

U.S. Department of Labor

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



BRB No. 24-0275 BLA

MEGAN N. BURNEY
(o/b/o DAVID D. HOWARD)

Claimant-Petitioner

v.

HERITAGE COAL COMPANY, LLC

Employer- Respondent

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

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 07/31/2025

DECISION and ORDER

Appeal of the Order Awarding Fees and Costs of Theodore W. Annos,
Administrative Law Judge, United States Department of Labor.

Austin P. Vowels and David 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, ROLFE,
Administrative Appeals Judge, and ULMER, Acting Administrative Appeals
Judge.

PER CURIAM:

Claimant's counsel (Counsel) appeals Administrative Law Judge (ALJ) Theodore
W. Annos's Order Awarding Fees and Costs (2020-BLA-05360) issued in connection with
an attorney fee petition filed pursuant to the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (2018) (Act).¹ On October 31, 2023, the ALJ granted Employer's motion to remand the case to the Office of Workers' Compensation Programs for the Black Lung Disability Trust Fund (Trust Fund) to pay benefits pursuant to an agreement between Employer and the Department of Labor. Order Granting Motion to Remand to Initiate Payment at 2. Under that agreement, Employer would remain responsible for any attorney fees. *Id.* at 1-2.

Thereafter, Counsel filed a complete, itemized fee petition requesting \$34,936.75 for work performed before the ALJ in fees and expenses, as follows: 1) \$10,400.00 for 32 hours of legal services provided by Austin P. Vowels at an hourly rate of \$325.00; 2) \$343.75 for 1.25 hours of legal services provided by M. Alexander Russell at an hourly rate of \$275.00; 3) \$8,775.00 for 39 hours of legal services provided by Lindsey Zielinski at an hourly rate of \$225.00; 4) \$2,392.50 for 14.50 hours of paralegal services provided by Desire Smith at an hourly rate of \$165.00; 5) \$50.00 for 0.50 hours of paralegal services provided by Kayleigh Cleveland at an hourly rate of \$100.00; 6) \$10,263.00 for 62.20 hours of paralegal services provided by Sarah Agnew at an hourly rate of \$165.00; 7) \$27.50 for 0.25 hours of paralegal services provided by Linda Totten at an hourly rate of \$110.00; 8) \$75.00 for 0.75 hours of paralegal services provided by Maci Uffelman at an hourly rate of \$100.00; 9) \$27.50 for 0.25 hours of paralegal services provided by Lauren Ellis at an hourly rate of \$110.00; and 10) \$2,582.50 in expenses. Fee Petition.

Employer filed objections to the fee petition contesting the requested hourly rates; the use of quarter-hour billing; and multiple time entries it argued should be disallowed as clerical or duplicative, or reduced as excessive. Employer's Response to Claimant's Motion for Attorney Fees (Employer's Objections). It also objected to \$65.00 in expenses. *Id.* at 10. Counsel replied, addressing Employer's objections and adjusting the petition to reflect \$31,150.25 in fees and \$2,517.50 in costs,² noting Counsel and Employer had

¹ Claimant is the daughter of the Miner, David D. Howard, who died on May 1, 2021. Notice of Death and Motion to Substitute Party. She is pursuing the claim on behalf of the Miner's estate. Order Granting Motion to Substitute Party.

² The calculations Counsel provided in his reply to Employer's objections included \$2,582.50 in expenses. Counsel's Reply to Employer's Objections at 14 (unpaginated). However, this was the amount Counsel requested in his initial fee petition and Counsel conceded that \$65.00 paid to Dr. Crum for an x-ray reading was returned and thus should be excluded from the expenses. Counsel's Reply to Employer's Objections at 9 (unpaginated); Employer's Objections at 10.

stipulated to hourly rates.³ Counsel's Reply to Employer's Objections. Counsel also requested an additional \$1,556.25 for responding to Employer's objections. *Id.* at 9-10 (unpaginated).⁴

After considering the fee petition, Employer's objections, and Counsel's reply, the ALJ found the compromised hourly rates to be reasonable, but reduced the amount of compensable time. Order Awarding Fees and Costs. The ALJ found certain entries to be excessive, duplicative, clerical, or estate work not performed in furtherance of the Miner's black lung claim. *Id.* at 6-8. He also rejected Counsel's request for \$1,556.25 for preparing a reply to Employer's objections. *Id.* at 9. Finally, he reduced the requested expenses by \$135.00, finding \$70.00 for an x-ray reading was incurred before the district director and not before the ALJ and \$65.00 for an x-ray reading by Dr. Crum had been returned. *Id.* Thus, the ALJ awarded a total fee of \$25,370.50, representing 124.05 hours⁵ and \$2,447.50 in costs. *Id.*

On appeal, Counsel maintains that the ALJ erred in reducing and disallowing certain time entries and in disallowing all time spent defending the fee award. Employer responds, requesting affirmance of the ALJ's award of attorney's fees. Counsel replies, reiterating his contentions.⁶ The Acting Director, Office of Workers' Compensation Programs, has not filed a response brief.

³ The parties agreed upon an hourly rate of \$300.00 for Attorney Vowels, an hourly rate of \$250.00 for Attorney Russell, and an hourly rate of \$215.00 for Attorney Zielinski. Counsel's Reply to Employer's Objections at 2 (unpaginated). For the paralegals and legal assistants, the parties agreed to an hourly rate of \$145.00 for Mss. Smith, Wright, and Agnew, and an hourly rate of \$100.00 for Mss. Totten, Uffelman, and Ellis. *Id.* The ALJ found these rates to be reasonable. Order Awarding Fees and Costs at 5. The hourly rates are not at issue on appeal.

⁴ Counsel's request of \$1,556.25 for additional work performed before the ALJ responding to Employer's objections included 1) \$150.00 for 0.50 hours of legal services provided by Austin P. Vowels at an hourly rate of \$300.00 and 2) \$1,406.25 for 6.25 hours of legal services provided by David Littrell III at an hourly rate of \$225.00. Counsel's Reply to Employer's Objections at 9-10 (unpaginated).

⁵ The ALJ reduced the requested time by 26.65 hours.

⁶ While Counsel continues to contend \$2,582.50 is the appropriate amount of expenses, Counsel's Brief at 23, he does not challenge the ALJ's reduction of the requested expenses to \$2,447.50. *See* Counsel's Brief; Counsel's Reply. Insofar as Counsel contends the ALJ erred in reducing the requested expenses, we find the argument inadequately

When an attorney prevails on behalf of a claimant, the Act provides the employer, its insurer, or the Trust Fund shall pay a “reasonable attorney’s fee” to the claimant’s counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The amount of an attorney fee award by an ALJ 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.⁷ See *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 (7th Cir. 2003); *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 661 (6th Cir. 2008); see also *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

In determining the amount of attorney’s fees to award under a fee-shifting statute, the United States Supreme Court has held that a court 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. *Pa. 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. *E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010); *Bentley*, 522 F.3d at 663.

Counsel asserts that the ALJ arbitrarily excluded or reduced fees by finding certain time entries excessive, duplicative, or clerical when they were not and also inappropriately reduced quarter-hour billing.⁸ Counsel’s Brief at 7, 9. We address Counsel’s arguments in turn.

Attorney Vowels’s Time Entries

The ALJ disallowed 2.10 hours from Attorney Vowels’s time entries, reducing fourteen different entries⁹ from 0.25 hours to 0.10 hours as either excessive considering the

briefed and affirm the ALJ’s finding that Employer owes \$2,447.50 in expenses. See *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1983); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

⁷ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Claimant performed his coal mine employment in Illinois. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 3.

⁸ We affirm, as unchallenged on appeal, the ALJ’s reduction of Ms. Ellis’s time by 0.15 hour and the reduction of Ms. Uffelman’s time by 0.50 hour. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Order Awarding Fees and Costs at 7-8.

⁹ The time entries were dated January 15, 2020, January 21, 2020, January 23, 2020, January 24, 2020, June 2, 2020, June 4, 2020, June 5, 2020, May 24, 2021, July 9, 2021,

work performed or as partially clerical in nature. Order Awarding Fees and Costs at 6. Counsel argues that all the entries were “minimal entries of compensable time” and such “quarter-hour billing” is permissible under law. Counsel’s Brief at 8-9. Thus, he contends the ALJ’s reduction of this already minimal time was arbitrary. *Id.* at 9.

As Counsel appears to acknowledge, while attorneys are permitted to bill in quarter-hour increments, an ALJ may determine if such time expended is reasonable based on the specific task. *See Hawker*, 326 F.3d at 902 (“[W]e review the question of reasonableness of time spent by a lawyer on a particular task in the course of litigation under a highly deferential version of the ‘abuse of discretion standard.’”); *see also Gosnell*, 724 F.3d 576-78 (rejecting employer’s blanket challenge to quarter-hour billing, but acknowledging such billing can lead to over-billing); *Bentley*, 522 F.3d 657 (ALJs may approve quarter-hour billing, as long as the total billable hours is reasonable in relation to the work performed); 20 C.F.R. §725.366(b). Of note, the ALJ did not make a blanket reduction of all quarter-hour entries; rather, he reasonably found certain tasks did not require fifteen minutes to complete, such as reviewing emails, faxes, letters, and x-ray reports. *See Gosnell*, 724 F.3d 578; Order Awarding Fees and Costs at 6; Fee Petition at 27-28. Thus, Counsel has not explained how the ALJ’s reductions are arbitrary. Moreover, two entries, dated January 24, 2020, and May 29, 2023, were reduced because the ALJ found some of the tasks were clerical, a finding Counsel does not challenge. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Order Awarding Fees and Costs at 6; Counsel’s Brief at 7-9. Thus, the ALJ was within his discretion to reduce Attorney Vowels’s requested time by 2.1 hours.

Attorney Zielinski’s Time Entries

The ALJ reduced the requested time for two entries performed by Attorney Zielinski, dated March 28, 2022, and September 15, 2022. Order Awarding Fees and Costs at 7. Counsel contends the ALJ was incorrect in classifying the work Attorney Zielinski performed on March 28, 2022, as clerical, as she was corresponding with the client, taking a deposition, and reviewing and organizing the evidence. Counsel’s Brief at 12. While Attorney Zielinski performed such tasks in this time entry, Counsel does not address that she also indicated that she “scan[ned] in notes.” Fee Petition at 31. Thus, we hold the ALJ was within his discretion in reducing the requested 1.5 hours of time by 0.50 hours given the entry also included a routine, clerical task. *See Bentley*, 522 F.3d at 666-67 (“While reviewing correspondence can constitute legal work, receiving and filing correspondence presumably constitutes clerical work.”).

March 3, 2022, March 28, 2022, September 7, 2022, December 21, 2022, and May 29, 2023. Order Awarding Fees and Costs at 6.

Counsel next maintains that the ALJ erred in finding Attorney Zielinski's entry dated September 15, 2022, duplicative of an entry for work Attorney Vowels performed on the previous day. Counsel's Brief at 11-12. On September 14, 2022, Attorney Vowels billed 1.5 hours of time for the following: "Review file, review of Dr. Pearle's report, preparation of CX¹⁰ 8, preparation of letter to disclose CX 8, preparation of memorandum on case plan regarding action needed and evidence development." Fee Petition at 28. The next day, Attorney Zielinski entered 0.50 hour for "[r]eview and summarization of medical report from Dr. Pearle." *Id.* at 32. Counsel argues that these entries represent separate tasks, as Attorney Vowels performed a preliminary review of the evidence and submitted it, while Attorney Zielinski reviewed the evidence in detail and summarized it for the file. Counsel's Brief at 12. As both attorneys reviewed the same piece of evidence, we do not find the ALJ abused his discretion in reducing the time entry by 0.40 hour, particularly given that he also allowed time for the work Attorney Zielinski performed that did not overlap with the tasks performed by Attorney Vowels. *See Hawker*, 326 F.3d at 902; *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984) (ALJ has broad discretion to determine reasonableness of time entries); 20 C.F.R. §725.366(b). Thus, we affirm the ALJ's reduction of Attorney Zielinski's requested time by 0.90 hour.

Paralegal Smith's Time Entries

The ALJ reduced three entries for work performed by Ms. Smith on June 9, 2022, August 22, 2022, and July 11, 2023, as duplicative of attorneys' work. Order Awarding Fees and Costs at 7. Counsel argues that simply because Ms. Smith reviewed the same document or performed similar work as another timekeeper does not make the work duplicative. Counsel's Brief at 13-15. We hold the ALJ acted within his discretion in reducing the entries as partially duplicative of other work performed.

The ALJ disallowed 0.70 hour of Ms. Smith's requested hour of time on June 9, 2022, for "[review] and summary of report of Dr. Meyer, review of order canceling [M]ay hearing and amending deadlines, review of employer's evidence summary form," finding it partially duplicative of Attorney Vowels's March 28, 2022 entry for "[r]eview of Dr. Meyer's report." Order Awarding Fees and Costs at 7; Fee Petition at 33. As at least one of the tasks performed by both timekeepers was the same, and the ALJ allowed time for the remaining tasks that were not overlapping, the ALJ was within his discretion to partially reduce this time entry. *See Hawker*, 326 F.3d at 902; *Lanning*, 7 BLR at 1-316.

The ALJ also disallowed one hour of Ms. Smith's requested 1.5 hours of time on August 22, 2022, for "[r]eview of medical records provided by operator, [and] review and

¹⁰ We infer that "CX" is an abbreviation for Claimant's Exhibit.

summary of transcript of deposition of Megan Burney,” as duplicative of Attorney Zielinski’s work from August 18, 2022 through August 23, 2022, reviewing and summarizing medical records, which totaled 5.75 hours. Order Awarding Fees and Costs at 7; Fee Petition at 33. Counsel argues that both timekeepers permissibly worked together to prepare for a deposition, Counsel’s Brief at 14; however, it is evident the duplicative work the ALJ subtracted from Ms. Smith’s requested time was her general review of medical records given that Attorney Zielinski already spent several hours on this task. Thus, we affirm the ALJ’s reduction of this time entry as within his discretion. *See Hawker*, 326 F.3d at 902; *Lanning*, 7 BLR at 1-316; 20 C.F.R. §725.366(b).

The ALJ additionally reduced, by 0.70 hour, Ms. Smith’s requested hour of time on July 11, 2023--for “Preparation for hearing, conference with client re: testimony and hearing procedure”--as duplicative of Attorney Russell’s 1.25 hours of work on July 12, 2023, for reviewing the file in preparation of hearing, conferencing with Claimant, and attending the hearing. Order Awarding Fees and Costs at 7; Fee Petition at 31, 34. Counsel contends the ALJ erred in not allowing Ms. Smith’s work in assisting the attorney in preparing for the hearing. Counsel’s Brief at 15. However, two different conferences with Claimant in preparation for the hearing were held on two separate days; thus, the ALJ was within his discretion to partially reduce Ms. Smith’s time as duplicative. *See Hawker*, 326 F.3d at 902; *Lanning*, 7 BLR at 1-316.

Next, the ALJ reduced Ms. Smith’s July 15, 2022 and September 2, 2022 entries as excessive considering the work performed. The ALJ reduced, by 0.40 hour, the requested time of 0.50 hour on July 15, 2022, for “[r]eview of order cancelling hearing and amending deadlines.” Order Awarding Fees and Costs at 7; Fee Petition at 33. Counsel contends this entry is not excessive, as the work involved not only reviewing an order, but also “laying out a plan.” Counsel’s Brief at 14. We do not find the ALJ abused his discretion in reducing this entry. While Counsel contends Ms. Smith did more than simply review an order, Counsel’s Brief at 14, the description does not reflect any such additional tasks; thus, we affirm the ALJ’s reduction of this time entry. *See Hawker*, 326 F.3d at 902; *Lanning*, 7 BLR at 1-316.

Counsel also objects to the ALJ’s reduction, by 0.50 hour, of Ms. Smith’s requested hour of time for the September 2, 2022 entry for “[r]eview of file and OALJ case status online record for determination of hearing date and prehearing filing deadlines.” Order Awarding Fees and Costs 7; Fee Petition at 33. He contends the entry is not excessive as staff must often research to determine a case’s status and it “simply takes time to properly monitor cases.” Counsel’s Brief at 14. We do not find the ALJ abused his discretion in reducing this time to 0.50 hour, as it is not unreasonable to expect checking the status of the case online to be completed within this amount of time. *See Hawker*, 326 F.3d at 902; *see also Gosnell*, 724 F.3d at 576-77 (“substantial deference” given to the ALJ’s

conclusions regarding whether hours represented in a fee petition are excessive); 20 C.F.R. §725.366(b). Thus, we affirm the ALJ's reduction of this time entry as excessive. Therefore, we also affirm the ALJ's reduction of Ms. Smith's requested time by 3.3 hours.

Legal Assistant Agnew's Time Entries

The ALJ reduced Ms. Agnew's requested time by 19.7 hours, reducing multiple entries as either excessive, duplicative, clerical in nature, or estate work not performed in furtherance of the black lung claim. Order Awarding Fees and Costs at 8.

Work Related to Estate/Probate

First, the ALJ disallowed time entries dated August 3, 2021, and December 14, 2021, as estate/probate work "that was not in furtherance of black lung claim" and reduced an entry dated September 22, 2021, which included corresponding with the estate attorney, as duplicative of an August 9, 2021 entry.¹¹ Order Awarding Fees and Costs at 8. Counsel argues that assisting Claimant in finding a probate attorney and communicating with that attorney regarding the status of the probate case was reasonable and in furtherance of the black lung claim; thus, he contends the ALJ's disallowance and reduction of this time is arbitrary. Counsel's Brief at 17-18.

We note that while the ALJ disallowed the August 3, 2021 and December 14, 2021 time entries, he allowed other time Ms. Agnew spent checking on the status of the probate case in the June 16, 2021, June 24, 2021, June 29, 2021, August 9, 2021, August 25, 2021, September 13, 2021, January 14, 2022, and February 9, 2022 time entries, totaling more than three hours. See Fee Petition at 36-37; Order Awarding Fees and Costs at 8. Thus, the ALJ did not wholly refuse all fees for monitoring the status of the probate case. Rather, the ALJ properly considered whether the tasks were reasonably regarded as necessary to establish Claimant's entitlement to federal black lung benefits. See *Lanning*, 7 BLR at 1-316; Order Awarding Fees and Costs at 8.

The excluded August 3, 2021 entry involved researching and calling various estate attorneys and leaving Claimant a message. Fee Petition at 36. Counsel has not demonstrated how assisting Claimant in finding counsel for the Miner's estate constitutes compensable legal services in a black lung claim; thus, we find the ALJ was within his discretion to exclude this entry. See *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217-18 (1986); *Lanning*, 7 BLR at 1-316. The excluded December 14, 2021 time entry involved

¹¹ The ALJ also noted similar work performed on September 22, 2021; however, there is only one entry with that date. Order Awarding Fees and Costs at 8; Counsel's Brief at 18.

a call with the estate attorney regarding a filing fee and a letter regarding the same. Fee Petition at 37. Again, we find no abuse of discretion in excluding this entry regarding filing fees in a separate legal matter. *See Bentley*, 522 F.3d at 666-67; *Lanning*, 7 BLR at 1-316. Finally, we do not find that the reduction of the September 22, 2021 entry by 0.40 of an hour was an abuse of discretion given the other telephone calls and emails with the estate attorney regarding the status of the probate claim.¹² *Bentley*, 522 F.3d at 666-67 (ALJs are afforded “broad deference” in determining whether the number of billable hours is reasonable in relation to the work performed because “they are in a much better position than the appellate court to make these determinations”); Order Awarding Fees and Costs at 36-37.

Thus, we affirm the ALJ’s reduction of 2.4 hours from Ms. Agnew’s August 3, 2021, September 22, 2021, and December 14, 2021 time entries.

Excessive Time

The ALJ also partially reduced Ms. Agnew’s entries dated April 13, 2021, and March 24, 2022, that he found excessive considering other tasks she performed and found an entry dated September 27, 2022, excessive given its lack of specificity. Order Awarding Fees and Costs at 8.

Initially, we affirm the ALJ’s reduction of the September 27, 2022 time entry by 0.40 hour. Counsel concedes the entry was not written in the “standard advisable language” but explains his file shows Ms. Agnew sought to find a computed tomography (CT) scan image and obtain a reading.¹³ Counsel’s Brief at 22. Although Counsel now elaborates before the Board the work that was performed on September 27, 2022, an ALJ’s decision must be based upon the record before him. 20 C.F.R. §725.477(b). We find no abuse of discretion in the ALJ’s reduction of this entry given its lack of specificity. *See Lanning*, 7 BLR at 1-316.

¹² The September 22, 2021 entry requested 0.50 hour for “[r]eview of file and TC with David Fines re: Estate, [preparation] of email to Mr. Fines. [Preparation of status] update memorandum.” Fee Petition at 37.

¹³ The entry provided: “Review of Checklist Item Completed: (7) Let[’]s have one of Mr. [Howard’s] CT Scans read by Dr. Crum. Dr. Pearle relied upon a CT scan reading to find no clinical CWP, so we can potentially refute that with a better expert (Board Certified Radiologist/B- Reader)” Fee Petition at 39.

Counsel next asserts that the combined time of the April 13, 2021 and March 24, 2022 entries, as well as the March 26, 2021 entry,¹⁴ demonstrates Ms. Agnew reviewed and summarized over 1,800 Director's Exhibits in nine hours and doing so was "highly efficient;" thus he contends the ALJ's reduction of these entries was arbitrary. Counsel's Brief at 17.

We agree that it is unclear how the ALJ determined that nine hours of work reviewing and summarizing over 1,800 Director's Exhibits, as well as reviewing the file in preparation of a deposition, is excessive. *See Small v. Richard Wolf Med. Instruments Corp.*, 264 F.3d 702, 708 (7th Cir. 2001) (while determining excessive hours is a factual determination accorded "great deference," the court must "provide a 'concise but clear explanation of its reasons' for any reduction") (quoting *Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 409 (7th Cir. 1999)); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). This determination appears arbitrary, particularly considering the ALJ's allowance of over twelve hours of time billed for the review and summarization of 1,135 pages of medical records by Attorney Zielinski. *See Order Awarding Fees and Costs at 7; Fee Petition at 32.* Thus, we vacate the ALJ's reduction of Ms. Agnew's April 13, 2021 and March 24, 2022 time entries and remand for further consideration.¹⁵

Duplicative Entries

The ALJ also reduced certain time entries performed by Ms. Agnew that he found were duplicative of tasks performed by Attorney Zielinski. *Order Awarding Fees and Costs at 8.* Counsel argues the ALJ's reduction of Ms. Agnew's time on this basis mischaracterized her tasks and was arbitrary and insufficiently explained. Counsel's Brief at 18-19, 21.

¹⁴ The March 26, 2021 entry requested 1.5 hours for "[r]eview and summarization of [Director's Exhibits] - review and summarization of claimant deposition (1805)." *Fee Petition at 36.* The April 13, 2021 entry requested 3.0 hours for "[f]urther review and summarization of [Director's Exhibits] (1,000 plus pages)." *Id.* The March 24, 2022 entry requested 4.5 hours for "[r]eview of file in preparation of deposition questions. Review and summarization of [Director's Exhibits]." *Id.* at 37.

¹⁵ Employer argues the ALJ's reduction was proper given that several of the Director's Exhibits include deposition transcripts and duplicates Counsel has received in "numerous" claims and account for a significant amount of the Director's Exhibits. *Employer's Response at 10.* However, the ALJ did not provide this explanation when reducing Ms. Agnew's entries regarding the Director's Exhibits.

First, the ALJ reduced, by two hours, Ms. Agnew's 2.5 hour time entry for March 15, 2022, for "[review] and summarization of Taylorville Memorial Hospital (386 pages)[.] Review and summarization of Memorial Medical Hospital (2137 pages)." Fee Petition at 37; Order Awarding Fees and Costs at 8. He found the entry to be duplicative of Attorney Zielinski's entries from June 14, 2022 through June 17, 2022. Order Awarding Fees and Costs at 8.

Counsel contends that while both Ms. Agnew and Attorney Zielinski reviewed and summarized medical records from Taylorville Memorial Hospital and Memorial Medical Hospital, it is "clear" that Ms. Agnew began reviewing the records in March 2022 and Attorney Zielinski then resumed the work in June 2022. Counsel's Brief at 19. Contrary to Counsel's contention, the descriptions do not clearly demonstrate that these were separate tasks and did not overlap. Attorney Zielinski's entry does not indicate she resumed a task Ms. Agnew started; rather, she clearly notes she reviewed the records beginning at page one of both sets of records and then notes her completing the review and summarization, including the specific page numbers she completed in each entry. Fee Petition at 31-32. Ms. Agnew's entry simply notes her review and a summary of the medical records in question. Fee Petition at 37. Thus, the ALJ was within his discretion to reduce Ms. Agnew's March 15, 2022 time entry as duplicative of Attorney Zielinski's work. *See Hawker*, 326 F.3d at 902; *see also Gosnell*, 724 F.3d at 576-77.

Next, Counsel challenges the ALJ's reduction of Ms. Agnew's time spent preparing and summarizing multiple Claimant's Exhibits in entries dated August 23, 2022 through August 25, 2022, as duplicative of tasks performed by Attorney Zielinski in time entries dated August 9, 2022, August 12, 2022, August 15, 2022, August 16, 2022, August 17, 2022, August 18, 2022, August 22, 2022, and August 23, 2022, noting she reviewed and summarized the medical records included in these exhibits. Counsel's Brief at 21; Counsel's Reply at 18-19; Order Awarding Fees and Costs at 8. He contends the ALJ again mischaracterized Ms. Agnew's work. Specifically, he argues that while Attorney Zielinski reviewed and summarized the medical records, the time Ms. Agnew spent was for her work in turning the records into exhibits, including adding page numbers and a more detailed summary for the hearing, which is a separate, compensable task. Counsel's Brief at 21.

We agree that the ALJ has not explained why he found Ms. Agnew's work in her entries from August 23, 2022 through August 25, 2022, was duplicative. Attorney Zielinski's entries that the ALJ points to consist of reviewing and summarizing medical records. Order Awarding Fees and Costs at 8; Fee Petition at 31. However, as Counsel argues, it appears Ms. Agnew's work involved converting those records into exhibits. Fee Petition at 38. As the ALJ provided no further explanation for why he found these tasks are duplicative and warranted a reduction of 5.5 hours of Ms. Agnew's time, we remand to

the ALJ for further consideration of the compensability of this time. *See Small*, 264 F.3d at 708; *Wojtowicz*, 12 BLR at 1-165.

Clerical Tasks

Finally, the ALJ excluded or partially reduced certain entries by Ms. Agnew as clerical. As Counsel acknowledges, fees for clerical tasks must be included as part of overhead in setting the hourly rate and thus are not compensable. *See Gosnell*, 724 F.3d at 578; *Braenovich v. Cannelton Indus., Inc.*, 22 BLR 1-236, 1-250 (2003).

Counsel concedes Ms. Agnew's June 4, 2020 entry is clerical in nature and the ALJ appropriately excluded this time; thus, we affirm the ALJ's exclusion of one hour of time on June 4, 2020. *See Skrack*, 6 BLR at 1-711; Counsel's Brief at 16. However, Counsel challenges the ALJ's reduction of Ms. Agnew's time entries dated June 5, 2020, August 10, 2022, August 15, 2022, and August 19, 2022, arguing the tasks are compensable. Counsel's Brief at 16, 19-21.

We first address the August 15, 2022 time entry, which consisted of "[r]eview of 2/08/18 [chest x-ray] read by Smith and upload to file preparation of status update to summarize as evidence summary was locked for edits by attorney." Fee Petition at 38. Counsel concedes that part of the entry--uploading to the file--is clerical; however, he contends most of the entry was not and, given that it is a "minimum" quarter-hour, the entirety of the entry should be allowed. Counsel's Brief at 20. Counsel has not explained how the ALJ's reduction of an entry that admittedly contains clerical as well as compensable tasks from 0.25 of an hour to 0.10 of an hour is an abuse of discretion. *Braenovich*, 22 BLR at 1-250; *Lanning*, 7 BLR at 1-316. Thus, we affirm the ALJ's reduction of the August 15, 2022 time entry.

Next, Counsel argues the ALJ erred in reducing Ms. Agnew's June 5, 2020 time entry, as she reviewed evidence and summarized evidence to the file, which are not clerical tasks. Counsel's Brief at 16-17. While Ms. Agnew reviewed and summarized several items of evidence and litigation documents, which is compensable work, Counsel acknowledges in his reply that Ms. Agnew also noted uploading a number of these documents. Fee Petition at 35; Counsel's Reply at 14. Counsel previously acknowledged that uploading documents to the file constitutes clerical work. Counsel's Brief at 20. Thus, Counsel has not demonstrated that the ALJ abused his discretion in reducing the requested

time from 4.5 hours to two hours.¹⁶ See *Bentley*, 522 F.3d at 666-67; *Lanning*, 7 BLR at 1-316.

We agree with Counsel, however, that the ALJ erred in reducing entries that involved reviewing correspondence from the parties, writing correspondence to obtain evidence, and organizing exhibits. Counsel's Brief at 19-21. Work reviewing the file, reviewing and preparing correspondence, traveling, organizing exhibits, and preparing briefs may be found to be necessary and reasonable. See *Bentley*, 522 F.3d at 666-67; *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128, 130-31 (1989); *Jones*, 21 BLR at 1-109.

The ALJ disallowed 0.50 hour of time Ms. Agnew spent on August 10, 2022, reviewing emails from the Department of Labor and the responsible operator, updating the file, and preparing documents to locate x-rays. Fee Petition at 38; Order Awarding Fees and Costs at 8. He also reduced 0.75 hour of time spent preparing a table of contents and combining medical records. Fee Petition at 38; Order Awarding Fees and Costs at 8. Because the ALJ provided no explanation for disallowing these 1.25 hours of services other than incorrectly stating some of the tasks are clerical in nature, we reverse his disallowance of the time requested for these services. 30 U.S.C. §932(a); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (ALJ has duty to consider all the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for his decision); *Jones*, 21 BLR at 1-109.

Supplemental Fee for Defending Fee Petition

Counsel also argues the ALJ denied him the opportunity to reply to Employer's objections to his fee petition and denied all requested fees for defending the fee petition "without giving any legal justification." Counsel's Brief at 4. Contrary to Counsel's contention, while the ALJ noted Counsel did not request leave to file a reply, he nonetheless addressed Counsel's request for the additional fee of \$1,556.25. Order Awarding Fees and Costs at 9. Further, the ALJ explained why he did not award the supplemental fee: he determined Counsel was not entitled to the additional fee because he had not successfully defended the petition as the ALJ found Employer's objections had merit and warranted "significant" reductions in the requested hours. *Id.* at 9. Thus, we reject Counsel's arguments that the ALJ did not allow him to reply and failed to provide reasoning for denying the additional fee.

¹⁶ We also note that Ms. Agnew provided the amount of time spent on the different tasks listed in this time entry, which total 4.1 hours, not 4.5 (0.5 + 0.5 + 1.0 + 0.5 + 1.0 + 0.1 + 0.5 = 4.1). See Fee Petition at 35.

However, because we have vacated the ALJ's reduction of some of the time entries and reversed others, which may change the ALJ's analysis on the issue, the ALJ should also determine on remand if Counsel has successfully defended his fee petition and is thus entitled to reasonable fees in doing so. See *Hawker*, 326 F.3d at 903; *Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 134 (4th Cir. 2001); *Workman v. Director, OWCP*, 6 BLR 1-1281, 1-1283 (1984) ("an attorney should not be deprived of a fee for time spent successfully defending his fee or in raising his fee"); see also *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 157 (2009) (disallowing excessive time for defending fee petition).

Accordingly, we affirm in part, reverse in part, and vacate in part the ALJ's Order Awarding Fees and Costs and remand this case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge