



BRB No. 24-0187 BLA

THOMAS C. TRADER

Claimant-Petitioner

v.

HERITAGE COAL COMPANY, LLC
c/o PEABODY ENERGY CORPORATION

Employer-Respondent

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 01/24/2025

DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney Fees and Order Granting Motion for Reconsideration and Denying Motion for Award of Additional Attorney Fees of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels and David W. Littrell III (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Ryan D. Thompson (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant's counsel (Counsel), Austin P. Vowels, appeals Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Attorney Fees (Fee Award) and Order Granting Motion for Reconsideration and Denying Motion for Award of Additional Attorney Fees (Order on Reconsideration) (2021-BLA-05722), issued in connection with the successful prosecution of a claim filed on September 5, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The district director issued a proposed award of benefits on January 25, 2021, and upon Employer's request, the ALJ held a hearing on April 11, 2023.

On August 14, 2023, Employer filed a motion to stay the deadlines in this case because the Department of Labor and Peabody Energy had reached a settlement agreement regarding all claims involving Peabody Energy that would also impact this case. The next day, August 15, 2023, the ALJ granted Employer's motion and stayed all deadlines for thirty days and suspended proceedings "until further Order." Subsequently, on October 16, 2023, Employer filed a motion to remand the case to the district director for payment of benefits, which the ALJ granted. October 16, 2023 Order. The ALJ also instructed Claimant's Counsel to file his fee petition within thirty days and provided Employer the opportunity to file any objections to the fee petition within ten days after the petition was filed. *Id.* Claimant requested an extension of time to file the fee petition, which the ALJ granted.

On January 8, 2024, Counsel filed a fee petition for legal services performed before the ALJ from February 22, 2021 through November 14, 2023, requesting \$20,907.50 for attorney fees and expenses, representing \$4,050.00 for 13.5 hours of attorney services by Austin P. Vowels at the hourly rate of \$300.00; \$3,440.00 for 16 hours of attorney services by David W. Littrell III at the hourly rate of \$215.00; \$3,500.00 for 14 hours of attorney services by M. Alexander Russell at an hourly rate of \$250.00; \$25.00 for 0.25 hour of legal assistant services by Jolie Divetro at the hourly rate of \$100.00; \$950.00 for 9.5 hours of legal assistant services by Shawna Brown at the hourly rate of \$100.00; \$100.00 for 1 hour of legal assistant services by Kayleigh Cleveland at the hourly rate of \$100.00; \$75.00 for 0.75 hour of legal assistant services by Maci Uffelman at the hourly rate of \$100.00; \$2,100.00 for 21 hours of legal assistant services by Linda Totten at the hourly rate of \$100.00; \$343.75 for 2.75 hours of paralegal services by Leslie Jackson at the hourly rate of \$125.00; \$688.75 for 4.75 hours of paralegal services by Desire Smith at the hourly rate of \$145.00; \$2,863.75 for 19.75 hours of legal assistant services by Sarah Agnew at the

hourly rate of \$145.00; \$471.25 for 3.25 hours of paralegal services by Trisha Wright at the hourly rate of \$145.00; and \$2,300.00 in expenses.¹ Fee Petition at 1-2, 34-46.

On January 8, 2024, the same day the fee petition was filed, Employer objected to Counsel's use of quarter-hour billing and argued that multiple billing entries should be disallowed or reduced as administrative, clerical, redundant, excessive, or duplicative. Employer's Objections at 2-7. Employer also objected to Attorney Littrell's charges for sixteen hours of work on a post-hearing brief because the work was performed after the ALJ had stayed all deadlines. *Id.* at 7.

On January 16, 2024, after considering Counsel's fee petition and Employer's objections, the ALJ awarded Counsel \$17,172.50 in attorney's fees, representing \$14,872.50 in fees and \$2,300 in expenses. The ALJ reduced Attorney Vowels's time for work performed on April 10, 2023, from 0.25 hour to 0.1 hour; reduced Legal Assistant Totten's time for work performed on July 24 and 25, 2023, and August 7, 2023, by 2.5 hours; and disallowed all 16 hours Attorney Littrell spent drafting Claimant's post-hearing brief.

On January 19, 2024, Counsel filed a motion for reconsideration of the ALJ's fee award, asserting the ALJ denied him the opportunity to respond to Employer's objections and erroneously disallowed all sixteen hours Attorney Littrell spent drafting Claimant's post-hearing brief. Also, Counsel requested an additional \$848.00 for time spent defending his fee request. On February 12, 2024, the ALJ denied Claimant's motion for reconsideration and his request for additional fees.

On appeal, Counsel contends he should have been permitted to file a reply to Employer's objections. He further argues the ALJ should not have disallowed Attorney Littrell's requested fees for drafting the post-hearing brief, the ALJ's disallowance of certain hours is arbitrary, and Legal Assistant Totten's work was not excessive. Employer responds, urging affirmance of the ALJ's fee award. Counsel filed a reply brief, reiterating his arguments on appeal. The Director, Office of Workers' Compensation Programs, did not file a response brief.

The amount of an attorney's fee award is discretionary. The Benefits Review 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.² *See B & G*

¹ Counsel and Employer compromised and agreed on the hourly rates requested. Fee Petition at 1 n.1.

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See*

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).

ALJ's Denial of Counsel's Right to Reply to Employer's Objections

Counsel initially argues the ALJ erred by not allowing him to file a reply to Employer's objections to his fee request. Counsel's Brief at 5-8.

In his order on reconsideration, the ALJ ruled that "[Counsel] had no absolute right to file a reply brief in support of his claim for fees." Order on Reconsideration at 3. The ALJ cited no regulatory authority for his conclusion. However, the ALJ also correctly noted that Claimant did not request leave to file a reply or indicate his intent to file a reply during the eight-day period between the time Employer filed its objections on January 8, 2024, and the time the Fee Award was issued on January 16, 2024. *Id.* at 3-4.³ Thus, we see no abuse of discretion by the ALJ in not providing Claimant a specific opportunity to respond to Employer's objections. *Bentley*, 522 F.3d at 661; *Jones*, 21 BLR at 1-108. Moreover, any error by the ALJ was harmless because Claimant filed a motion for reconsideration, which was granted, and thereby had the opportunity to challenge both Employer's objections and the ALJ's findings. *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); Order on Motion for Reconsideration at 3-4; Counsel's Motion for Reconsideration at 1-5 (unpaginated).

ALJ's Disallowance of All Sixteen Hours for Post-Hearing Brief

Counsel argues the ALJ erred in disallowing all sixteen hours requested for Attorney Littrell's drafting of Claimant's post-hearing brief. Counsel's Brief at 8-12. Counsel asserts that when Attorney Littrell was drafting the post-hearing brief, the Peabody settlement agreement had not yet been disclosed and Employer had merely informed the parties that it needed a temporary stay on deadlines to determine the settlement's impact on specific cases, including this case. *Id.* at 8-9. Because Attorney Littrell "was drafting the post-hearing brief as if the case was continuing forward with litigation," Counsel contends it was arbitrary and unreasonable for the ALJ to disallow this work. *Id.* 9-10. We are unpersuaded by Counsel's argument.

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 10-11.

³ We also note that Counsel cites no authority for the proposition that he was entitled to file a reply brief.

The proper inquiry in determining whether a fee is compensable is whether Counsel, at the time he performed the work, could reasonably regard it as necessary to establish Claimant's entitlement to benefits. *See Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999) (emphasis added). Because the ALJ's Order dated August 15, 2023, stayed "all further proceedings . . . until further Order," and it issued three days before Attorney Littrell began drafting the post-hearing brief, the ALJ committed no abuse of discretion in ruling that Counsel was aware that the work "was not necessary" "[u]nder the facts and timeline of this case." *See Murphy*, 21 BLR at 1-120; Order on Reconsideration at 5-8; Fee Award at 2-3. Consequently, we affirm the ALJ's disallowance of all sixteen hours spent by Attorney Littrell in drafting Claimant's post-hearing brief.

ALJ's Disallowance of Other Hours

Counsel also argues the ALJ erred in reducing one of his 0.25 hour billing entries to 0.1 hour and Legal Assistant Totten's billing entry by 2.5 hours. Counsel's Brief at 12-14. Counsel first raised these arguments in his opening brief to the Board on appeal, not in his motion for reconsideration to the ALJ when he had the opportunity to do so. Thus, because Counsel failed to raise these issues to the ALJ, we decline to address them. *See Braenovich v. Cannelton Indus.*, 22 BLR 1-236, 1-251 (2003).

Supplemental Fee Request

In his motion for reconsideration to the ALJ, Counsel requested \$848.00 in supplemental fees, representing \$375.00 for 1.25 hours of Attorney Vowels's services at an hourly rate of \$300.00 and \$473.00 for 2.2 hours of Attorney Littrell's services at an hourly rate of \$215.00 for time spent responding to Employer's objections to his fee petition. The ALJ denied the request. Order on Reconsideration at 9-10. The ALJ reasoned that, while Counsel would usually be entitled to a fee for reasonable efforts in defending his fee request, the efforts in this case were not reasonable because they were based on Counsel's misstatement that the ALJ's stay of proceedings was limited to thirty days and not indefinite. *Id.* Counsel requests that the Board revise the fee award to include the \$848.00 fee for time spent "litigating the fee issue." Counsel's Brief at 8. We decline to address the issue as it is inadequately briefed. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1983).

Accordingly, we affirm the ALJ's Decision and Order Awarding Attorney Fees and Order Granting Motion for Reconsideration and Denying Motion for Award of Additional Attorney Fees.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge