U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 21-0514 BLA
and 22-0139 BLA

EDDIE J. LAWSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	DATE ISSUED: 8/04/2023
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Attorney Fee Order of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Scott A. White (White & Risse, L.L.C.), Arnold, Missouri, for Employer.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits and Attorney Fee Order (2016-BLA-05878) rendered on a claim filed on January 7, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for a second time.[1]

The ALJ accepted the parties' stipulation that Claimant has 39 years of qualifying coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the

[1] On December 28, 2017, ALJ Richard A. Morgan issued a Decision and Order Awarding Benefits. Pursuant to Employer's appeal, the Board remanded the case for reassignment to a different ALJ on November 29, 2018, pursuant to *Lucia v. Securities and Exchange Comm'n*, 585 U.S. , 138 S. Ct. 2044 (2018). *Lawson v. Mingo Logan Coal Co.*, BRB No. 18-0182 BLA, slip op. at 4 (November 29, 2018) (unpub.). The case was initially assigned to ALJ Drew Swank but was returned to unassigned status on August 15, 2019. The case was subsequently assigned to ALJ Ramaley (the ALJ) on October 31, 2019.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Constitution, Art. II § 2, cl.2.[3] It further asserts the removal provisions applicable to the ALJ render his appointment unconstitutional. On the merits, Employer asserts the ALJ erred in finding the Section 411(c)(4) presumption unrebutted. Employer further challenges the ALJ's award of attorney's fees. Claimant responds in support of the award of benefits and attorney's fees. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting the ALJ had authority to decide the case. Employer filed three reply briefs[4] reiterating its assertions that the ALJ was improperly appointed, that the ALJ erroneously found the Section 411(c)(4) presumption unrebutted, and that the attorney's fee award must be vacated.[5]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance

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[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] Employer submitted individual reply briefs to the Director's response briefs as well as a consolidated reply brief to Claimant's response brief. Employer's Reply Brief (BRB No. 21-0514 BLA); Employer's Attorney Fee Reply Brief (BRB No. 22-0139 BLA); Employer's Consolidated Reply Brief.

[5] Claimant initially filed a motion for leave to submit a cross-petition for review at the same time as his response to Employer's petition for review. Claimant's Motion for Leave to Submit Cross Petition for Review and Response to Employer's Petition for Review at the Same Time (Aug. 2, 2021). By Order dated September 23, 2021, the Board granted Claimant's motion. 20 C.F.R. §§802.211, 802.212, 802.217. However, although Claimant responded to Employer's briefs in support of its petitions for review, he did not ultimately file a cross-petition for review with the Board. *See* Claimant's Response Brief (BRB No. 21-0514 BLA); Claimant's Attorney Fee Response Brief (BRB No. 22-0139 BLA).

with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359 (1965). The Board reviews an ALJ's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Appointments Clause

Employer urges the Board to vacate the ALJ's Decision and Order and Attorney Fee Order and remand this case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). Employer's Brief (BRB No. 21-0514 BLA) at 13-21; Employer's Attorney Fee Brief (BRB No. 22-0139 BLA) at 1-8; Employer's Reply Brief (BRB No. 21-0514 BLA) at 1-5; Employer's Attorney Fee Reply Brief (BRB No. 22-0139 BLA) at 1-3; Employer's Consolidated Reply Brief at 2-3. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017, but asserts any ratification was insufficient to cure "someone else's invalid choice" or the constitutional defect in ALJ Ramaley's prior appointment. Employer's Brief at 2-3, 14-16, 18; Employer's Attorney Fee Brief at 2-6. Claimant and the Director respond, asserting the ALJ had the authority to decide this case because he was properly appointed. Claimant's Response Brief (BRB No. 21-0514 BLA) at 8; Claimant's Attorney Fee Response Brief (BRB No. 22-0139 BLA) at 6-7; Director's Response Brief (BRB No. 21-0514 BLA) at 2-5; Director's Attorney Fee Response Brief (BRB No. 22-0139 BLA) at 4-5.

Initially, contrary to Employer's argument and as Claimant and the Director correctly assert, although the ALJ was previously an ALJ with the Social Security Administration, the Secretary did not ratify the ALJ's appointment but rather appointed him as an ALJ in the Department of Labor pursuant to his authority as Secretary.[7]

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Employer's Exhibit 2 at 16.

[7] The Secretary of Labor issued a letter to the ALJ on September 12, 2018, stating:

> Pursuant to my authority as Secretary of Labor, I hereby appoint you as an [ALJ] in the U.S. Department of Labor, authorized to execute and fulfill the duties of that office according to law and regulation, and to hold all the powers and privileges

Director's Response at 3-5; Director's Attorney Fee Response at 4-5; Secretary of Labor's September 12, 2018 Letter to ALJ Ramaley. Moreover, we have already addressed and rejected Employer's assertions regarding ratification in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023). We thus reject Employer's arguments.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 13-21; Employer's Attorney Fee Brief at 4-9; Employer's Reply Brief at 3-4; Employer's Attorney Fee Reply Brief at 2-3. It generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 15-20; Employer's Attorney Fee Brief at 4-8. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020). Employer's Brief at 14-17; Employer's Attorney Fee Brief at 2-5; Employer's Reply Brief at 5; Employer's Attorney Fee Reply Brief at 1-3. For the reasons set forth in *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis,[8] the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[9] or that "no part of [his] respiratory or pulmonary total

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pertaining to that office. U.S. Const. art. II, § 2, cl. 2; 5 U.S.C. § 3105. This action is effective upon transfer to the U.S. Department of Labor.

Secretary of Labor's September 12, 2018 Letter to ALJ Ramaley.

[8] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19.

[9] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions

disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[10] Decision and Order at 27-28.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 555 (4th Cir. 2013); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Rosenberg and Tuteur to disprove the existence of legal pneumoconiosis, both of whom diagnosed chronic obstructive pulmonary disease (COPD) and emphysema caused entirely by smoking cigarettes and unrelated to coal mine dust exposure. Director's Exhibits 25; Employer's Exhibits 5, 8, 9, 13. The ALJ discredited their opinions and thus found Employer did not meet its burden to affirmatively disprove legal pneumoconiosis. Decision and Order at 27.

Employer contends the ALJ erred in finding Claimant smoked for 28.50 pack years and contends this error "set forth a 'slippery slope' of underestimating the effect of [Claimant's] smoking history and thereby underestimating the effect of [his] smoking history on his self-inflicted lung disease." Employer's Brief at 25-26. We disagree.

The ALJ recounted the various descriptions of Claimant's smoking history. Decision and Order at 5; Employer's Brief at 25-26. Claimant testified he smoked from 1972 to around 2009 or 2010 at an average of one-half pack per day. Hearing Tr. at 20. Dr. Rasmussen documented a history of twenty-four years at a rate of three-fourths pack per day. Director's Exhibit 18 at 2. Dr. Rosenberg documented a history of thirty-seven years at a rate of less than one-half pack per day. Director's Exhibit 25 at 3. Dr. Fino concluded Claimant smoked for thirty-one to thirty-six years at a rate of one-half to three-fourths pack per day. Claimant's Exhibit 1 at 8. Dr. Tuteur opined Claimant smoked for thirty-seven years at a rate of one-half to three-fourths pack per day. Employer's Exhibit

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characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[10] The ALJ found Employer rebutted the presumed existence of clinical pneumoconiosis. Decision and Order at 23.

5 at 1. Finally, Dr. Cohen opined Claimant has a smoking history of forty-five years but potentially as high as ninety years. Claimant's Exhibit 6 at 7-8.

The ALJ permissibly found Claimant smoked for thirty-eight years at a rate of three-quarters pack per day, Decision and Order at 5 n.4, for a total smoking history of 28.50 pack years. *See Owens*, 724 F.3d at 557 (explaining that substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) ("If a reviewing court can discern what the ALJ did and why he did it, the duty of explanation is satisfied.") (quotation removed). Employer's assertion that Dr. Cohen's conclusion that Claimant may have a smoking history of as much as ninety pack-years amounts to a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 26. Moreover, Drs. Rosenberg and Tuteur provided the only opinions supportive of Employer's burden to affirmatively disprove legal pneumoconiosis; they concluded Claimant has a smoking history of between eighteen-and-a-quarter pack-years and twenty-seven-and-three-quarters pack-years, less than the total found by the ALJ. Director's Exhibit 25 at 3; Employer's Exhibit 5 at 1; Decision and Order at 5. Any error in the ALJ's calculation would therefore be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 25-26. Thus, we affirm the ALJ's finding that Claimant smoked for 28.50 pack-years. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 5.

Employer alleges the ALJ applied an incorrect standard in discrediting Drs. Rosenberg's and Tuteur's opinions by requiring it to "eliminat[e] all possibility" of Claimant's impairment being connected to coal mine dust exposure. Employer's Brief at 26-27. We disagree.

As the ALJ correctly observed, because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to rebut the presumed existence of pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 21. He correctly noted this standard requires Employer to prove Claimant's pulmonary impairment was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 17 (quoting 20 C.F.R. §718.201(b)); *see Minich*, 25 BLR at 1-155.

Moreover, contrary to Employer's characterization of the ALJ's decision, he did not discredit Drs. Rosenberg's and Tuteur's opinions based on an incorrect standard. Rather, as the ALJ observed, Dr. Rosenberg based his opinion in part on his conclusion that the

magnitude and pattern of reduction in Claimant's FEV1/FVC ratio on pulmonary function testing was "classic for emphysema related to smoking" and not representative of coal mine induced emphysema. Employer's Exhibits 9 at 34-35; 13 at 6-9; Director's Exhibit 25 at 5-7; Decision and Order at 10-12, 27. The ALJ permissibly found Dr. Rosenberg's rationale inconsistent with the medical science, found credible by the DOL in the preamble to the 2001 revised regulations, that coal mine dust exposure can cause clinically significant obstructive disease shown by a reduction in the FEV1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013); Decision and Order at 27. He further permissibly discredited Dr. Rosenberg's opinion because, although he opined coal mine dust exposure did not contribute to Claimant's impairment "to a clinically significant degree," Employer's Exhibit 9 at 37, he did not sufficiently address why coal mine dust exposure did not otherwise aggravate Claimant's COPD and emphysema. *See Stallard*, 876 F.3d at 671-72; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 27.

The ALJ likewise permissibly discredited Dr. Tuteur's opinion as internally contradictory, as the physician indicated he was unable to specifically differentiate whether an impairment is caused by smoking or coal mine dust exposure when evaluating an individual person, but also that, "using the reasoning process regularly employed" by physicians, he could definitively opine Claimant's COPD is caused by smoking and unrelated to coal mine dust exposure.[11] *See Harman Mining Co. v. OWCP*, [*Looney*], 678 F.3d 305, 314-16 (4th Cir., 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Akers*, 131 F.3d at 441; Decision and Order at 26-27; Employer's Exhibits 5 at 3; 8 at 26-27. In addition, the ALJ permissibly found Dr. Tuteur's opinion contradictory and not reasoned as the physician testified that statistics cannot be applied to an individual to determine etiology, but then applied statistics to Claimant to determine his impairment was entirely due to smoking.[12] *See Stallard*, 876 F.3d at 674; *Cochran*,

[11] Dr. Tuteur stated that when evaluating an individual, "available characteristics" cannot be used to differentiate between an impairment caused by coal mine dust exposure and smoking. Employer's Exhibit 5 at 3. He went on to indicate, however, that "using the reasoning process regularly employed by physicians in the day-to-day care and management of patients - relative risk assessment - it is with reasonable medical certainty that [Claimant's] COPD is due to the chronic inhalation of tobacco smoke, not coal mine dust." Employer's Exhibit 5 at 3.

[12] Because the ALJ provided valid reasons for discrediting Drs. Rosenberg's and Tuteur's opinions, we need not address Employer's arguments regarding the additional

718 F.3d at 324; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 26-27; Employer's Exhibits 5 at 4; 8 at 31-32, 36-38.

As the trier-of-fact, the ALJ is charged with assessing the credibility of the medical evidence and assigning it appropriate weight. *See Cochran*, 718 F.3d at 324; *Looney*, 678 F.3d at 314-15. Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113. Because the ALJ's credibility determinations are supported by substantial evidence, we affirm them and his conclusion that Employer did not disprove legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i).

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ found neither Dr. Rosenberg's nor Dr. Tuteur's opinion was sufficiently credible to meet Employer's burden. Decision and Order at 29. Employer raises no contention of error in the ALJ's finding that it failed to rebut disability causation beyond its arguments addressed above; thus, we further affirm his finding that Employer failed to rebut the presumption at 20 C.F.R. §718.305(d)(1)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 29. Consequently, we affirm the ALJ's award of benefits.

Attorney Fee Award

For work performed before the ALJ, Claimant's counsel (Counsel) submitted an itemized fee petition requesting $24,225.00 in fees and $1,976.90 in expenses, for a total of $26,201.90. The fee petition reflected 80.75 hours of legal services performed by Leonard J. Stayton at an hourly rate of $300.00. In support of his fee petition, Counsel submitted affidavits from attorneys Sandra Fogel and Stephen Sanders showing that they earn $295 and $325 per hour, respectively. In support of his $300 hourly rate, Counsel indicated he has practiced in black lung litigation since November 1982, has at least eleven published decisions before the Board, and has litigated nineteen cases before the United States Courts of Appeals. After considering the fee petition, Employer's objections, and the regulatory criteria at 20 C.F.R. §725.366, the ALJ found Counsel's fee petition to be timely, billed in the correct forum, "market based," and reasonably compensable. Attorney

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reasons the ALJ gave for discrediting them. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 28.

Fee Order at 3-5. Consequently, the ALJ awarded Counsel $24,225.00 in fees and $1,976.90 in expenses, for a total of $26,201.90. *Id*.

The amount of an attorney's 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. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 568-69 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289 (4th Cir. 2010); *Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998) (en banc).

Employer contends the ALJ erred in awarding attorney fees because the fee petition was untimely and because the ALJ erred in finding the hourly rate and hours requested to be reasonable. Employer's Attorney Fee Brief at 9-22.

Timeliness

Employer asserts that, because Counsel did not submit a fee petition within sixty days of ALJ Morgan's December 29, 2017 Decision and Order Awarding Benefits, the fee petition is untimely as it requests fees for work performed prior to the Board's November 29, 2018 remand order.[13] Employer's Attorney Fee Brief at 9; Employer's Attorney Fee Reply Brief at 1-3. We disagree.

A fee petition must be filed "within the time limits allowed by the . . . [ALJ] . . . ." 20 C.F.R. §725.366(a); *see Bankes v. Director, OWCP*, 765 F.2d 81, 82 (6th Cir. 1985) ("It is within the discretion of the deputy commissioner to set the time limitation for the filing of a fee application for services performed before him in a black lung benefits case."). Contrary to Employer's assertions, the ALJ reasonably concluded that, because the Board vacated ALJ Morgan's Decision and Order Awarding Benefits, any time limits contained in that decision are moot. *See Cox*, 602 F.3d 276, 289 (4th Cir. 2010); *Jones*, 21 BLR at 1-108; Decision and Order at 3; Employer's Attorney Fee Brief at 9. Therefore, we affirm the ALJ's determination that Claimant's attorney fee petition was timely filed on August 20, 2021, after the ALJ granted an extension. Attorney Fee Order at 3; *see* Claimant's Mot. For Extension of Time to File Fee Petition (July 23, 2021 Motion).

[13] We find no error in the ALJ's determination that legal services by Counsel performed between August 4, 2016, and January 2, 2018, are compensable for work done before the Office of Administrative Law Judges. *See Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 804 (4th Cir. 1999); Attorney Fee Award at 3-5; Employer's Attorney Fee Brief at 11.

Hourly Rate

Under fee-shifting statutes, the United States Supreme Court has held that courts 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. *See Pennsylvania 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. *See Gosnell*, 724 F.3d at 572; *Cox*, 602 F.3d at 276.

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); *see also B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 661 (6th Cir. 2008). 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; *see Gosnell*, 724 F.3d at 571. Further, the regulation states:

> Any fee approved under . . . this section shall be reasonably commensurate with the necessary work done and 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(b).

Employer contends Counsel failed to establish his requested hourly rate of $300.00 is in line with the prevailing market rate of similarly experienced black lung counsel in "rural Kentucky." Employer's Attorney Fee Brief at 11-17, 21-22. We disagree.

Contrary to Employer's contention, the ALJ considered the relevant factors, including Counsel's credentials, the quality of his representation, and the affidavits of similarly situated attorneys. Attorney Fee Order at 4-5. The ALJ explained that a rate of $300.00 an hour was appropriate given that Counsel has been awarded this rate "in temporally proximate black lung cases," and is therefore "market based." *Id.* at 4. Employer fails to explain why the ALJ's award of a $300.00 hourly rate to Counsel is arbitrary, capricious, or an abuse of discretion. *See Cox*, 602 F.3d at 289; *Jones*, 21 BLR at 1-108. We therefore affirm it.

Allowable Hours

We reject Employer's contention that Counsel improperly billed in quarter-hour increments. *See* 20 C.F.R. §802.203(d)(3); Employer's Attorney Fee Brief at 17-21; Employer's Consolidated Reply Brief at 11-13. We also reject Employer's assertion that Counsel's quarter-hour charges for "review of routine notices, documents, and orders" is excessive.[14] Employer's Attorney Fee Brief at 19-21.[15] Employer does not explain how the ALJ's allowance of Counsel's billing for participating in depositions, attending two hearings, and writing both closing briefs is excessive, arbitrary, or capricious. *See Gosnell*, 724 F.3d at 568-69; *Cox*, 602 F.3d at 282; *Jones*, 21 BLR at 1-108. Because Employer has not shown the ALJ abused his discretion in reviewing the fee petition and determining the appropriate hourly rates and compensable charges, we affirm his award of $24,225.00 in fees and $1,976.90 in expenses as reasonably commensurate with the work performed by Counsel and compensable. *See Gosnell*, 724 F.3d at 568-69; *Cox*, 602 F.3d at 282; *Jones*, 21 BLR at 1-108; Attorney Fee Order at 5.

[14] Further, although Employer generally asserts varying classes of tasks are clerical, it does not specifically identify any individual charges which it contends constitute disallowable clerical work.

[15] Employer challenges certain quarter-hour charges as not advancing the prosecution of the claim as Counsel did not participate in the depositions, attend the hearing, or write the closing argument. Employer's Attorney Fee Brief at 12-15. Counsel responded, asserting he attended both hearings, participated in the depositions, and wrote both closing briefs. Claimant's Attorney Fee Response at 2. The hearing transcripts and deposition transcripts support Counsel's position and the ALJ reasonably considered Employer's objections. Therefore, we affirm the ALJ's determination that Counsel's total requested for fees and expenses of $26,201.90 is reasonable and compensable under the Act. Attorney Fee Order at 5; *see E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 568-69 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289 (4th Cir. 2010); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

Accordingly, we affirm the Decision and Order Awarding Benefits and Attorney Fee Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge