

M. M.)	BRB No. 09-0215
)	
Claimant-Petitioner)	
)	
v.)	
)	
ARMY & AIR FORCE EXCHANGE)	DATE ISSUED: 07/31/2009
SERVICE)	
)	
Self-Insured)	
Employer-Respondent)	
)	
M. M.)	BRB No. 09-0220
)	
Claimant-Respondent)	
)	
v.)	
)	
ARMY & AIR FORCE EXCHANGE)	
SERVICE)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeals of the Order Sustaining Employer's Objection to Claimant's Counsel's Fee Petition and Approving a Reduced Fee of Janice K. Bullard, Administrative Law Judge, and the Compensation Order Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

Annamarie Fortunato (Fortunato & Fortunato, PLLC), Brooklyn, New York, for claimant.

James M. Mesnard (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Sustaining Employer's Objection to Claimant's Counsel's Fee Petition and Approving a Reduced Fee (2007-LHC-00385) of Administrative Law Judge Janice K. Bullard, BRB No. 09-0215, and employer appeals the Compensation Order Award of Attorney Fees (Case No. 02-129169) of District Director Richard V. Robilotti, BRB No. 09-0220, rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant slipped and fell, injuring her back during the course of her employment for employer on November 20, 2000. Claimant was released by employer in June 2002 due to repeated absences from work. Subsequently, claimant was diagnosed with severe hypertension, and, on April 12, 2007, she sustained a myocardial infarction. Claimant alleged that stress related to her back injury caused hypertension, coronary artery disease, and the April 2007 heart attack. Claimant further alleged that she injured her left wrist at the time of the November 2000 fall. She sought compensation under the Act for permanent total disability. 33 U.S.C. §908(a).

In her Decision and Order, the administrative law judge found that claimant failed to establish either that her wrist condition is due to the work accident or that her coronary artery disease and heart attack are related to the work injury. The administrative law judge found that claimant sustained a back injury and that she is unable to return to work for employer as a cashier/greeter due to this condition. The administrative law judge also found that claimant's hypertension has been aggravated by work-related back pain. The administrative law judge awarded claimant compensation for permanent total disability, 33 U.S.C. §908(a), based on the parties' stipulated compensation rate of \$169.56. Employer was found liable for medical treatment related to claimant's back condition and for aggravation of claimant's elevated blood pressure related to a prior episode of back pain.

Claimant's counsel subsequently sought an attorney's fee of \$72,881.95 for legal work performed from September 6, 2005, to June 30, 2008, representing 164.25 hours at \$375 per hour, plus \$11,288.20 in costs. Employer objected to the fee petition, to which claimant responded. The administrative law judge excluded 14 hours of service performed while the claim was pending before the district director. The administrative law judge reduced the hourly rate requested to \$350 per hour for attorney work. The administrative law judge also disallowed numerous entries and costs on the fee petition

for various reasons. *See* discussion, *infra*. The administrative law judge awarded claimant's counsel a fee of \$15,515.49, representing \$12,687.50 in attorney's fees and \$2,827.99 in costs.

Claimant's counsel also filed a fee petition for work performed before the district director from July 17, 2003, to September 13, 2006, in which she requested a fee of \$14,574.08, representing 37 hours for legal work at \$375 per hour and \$699.08 in costs. The district director reduced the requested hourly rate to \$325 and disallowed the requested costs as they were not itemized. The district director awarded claimant's counsel a fee of \$12,025.

On appeal, claimant challenges the fee awarded by the administrative law judge. Employer responds, urging affirmance. BRB No. 09-0215. Employer appeals the attorney's fee awarded by the district director. Claimant responds, urging affirmance. BRB No. 09-0220.

We first address claimant's appeal of the administrative law judge's attorney's fee award. Claimant challenges the denial of a fee for all entries designated on the fee petition as performed by "FF." Claimant asserts the record shows that this work was performed by attorneys Annamarie Fortunato or Camille Fortunato. In her decision, the administrative law judge found that claimant's counsel sought a "blended rate" of \$375 for work performed by attorneys and non-attorneys in the Fortunato Firm ("FF"), and she rejected this method. The administrative law judge found that these disputed entries failed to identify the professional status of the person performing the work, the actual hours performed by each individual, and the normal billing rate for that person, as required by 20 C.F.R. §702.132(a). The administrative law judge found that even if there was sufficient information to find that the services attributed to "FF" were compensable, services rendered by non-attorneys George Fortunato and Dennis Virga may be compensated, at most, only at a rate for a paralegal.¹ The administrative law judge also found that many of the "FF" designated entries are duplicative, excessive, and involve only a clerical function, or they describe multiple tasks without a corresponding assertion of time for each specific task. Accordingly, the administrative law judge declined to award any fee for services designated as performed by "FF." The administrative law

¹ Mr. Fortunato and Mr. Virga are listed on the firm's letterhead as "compensation representatives." As the administrative law judge found, employer cannot be liable for a fee for lay representatives, 33 U.S.C. §928; *see Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001), but may be liable for work performed by non-attorneys who work under the guidance of an attorney, such as paralegals and legal assistants, at a reduced rate.

judge also declined to attribute the “FF” services to attorney Annamarie Fortunato. The administrative law judge found that the fee petition did not indicate she performed the services, and that, although Ms. Fortunato signed some pleadings and submissions, she did not enter an appearance as claimant’s counsel nor did she appear on claimant’s behalf in discovery proceedings or at the hearing. The administrative law judge found that claimant’s counsel had notice of employer’s objections to the fee petition on these grounds, and ample opportunity to identify which individuals performed what type of work, but counsel declined to do so when responding to employer’s objections.

Section 702.132 of the regulations, 20 C.F.R. §702.132, provides that “the fee petition shall be supported by a complete statement of the extent and character of the necessary work done, described *with particularity* as to the professional status (e.g., attorney, paralegal, law clerk, or other person assisting an attorney) of each person performing such work, the normal billing rate for each such person, and the hours devoted by each such person to each category of work.” 20 C.F.R. §702.132(a) (emphasis added). We affirm the administrative law judge’s denial of a fee for all work performed by “FF,” as the administrative law judge rationally found that these entries fail to comply with Section 702.132(a). Notwithstanding the assertion on appeal that attorneys performed all of the work attributed to “FF,” counsel repeatedly stated to the administrative law judge in response to employer’s objections that she sought a blended rate for work performed by attorneys and paralegals.² *See, e.g.*, Emp. Br. at EX 5 at 2-4, 6, 20-21; EX 8 at 3. Moreover, a review of the administrative file shows that most of the correspondence from counsel’s firm was signed by either Mr. Fortunato or Mr. Virga, who are not attorneys. Accordingly, the administrative law judge rationally concluded that the billing entries attributed to “FF” fail to comply with the regulatory requirement that the fee petition identify with particularity the person performing the work, the normal billing rate, and the actual time expended on each task. Additionally, the administrative law judge properly found that Section 702.132(a) precludes awarding a fee based on a blended rate for work performed by attorneys and non-attorneys as the regulation specifies that the fee petition must state the normal billing rate for each person for whose work a fee is requested. As counsel has failed to establish an abuse of the administrative law judge’s discretion, we affirm the administrative law judge’s denial of a fee for the non-conforming entries in the fee petition that are designated as having been performed

² Contrary to counsel’s assertion in claimant’s appellate brief, the file does not contain contemporaneous time records that she states were submitted with the fee petition.

by “FF.”³ See *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975).

Claimant next challenges the administrative law judge’s denial of a fee for 26 hours expended by “FF/TB/MFS” for the period from “12-10-07 thru 1-15-08” for preparation of a brief. The administrative law judge found that she is unable to determine how much time was expended by each individual or how much time was spent on any of the tasks described. The administrative law judge found that the single billing entry is also too vague both because all of the services described involve document review, not the actual drafting of the brief, and the entry incorporates unspecified hours over a period of days. The administrative law judge found that this entry fails to meet the regulatory requirements for specificity by failing to provide a complete statement of the extent and character of the work performed. The administrative law judge did not abuse her discretion in finding that this entry fails to comply with Section 702.132(a) and we affirm the denial of fee on this basis.⁴ See generally *Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994).

Claimant also challenges the administrative law judge’s reduction of 10 hours requested by “FF” and Attorney Roper to draft a motion regarding a change of venue and four hours requested by “FF” and Attorney Bushlow related to the deposition of Dr. Langman. The administrative law judge found excessive 5.5 hours requested by Mr. Roper on April 19, 2008, and 4.5 hours by “FF” on April 20, 2008, to research and prepare the specific motion filed with her. She approved 5 hours, but awarded a fee only to Mr. Roper for 2.75 hours. The 4.5 hours requested by “FF” was denied as the administrative law judge could not determine who performed the work. We have

³ We reject Ms. Fortunato’s assertion that the administrative law judge erred by finding that she did not enter an appearance in the case. The administrative file shows that Mr. Fortunato signed the letter of representation filed with the Office of Workers’ Compensation Programs on October 14, 2003, and the administrative law judge’s finding that Ms. Fortunato did not appear at discovery proceedings or at the formal hearing is supported by the record. Thus, the administrative law judge did not err by not attributing any of the “FF” work to attorney Fortunato.

⁴ We need not address claimant’s counsel assertion that the administrative law judge erred by denying a fee for work performed by attorneys that she found was clerical in nature. The contested entries were listed as being performed by “FF,” and we have affirmed the administrative law judge’s denial of any fee for work performed by “FF.” For the same reason, we also affirm the administrative law judge’s denial of a fee for 29.5 hours expended by “FF” for replying to employer’s objections to the fee petition, as the administrative law judge rationally found this endeavor was substantially unsuccessful.

affirmed the administrative law judge's denial of a fee for entries designated as "FF." Moreover, as claimant has not met her burden of showing that the administrative law judge abused her discretion in reducing the time found compensable for services rendered by Mr. Roper in this regard, the number of hours awarded by the administrative law judge is affirmed. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

The administrative law judge also found that the attorney time incurred due to claimant's consultation with Dr. Langman, a neurologist, was not reasonable or necessary. The administrative law judge found that claimant had not been referred to any neurologist, Dr. Langman referred claimant to an orthopedist, the type of physician with whom claimant was already treating, and his opinion was of little probative value in deciding the case for orthopedic and coronary injuries. The administrative law judge found that the billing entry on June 21, 2007, refers to preparation for the depositions of Drs. Chung and Langman; therefore, she was unable to apportion the time spent by counsel in performing these tasks. Accordingly, the administrative law judge denied the 2.5 hours charged to prepare for the depositions of Drs. Chung and Langman, and 1.5 hours charged on June 28, 2007, for Dr. Langman's deposition. The test for determining the necessity of work performed by counsel is whether, at the time it was performed, the attorney reasonably believed it was necessary to establish entitlement. *See, e.g., O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). In this case, the administrative law judge rationally found that Dr. Langman's deposition was not reasonable or necessary at the time it was taken based on his qualifications and the nature of claimant's injury, which were facts known to claimant's counsel at the time of the deposition. Moreover, the administrative law judge could rationally deny the time requested for Dr. Chung's deposition as counsel failed to apportion the fee request according to the service performed. Accordingly, we affirm the administrative law judge's denial of a fee related to these depositions.⁵ *O'Kelley*, 34 BRBS at 44.

Finally, claimant challenges the administrative law judge's denial of travel expenses, including airfare, lodging, car service, and postage. The administrative law

⁵ Claimant also challenges the administrative law judge's denial of the \$3,500 cost for Dr. Langman's deposition. Under Section 28(d), the cost of an expert witness's testimony or report offered in support of claimant's claim may be awarded against employer where claimant prevails, and the administrative law judge finds the cost to be necessary and reasonable. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); 33 U.S.C. §928(d); 20 C.F.R. §702.135. In this case, the administrative law judge reasonably determined that Dr. Langman's deposition was neither reasonable nor necessary.

judge found that claimant is entitled to travel costs to attend the hearing in New York, from her home in Georgia. The administrative law judge also found that claimant's counsel would be entitled to reasonable and necessary costs for traveling from their location in New York to claimant's home, but that counsel failed to clarify and explain in response to employer's objections the necessity and reasonableness of the travel costs listed in the fee petition. Accordingly, the administrative law judge denied reimbursement of \$325 for Allnet Transportation, \$268.77 to Expedia.com (hotel), \$467.80 to Travelscape LLC (airfare), as no explanation of the purpose or need for these travel costs was provided. The administrative law judge further denied additional unexplained travel costs of \$296 and \$222 for "Court Express Car Service." The administrative law judge denied FedEx expenses totaling \$367.14 as office overhead. Section 28(d) of the Act, 33 U.S.C. §928(d), provides that where an attorney's fee is awarded against employer, costs also may be assessed against employer. *See Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989). Upon review of the costs enumerated in claimant's counsel's fee petition and counsel's replies to employer's objections, we hold that the administrative law judge did not abuse her discretion in disallowing specific travel costs on the basis that counsel failed to adequately explain their reasonableness and necessity. *See generally Brinkley v. Dept. of the Army/NAF*, 35 BRBS 60 (2001). Moreover, the administrative law judge acted within her discretion in disallowing the FedEx expense as office overhead. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Picinich*, 23 BRBS 128. Accordingly, as claimant has failed to establish an abuse of the administrative law judge's discretion in reducing the fee and costs due to significant omissions in the fee petition, the administrative law judge's attorney's fee award is affirmed.⁶ *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

In its appeal, employer challenges the attorney's fee awarded by the district director. Employer argues that the fee order should be vacated because, with the exception of some entries with Mr. Fortunato's or Mr. Virga's initials, the fee petition fails to identify the professional status of the person performing the work, the actual hours performed by each individual, and the normal billing rate for that person. Employer also challenges the district director's allowance of a blended rate of \$325 for work performed by attorneys and non attorneys, and the same rate for work identified as having been performed by Mr. Fortunato and Mr. Virga. Employer filed objections to these hours and to the hourly rate with the district director. Finally, employer asserts that

⁶ We note, moreover, that the administrative law judge rationally found that the fee request of almost \$73,000 was excessive and not commensurate with the quality of the representation, the scope or necessity of the work performed, the complexity of the case, or the results achieved. Decision and Order at 7. This finding is within her discretion. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001).

the district director's order does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as he did not provide an explanation or basis for the fee award.

Pursuant to Section 19(d) of the Act, 33 U.S.C. §919(d), the APA is not strictly applicable to fee awards issued by the district director. *See generally Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000). We nonetheless agree with employer that the district director did not sufficiently address employer's objections. The district director's order cited 20 C.F.R. §702.132, but failed to apply the regulation in view of employer's objections stating only:

This office makes note of various objections filed by counsel for employer/carrier. The requested expenses were not itemized and are disallowed. The hourly rate is reduced from the requested \$375 to \$325.

Compensation Order Award of Attorney's Fees at 2. Given the cursory nature of the district director's order, we must vacate the district director's fee award and remand this case for further consideration. On remand, the district director should fully discuss employer's objections based on the criteria enumerated in Section 702.132(a) and provide an adequate rationale for his findings consistent with law. *See Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); *see also Galle*, 246 F.3d 440 35 BRBS 17(CRT).

Accordingly, the administrative law judge's Order Sustaining Employer's Objection to Claimant's Counsel's Fee Petition and Approving a Reduced Fee is affirmed. The district director's Compensation Order Award of Attorney's Fees is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge