U.S. Department of Labor

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

BRB Nos. 24-0241 BLA,
24-0391 BLA, and 24-0470 BLA

DAVID A. OWENS)
)
Claimant-Respondent)
)
v.)
)
BLACKJEWEL, LLC)
)
and)
)
LIBERTY MUTUAL INSURANCE COMPANY)
)
Employer/Carrier-Petitioners)
)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)
)
Party-in-Interest)

NOT-PUBLISHED

DATE ISSUED: 07/31/2025

DECISION and ORDER

Appeals of the Decision and Order Granting Benefits and Attorney Fee Order of Heather C. Leslie, Administrative Law Judge, United States Department of Labor, and the Proposed Order Supplemental Award Fee for Legal Services of Gretchen J. Wilkinson, Claims Examiner, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Anne L. Rife (Midkiff, Muncie & Ross, P.C.), Bristol, Tennessee, for Employer and its Carrier.

Amanda Torres (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE, Administrative Appeals Judge, and ULMER, Acting Administrative Appeals Judge.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Granting Benefits (2020-BLA-06003) rendered on a claim filed on August 3, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Employer also appeals the ALJ's Attorney Fee Order (ALJ Fee Order) and Claims Examiner Gretchen J. Wilkinson's Proposed Order Supplemental Award Fee for Legal Services (District Director's Fee Award).

The ALJ's Decision and Order

The ALJ found Blackjewel, LLC (Employer), is the responsible operator. She credited Claimant with 16.54 years of qualifying coal mine employment and found he established complicated pneumoconiosis. Thus, she found he invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. She further found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203, and awarded benefits.

On appeal, Employer asserts the ALJ lacked authority to hear this case because the removal protections applicable to Department of Labor (DOL) ALJs render her appointment unconstitutional. It further contends the ALJ erred in finding Employer is the responsible operator and, therefore, that its insurance carrier, Liberty Mutual, is the liable carrier. On the merits of entitlement, Employer argues the ALJ erred in finding Claimant established 16.54 years of coal mine employment and in determining the commencement

date for benefits.[1] Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's arguments.[2]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359, 362 (1965).

ALJ's Authority to Adjudicate the Claim

Employer challenges the constitutionality of the removal protections afforded Department of Labor ALJs. Employer's Brief at 10-11. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC*, 585 U.S. 237 (2018), as well as the United States Supreme Court's holding in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010). *Id.* In *Howard v. Apogee Coal Co*., 25 BLR 1-301 (2022), the Board rejected similar arguments, in part, because the employer did not sufficiently allege "it suffered any harm due to the ALJ's removal protections." 25 BLR at 1-307 (applying *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022)). Subsequently, in *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 145 (4th Cir. 2023), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, held that "the Board has no authority to remedy the alleged separation-of-powers violation." The court nevertheless denied the employer's request for a new hearing because it did not show that the alleged "constitutional violation caused [it] harm." *Keene*, 86 F.4th at 149. So too in this case. Thus, even if the Board had authority to remedy the violation presented by Employer's removal protections

[1] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018), and that Claimant's complicated pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b). Therefore, we affirm the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 31-32.

[2] The Director declined to address Employer's contentions regarding the commencement date for benefits. Director's Response Brief at 1 n.1.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989); Hearing Transcript at 24.

arguments, we would decline to do so because Employer has failed to identify a harm caused by the allegedly unconstitutional removal provisions.

Length of Coal Mine Employment

Claimant bears the burden of establishing the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The dates and length of employment may be established by any credible evidence, and the Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986). The ALJ found Claimant established 16.54 years of coal mine employment, including 0.71 years with Employer in 2018 and four years with Renco Excavating. Decision and Order at 9-11.

Employer contends the ALJ erred calculating the length of Claimant's coal mine employment, asserting Claimant can establish only 12.21 years because it employed Claimant for only 0.29 years in 2018 and his employment with Renco Excavating did not constitute coal mine employment. Employer's Brief at 13-16. The Director responds that any error in the ALJ's calculating the length of Claimant's coal mine employment was harmless. Director's Brief at 13-14. We agree with the Director's position.

Employer concedes Claimant established 12.21 years of coal mine employment. Employer's Brief at 13. Claimant thus invoked the presumption at 20 C.F.R. §718.203(b) that his complicated pneumoconiosis was caused by his coal mine employment. The ALJ found Employer did not rebut the presumption, Decision and Order at 32, and Employer does not assert on appeal that the ALJ erred in reaching this finding. Thus, any error in the ALJ's calculation of the length of coal mine employment is harmless. *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).

Onset of Complicated Pneumoconiosis and Commencement Date of Benefits

The date for commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). When a claimant establishes complicated pneumoconiosis, the factfinder must consider whether the evidence establishes the date of onset of the disease. *See Williams v. Director, OWCP*, 13 BLR 1-18, 1-30 (1989). If it does not, the commencement date is the month in which the claim was filed, unless the evidence establishes the miner had only simple pneumoconiosis for any period after the date of

filing. In that case, the date for the commencement of benefits follows the period when the miner had only simple pneumoconiosis. *Williams*, 13 BLR at 1-30.

The ALJ found the record does not clearly establish the date on which Claimant first became totally disabled due to pneumoconiosis, but no evidence established he was not totally disabled due to pneumoconiosis at any time after he filed his claim. Decision and Order at 32. She thus awarded benefits commencing in August 2017, the month Claimant filed his claim. *Id.* at 33.

Employer argues the ALJ erred in finding benefits should commence in August 2017. Employer's Brief at 16-21; Employer's Reply Brief at 4-5. It asserts the ALJ erred in finding the readings of the November 3, 2017 x-ray positive for complicated pneumoconiosis rather than in equipoise. Employer's Brief at 18. Therefore, Employer contends there is no "unrefuted proof" establishing complicated pneumoconiosis dating from before the April 9, 2018 computed tomography (CT) scan. Employer's Brief at 18-21. We are not persuaded.

Dr. DePonte read the November 3, 2017 x-ray and checked the box for large opacities, Category A, and commented that the x-ray showed "[l]ikely Category A opacities" but that she recommended a CT scan to confirm. Director's Exhibit 13 at 22. Dr. Crum read the November 3, 2017 x-ray twice, both times diagnosing complicated pneumoconiosis, Category A. Director's Exhibit 24 at 2; Claimant's Exhibit 2. Drs. Seaman and Ramakrishnan read the x-ray as negative for complicated pneumoconiosis. Director's Exhibit 19 at 2; Employer's Exhibit 2. The ALJ observed that all the physicians interpreting the x-ray are dually-qualified as B readers and Board-certified radiologists and entitled to equal weight. Decision and Order at 23. Thus, because there are three positive readings of the November 3, 2017 x-ray for complicated pneumoconiosis and two negative readings, the ALJ found the November 3, 2017 x-ray is positive for complicated pneumoconiosis. *Id.* at 24.

Employer asserts the ALJ erred in finding Dr. DePonte read the November 3, 2017 x-ray as positive for complicated pneumoconiosis, arguing her statement that the x-ray "[l]ikely" shows Category A opacities is equivocal. Employer's Brief at 18-19. It thus contends there are two positive readings, two negative readings, and one equivocal reading of the November 3, 2017 x-ray, and therefore the ALJ should have found the readings of this x-ray are in equipoise. *Id.* Contrary to Employer's contention, the Fourth Circuit has held that "refusal to express a diagnosis in categorical terms is candor, not equivocation." *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763 (4th Cir. 1999) (opinion that pneumoconiosis "could be" a complicating factor in the miner's death was not equivocal).

Employer's argument amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the ALJ's finding that the November 3, 2017 x-ray is positive for complicated pneumoconiosis. Decision and Order at 24. Because it is the earliest x-ray after the date on which Claimant filed his claim for benefits, and because the ALJ found the readings of the later x-rays are in equipoise, the record does not establish any period after the date of filing of the claim during which Claimant had only simple pneumoconiosis. *See Williams*, 13 BLR at 1-30. Thus, we affirm the ALJ's finding that the record does not establish the precise date on which Claimant first became disabled due to pneumoconiosis, and, therefore, we further affirm her finding that Claimant is entitled to benefits commencing in August 2017, the month in which he filed his claim. *See* 20 C.F.R. §725.503(b); *see also Williams*, 13 BLR at 1-30; *Lykins*, 12 BLR at 1-186; Decision and Order at 32-33.

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for at least one year.[4] 20 C.F.R. §§725.494(c), 725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director properly identifies a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

The ALJ found Claimant worked for Employer for 1.71 years and did not work for another coal mine operator after his employment with Employer ended. Decision and Order at 9. She further found the Director submitted a closing brief addressing the responsible operator issue and arguing that the evidence in the record establishes that

[4] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

Employer was properly designated as the responsible operator, whereas Employer did not submit evidence or argument to support its assertion that it is not the properly designated responsible operator. *Id.* at 15. Thus, she found Employer is the properly designated responsible operator. *Id.*

Employer contends the ALJ erred in finding it is the properly designated responsible operator because she failed to address the arguments it raised in its post-hearing brief and the evidence it submitted to the district director that it asserts demonstrates it did not employ Claimant for at least one year. Employer's Brief at 11-13 (citing Director's Exhibits 50, 52). Employer's argument has merit.

In its post-hearing brief to the ALJ, Employer specifically asserted it does not qualify as a potentially liable operator in this case because it did not employ Claimant for at least a year. Employer's Post-Hearing Brief at 8-9. Employer specifically asserted that Director's Exhibits 50 and 52 demonstrate Claimant was employed by Revelation Energy, LLC (Revelation), from January 8, 2017 through December 31, 2017, and that he worked for Employer only from January 1, 2018 through April 14, 2018. *Id.* at 8. Thus, contrary to the ALJ's finding, Employer did submit argument and evidence to support its assertion that it is not the properly designated responsible operator. Decision and Order at 15; Employer's Post-Hearing Brief at 8-9; Director's Exhibits 50-52.

Because the ALJ failed to address Employer's arguments or weigh relevant evidence with respect to Claimant's coal mine employment history, her responsible operator finding does not satisfy the requirements of the Administrative Procedure Act (APA).[5] 30 U.S.C. §923(b) (factfinder must address all relevant evidence); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (factfinder's failure to address relevant evidence requires remand); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (ALJ has duty to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for her decision). Under these circumstances, the proper course is for the Board to remand the claim for the ALJ to consider the evidence in the first instance.

[5] 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).

The Director argues any error in failing to address Employer's arguments that it did not employ Claimant for at least one year or the evidence upon which it relies is harmless. Director's Brief at 10-12. Specifically, the Director asserts the evidence on which Employer relies is contradictory and establishes that Claimant either worked for Employer from January 8, 2017 to April 14, 2018, or that Employer is a successor operator to Revelation. *Id.* (citing 20 C.F.R. §725.492; Director's Exhibits 8, 50, 52). Thus, because this evidence establishes Employer is responsible for the payment of benefits, the Director contends the ALJ's error in failing to address Employer's arguments regarding that evidence is harmless. *Id.* at 12. However, these are factual findings committed to the ALJ, and the Board lacks the authority to render factual findings to fill in gaps in the ALJ's opinion. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (it is the ALJ's function as trier of fact to weigh the evidence); *McCune*, 6 BLR at 1-998. As the ALJ failed to consider Employer's arguments and liability evidence, we decline to do so in the first instance.

Consequently, we vacate the ALJ's responsible operator finding and remand this case for further consideration of the responsible operator issue.[6] The ALJ is instructed to address all relevant evidence and reconsider whether Employer met its burden to support its argument that Revelation and Employer are separate entities and not subsequent operators, and that Employer therefore did not employ Claimant for at least one year. *See* 20 C.F.R. §§725.494(c), (e), 725.495(c)(2), (d); *Addison*, 831 F.3d at 252-53; *Rowe*, 710 F.2d at 254-55; *McCune*, 6 BLR at 1-998. We offer no opinion on the weight to be given to Employer's arguments or the evidence it cites in support of its arguments. The ALJ must, however, consider the parties' arguments and explain her findings as the APA requires. *Wojtowicz*, 12 BLR at 1-165.

Attorney Fee Award: District Director

On April 15, 2024, Claimant's counsel (Counsel) submitted an itemized fee petition requesting a fee for legal services performed before the district director from July 29, 2019 to August 5, 2020. Counsel requested attorney fees in the amount of $8,397.50, representing: $3,937.50 for 11.25 hours of legal services performed by Joseph E. Wolfe at an hourly rate of $350.00; $2,280.00 for 7.6 hours of legal services performed by Bradley

[6] Employer further contends therefore that its insurance carrier, Liberty Mutual, is not the properly designated responsible carrier. Employer's Brief at 16-20; Employer's Reply Brief at 4. To the extent these arguments extend beyond the commencement date of benefits, which we have affirmed, we decline to consider Employer's responsible carrier contentions as premature in light of our vacating the ALJ's finding that Employer is the responsible operator.

A. Austin at an hourly rate of $300.00; $300.00 for 1.5 hours of legal services performed by Rachel Wolfe at an hourly rate of $200.00; $187.50 for 1.25 hours of legal services performed by Victoria Herman at an hourly rate of $150.00; $262.50 for 1.75 hours of legal services performed by Shane Hobbs at an hourly rate of $150.00; $1,430.00 for 14.3 hours of legal assistant services performed at an hourly rate of $100.00; and expenses of $660.00. After considering the fee petition, Employer's objections, and the regulatory criteria at 20 C.F.R. §725.366, the district director reduced the hourly rate for Mr. Wolfe from $350.00 to $300.00, Mr. Austin from $300.00 to $200.00, Ms. Wolfe from $200.00 to $150.00, and for the legal assistants from $100.00 to $75.00. The district director further reduced the requested hours by 9.55 hours for entries deemed as clerical,[7] and she denied Counsel's requests to reimburse expenses totaling $360.00 for x-rays dated January 1, 2020, taken at Norton Community Hospital, and an x-ray reading dated April 20, 2020, from Dr. Ramakrishnan, determining the expenses did not contribute to the decision rendered. The district director therefore awarded $5,926.25 in fees and $300.00 in expenses.

[7] The claims examiner denied the following entries, representing 9.55 hours of legal assistant time, as clerical:

> 08/01/2017, 08/24/2017, 09/21/2017, 09/30/2017(2), 10/02/2017, 10/12/2017, 12/12/2017(2), 12/31/2017, 12/30/2017, 01/17/2018, 01/22/2018, 01/26/2018, 01/29/2018, 02/05/2018, 02/27/2018, 03/07/2018(2), 03/26/2018, 03/27/2018, 03/28/2018, 06/13/2018(2), 06/14/2018, 06/26/2018, 07/10/2018, 08/02/2018, 08/10/2018, 09/05/2018, 09/13/2018, 09/20/2018, 09/25/2018, 10/09/2018, 10/22/2018, 12/20/2018, 02/12/2019, 02/13/2019, 02/14/2019, 02/26/2019, 03/04/2019, 03/05/2019, 07/16/2019, 09/16/2019, 09/19/2019(2), 10/04/2019, 10/07/2019, 10/24/2019, 11/04/2019, 11/12/2019, 01/13/2020, 01/16/2020(3), 01/17/2020, 01/20/2020, 01/21/2020, 01/22/2020(2), 01/24/2020(2), 01/28/2020, 01/30/2020 [duplicate] billing, 02/14/2020, 03/05/2020, 03/14/2020, 04/02/2020, 04/03/2020, 04/05/2020, 04/07/2020, 04/08/2020(2), 04/09/2020, 04/10/2020, 04/13/2020(2), 04/17/2020(2), 04/18/2019, 04/19/2020, 04/20/2020(2), 04/21/2020, 04/23/2020, 05/12/2020, 05/14/2020(2), 05/15/2020, 05/27/2020, 05/28/2020, 06/25/2020, 06/29/2020(2), 07/01/2020, 07/06/2020, 07/29/2020, 08/01/2020, [and] 08/04/2020.

District Director's Fee Award at 5 (unpaginated).

Employer argues the district director's award of a $300.00 hourly rate to Mr. Wolfe, a $200.00 hourly rate to Mr. Austin, and a $75.00 hourly rate for work performed by the legal assistants is unsupported and should be reduced. Employer's Brief in Appeal of the District Director's Fee Award at 6-8. Counsel responds in support of the fee award. The Director did not file a substantive brief responding to Employer's fee arguments.

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. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 568-69 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289 (4th Cir. 2010); *Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998) (en banc). 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. *See Gosnell*, 724 F.3d at 572; *Cox*, 602 F.3d at 276.

An attorney's reasonable hourly rate is "calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). "[T]he rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record" comprises the market rate. *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); *see also B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 663 (6th Cir. 2008). The fee applicant has the burden to 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 Gosnell*, 724 F.3d at 571. Further, the regulation states:

> Any fee approved under . . . 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 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).

Employer contends the record and market support an hourly rate of no more than $175.00 for Mr. Wolfe, $150.00 for Mr. Austin, and $50.00 for work performed by the

legal assistants.[8] Employer's Brief in Appeal of the District Director's Fee Award at 7-8. We disagree.

The district director appropriately assessed the reasonableness of the requested hourly rates by considering the regulatory criteria set forth at 20 C.F.R. §725.366(b), including the qualifications of the representatives, complexity of the issues involved, and level at which the claim was decided. 20 C.F.R. §725.366(b); District Director's Fee Award at 5 (unpaginated). In reducing the hourly rate awarded to Mr. Wolfe, Mr. Austin, and the legal assistants, the district director stated the "work was performed in a routine case which did not call for special ability and effort" and "the approved rate is comparable to that being charged by other highly qualified attorneys within the same geographical location who also have considerable expertise in the handling" of federal black lung claims. District Director's Fee Award at 5 (unpaginated).

Contrary to Employer's contention, the district director's award of an hourly rate of $300.00 for Mr. Wolfe, $200.00 for Mr. Austin, and $75.00 for work performed by the legal assistants is supported by the record and the local market rates. Counsel identified seventy cases in which Mr. Wolfe was awarded $300.00 per hour, twenty cases in which Mr. Austin was awarded $300.00 per hour, and eleven cases in which Counsel was awarded an hourly rate of $100.00 for services performed by legal assistants. Claimant's District Director Fee Petition at 4-12. "[P]rior fee awards constitute evidence of a prevailing market rate that may be considered in fee-shifting contexts, including those prescribed by the [Act]." *Gosnell*, 724 F.3d at 572. "[T]he most reliable indicator of prevailing market rates in a black lung case will be evidence of rates allowed in other black lung cases." *Id.* at 573. "Because hourly rates are not set on the trading floor, reasonable differences in opinion about what constitutes the appropriate rate can be expected." *Id.* at 665.

Given that the record establishes previously awarded hourly rates equal to or above those awarded by the district director for Mr. Wolfe, Mr. Austin, and Counsel's legal assistants, Employer has not established an abuse of discretion in the district director's award of an hourly rate of $300.00 for Mr. Wolfe, $200.00 per hour for Mr. Austin, and $100.00 for Counsel's legal assistants. *See Gosnell*, 724 F.3d at 572-73; *Cox*, 602 F.3d at 289; *Bentley*, 522 F.3d at 664-65; Claimant's District Director Fee Petition at 4-12. We therefore affirm the district director's award of an hourly rate of $300.00 for Mr. Wolfe,

[8] Employer does not challenge the rates awarded to attorneys Rachel Wolfe, Victoria Herman, and Shane Hobbes. Therefore, we affirm them. *See Skrack*, 6 BLR at 1-711.

$200.00 for Mr. Austin, and $100.00 for Counsel's legal assistants.[9] As Employer raises no other challenges, we affirm the district director's fee award.

Attorney Fee Award: ALJ

On April 16, 2024, Counsel submitted a complete, itemized fee petition requesting $12,012.50 for legal services performed, and expenses incurred, before the Office of Administrative Law Judges from August 7, 2020 to March 18, 2024. The total fee requested represents: $4,812.50 for 13.75 hours of legal services performed by Mr. Wolfe at an hourly rate of $350.00; $2,520.00 for 8.4 hours of legal services performed by Mr. Austin at an hourly rate of $300.00; $350.00 for 1.75 hours of legal services performed by Cameron Blair at an hourly rate of $200.00; $1,420.00 for 7.1 hours of legal services performed by Ms. Wolfe at an hourly rate of $200.00; and $1,900.00 for 19 hours of legal assistant services performed at an hourly rate of $100.00; and expenses of $1,010.00. After considering the fee petition, Employer's objections, and the regulatory criteria at 20 C.F.R. §725.366, the ALJ reduced the hours requested by Mr. Wolfe on January 19, 2022, by 0.125 hours and disallowed 0.1 hours requested for Ms. Wolfe on January 28, 2022. ALJ Fee Order at 2. She further disallowed 6.675 hours of legal assistant services. *Id.* at 2-8. Finding the remainder of Counsel's requested times and expenses reasonably compensable, she awarded Counsel $10,271.50 in fees and $1,010.00 in expenses for a total of $11,281.50. *Id.* at 8-9.

On appeal, Employer asserts the ALJ should have disallowed specific time entries for legal services performed by Mr. Wolfe and Ms. Wolfe, as well as for legal assistant services, as being administrative in nature and thus non-compensable.[10] Employer's Brief in Appeal of the ALJ's Fee Award at 6-7. Claimant responds in support of the awarded fee. The Director declined to file a substantive response.

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[9] Employer's contention that the hourly rates for Mr. Wolfe and Mr. Austin should be reduced to $175.00 and $150.00, respectively, because Virginia's Department of Employment Dispute Resolution allows a fee of $158.00 per hour in northern Virginia and $131.00 per hour elsewhere in Virginia has no relevance in this case, because this case involves whether Claimant is entitled to federal black lung benefits, not whether he was wrongly discharged. *See B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 665-66 (6th Cir. 2008).

[10] We affirm, as unchallenged, the ALJ's award of an hourly rate of $350.00 for Mr. Wolfe, $200.00 for Ms. Wolfe, and $100.00 for legal assistant services, as well as the ALJ's total awards of $2,520.00 for legal services performed by Mr. Austin and $350.00 for legal services performed by Mr. Blair. *See Skrack*, 6 BLR at 1-711; ALJ Fee Order at 1.

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. *See Gosnell*, 724 F.3d at 568-69; *Cox*, 602 F.3d at 289; *Jones*, 21 BLR at 1-108.

Employer asserts the ALJ erred in awarding 0.25 hours of legal services performed by Mr. Wolfe on January 19, 2022, and 0.1 hours of legal services performed by Ms. Wolfe on January 28, 2022, as well as legal assistant services of 0.25 hours on January 3, 2022, 0.25 hours on January 18, 2022, and 0.75 hours on July 23, 2023. Employer's Brief in Appeal of the ALJ's Fee Award at 6-7. We disagree.

Traditional clerical duties, whether performed by clerical employees or counsel, are not properly compensable services for which separate billing is permissible. Fees for clerical tasks must be included as part of overhead in setting the hourly rate. *See Gosnell*, 724 F.3d at 578; *Braenovich v. Cannelton Indus., Inc.*, 22 BLR 1-236, 1-250 (2003). However, services relating to drafting, revising, and reviewing correspondence or documents and communicating with clients about the case may constitute compensable legal work. *See Bentley*, 522 F.3d at 666; *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984).

The ALJ addressed each of the entries to which Employer objects. ALJ Fee Award at 2-8. Specifically, she reduced the request for 0.25 hours of legal services by Mr. Wolfe on January 19, 2022, to 0.125 hours, finding it excessive, and disallowed the request of 0.1 hours of legal services by Ms. Wolfe on January 28, 2022, as being administrative. *Id.* at 2. She further reduced the requests for 0.25 hours of legal assistant services on January 3, 2022, to 0.125 hours, the request for 0.25 hours on January 18, 2022, to 0.125 hours, and the request for 0.75 hours on July 23, 2023, to 0.25 hours, finding them to be excessive. *Id.* at 7-8. Employer does not allege any specific error with regard to the ALJ's findings except for its general assertion that these entries should have been disallowed as non-compensable administrative tasks. *See* Employer's Brief in Appeal of the ALJ's Fee Award at 6-7. We regard Employer's assertions to be requests to reweigh the evidence, which we are not permitted to do. *Anderson*, 12 BLR at 1-113. We thus discern no abuse of discretion in the ALJ's findings. *Bentley*, 522 F.3d at 666; *Jones*, 21 BLR at 1-108. We therefore affirm the ALJ's attorney fee award.[11]

[11] Any fee awarded is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *See Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1993).

Conclusion

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Granting Benefits, and we remand the case to the ALJ for further proceedings consistent with this opinion. In addition, we affirm the District Director's Fee Order and the ALJ's Attorney Fee Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge