

U.S. Department of Labor

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



BRB No. 23-0105 BLA

STEVEN E. HARPER)

Claimant-Petitioner)

v.)

HERITAGE COAL COMPANY, LLC)

and)

PEABODY ENERGY CORPORATION c/o)

UNDERWRITERS SAFETY & CLAIMS)

Employer/Carrier-)

Respondents)

DIRECTOR, OFFICE OF WORKERS')

COMPENSATION PROGRAMS, UNITED)

STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 12/11/2023

DECISION and ORDER

Appeal of the Order Awarding Attorney Fees and Expenses of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel (Counsel) appeals Administrative Law Judge (ALJ) Steven D. Bell's Order Awarding Fees and Expenses (Attorney Fee Order) (2018-BLA-06179), rendered on a claim filed pursuant to Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The ALJ awarded Claimant benefits in a Decision and Order Awarding Benefits issued on September 13, 2022.¹

On November 4, 2022, Counsel filed a complete, itemized fee petition requesting \$19,654.50 for attorney fees and expenses, representing \$5,940 for 21.6 hours of services performed by Attorney Austin P. Vowels at an hourly rate of \$275; \$5,747.50 for 20.9 hours of services performed by Attorney M. Alexander Russell at an hourly rate of \$275;² \$15 for 0.2 hour of services performed by Legal Assistant Jolie DiVietro at an hourly rate of \$75; \$3,597 for 21.8 hours of services performed by Paralegal Desire Smith at an hourly rate of \$165; \$1,683 for 10.2 hours of services performed by Legal Assistant Sarah Agnew at an hourly rate of \$165; and \$2,672 in expenses.

On November 30, 2022, Employer objected to the hourly rates of Attorneys Vowels and Russell, Paralegal Smith, and Legal Assistant Agnew, asserting they should be awarded the same lower hourly rates awarded them in *Miller v. Heritage Coal Co.*, OALJ Case No. 2020-BLA-05711 (Sept. 6, 2022). Employer also objected to certain time entries.

In his Attorney Fee Order dated November 30, 2022, the ALJ found all time entries compensable but reduced the hourly rate of Attorney Vowels to \$250, the hourly rate of Attorney Russell to \$150, the hourly rate of Paralegal Smith to \$150, and the hourly rate of Legal Assistant Agnew to \$110. Thus, the ALJ awarded \$12,747.00 in attorney's fees, representing \$5,400 for 21.6 hours at the hourly rate of \$250 for services performed by Attorney Vowels; \$2,940 for 19.6 hours at the hourly rate of \$150 for services performed by Attorney Russell; \$15 for 0.2 hour at the hourly rate of \$75 for services performed by

¹ The Benefits Review Board assigned Employer's appeal of the ALJ's Decision and Order Awarding Benefits case number BRB No. 23-0017 BLA and Claimant's cross-appeal of the ALJ's Order Awarding Fees and Expenses case number BRB No. 23-0105 BLA, and it consolidated these appeals for purposes of decision only. *Harper v. Heritage Coal Co., LLC*, BRB Nos. 23-0017 BLA and 23-0105 BLA (Apr. 6, 2023) (unpub.). However, on November 28, 2023, the Board dismissed the appeal in BRB No. 23-0017 BLA at Employer's request. See *Harper v. Heritage Coal Co., LLC*, BRB No. 23-0017 BLA (Nov. 28, 2023) (unpub.). Consequently, we now address only Counsel's appeal of the ALJ's fee award.

² The fee petition requests 20.9 itemized hours for Attorney Russell on pages 19 and 20, but the charts on pages 1 and 25 reflect he performed 19.6 hours of legal services.

Legal Assistant DiVietro; \$3,270 for 21.8 hours at the hourly rate of \$150 for services performed by Paralegal Smith; and \$1,122 for 10.2 hours at the hourly rate of \$110 for services performed by Legal Assistant Agnew.³ Attorney Fee Order at 3. The ALJ also awarded the requested \$2,672 in expenses. *Id.*

On appeal, Counsel contends the ALJ erred in reducing the requested hourly rates of Attorneys Vowels and Russell, Paralegal Smith, and Legal Assistant Agnew.⁴ Neither Employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The amount of an attorney's fee award is discretionary. The Board will uphold an award on appeal unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.⁵ *See B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661 (6th Cir. 2008); *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 902 (7th Cir. 2003); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

Hourly Rates

When attorneys prevail on behalf of a claimant under the Act, they are entitled to a "reasonable attorney's fee" paid by the responsible party. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a) of the Longshore and Harbor Workers' Compensation Act. 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,

³ Employer filed objections to the fee petition on the same day the ALJ issued his fee award. It appears the ALJ did not consider Employer's objections as he indicated no party had contested the fee petition. Attorney Fee Order at 1.

⁴ We affirm, as unchallenged on appeal, the ALJ's approval of Legal Assistant DiVietro's requested hourly rate of \$75; his approval of all the requested attorney time and paralegal/legal assistant time as compensable; and his granting of expenses in the amount of \$2,672. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Attorney Fee Order at 3.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as Claimant performed his coal mine employment in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 4; Hearing Transcript at 9.

and any other information which may be relevant to the amount of the fee requested.” 20 C.F.R. §725.366(b).

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 a 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. *Bentley*, 522 F.3d at 663.

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). To identify the prevailing market rate, the fee applicant must 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 Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 894 (7th Cir. 2002). Evidence of fees received in other black lung cases may be an appropriate consideration in establishing a market rate. *See Chubb*, 312 F.3d at 895; *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672 (7th Cir. 2002).

Attorney Vowels

Attorney Vowels requested an hourly rate of \$275, noting that he had routinely been awarded \$250 an hour for the past ten years but was raising his rate to \$275 after ten years of litigating black lung cases. Fee Petition at 4. He indicated that he was awarded an hourly rate of \$275 in at least three cases in 2022. *Id.*

The ALJ determined that because Counsel failed to cite any cases where an ALJ or the Board considered his requested hourly rate of \$275 or “discussed the appropriateness of that rate,” the request was unsupported. Attorney Fee Order at 2. The ALJ therefore awarded Counsel an hourly rate of \$250, relying on a 2019 Board case which affirmed as unchallenged an ALJ’s award of \$250 per hour to him. *Id.*, citing *Dennis v. Mountain Edge Mining, Inc.*, BRB Nos. 18-0450 BLA and 18-0450 BLA-A (Mar. 25, 2019) (unpub.).

We agree with Counsel that the ALJ failed to adequately address his contentions that he is entitled to an hourly rate of \$275 based on the length of his black lung litigation experience and the effects of inflation.⁶ Claimant’s Brief at 10-12. The ALJ has the

⁶ Counsel asserts the Laffey Matrix provides further support for ten years of practice being an “appropriate point for rates to increase.” Claimant’s Brief at 10-11; *see also* Fee Petition at 4.

authority to adjust a fee based on historical rates to reflect its present value, apply current market rates, or employ any other reasonable means to compensate a claimant's counsel for a delay or, as in this case, inflation. *See Missouri v. Jenkins*, 491 U.S. 274, 282-84 (1989); *Anderson v. Director, OWCP*, 91 F.3d 1322, 1324-25 (9th Cir. 1996); *Nelson v. Stevedoring Services of America*, 29 BRB 90, 97 (1995); *Wright v. Consol of Kentucky, Inc.*, BRB No. 18-0114 BLA (Feb. 13, 2019) (unpub.) (approving an ALJ's consideration of inflation in determining counsel's hourly rate). Consequently, the ALJ abused his discretion by not addressing Counsel's requested hourly market rate of \$275 based on his increased experience and inflation. *See Hawker*, 326 F.3d at 902; *Jones*, 21 BLR at 1-108; Attorney Fee Order at 2.

Thus, we vacate the ALJ's award of an hourly rate of \$250 to Attorney Vowels and remand this case for the ALJ to consider Counsel's arguments and evidence, and to explain his determination regarding what constitutes a reasonable hourly rate for Attorney Vowels in accordance with the Administrative Procedure Act (APA).⁷ *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Attorney Russell

In support of his fee petition, Counsel noted Attorney Russell has been licensed to practice law since 2016 and customarily bills between \$175 and \$275 per hour. Fee Petition at 8-9. Counsel requested an hourly rate of \$275 because of Attorney Russell's increased experience and inflation. *Id.* at 9.

The ALJ recognized Attorney Russell has substantially less experience than Attorney Vowels and concluded the requested rate was substantially higher than Attorney Russell's experience level; he thus awarded an hourly rate of \$150.⁸ Attorney Fee Order at 2-3. In addition, the ALJ noted Attorney Russell spent 18.4 hours drafting Claimant's post-hearing brief and opined "counsel deserving a rate of \$275 per hour should have been able to draft a workmanlike post-hearing brief in half the time." *Id.*

⁷ The APA requires every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

⁸ The ALJ noted Attorney Russell's requested rate is "towards the top of the range of fees which I pay to experienced claimant's counsel" and that Mr. Russell "has no experience remotely comparable to that of the lawyers to whom I pay rates in the \$275 per hour range" Attorney Fee Order at 2.

We agree with Counsel’s argument that the ALJ arbitrarily reduced Attorney Russell’s requested hourly rate without adequate explanation. In support of his request, Counsel identified Attorney Russell’s customary hourly rate as between \$175 and \$275, and identified previous cases where he had been awarded \$200 and \$250 per hour. While the ALJ permissibly found Attorney Russell was not entitled to the same hourly rate as Attorney Vowels (\$275) due to his having less experience than Mr. Vowels in black lung claims, the ALJ did not explain how he determined \$150 per hour was appropriate as the market rate, aside from a vague reference to “past” fees he has awarded to other unnamed counsel with allegedly similar experience.⁹ See *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 470 (7th Cir. 2001) (ALJ must award an hourly rate that is market-based and not “a number plucked from a hat”). Thus, we vacate the ALJ’s award of an hourly rate of \$150 for Attorney Russell and remand this case to the ALJ to determine a reasonable market-based hourly rate for Attorney Russell, with an adequate explanation for that determination. See *Wojtowicz*, 12 BLR at 1-165.

Paralegal Desire Smith

Counsel requested an hourly rate of \$165 for Ms. Smith’s paralegal services. Claimant’s Brief at 22. In his fee petition, Counsel specified that as of 2020 Ms. Smith was one of eighteen paralegals in Kentucky certified by the National Association of Legal Assistants and has been a licensed paralegal since 2014. Fee Petition at 10-11. Counsel also cited two cases from 2020 and 2022 in which Ms. Smith was awarded an hourly rate of \$150 and an order from the United States Court of Appeals for the Sixth Circuit awarding her \$165 per hour. Counsel alleged Legal Assistant Agnew’s services warranted the higher rate because of her increased experience and the effects of inflation.¹⁰ *Id.* at 11-13.

The ALJ misstated that Counsel “seeks” an hourly rate of \$150 for Ms. Smith. Attorney Fee Order at 3. Acknowledging Ms. Smith has an “excellent background” and

⁹ Nor did the ALJ explain why Attorney Russell is entitled to the same hourly rate for his legal services (\$150) as Ms. Smith is for her paralegal services (also \$150).

¹⁰ Counsel also cited the 2018 and 2020 National Association of Legal Assistants (NALA) National Utilization and Compensation Survey Report. Fee Petition at 10-14. He further explained that Ms. Smith has worked in administrative support roles since 2009, published an article in the NALA quarterly journal on black lung, and leads a legal education presentation on black lung claims. Fee Petition at 10-11. In addition, he indicated Ms. Smith assisted in evidence development, research, writing, and other tasks to successfully pursue this claim. *Id.* at 12.

previously has received an hourly rate of \$150 in prior ALJ attorney fee decisions, the ALJ awarded her a rate of \$150 per hour as “an experienced paralegal.” *Id.*

We agree with Counsel that the ALJ erred when he stated Counsel sought an hourly rate of \$150 for Ms. Smith’s services after listing the correct requested hourly rate of \$165 earlier in his decision. Claimant’s Brief at 22; *see* Attorney Fee Order at 2-3. Because the ALJ mischaracterized the requested rate and did not fully weigh the evidence provided by Counsel, his determination that \$150 is the appropriate hourly rate for Ms. Smith fails to satisfy the APA. *See Wojtowicz*, 12 BLR at 1-165. We therefore vacate his determination.

Legal Assistant Agnew

Finally, Counsel requested an hourly rate of \$165 for Ms. Agnew’s services. In support of his fee petition, he noted Ms. Agnew was an administrative assistant for twelve years before joining Counsel’s firm in January 2019, where she works on black lung claims and customarily bills between \$75 and \$165 per hour. Fee Petition at 14-15. Counsel provided copies of ALJ attorney fee decisions awarding Ms. Agnew \$125 and \$150 per hour, and a Sixth Circuit order awarding her \$165 per hour. *Id.* at 15-16.¹¹ Counsel requested the higher rate on the basis that Ms. Agnew has become more experienced and because of inflation.

The ALJ described Ms. Agnew’s qualifications as “excellent[.]” but noted her requested rate of \$165 is well above what has been awarded to paralegals and legal assistants in other cases, and instead summarily awarded her an hourly rate of \$110. *Id.* Attorney Fee Order at 3.

We agree with Counsel that the ALJ arbitrarily reduced Ms. Agnew’s requested hourly rate and “relied upon a number he seemingly pulled out of thin-air[.]” Claimant’s Brief at 24. Because the ALJ provided no explanation for how he arrived at the reduced hourly rate for Ms. Agnew, his determination fails to satisfy the APA. *See Wojtowicz*, 12 BLR at 1-165; Attorney Fee Order at 3. Thus, we vacate the ALJ’s award of an hourly rate of \$110 to Ms. Agnew and remand this case for him to determine a reasonable hourly rate based on Counsel’s evidence and the regulatory criteria.

¹¹ Counsel also referenced the 2018 NALA National Utilization and Compensation Survey Report, which included rates up to \$140 per hour for legal assistants without special training. Fee Petition at 16.

Remand Instructions

On remand, the ALJ must reconsider the requested hourly rates of Attorneys Vowels and Russell, Paralegal Smith, and Legal Assistant Agnew, taking into account the documentation supplied in the fee petition and Counsel's arguments in support of the requested rates. The ALJ must explain the bases for his determinations as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.¹²

Accordingly, we affirm in part and vacate in part the Order Awarding Attorney Fees and Expenses, and remand this case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

¹² We make no judgment as to the merits of Counsel's arguments and evidence. That is the province of the ALJ. Rather, we remand for the required consideration and explanations for the ALJ's determinations.