zeigler Coal Co.***, 22 BLR 1-168 (Aug. 23, 2000), *aff'd on recon.*, 22 BLR 1-177 (July 2, 2001).

The Board affirmed the administrative law judge's finding that claimant's counsel is entitled to interest on his award of attorney's fees, pursuant to Section 725.608(c) and (d), as enhancement for employer's delay in payment of the fees. 20 C.F.R. §725.608. In affirming this finding, the Board rejected employer's contention that the administrative law judge's application of the new regulation at Section 725.608 was impermissibly retroactive because it imposes a new burden on employer. The Board held that the regulation at Section 725.608 simply provides the mechanism by which claimants' attorneys receive enhancement, in the form of interest in cases involving responsible operators. 65 Fed. Reg. 80020 (2000). The Board held that Section 725.608 is thus a procedural rule, and is, therefore, entitled to retroactive effect. ***Frisco v. Consolidation Coal Co.***, BRB Nos. 02-0766 BLA and 02-0766 BLA-A (Sept. 8, 2003)(published)(Dolder, J., concurring and dissenting).

11/04