

U.S. Department of Labor

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



BRB No. 23-0018 BLA

TIMOTHY MILLER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HERITAGE COAL COMPANY)	
)	
and)	DATE ISSUED: 01/30/2024
)	
PEABODY ENERGY CORPORATION)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Awarding Attorney Fees and Expenses and Order Denying Motion for Reconsideration 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, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel (Counsel) appeals Administrative Law Judge (ALJ) Steven D. Bell's Order Awarding Attorney Fees and Expenses and Order Denying Motion for

Reconsideration (2020-BLA-05711) issued in connection with the successful prosecution of a claim filed on October 18, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

On July 20, 2022, the ALJ issued a Decision and Order Awarding Benefits.¹ Subsequently, on August 18, 2022, Counsel filed an itemized fee petition requesting \$15,384.00 for legal services including: \$3,905.00 for 14.2 hours of attorney services by Austin P. Vowels at a rate of \$275.00 per hour; \$797.50 for 2.9 hours of attorney services by M. Alexander Russell at an hourly rate of \$275.00; \$8,217.00 for 49.8 hours of paralegal services by Desire Smith at an hourly rate of \$165.00; \$2,442.00 for 14.8 hours of legal assistant services by Sarah Agnew at an hourly rate of \$165.00; and \$22.50 for 0.3 hours of legal assistant services by Jolie DiVietro at an hourly rate of \$75.00. Motion for Attorney's Fees and Expenses for Work Performed Before the Administrative Law Judge (Fee Petition) at 1-2.

The ALJ noted there were no objections to the fee petition, and found the number of hours of legal services, as well as the expenses, were reasonable. September 6, 2023 Order Awarding Attorney Fees (Order). However, he reduced the requested hourly rates to \$250.00 per hour for Mr. Vowels, \$150.00 an hour for Mr. Russell, \$125.00 an hour for Ms. Smith, and \$110.00 per hour for Ms. Agnew. *Id.* at 2-3. Based on these reductions, the ALJ awarded Counsel a fee in the amount of \$11,860.05 for legal services. *Id.* On October 5, 2022, the ALJ denied Counsel's motion to reconsider the hourly rates awarded for Mr. Vowels, Mr. Russell, Ms. Smith, and Ms. Agnew. Order Denying Motion for Reconsideration (Order Denying Reconsideration) at 2.

On appeal, Counsel contends the ALJ applied the wrong legal standard and arbitrarily reduced the hourly rates requested for Mr. Vowels and Mr. Russell, as well as Ms. Smith and Ms. Agnew, without accounting for inflation, the proffered evidence, and his firm's increased experience. Claimant's Brief at 3, 6, 8. Neither Employer nor the Director filed a response. We agree with Claimant's arguments.²

¹ On October 5, 2023, the Benefits Review Board dismissed Employer's appeal of the ALJ's Decision and Order Awarding Benefits pursuant to Employer's Motion. *Miller v. Heritage Coal Co.*, BRB No. 22-0431 BLA (Oct. 5, 2023) (unpub. order).

² We affirm, as unchallenged on appeal, the ALJ's approval of a fee of \$22.50 for 0.3 hours of services by Legal Assistant Jolie DiVietro at an hourly rate of \$75.00, as well as the \$2,055.00 awarded in expenses. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Order at 3.

The amount of an attorney 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.³ *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); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

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.⁴ See *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663 (6th Cir. 2008).

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.” *Id.* 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).

Hourly Rate of Attorney Austin P. Vowels

Counsel requested an hourly rate of \$275.00 for his work in this case. Fee Petition at 3-8. In support of this request, Counsel identified his professional qualifications, including his experience litigating black lung cases since 2011. *Id.* at 3. He also noted that

³ The Board will apply the law of the United States Court of Appeals for the Seventh Circuit because Claimant performed his last coal mine employment in Indiana. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11; Director’s Exhibits 3; 53 at 7.

⁴ The regulations implementing the Act further 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).

he customarily bills between \$175.00 and \$275.00 an hour for a range of work. *Id.* at 3-4. He explained that, prior to 2022, he consistently requested and was awarded a rate of \$250.00 per hour in federal black lung claims, and he submitted eleven attorney fee awards in which he was awarded this rate for work performed before the United States Court of Appeals for the Sixth Circuit, the Board, and the Office of Administrative Law Judges (OALJ) from 2016 to 2018. *Id.* at 3-5.

Counsel explained that he began requesting an increased hourly rate of \$275.00 after he reached ten years of black lung experience. Fee Petition at 4. In support of his request for a higher hourly rate, he submitted: (1) two fee awards from 2022 in which he asserts he was awarded \$275.00 an hour; (2) two fee awards from 2008 and 2012 where other attorneys were awarded a hourly rate of \$250.00 in black lung claims;⁵ (3) three fee awards from 2012, 2013, and 2016 where other attorneys were awarded hourly rates of \$300.00 and \$425.00 in black lung claims; (4) research from the National Law Journal listing hourly rates for partners in law firms across the country ranging from \$145.00 to \$1,055.00; (5) a survey from consumer attorneys in Kentucky showing an average rate of \$298.00 an hour; and (6) the Laffey Matrix, as modified to account for the cost of living. *Id.* at 6-8. He further stated that, based on the Consumer Price Index, the \$250.00 an hour awarded to another attorney in 2008 has the same buying power as \$298.03 today. *Id.* at 8. Thus, he requested that he be awarded an increased \$275.00 hourly rate from his customary hourly rate of \$250. *Id.*

The ALJ found unpersuasive the two fee awards from 2022 where Mr. Vowels was allegedly awarded \$275.00 per hour, as they did not contain a discussion of the appropriateness of that rate or expressly approve it. Order at 2. He further determined the record did not include a compelling argument to award a higher rate of \$275.00 based on the novelty or complexity of the case and noted a 2019 case from the Board in which Mr. Vowels was awarded an hourly rate of \$250.00. Order at 2, *citing Dennis v. Mountain Edge Mining, Inc.*, BRB Nos. 18-0450 BLA and 18-0450 BLA-A (Mar. 25, 2019) (unpub.); Order Denying Reconsideration at 2-3, 5. In addition, the ALJ found he had no authority to increase Counsel's hourly rate based on inflation. Order Denying Reconsideration at 3.

We agree with Counsel's argument that the ALJ erroneously declined to consider whether it was appropriate to make an adjustment to the market rate based on inflation. *See Missouri v. Jenkins ex rel. Agyei*, 491 U.S. 274, 283-84 (1989); *Anderson v. Director, OWCP*, 91 F.3d 1322 (9th Cir. 1996); Claimant's Brief at 6-8. Specifically, the ALJ has the authority to adjust the fee based on historical rates to reflect its present value, by

⁵ Counsel also cited to a fee petition from 2017, in which he requested a rate of \$250.00 per hour but was only awarded \$225.00 an hour. Fee Petition at 7.

applying current market rates, or employing any other reasonable means to compensate a claimant's counsel for delay in payment of fees. *Jenkins*, 491 U.S. at 281 (“an enhancement for delay in payment is, where appropriate, part of a reasonable attorney’s fee”) (internal quotations omitted); *Del. Valley Citizens’ Council for Clean Air*, 483 U.S. at 716 (“[C]ourts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value.”); *Anderson*, 91 F.3d at 1325; *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95, 96 (1997). Consequently, the ALJ abused his discretion by applying the wrong legal standard and indicating he could not adjust Mr. Vowels’ hourly rate based on inflation. *Hawker*, 326 F.3d at 902 (“An abuse of discretion exists when the [ALJ] applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.”); *Anderson*, 91 F.3d at 1322; Order Denying Reconsideration at 3.

Moreover, in determining the hourly rate for Mr. Vowels, the ALJ limited his consideration of the evidence to the two fee awards from 2022 in which Counsel asserts he was awarded an hourly rate of \$275.00 and a case from 2019 in which he was awarded \$250.00 an hour.⁶ Order at 7. The ALJ failed to consider the other evidence Counsel cited, including seventeen additional fee awards, research from the National Law Journal on the hourly rates that partners in law firms across the country charge, a survey of the hourly rates that Kentucky attorneys charge, and the Laffey Matrix. Fee Petition at 3-8; Claimant’s Brief at 3-8. Nor did the ALJ consider Counsel’s argument that his rate should increase as he has now attained more than ten years of specialized experience in black lung law. *Id.*

As the ALJ applied the incorrect legal standard and did not fully address the arguments or evidence Counsel presented, his findings do not comply with the Administrative Procedure Act (APA).⁷ See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-

⁶ As the ALJ noted, the two fee awards from 2022 which Counsel submitted as establishing a rate of \$275.00 an hour do not provide any detail for the ALJ to determine that rate was awarded to Counsel. Order at 7. In *Tapp v. Big Ridge, Inc.*, OALJ No. 2019-BLA-06055 (June 6, 2022) (Order), Counsel was awarded a total of \$34,297.50 for legal services, but neither the hourly rate nor the hours worked were identified. In *Morse v. Island Creek Coal Co.*, OALJ No. 2020-BLA-05497 (Apr. 12, 2022) (Order), Counsel was awarded a total of \$19,487.50 for legal services, but again neither the hourly rate nor the hours worked were noted. We therefore see no error in the ALJ’s determination that these fee awards do not support Counsel’s request for a \$275.00 hourly rate.

⁷ The Administrative Procedure Act provides that every adjudicatory decision must include “findings and conclusions and the reasons or basis therefor, on all the material

162, 1-165 (1989). Thus, we vacate the ALJ’s award of an hourly rate of \$250.00 for Mr. Vowels and remand this case for the ALJ to consider the aforementioned factors and explain his determination regarding a reasonable hourly rate in accordance with the APA.

Hourly Rate of Attorney M. Alexander Russell

Counsel requested an hourly rate of \$275.00 an hour for Mr. Russell, noting that he has been licensed to practice law since 2016, has been practicing black lung law for 20 months, and consistently bills between \$175.00 and \$275.00 per hour for his work. Fee Petition at 8-9; Claimant’s Brief at 8-9. In support of his request for a rate of \$275.00 an hour, Counsel cited to the highly specialized nature of federal black lung work and noted Mr. Russell prepared for an expert witness’s deposition. *Id.* at 9. He further submitted two Board and OALJ fee awards from 2019 and 2021 awarding Mr. Russell an hourly rate of \$250.00. *Id.* Finally, Counsel noted that an ALJ awarded Mr. Russell a rate of \$200.00 an hour in 2021, early into his career in federal black lung claims, and his additional experience supported an increased rate. *Id.*

The ALJ found that Mr. Russell has substantially less experience than Mr. Vowels and “did not play a particularly meaningful role in the litigation of this case”⁸ Fee Order at 2; Order Denying Reconsideration at 3 n.1, 4-5. Further, the ALJ found that a paralegal would normally conduct the work he performed in preparing for a deposition. Fee Order at 2. He concluded that the requested rate was substantially higher than Mr. Russell’s experience level and therefore awarded a reduced hourly rate of \$150.00. *Id.*

Counsel requested reconsideration, clarifying that Mr. Russell also conducted the deposition in question, submitting an additional fee award in which Mr. Russell was awarded a rate of \$200.00 an hour, and asking the ALJ to also consider inflation and the surveys, research, and cases he cited in support of his own requested fee. Motion for Reconsideration at 3. The ALJ denied the request for reconsideration, finding Mr. Russell’s work conducting the deposition further demonstrated his inexperience in black lung litigation, and again found there was no authority for him to adjust for inflation. Order Denying Reconsideration at 4. Finally, citing to news sources, the ALJ found Mr. Russell appeared not to work as an attorney full-time. *Id.*

issues of fact, law, or discretion presented” 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

⁸ The ALJ calculated Mr. Russell’s involvement as 3.5% of the firm’s total time of eighty-two hours spent on this case based on his 2.9 hours billed. Order Denying Reconsideration at 3 & n.1.

For the reasons already discussed, the ALJ again erred in finding he could not account for inflation in determining the hourly rate for Mr. Russell. *Anderson*, 91 F.3d at 1325; Order Denying Reconsideration at 3; Claimant’s Brief at 9-10. Moreover, the ALJ erred in considering evidence not in the record without taking official notice and giving the parties an opportunity to respond when he relied on news sources predating Mr. Russell’s employment at Mr. Vowels’s law firm to determine he did not work full-time as a lawyer. 29 C.F.R. §18.84; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); Order Denying Reconsideration at 4. We further agree with Counsel that the ALJ has not adequately explained how he determined a market rate of \$150.00 an hour for Mr. Russell, below the lower end of Mr. Russell’s customary billing rate, in light of the evidence submitted. *See Wojtowicz*, 12 BLR at 1-165; Fee Petition at 9; Motion to Reconsider at 3; Claimant’s Brief at 8-9, 14-15.

As the ALJ applied the incorrect legal standard, did not address the arguments and evidence Counsel presented, and considered evidence outside of the record without giving Counsel an opportunity to respond, his findings do not comply with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Thus, we vacate the ALJ’s award of an hourly rate of \$150.00 for Mr. Russell and remand this case for the ALJ to explain his determination in consideration of the aforementioned factors and to determine a reasonable hourly rate in accordance with the requirements of the APA. *Blum*, 465 U.S. at 896 n.11; *Chubb*, 312 F.3d at 894; *Wojtowicz*, 12 BLR 1-162.

Hourly Rate of Paralegal Desire Smith

Counsel requested an hourly rate of \$165.00 an hour for Ms. Smith’s work, noting her professional experience and that he customarily bills for her work at a rate of \$100.00 to \$165.00 an hour. Fee Petition at 10-12. He further submitted in support of his request: (1) four fee awards from 2021 and 2022 in which Ms. Smith was awarded an hourly rate of \$150.00 for work performed before the OALJ and the Board; (2) one fee award in which another paralegal was awarded \$200.00 an hour for work performed before the Board in 2015; (3) seven fee awards in which other paralegals were awarded \$150.00 an hour for work performed before the Sixth Circuit, the Board, and the OALJ between 2012 and 2020;⁹ and (4) data from the 2018 and 2020 National Association of Legal Assistants (NALA) Compensation and Utilization Survey and Study showing a national average

⁹ Counsel also noted three fee awards in which the hourly rate for other paralegals was reduced to \$96.00 to \$125.00 in contested cases from 2017 to 2022 for work performed before the OALJ and the Board. Fee Petition at 13.

billing for paralegals of \$61.00 to \$215.00 an hour. *Id.*; Motion to Reconsider at 5. Counsel requested a higher rate for Ms. Smith based on inflation as well as her education, experience, and certification. Fee Petition at 12-13; Motion to Reconsider at 5.

The ALJ acknowledged that Ms. Smith has an excellent background and has previously received an hourly rate of \$150.00. Order at 2; Order Denying Reconsideration at 5. However, given the complexity of the work she performed in this case, the ALJ awarded her a rate of \$125.00 per hour. Order at 2; Order Denying Reconsideration at 4-5. The ALJ again found he could not increase the requested hourly rate based on inflation. Order Denying Reconsideration at 3.

Again, the ALJ erred in finding he could not account for inflation in determining the hourly rate for Ms. Smith. *Anderson*, 91 F.3d at 1325; Claimant's Brief at 9-10. We further agree with Counsel's assertion that the ALJ erred in reducing Ms. Smith's hourly rate because many of her time entries involved routine office tasks that "should have been[] performed by someone with a significantly lower hourly rate" ¹⁰ Order at 2; Order Denying Reconsideration at 5 & n.6.

The question in determining a compensable fee is not whether it would have been cheaper for Counsel to delegate the work to paralegals or legal assistants; rather, it is whether the work and time that Counsel requested was reasonable and necessary to establish Claimant's entitlement to benefits at the time the work was performed. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008) (An ALJ "may not attempt to impose [their] own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests."); *Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999); *Lanning v. Director, OWCP*, 7 BLR 1-314, 316 (1984) (services that counsel billed are compensable if the amount of time is not excessive).

Thus, the ALJ's determination that the work Ms. Smith performed could have been performed by someone else does not justify a reduction in the requested hourly rate. *See*

¹⁰ The ALJ specifically pointed to Ms. Smith's time entries from January 27, 2021, February 2, 2021, February 3, 2021, February 10, 2021, February 24, 2021 (both entries), February 25, 2021, February 26, 2021, March 8, 2021 (both entries), March 11, 2021, March 12, 2021 (both entries), March 26, 2021, April 2, 2021, April 5, 2021, May 21, 2021, and August 10, 2021. Order at 2; Order Denying Reconsideration at 5. Counsel asserts these time entries are crucial and necessary in Ms. Smith's role, and could not be assigned to a legal assistant, as she specifically comprehends the prehearing deadlines and simultaneously manages the procurement of evidence. Claimant's Brief at 17-18.

Lanning, 7 BLR at 316; Order Denying Reconsideration at 5 & n.6. Further, none of the time she billed was found to be excessive or unnecessary in establishing Claimant's entitlement.

We therefore vacate the ALJ's award of an hourly rate of \$125.00 to Ms. Smith and remand this case for him to reconsider her fee in light of inflation, the evidence, and the arguments presented, and to explain his determination in accordance with the APA. *Blum*, 465 U.S. at 896 n.11; *Chubb*, 312 F.3d at 894; *Wojtowicz*, 12 BLR 1-165.

Legal Assistant Agnew's Hourly Rate

Counsel requested a fee of \$165.00 an hour for Ms. Agnew's work as a legal assistant, noting her professional experience and her customary billing rate of between \$75.00 and \$165.00 per hour. Fee Petition at 14-15. He provided: (1) a fee award citation from 2022 in which counsel asserts Ms. Agnew was awarded an hourly rate of \$150.00;¹¹ (2) two fee awards from 2021 and 2022 awarding Ms. Agnew an hourly rate of \$125.00 for work performed before the OALJ; (3) one fee award from 2020 awarding Ms. Agnew an hourly rate of \$100.00; and (4) two fee awards from 2021 in which an unnamed legal assistant was awarded an hourly rate of \$100.00 for work performed before the OALJ and the Board. *Id.*; Motion to Reconsider at 5. In addition, Counsel referenced the 2018 NALA Compensation and Utilization Survey and Study which included rates up to \$140.00 per hour for legal assistants without special training. Motion to Reconsider at 5, 15. Counsel requested a higher rate because of inflation and Ms. Agnew's increased experience and education. Fee Petition at 15; Motion to Reconsider at 5-6.

The ALJ found Ms. Agnew had excellent qualifications but determined that some of her time entries "may be the type of clerical work for which reimbursement is not available." Order at 2-3 (emphasis added); Order Denying Reconsideration at 5 & n.6. Rather than excluding these entries, the ALJ instead reduced her hourly rate to \$110.00. *Id.*

The ALJ again erred in finding he could not account for inflation in determining the hourly rate for Ms. Smith. *Anderson*, 91 F.3d at 1325; Order Denying Reconsideration at 3; Claimant's Brief at 9-10. Moreover, rather than determining what parts of Ms. Agnew's work were "clerical" and excluding those entries as non-compensable, the ALJ broadly

¹¹ Counsel asserts the ALJ in *Tapp* awarded an hourly rate of \$150.00 for Ms. Agnew's work. Fee Petition at 15. However, the ALJ actually awarded a total fee of \$35,984.83 but did not designate the hourly rate requested or granted, or who performed the work. *Tapp*, OALJ No. 2019-BLA-06055.

characterized her work as possibly clerical and identified that as a basis to reduce her hourly rate.¹² Order at 2-3.

The ALJ is correct that fees for clerical tasks must be included as part of overhead in setting the hourly rate. *See E. Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 578 (4th Cir. 2013); *Braenovich v. Cannelton Indus., Inc.*, 22 BLR 1-236, 1-250 (2003). However, the ALJ was still required to determine what duties were clerical in nature and exclude them, and then determine the market rate for Ms. Agnew's work. *Id.* Consequently, we cannot affirm the ALJ's award of a \$110.00 hourly rate for Ms. Agnew. *See Anderson*, 91 F.3d at 1325; *Allen*, 31 BRBS at 96; *Wojtowicz*, 12 BLR at 1-165. We remand this case for the ALJ to determine a market rate for Ms. Agnew's work and to determine what, if any, of her work was clerical in nature and is therefore not compensable. *Gosnell*, 724 F.3d at 578; *Braenovich*, 22 BLR at 1-250.

¹² Counsel argues that none of her entries were clerical and instead involved necessary and reasonable professional tasks. Claimant's Brief at 19-20; Motion to Reconsider at 5-6.

Accordingly, we affirm in part and vacate in part the ALJ's Order Awarding Attorney Fees and Expenses and Order Denying Motion for Reconsideration, and we remand this case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge