



BRB No. 22-0268 BLA

JEROME H. DEMOSS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	
)	DATE ISSUED: 8/24/2023
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeals of March 19, 2019 Proposed Order Supplemental Award Fee for Legal Services of Crystal Robinson, Claims Examiner, and March 18, 2022 Letter Denying Request for Reconsideration of the Proposed Order Supplemental Award Fee for Legal Services of Dennis Glaze, Claims Examiner, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, 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, BOGGS and BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Claimant's counsel (Counsel), Austin P. Vowels, appeals Claims Examiner Crystal Robinson's (the district director's) March 19, 2019 Proposed Order Supplemental Award Fee for Legal Services (Supplemental Fee Award) and Claims Examiner Dennis Glaze's (the district director's) March 18, 2022 Letter Denying Request for Reconsideration of the Supplemental Fee Award (Letter Denying Reconsideration) (2017-BLA-06244) issued in connection with the successful prosecution of a claim filed on March 5, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a Proposed Decision and Order (PDO) - Denial of Benefits dated April 11, 2017, the district director found Claimant did not establish the Miner's pneumoconiosis arose out of his coal mine employment or that he was totally disabled from a pulmonary or respiratory impairment. Director's Exhibit 69. Following Claimant's request for a hearing, the district director forwarded the claim to the Office of Administrative Law Judges (OALJ). Director's Exhibits 75, 77-82. On October 22, 2018, Administrative Law Judge (ALJ) Colleen A. Geraghty issued a Decision and Order Awarding Benefits, which the Benefits Review Board affirmed. *Demoss v. Island Creek Coal Co.*, BRB No. 19-0107 BLA (Apr. 8, 2020) (unpub.). The Board also denied Employer's Motion for Reconsideration En Banc. *Demoss v. Island Creek Coal Co.*, BRB No. 19-0107 BLA (Sept. 29, 2021) (Order on Recon.) (unpub.).

On November 15, 2018, Counsel filed a complete, itemized fee petition requesting \$7,930.00 for legal services performed before the district director from November 19, 2015 to August 7, 2017. The total fee requested for legal services represents: \$6,850.00 for 27.4 hours of Attorney Vowels's services at an hourly rate of \$250.00 and \$1,080.00 for 7.2 hours of services performed by Paralegal Trisha Wright (Paralegal Wright) at an hourly rate of \$150.00. Counsel also requested \$675.82 for expenses incurred in representing Claimant. Employer did not file objections to the fee request before the district director. On March 19, 2019, the district director awarded attorney's fees in the amount of \$7,570.00, representing: \$6,850.00 for 27.4 hours of services at an hourly rate of \$250.00 for Attorney Vowels and \$720.00 for 7.2 hours of services at an hourly rate of \$100.00 for Paralegal Wright. The district director also awarded \$425.82 for expenses.

In sum, the district director awarded the entire 34.6 hours requested, but reduced the hourly rate for the paralegal from \$150.00 to \$100.00, and disallowed \$250.00 in expenses for Dr. Chavda's February 2, 2016 supplemental medical report because she determined it

was “not reasonably necessary” for seeking Claimant’s benefits. On March 25, 2019, Counsel requested reconsideration of the district director’s Supplemental Fee Award, arguing she did not explain why \$250.00 in expenses for Dr. Chavda’s supplemental medical report was not “reasonably necessary.” On March 18, 2022, the district director denied Counsel’s request for reconsideration of her decision to disallow \$250.00 in expenses for Dr. Chavda’s supplemental medical report because the report was untimely submitted before the district director and only relevant when the case was before the OALJ.

On appeal, Counsel contends the district director erred in disallowing the \$250.00 in expenses for Dr. Chavda’s supplemental medical report and in reducing the paralegal’s requested hourly rate from \$150.00 to \$100.00. Employer responds in support of the district director’s Supplemental Fee Award and Letter Denying Reconsideration. The Director, Office of Workers’ Compensation Programs (the Director), has filed a response, urging the Board to grant Claimant’s request for \$250.00 in expenses to submit Dr. Chavda’s supplemental medical report while the case was before the district director.¹ In his reply to Employer’s response brief, Counsel reiterates his contentions.

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.² *See B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661 (6th Cir. 2008); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc). The regulations provide that an approved fee must 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 the fee requested.” 20 C.F.R. §725.366(b).

Under a fee-shifting statute, the United States Supreme Court has held 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

¹ We affirm, as unchallenged on appeal, the district director’s award of an hourly rate of \$250.00 for Counsel’s services. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 77.

U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *Bentley*, 522 F.3d at 663.

Paralegal's Hourly Rate

Counsel argues the district director erred in failing to consider all of the evidence he submitted to support the hourly rate of Paralegal Wright and by not explaining how she weighed the evidence that she did consider, thereby arbitrarily reducing Paralegal Wright's hourly rate. Counsel's Brief at 4-9; Counsel's Reply Brief at 1-3. We agree.

A 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 burden falls on the fee applicant to produce satisfactory evidence that the requested rates are in line with those for similar services by persons of comparable skill, experience, and reputation. *Id.* at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

The district director summarily stated the hourly rate for Counsel's paralegal "was reduced" from \$150.00 to \$100.00 "after considering the complexity of the issues, the qualifications of the representative, and the level at which the claim was decided." Supplemental Fee Award at 1. She also stated "the approved rate [was] comparable to that [being] charged by other highly qualified attorneys within the same geographical location" *Id.* Because she did not explain how the factors supported reducing the requested hourly rate, we are unable to discern her rationale.

We also agree with Counsel's argument that the district director did not address the evidence of prior fee awards that he submitted before reducing the requested hourly rate for his paralegal.³ Counsel's Brief at 5-6; Counsel's Reply Brief at 2.

³ To support his requested hourly rate for Paralegal Wright, Counsel submitted a fee award by the Sixth Circuit, who considered an opposed fee request and awarded a paralegal an hourly rate of \$150.00, and three ALJ fee orders awarding that same rate. Counsel's Brief at 5; *see Advent Mining LLC v. Davis*, No. 16-4049 (6th Cir. Oct. 16, 2017) (Order); *Lloyd v. Cumberland Coal Res., LP*, Case No. 2015-BLA-05218 (Feb. 16, 2017) (Order Granting Attorney Fees); *Lee v. Armstrong Coal Co.*, Case No. 2014-BLA-05683 (Feb. 16, 2017) (Order Granting Attorney Fees); *Estate of Virginia L. Mortis v. Kenamerican Res.*, Case No. 2017-BLA-05459 (Aug. 15, 2018) (Supplemental Order Granting Attorney Fees).

Additionally, Counsel submitted an ALJ fee order in *Honeycutt v. Tammy Anne, Inc.*, Case No. 2006-BLA-05209 (July 10, 2012), in which "legal assistants" were awarded \$100.00 per hour for work on federal black lung claims, explaining Paralegal Wright is

Counsel's request for \$150.00 per hour for his paralegal was both unopposed by Employer before the district director and supported by several past fee awards for that paralegal of \$150.00 per hour, along with another fee award demonstrating that other less-credentialed paralegals had received awards of \$100.00 per hour *eleven years ago*. See *Bentley*, 522 F.3d at 666 ("an adjudicator can look to prior awards for guidance in determining a prevailing market rate" under the Black Lung Benefits Act). Given that Counsel filed his fee petition nearly five years ago, he supported his fee petition with market rate evidence, Employer did not object to the \$150 hourly rate before the district director, and the total amount impacted by the district director's error is limited,⁴ we conclude neither the parties nor judicial economy are served by remanding the claim for further factfinding. We therefore reverse the district director's reduction of this paralegal's hourly rate.

Expenses

Counsel next argues the district director erred in disallowing \$250.00 in expenses for Dr. Chavda's February 2, 2016 supplemental medical report because it was not reasonable and necessary. Counsel's Brief at 9-14; Counsel's Reply Brief at 3-4. The Director also asserts Dr. Chavda's supplemental report was relevant to the proceedings before the district director as the "relevant sequence" of events establishes the doctor's report "was part of Claimant's case before the district director rather than the ALJ." Director's Response Brief at 3. He contends "Claimant was clearly not 'pre[paring] for the hearing' . . . when he obtained Dr. Chavda's supplemental report." *Id.* (citing *Matthews v. Director, OWCP*, 9 BLR 1-184, 1-186-87 (1986)).

A representative seeking fees and costs for services performed on a claimant's behalf must "make application therefor to the district director, [ALJ], or appropriate appellate tribunal, as the case may be, before whom the services were performed." 20 C.F.R. §725.366(a). The Board has held that "[i]n determining the jurisdictional cutoff date between the [district director] and the [OALJ], the issue is not whether the work was performed before or after a certain date. Rather, the issue . . . concerns whether the work performed was relevant to the proceedings before the [ALJ]." *Matthews*, 9 BLR at 1-186. The adjudicator reviewing a fee petition "must determine, from the facts of that case,

"more educated than the traditional legal assistant" based on her advanced education and experience with black lung claims. Counsel's Brief at 5-6.

⁴ The district director reduced the paralegal's total requested fee by \$360, i.e., \$50 less per hour than requested, multiplied by 7.2 hours, equals a \$360 reduction.

whether the work which was done is ‘reasonably integral’ to [the] preparation” of the party’s case before that official. *Id.*

We agree with Claimant and the Director that the district director did not adequately explain why she found Dr. Chavda’s supplemental report was not reasonable and necessary to the proceedings before the district director. On October 15, 2015, the district director issued the first Schedule for the Submission of Additional Evidence (SSAE), allowing the parties to submit affirmative evidence by December 29, 2015, and responsive evidence by January 28, 2016. Director’s Exhibit 39 at 2. On December 26, 2015, Claimant requested an extension of time to submit affirmative evidence, noting that Dr. Chavda’s recent deposition revealed information about the doctor’s understanding of the extent of Claimant’s coal mine dust exposure and he wanted to obtain a supplemental report from the doctor in light of this new evidence. Director’s Exhibit 47. The district director granted Claimant’s request, allowing him to submit additional affirmative evidence by January 30, 2016, and “other parties” thirty days after receipt of his evidence to submit response evidence. Director’s Exhibit 55. On January 29, 2016, Claimant requested a second extension of time to submit evidence, noting he had requested, but not yet received, Dr. Chavda’s supplemental report. Director’s Exhibit 56. On February 17, 2016, the district director denied Claimant’s second extension request. Director’s Exhibit 58.

On March 2, 2016, the district director issued a second SSAE, allowing the parties to submit affirmative evidence by May 1, 2016, and responsive evidence by May 31, 2016. Director’s Exhibit 46 at 2. On March 10, 2016, Claimant submitted Dr. Chavda’s supplemental report. Director’s Exhibit 74 at 5-22. However, on March 14, 2016, the district director advised Claimant that “[the March 2, 2016 SSAE] was issued in error and should be deleted from the record.” Director’s Exhibit 54. Further, she stated the first SSAE “is in effect and a [PDO] will be issued in the very near future.” *Id.*

By letter dated February 23, 2017, Claimant requested the district director to issue a PDO and informed her that the SSAE deadline to submit additional evidence “lapsed on May 31, 2016.” Director’s Exhibit 62. On April 11, 2017, the district director rejected Dr. Chavda’s supplemental report as untimely submitted. Director’s Exhibit 74. Further, as discussed, she issued a PDO denying benefits on the same day. Director’s Exhibit 69. On April 20, 2017, Claimant requested a revision of the PDO or a hearing, asserting Dr. Chavda’s supplemental report was timely submitted based on the second SSAE. Director’s Exhibit 75. Further, on July 10, 2017, Claimant informed the district director that he was “still waiting” for her response to his requests for either a revision of the PDO or a hearing. Director’s Exhibit 77. On July 21, 2017, the district director advised Claimant that his July 10, 2017 request for a hearing was “untimely and the claim is now final.” Director’s Exhibit 78. Claimant again requested a hearing on July 25, 2017, but the district director did not respond to his request, address his submission of Dr. Chavda’s supplemental

medical report, or conduct any further proceedings in the case until she forwarded it to the OALJ on September 22, 2017. Director's Exhibits 79-82.

As the Director argues, the basis for Claimant to obtain Dr. Chavda's supplemental report "had nothing to do with his request for a hearing before the ALJ, which would not occur for more than a year" after he initially submitted it to the district director. Director's Response Brief at 4. Rather, Claimant sought and secured Dr. Chavda's supplemental report while his claim was before the district director and submitted it consistent with the district director's second SSAE prior to the time that the SSAE was recalled. *Matthews*, 9 BLR at 1-186-87 (relevant inquiry is whether the lawyer's work was "reasonably integral" to his client's case before the adjudicator with whom the fee petition is filed); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989) (proper test to determine compensability is whether, at the time the work was performed, the lawyer could reasonably regard the work as necessary to establish entitlement, regardless of whether the evidence was actually used). Because there is no basis for the district director to deny Counsel's \$250.00 reimbursement request based on the facts in this specific case, we reverse the denial of these costs and remand the case to the district director to instruct Employer to pay them directly to Counsel. *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (reversal appropriate where the law and facts support "only [one] reasonable outcome").

Accordingly, the district director's March 19, 2019 Proposed Order Supplemental Award Fee for Legal Services and March 18, 2022 Letter Denying Request for Reconsideration of the Proposed Order Supplemental Award Fee for Legal Services are affirmed in part and reversed in part to reflect an award of 7.2 hours of paralegal work at an hourly rate of \$150.00, reimbursement of \$675.82 for expenses incurred in representing Claimant, and a total award of \$8,605.82 for fees and expenses. The case is remanded to the district director for entry of an order awarding fees and expenses consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge