U.S. Department of Labor

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

BRB Nos. 22-0195 BLA
and 22-0356 BLA

LORI VENDETTI o/b/o DENNIE J. BRANDON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHOSHONE COAL CORPORATION	)	DATE ISSUED: 6/12/2023
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Attorney Fee Order of Steven B. Berlin, Administrative Law Judge, Untied States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds) Norton, Virginia, for Claimant.

Scott A. White (White & Risse, LLC.) Arnold, Missouri, for Employer.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order Awarding Benefits and Attorney Fee Order (2016-BLA-05692) rendered on a subsequent claim[1] filed on January 24, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant[2] established the Miner had twenty-seven years of underground coal mine employment and a totally disabling pulmonary or respiratory impairment. Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits.

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[1] The Miner filed one previous claim on March 28, 2002; the district director denied the claim on November 25, 2002, for failure to establish any element of entitlement. Director's Exhibit 1.

[2] Claimant is the daughter of the Miner, who died on April 4, 2020. Decision and Order at 2; Hearing Transcript at 9; Claimant's Exhibit 3. She is pursuing the miner's claim on behalf of his estate. Decision and Order at 2; Hearing Transcript at 9.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). As the Miner's initial claim was denied for failure to establish any element of entitlement, Claimant had to establish at least one element of entitlement to obtain review of the merits of the Miner's current claim. *Id.*; *see White*, 23 BLR at 1-3.

On appeal, Employer argues the ALJ lacked authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2,[5] and the removal provisions applicable to the ALJ rendered his appointment unconstitutional. As to the merits, Employer argues the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement, and that it did not rebut the presumption. Employer also asserts various errors to the ALJ's award of attorney fees. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's constitutional challenges. Employer replied, reiterating its arguments.

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.[6] 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 (1965).

Appointments Clause and Removal Provisions

Employer urges the Board to vacate the ALJ's decision and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[7] Employer's Brief at 15-22; Employer's Reply Brief at 1-

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[6] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit because the Miner performed his last coal mine employment in Wyoming. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

[7] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the

5. Although the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[8] Employer maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.*

It also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 15-22; Employer's Reply Brief at 3-5. It generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 15-22; Employer's Reply Brief at 3-5. It also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the United States Court of Appeals for the Federal Circuit's holding in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *See* Employer's Brief at 15-22; Employer's Reply Brief at 3-5. For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , 22-0022 BLA, slip op. at 3-5 (May 26, 2023) and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if he has a respiratory or pulmonary impairment which, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R.

Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (*citing Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded the Supreme Court's holding in *Lucia* applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Berlin.

§718.204(b)(1). Claimant may establish total disability based on qualifying pulmonary function study evidence or arterial blood gas study evidence,[9] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must consider all the relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant established total disability based on the arterial blood gas studies and medical opinions, and his weighing of the evidence as a whole.[10] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 21-25.

Blood Gas Studies

The ALJ considered three blood gas studies. 20 C.F.R. §718.204(b(2)(ii); Decision and Order at 8. Dr. Walker's March 12, 2012 treatment blood gas study produced qualifying values at rest and did not include any exercise blood gas testing. Employer's Exhibit 7. Dr. Gagon's April 15, 2014 blood gas study produced non-qualifying resting values and qualifying exercise values. Director's Exhibit 12. Dr. Tuteur's December 2, 2016 blood gas study produced non-qualifying resting values and did not include any exercise blood gas testing. Employer's Exhibit 24. Finding Dr. Gagon's exercise study most probative of the Miner's ability to perform his usual coal mine employment,[11] the ALJ found it established disability. Decision and Order at 23.

Employer asserts the ALJ erred in finding Dr. Gagon's April 15, 2014 qualifying exercise study valid despite the opinions of Drs. Farney and Tuteur that it reflects normal oxygenation with exercise when corrected for age and elevation. Employer's Brief at 22-24, 32-37; Employer's Exhibits 24 at 4, 35 at 8-9, 45 at 28. We disagree. The ALJ permissibly found Drs. Farney's and Tuteur's interpretations of the test values

[9] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] The ALJ found the pulmonary function studies do not support a finding of total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 23.

[11] The ALJ found the Miner last worked as a belt man, which required him to shovel spilled coal, carry belt rollers, put up timbers, and perform rock dusting by hand and with a machine. Decision and Order at 4 (referencing Employer's Exhibit 8 at 23-25).

unpersuasive because the DOL considered elevation and the advanced age of many miners in determining the qualifying table values in Appendix C to Part 718. 45 Fed. Reg. 13,678, 13,712 (Feb. 29, 1980); *Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055 (10th Cir. 1990) (DOL regulations already account for the effects of elevation and altitude); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361-62 (1984) (party challenging the validity of a study has the burden to establish the results are invalid or unreliable); *see also Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], 93 Fed. App'x. 551, 560 (4th Cir. 2004) (upholding ALJ's discrediting an opinion that contradicts Appendix C); Decision and Order at 23-25. Because Employer does not otherwise challenge the ALJ's finding that Dr. Gagon's April 15, 2014 qualifying exercise study is valid and qualifying in accordance with Appendix C, we affirm his determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); Decision and Order at 23-25.

Medical Opinions and Record as a Whole

The ALJ weighed Dr. Gagon's opinion that the Miner was totally disabled against the contrary opinions of Drs. Tuteur and Farney. Decision and Order at 23-25; Director's Exhibit 12; Employer's Exhibits 9, 14, 22, 24, 35, 45, 46. He credited Dr. Gagon's opinion as adequately reasoned because it is consistent with Claimant's qualifying exercise blood gas study. Decision and Order at 23; Employer's Exhibit 9 at 30-31. Conversely, he rejected the opinions of Drs. Tuteur and Farney because the DOL had addressed those factors in establishing Appendix C. Decision and Order at 23-25; Employer's Exhibits 22, 24, 25, 35, 45, 46. Thus, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(iv).

Having affirmed the ALJ's finding that Claimant established total disability based on the valid and qualifying blood gas studies, we affirm his discrediting of Drs. Tuteur's and Farney's opinions at 20 C.F.R. §718.204(b)(2)(iv).[12] *See Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-62 (10th Cir. 2015). We also reject Employer's assertion that the ALJ failed to address whether the Miner's disabling blood gas impairment was related to his age rather than a pulmonary or respiratory cause in weighing the evidence at 20 C.F.R. §718.204(b)(2). 20 C.F.R. §718.204(a) (If "a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or

[12] We affirm as unchallenged the ALJ's finding that Drs. Farney and Tuteur failed to address the Miner's respiratory disability in light of his need for continuous oxygen. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25.

pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled . . . ."); Employer's Brief at 22-23.

Because it is supported by substantial evidence, we affirm the ALJ's findings that Claimant established total disability by the blood gas studies and the medical opinion of Dr. Gagon, and in consideration of the evidence as a whole.[13] 20 C.F.R. §718.204(b)(2); *Gunderson*, 805 F.3d at 1260-62; *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); Decision and Order at 25. We thus further affirm that Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309[14] and invoked the Section 411(c)(4) presumption. Decision and Order at 25.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[15] or that

[13] Employer asserts the ALJ failed to properly consider Dr. Gagon's observation that the Miner's exercise blood gas study was "relatively normal" when corrected for age. But this is just an extension of Employer's challenge to the qualifying nature of the blood gas studies at 20 C.F.R. 718.204(b)(2)(i) which we have already rejected. *See Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-62 (10th Cir. 2015).

[14] We reject Employer's assertion that the ALJ was required to compare the evidence submitted in the Miner's initial claim with his subsequent claim evidence under 20 C.F.R. §725.309. *See Consolidation Coal Co. v. Dir., OWCP* [*Burris*], 732 F.3d 723, 731 (7th Cir. 2013) ("[T]he ALJ need not compare the old and new evidence to determine a change in condition . . . ."); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 486 (6th Cir. 2012) (same); Employer's Brief at 40-41. As the Miner's prior claim was denied for failure to establish any element of entitlement and the new evidence establishes the Miner was totally disabled, Claimant has established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3.

[15] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the

"no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not rebut the presumption under either method.[16] Decision and Order at 31-32.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *Consolidation Coal Co. v. Director, OWCP* [*Noyes*], 864 F.3d 1142, 1152 (10th Cir. 2017); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Tuteur and Farney that Claimant does not have legal pneumoconiosis. Decision and Order at 26-31; Employer's Exhibits 22 at 14, 24 at 4, 35 at 10 & 19, 45 at 20-21, 46 at 34. As Dr. Tuteur did not diagnose a blood gas impairment, contrary to the ALJ's finding at 20 C.F.R. §718.204(b)(2), the ALJ found his opinion lacked credibility as to whether the Miner had legal pneumoconiosis. Decision and Order at 29. The ALJ also observed that while Dr. Farney attributed the Miner's blood gas abnormality to other conditions, such as "his advanced age, normal physiological deterioration and deconditioning, obesity, and likely underlying cardiac dysfunction," he failed to explain how he eliminated the Miner's significant history of underground coal dust exposure as a contributing cause of his blood gas abnormality. Decision and Order at 29-31; Employer's Exhibit 35 at 20. On the other hand, the ALJ found Dr. Gagon's opinions in his medical report and at his deposition consistent with the premises underlying the Act, that coal dust exposure can result in disabling respiratory impairment and its effects can be additive with those of smoking, and therefore found them sufficient to establish that the Miner's respiratory impairment was related at least in part to his coal mine dust exposure or, consequently, legal pneumoconiosis. Decision and Order at 28; Director's Exhibit 12; Employer's Exhibit 9 at 11.

Although Employer generally asserts the opinions of Drs. Farney and Tuteur are better reasoned than Dr. Gagon's opinion as to whether the Miner had legal pneumoconiosis, it identifies no specific error in the ALJ's stated rationales for discounting

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lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[16] The ALJ found Employer established the Miner did not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 27.

their opinions.[17] 20 C.F.R. §802.211(b); *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983); Employer's Brief at 29. Employer's arguments on legal pneumoconiosis thus amount to a simple 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). Because the ALJ permissibly discredited the only opinions supportive of Employer's burden of proof,[18] we affirm his finding that Employer did not disprove the Miner had legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). He permissibly discredited the disability causation opinions of Drs. Tuteur and Farney as tied to their erroneous conclusion that the Miner's blood gas impairment does not constitute legal pneumoconiosis. *See Energy W. Mining Co. v. Director, OWCP* [*Bristow*], 49 F.4th 1362, 1372 (10th Cir. 2022); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision

[17] Although Employer asserts the ALJ miscalculated the Miner's smoking history, it fails to explain how the alleged error affected his disposition of this case since the ALJ did not discredit Employer's physicians for relying on an inaccurate smoking history. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 23-24. Similarly, we reject Employer's contention that the ALJ "showed clear prejudice" in considering Claimant's hearsay testimony regarding Dr. Tuteur's comments during his examination of the Miner. 20 C.F.R. §802.211(b); *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983); Employer's Brief at 40. Although the ALJ noted Claimant's account of Dr. Tuteur's comments "reflect an unseemly disdain for the seriousness of [M]iner's claims," the ALJ explicitly stated they did not affect his assessment of Dr. Tuteur's credibility, and Employer has not asserted otherwise nor explained how the ALJ's consideration of Claimant's testimony affected the disposition of the case. *See Shinseki*, 556 U.S. at 413; Decision and Order at 24 n.5.

[18] Having affirmed the ALJ's rejection of Employer's experts, we need not consider Employer's challenges to Dr. Gagon's opinion regarding legal pneumoconiosis. Employer's Brief at 26-29.

and Order at 32. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

Attorney Fee Order

On January 25, 2022, Claimant's counsel filed an itemized fee petition requesting $20,025.00 for legal services performed, and expenses incurred, before the Office of Administrative Law Judges from April 21, 2016, to January 14, 2022. The total fee requested represents: $14,000.00 for 40 hours of legal services by Attorney Joseph E. Wolfe at an hourly rate of $350.00; $2,650.00 for 13.25 hours of legal services by Attorney Brad A. Austin at an hourly rate of $200.00; $37.50 for 0.25 hour of legal services by Attorney Victoria Herman at an hourly rate of $150.00; $412.50 for 2.75 hours of legal services by Attorney Rachel Wolfe at an hourly rate of $150.00; $37.50 for 0.25 hour of legal services by Attorney Shane Hobbs at an hourly rate of $150.00; $112.50 for 0.75 hour of legal services by Attorney Elizabeth Wolfe at an hourly rate of $150.00; $2,775.00 for 27.75 hours of services by legal assistants at an hourly rate of $100.00; and expenses in the amount of $490.77. ALJ Fee Request at 1, 12-13.

Employer objected to Mr. Wolfe's hourly rate, and certain services and expenses. Attorney Fee Order at 2. The ALJ awarded the requested hourly rates and expenses but disallowed certain time entries, awarding a total of $19,062.50 for fees and $490.77 for costs. *Id.* at 4-5, 7.

On appeal, Employer contends the ALJ erred in approving Mr. Wolfe's hourly rate of $350.00 and in allowing quarter-hour billing, clerical entries, and entries by counsel for tasks which should have been delegated to paralegals.[19] Employer's Brief at 42-49. Claimant urges affirmance of the ALJ's fee award. Claimant's Response at 24-26. The Director did not respond to Employer's appeal of the ALJ's fee award.

The amount of an attorney's fee award is discretionary and will 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); *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 (7th Cir. 2003); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989). The

[19] Employer also argues that the passage of time is not a basis to justify a $350.00 per hour charge; however, in generally referencing Claimant's counsel's fee request, it fails to point to where Claimant's counsel provides this justification for its fee request. *See* Employer's Brief at 49. As counsel's fee petition reflects no such justification, we reject Employer's argument as without merit.

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).

Hourly Rates

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. *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.

An attorney's 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 prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); *see also Bentley*, 522 F.3d at 666-67. 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; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

Employer contends Mr. Wolfe did not show that his requested hourly rate of $350.00 is in line with the prevailing market rate of similarly experienced counsel in Wyoming. Employer's Brief at 42-44. It argues that rates awarded in prior black lung cases are not direct evidence of what fee-paying clients pay for similar work and therefore not controlling. *Id.* at 43.

Contrary to Employer's argument, evidence of fees received in other black lung cases may be an appropriate consideration in establishing a market rate. *See 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 664. The ALJ noted Mr. Wolfe submitted the National Law Journal's 2014 Survey of Law Firm Economics for the South Atlantic region, reflecting a median hourly rate of $425.00 for

attorneys with thirty-one or more years of experience,[20] and a list of seventy prior fee awards in support of his requested hourly rate, fifty-two of which pertained to Mr. Wolfe's trial-level services in an administrative forum and awarded him hourly rates ranging between $300.00 and $425.00. Fee Order at 3. Thus, the ALJ permissibly found this evidence supports a market rate of $350.00 per hour for counsel's services in Appalachia, where his office is located. *See Bentley*, 522 F.3d at 664; Fee Order at 4. As Employer does not challenge the ALJ's finding that "there are very few lawyers in the West with the specialized skill and knowledge needed to represent coal miners on Black Lung cases in the remote areas of Utah and Wyoming," we affirm the ALJ's finding that the $350.00 hourly rate for Mr. Wolfe's services in Appalachia reflects a market rate for his services in this case. *See Jane L. v. Bangerter*, 61 F.3d 1505, 1510 (10th Cir. 1995) (recognizing an exception to the rule that "fee rates of the local area should be applied" where the subject of the litigation is "so unusual or requires such special skills" that only an out-of-state lawyer possesses); *Jeffboat, L.L.C. v. Director, OWCP* [*Furrow*], 553 F.3d 487, 490 (7th Cir. 2009) (the relevant "community" for purposes of a lodestar hourly rate determination may refer to a "community of practitioners," particularly when the subject matter of the litigation is such that the attorneys practicing it are highly specialized and the market for legal services in that area is a national market). Therefore, we affirm the ALJ's approval of Mr. Wolfe's hourly rate of $350.00 for services performed in this case.

Billable Hours

Employer challenges counsel's use of quarter-hour minimum billing increments. Employer's Brief at 45-48. Contrary to Employer's contention, an ALJ has discretion to award a fee based on quarter-hour minimum increments. *See Gosnell*, 724 F.3d at 576; *Bentley*, 522 F.3d at 666. In addition, the ALJ appropriately evaluated each quarter-hour entry to determine whether the amount billed was reasonable. *Bentley*, 522 F.3d at 666-67; Fee Order at 5. In reviewing the itemized time charges, he agreed certain entries were excessive and reduced them. Fee Order at 5. He awarded the remaining time as reasonable. *Id.* As Employer identifies no specific error in these findings, we reject Employer's argument that the ALJ erred in permitting quarter-hour billing. 20 C.F.R. §725.366; *see Lanning v. Director, OWCP*, 7 BLR 1-314, 316 (1984).

Employer also challenges certain entries as clerical in nature, although it does not specify which time entries fall into this category. Employer's Brief at 48-49. Traditional clerical duties, whether performed by clerical employees or counsel, are not properly compensable services for which separate billing is permissible, but rather must be included

[20] The ALJ found "Mr. Wolfe has been in practice for over 38 years and has extensive experience in the Black Lung area." Fee Order at 4.

as part of overhead in setting the hourly rate. *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217-18 (1986); *McKee v. Director, OWCP*, 6 BLR 1-233, 1-238 (1983). The ALJ considered each of the entries to which Employer objected and found "none" reflect clerical work. Fee Order at 5. As Employer identifies no specific error in this finding and fails to identify any entries that reflect clerical services, it has failed to establish the ALJ abused his discretion in allowing any of the requested time. *Bentley*, 522 F.3d at 666; *Jones*, 21 BLR at 1-108.

Employer further argues the ALJ should have reduced various time entries because Claimant's counsel did not properly utilize legal assistants for those tasks and thereby limit the fee amount. Employer's Brief at 48-49. It argues that many tasks Mr. Wolfe performed could have been done by someone with a lower hourly rate. *Id*.

Although the ALJ did not address this argument, the question in determining a compensable fee is not whether it would have been cheaper for counsel to delegate his work to paralegals or legal assistants. *See, e.g., Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008) ("The court may permissibly look to the hourly rates charged by comparable attorneys for similar work but may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests."). Rather, it is whether the work and time that counsel requested were reasonable and necessary to establish the Miner's entitlement to benefits at the time counsel performed the work. *See Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999). Because Employer has not shown the ALJ abused his discretion, we affirm his determination to allow the challenged time entries. *See Bentley*, 522 F.3d at 666-67; *Whitaker*, 9 BLR at 1-217. As Employer raises no further challenge to the ALJ's fee award, we affirm the ALJ's attorney fee award in all respects.

Accordingly, the ALJ's Decision and Order Awarding Benefits and Attorney Fee Order are affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge