



BRB No. 22-0166 BLA

ROBERT W. BAKER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WYOMING POCAHONTAS LAND)	
COMPANY)	
)	DATE ISSUED: 7/12/2023
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Attorney Fee Order on Remand, Order Denying Claimant’s Motion for Reconsideration of Attorney Fee Order, and Order Denying Attorney Fee Petition of Drew A. Swank, 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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant’s counsel (Counsel) appeals Administrative Law Judge (ALJ) Drew A. Swank’s Attorney Fee Order on Remand, Order Denying Claimant’s Motion for Reconsideration of Attorney Fee Order, and Order Denying Attorney Fee Petition (2015-

BLA-05928) rendered in connection with the successful prosecution of a miner's claim¹ filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This matter is before the Benefits Review Board for a second time.²

Counsel requested \$22,829.11 in fees and expenses for work before the ALJ, including: fees totaling \$20,300 for 52.1 hours of legal services at an hourly rate of \$250.00, 0.6 hours of legal services at an hourly rate of \$175.00, and 47.8 hours of paralegal work at an hourly rate of \$150.00; and expenses totaling \$2,529.11. In addition, he requested a total fee of \$962.50 for 3.5 hours of legal services at an hourly rate of \$275.00 for work done before the ALJ on remand.

In his initial fee order, the ALJ noted there were no objections to the fee petition from Employer or the Director, Office of Workers' Compensation Programs (the Director) and found the requested fees for the legal services the attorneys provided to be reasonable. He similarly awarded Counsel his requested expenses. However, the ALJ reduced the paralegal's requested hourly rate to \$100.00. Thus, he awarded \$17,910 in fees and \$2,529.11 in expenses, for a total of \$20,439.11.

Counsel appealed, arguing the ALJ erred in reducing the paralegal's requested hourly rate to \$100.00. The Board affirmed the ALJ's approval of legal services of 52.1 hours at an hourly rate of \$250.00, and 0.6 hours at an hourly rate of \$175.00, as well as the unchallenged award of \$2,529.11 in expenses. However, the Board held that, in lowering the paralegal's hourly rate, the ALJ failed to consider all the relevant evidence in the record, including four prior fee awards in which the paralegal was awarded \$150.00 per hour. Further, the Board held the ALJ did not address which aspects of the paralegal's work and qualifications led him to reduce her hourly rate. Thus, the Board remanded the case for further consideration of an appropriate hourly rate for the paralegal.

On remand, the ALJ again found that \$100.00 per hour is the appropriate rate for the paralegal. Counsel filed a motion for reconsideration of the ALJ's Order on Remand, arguing he failed to consider all the evidence and explain his rationale for reducing the paralegal's hourly rate to \$100.00 in accordance with the Board's remand instructions. The ALJ denied the motion for reconsideration, rejecting all of Counsel's arguments. On the same day Counsel filed his brief on remand, he also filed a fee petition for work performed before the ALJ on remand. In a separate order, the ALJ denied this fee petition because

¹ The ALJ issued a Decision and Order Awarding Benefits on February 21, 2018.

² We incorporate the procedural history of this case and the Board's prior holdings, as set forth in *Baker v. Wyoming Pocahontas Land Co.*, BRB No. 18-0548 BLA (Sept. 26, 2019) (unpub.).

Counsel did not recover increased compensation or other benefits for Claimant from the services provided on remand.

On appeal, Counsel again contends the ALJ erred in reducing the paralegal's hourly rate. He further argues the ALJ erred in denying his fee request for work done before the ALJ on remand. Neither Employer nor the Director has filed a response brief.

The amount of an attorney's fee award is discretionary and must be upheld on appeal unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *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 account for "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 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. *Bentley*, 522 F.3d at 663.

Paralegal's Hourly Rate

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).

Counsel argues the ALJ relied on his own opinion in setting the paralegal's hourly rate instead of weighing the evidence of record and rationally explaining why he reduced the hourly rate from \$150.00 to \$100.00. Petitioner's Brief at 4, 9-12. We agree.

Counsel submitted as evidence (1) a fee order issued by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, awarding the paralegal an hourly rate of \$150.00; (2) four fee orders ALJs issued awarding the paralegal

an hourly rate of \$150.00;³ (3) an ALJ’s 2012 fee order awarding an hourly rate of \$100.00 to a paralegal that Counsel asserts is less qualified than the paralegal in question, who has a Bachelor of Science in Political Science and Legal Studies and a Master’s Degree in Public Service Administration; (4) the National Association of Legal Assistants (NALA) 2018 and 2020 National Compensation and Utilization Survey Report showing the most common hourly rate for a paralegal is \$146.00 to \$150.00 per hour, the second most common hourly rate is more than \$215.00, and the third most common hourly rate is \$121.00 to \$125.00 per hour; and (5) a citation to a Board decision from 2021 awarding a paralegal an hourly rate of \$125.00. Petitioner’s Brief at 6-7; Attachments to Brief on Remand.

In his Order on Remand, the ALJ noted Counsel customarily bills \$150.00 per hour for the paralegal’s services, that her hourly rate has been reduced to \$100.00 in the past, and in most cases where the paralegal received an hourly rate of \$150.00 the petition was unopposed. Order on Remand at 3. He stated that, in his “research of Claimant’s counsel’s other Black Lung fee petitions, [he] found a number of recent cases in which an hourly rate of [\$100.00] per hour was awarded for Paralegal Wright.” *Id.* Further, he stated an hourly rate of \$100.00 is “customary for services provided by legal assistants/paralegals in like matters,” and thus reduced the hourly rate to \$100.00.⁴ *Id.*

In his order denying Counsel’s motion for reconsideration, the ALJ stated he considered the relevant factors at 20 C.F.R. §725.366(b),⁵ the prior approved billing rates

³ The prior fee awards include the awards Counsel submitted to the district director: *Advent Mining LLC v. Davis*, No. 16-4049 (6th Cir. Oct. 16, 2017) (Order); *Vincent v. Schoate Mining Co., LLC*, OALJ Case No. 2016-BLA-05600 (Nov. 20, 2017) (Order Granting Attorney Fees); *Lloyd v. Cumberland Coal Res., LP*, OALJ Case No. 2015-BLA-05218 (Feb. 16, 2017) (Order Granting Attorney Fees); *Lee v. Armstrong Coal Co.*, OALJ Case No. 2014-BLA-05683 (Feb. 16, 2017) (Order Granting Attorney Fees); *Estate of Virginia L. Mortis v. Kenamerican Res.*, OALJ Case No. 2017-BLA-05459 (Aug. 15, 2018) (Supplemental Order Granting Attorney Fees).

⁴ We note that the ALJ cited the cases he found in his research but did not cite to any evidence in the record for any of these findings in his Order on Remand.

⁵ Specifically, 20 C.F.R. §725.366(b) provides:

“Any fee approved under paragraph (a) of 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

Counsel submitted, and the fact there are no objections to the fee petition, but that he is not bound by “either the cases submitted by Claimant or objections made by Employer.” Order Denying Motion for Recon. at 2. He stated he “considered a number of cases in which fees were awarded to Claimant’s counsel [and] did not assign greater weight to certain cases or evidence.” *Id.* In addition, he rejected the hourly rates found in the NALA 2018 and 2020 National Utilization and Compensation Survey Reports because they are not geographically specific to the paralegal,⁶ and found prior fee decisions in cases where the paralegal performed comparable work more instructive of the appropriate hourly rate. *Id.* at 2-3. Finally, he stated that the paralegal’s education and experience were considered and that her “multiple degrees and years of relevant work do not automatically qualify her for a higher hourly rate.” *Id.* at 3.

Once again, the ALJ has not addressed what aspects of the paralegal’s work and qualifications led him to reduce her hourly rate to \$100.00 or explained how the prior fee awards of record support this reduction. Consequently, his analysis does not comport with the Administrative Procedure Act (APA).⁷ 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Moreover, an ALJ must evaluate the evidence of record and not rely on information outside the record, unless he takes judicial notice and gives the parties an opportunity to respond. 29 C.F.R. §18.84; *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 138-39 (1990). Here, the ALJ has not found the evidence of record is insufficient to establish an hourly rate of \$150.00 but rather has relied on his own “research of Claimant’s counsel’s other Black Lung fee petitions” without providing any explanation

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).

⁶ We note that, contrary to the ALJ’s finding, the 2018 and 2020 NALA survey reports submitted by Counsel state the average hourly billing rates by region. Order Denying Motion for Recon. at 2; Brief on Remand at 20, 23.

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 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).

or reason for why his research should be credited and relied upon, over the evidence of record, to reduce the hourly rate to \$100.00. *See Hall v. Director, OWCP*, 12 BLR 1-80, 1-81-82 (1988) (en banc) (The ALJ’s decision must “withstand scrutiny on the four corners of the document.”); Order on Remand at 3.

The ALJ has, on three occasions, declined to find any deficiency in the evidence Counsel submitted to establish the requested hourly rate of \$150.00 is reasonable. Attorney Fee Order; Order on Remand; Order Denying Motion for Recon. Additionally, the requested fee is unopposed and neither party submitted contrary evidence in the record establishing the requested rate is not reasonable. Therefore, in this specific case, there is no rational basis for a finding that \$150.00 is not an appropriate hourly rate. *See Bentley*, 522 F.3d at 663-66; *Gonter*, 510 F.3d at 617; *Jones*, 21 BLR at 1-108. In light of the above, we reverse the ALJ’s reduction of the paralegal’s hourly rate. *See Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (reversal is warranted where no factual issues remain to be determined and no further factual development is necessary).

Petition for Fees on Remand

Counsel has also challenged the ALJ’s denial of his unopposed request for fees and expenses for work performed on remand. Petitioner’s Brief at 12-14. The ALJ denied Counsel’s request because, on remand, the ALJ did not increase the hourly rate for the paralegal and thus the ALJ determined Counsel did not successfully prosecute his claim. Order Denying Fees on Remand at 2.

While the regulations do not specifically address this point,⁸ it has been held consistently that a claimant’s attorney is entitled to a fee award where he successfully defends his fee petition or where he succeeds on appeal in obtaining an increased fee. *See Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 903 (7th Cir. 2003); *Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 134 (4th Cir. 2001); *Workman v. Director, OWCP*, 6 BLR 1-1281, 1-1283 (1984). Because we reverse the ALJ’s finding Counsel did not successfully defend the paralegal’s hourly rate of \$150.00 requested in his fee petition, he successfully obtained an increased fee and is entitled to reasonable fees for the work performed on remand. *Id.* Moreover, no party objected to Counsel’s requested hourly rate or challenged the reasonableness of the requested fee in any regard. We thus reverse the ALJ’s denial of Counsel’s Motion for Fees and Expenses for Work Performed Before the Administrative Law Judge on Remand.

⁸ The regulation provides only that “[n]o fee approved shall include payment for time spent in *preparation* of a fee application.” 20 C.F.R. §725.366(b) (emphasis added).

Accordingly, the ALJ's Attorney Fee Order on Remand, Order Denying Claimant's Motion for Reconsideration of Attorney Fee Order are affirmed in part and reversed in part to reflect an award of 47.8 hours of paralegal work at an hourly rate of \$150.00 and a total award of \$22,829.11 for fees and expenses. The ALJ's Order Denying Attorney FeePetition is reversed to reflect an award of \$962.50, and the case is remanded to the ALJ for entry of an order awarding fees consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge