



BRB Nos. 22-0448 BLA  
and 22-0449 BLA

MARTHA A. JOHNSON <sup>1</sup>	)	
(o/b/o and Widow of RAYMOND L.	)	
JOHNSON)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 6/27/2023
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Attorney Fee Order, Order Granting Claimant’s Motion for Reconsideration of the Attorney Fee Order, and Order Granting Employer’s Motion for Reconsideration of the Attorney Fee Order of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

John A. Bednarz, Jr. (Bednarz Law Offices), Dallas, Pennsylvania, for Claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

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<sup>1</sup> Martha A. Johnson is deceased, and her daughters pursued both the miner’s and survivor’s claims on her behalf. *Johnson v. Consolidation Coal Co.*, BRB Nos. 17-0634 BLA and 18-0054 BLA, slip op. at 2 n.1 (March 15, 2019) (unpub.).

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel (Counsel), John A. Bednarz, appeals Administrative Law Judge (ALJ) Drew A. Swank's Attorney Fee Order, Order Granting Claimant's Motion for Reconsideration of the Attorney Fee Order, and Order Granting Employer's Motion for Reconsideration of the Attorney Fee Order (2013-BLA-05790 and 2015-BLA-05770). All of these orders were rendered in connection with the successful prosecution of a miner's claim filed on August 27, 2012 and a survivor's claim filed on January 15, 2015, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).<sup>2</sup>

On February 8, 2022, Counsel filed a complete, itemized fee petition requesting \$103,125.00, for 343.75 hours of legal services at an hourly rate of \$300.00 from April 9, 2014 to February 12, 2018, and from March 20, 2019 to July 10, 2020, and expenses in the amount of \$2,922.27. Employer objected to many services because they were not performed before the OALJ or were clerical, vague, unexplained, excessive, or unnecessary. Counsel responded in support of his fee request. The ALJ awarded Counsel \$81,225.00 in attorney's fees (270.75 hours at the rate of \$300.00 per hour) but disallowed 73 hours, as follows: 5.50 hours as work performed before the Board, 30.25 hours as

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<sup>2</sup> In 2017, ALJs Thomas M. Burke and Richard A. Morgan awarded benefits in separate decisions in the miner's claim and survivor's claim, respectively. Upon Employer's appeal, the Benefits Review Board vacated both awards and remanded the claims to the Office of Administrative Law Judges (OALJ) for further consideration. *Johnson*, BRB Nos. 17-0634 BLA and 18-0054 BLA. On remand, ALJ Drew A. Swank (the ALJ) awarded benefits in both claims. Upon Employer's second appeal, the Board affirmed the ALJ's awards. *Johnson v. Consolidation Coal Co.*, BRB Nos. 20-0373 BLA and 20-0443 BLA (Sept. 28, 2021) (unpub.).

The Board dismissed as premature Counsel's previous appeals of the ALJ's fee award that were filed prior to the issuance of his fee award on Employer's motion for reconsideration. *Johnson v. Consolidation Coal Co.*, BRB Nos. 22-0365 BLA and 22-0366 BLA (Aug. 25, 2022) (Order) (unpub.). The Board has assigned Counsel's appeal of the attorney's fee award in the miner's claim BRB No. 22-0448 BLA and Counsel's appeal of the attorney's fee award in the survivor's claim BRB No. 22-0449 BLA, and we have consolidated these appeals for purposes of decision only. *Johnson v. Consolidation Coal Co.*, BRB Nos. 22-0365 BLA, 22-0366 BLA, 22-0448 BLA, and 22-0449 BLA (Aug. 25, 2022) (Order) (unpub.).

clerical, 4 hours as vague, 8.50 hours as excessive, and 24.75 hours Counsel spent preparing the remand brief. He also awarded \$2,892.73 in costs after disallowing \$29.54. Thus, the ALJ awarded Counsel \$84,117.73 in fees and costs.

On April 5, 2022, Counsel filed a Motion for Reconsideration which the ALJ granted on April 28, 2022. The ALJ increased Counsel's fee award to \$88,650.00 (\$91,542.73 including costs), amounting to an additional 24.75 hours at \$300.00 per hour for drafting his remand brief – services the ALJ previously disallowed. Order Granting Claimant's Motion for Reconsideration of the Attorney Fee Order (Order Granting Claimant's Reconsideration) at 3.

On May 31, 2022, Employer filed its Motion for Reconsideration which the ALJ granted on June 29, 2022. The ALJ reduced Counsel's attorney's fees to \$82,050.00 (\$84,942.73 including costs) by disallowing 22 of the 24.75 hours previously awarded to Counsel for drafting his remand brief. Order Granting Employer's Motion for Reconsideration of the Attorney Fee Order (Order Granting Employer's Reconsideration) at 3.

On appeal, Counsel contends the ALJ erred in disallowing certain hours requested. Employer responds, urging affirmance of the disallowance. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.<sup>3</sup>

The amount of an attorney's fee award is discretionary and must be upheld unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.<sup>4</sup> *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, 288-89 (4th Cir. 2010); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

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<sup>3</sup> Although Counsel submitted two fee petitions, the ALJ "address[ed] the fee petitions together" as one document. Attorney Fee Order at 1 n.1. We affirm the ALJ's award of an hourly rate of \$300.00, his disallowance of 5.50 hours as work performed before the Board, his disallowance of all but 2 hours for the drafting of the evidence summary form, and his disallowance of \$29.54 in costs, as these reductions are unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Attorney Fee Order at 2, 3, 9, 11.

<sup>4</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the Miner performed his last coal mine employment in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Johnson*, BRB Nos. 17-0634 BLA and 18-0054 BLA, slip op. at 3 n.5.

## Disallowance of Hours

### **Clerical Entries**

Counsel argues the ALJ erred in disallowing certain hours as clerical.<sup>5</sup> Counsel's Brief at 3-4, 10-16. 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).

### **Concessions**

Counsel concedes the ALJ properly disallowed 5.75 hours<sup>6</sup> as clerical.<sup>7</sup> Counsel's Brief at 10-16. As concessions bind those who make them, we decline to address the ALJ's disallowance of these hours and affirm the ALJ's finding that they are not compensable. *See Consolidation Coal Co. v. Director, OWCP [Burris]*, 732 F.3d 723, 730 (7th Cir. 2013) ("concessions bind those who make them"); Attorney Fee Order at 4 (fifteenth and seventeenth entries); 5 (eighth, sixteenth, and twenty-fifth entries); 6 (third, seventh, and fourteenth through sixteenth entries); 7 (third, eighth, and twelfth entries); 8 (eighth, tenth, sixteenth through nineteenth, and twenty-first entries); Counsel's Brief at 10-16.

### **Unchallenged Entries Denied by the ALJ as Clerical**

Counsel does not challenge the ALJ's disallowance of 12.25 hours, which the ALJ denied as clerical. Counsel's Brief at 10-16. We affirm the ALJ's disallowance of these 12.25 hours as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR -710, 1-711 (1983); Attorney Fee Order at 4 (third, seventh, ninth, and tenth entries); 5 (third, fifteenth, twenty-first, twenty-second, twenty-fourth, and twenty-sixth entries); 6 (first,

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<sup>5</sup> In his brief, Counsel stated he attached five pages of the Attorney Fee Order "with an 'X' marked next to the time believed to be clerical duties," but it is not included in the Board's record. Counsel's Brief at 4.

<sup>6</sup> Counsel asserts the ALJ rationally disallowed 7.25 hours. *See* Counsel's Brief at 16, 17. However, it appears Counsel actually conceded to a disallowance of 5.75 hours in his brief. Counsel's Brief at 10-16.

<sup>7</sup> Counsel also concedes a quarter-hour entry on February 25, 2015, associated with a request for the Director's Exhibits, is duplicative of another quarter-hour entry on February 13, 2015. Counsel's Brief at 11.

second, and sixth entries); 7 (first, second, fourth through seventh, ninth through eleventh, and thirteenth through twenty-fifth entries); 8 (first through seventh, ninth, eleventh through fifteenth, and twentieth entries); Counsel's Brief at 10-16.

**Contested Entries**

**ALJ Properly Disallowed**

Counsel asserts that the following services should be awarded because he was attempting to schedule a telephone appointment:

2/23/2016	Telephone conference w/ Dr. Veraldi's office re telephone appointment	0.25
2/23/2016	Review email Correspondence from Dr. Veraldi's office re Telephone conference appointment	0.25
7/11/2016	Review email correspondence from Dr. [P]arker re setting up telephone appointment	0.25

Counsel's Brief at 10, 13. Contrary to Counsel's contention, the ALJ properly disallowed the above 0.75 hour of services, as scheduling appointments is a clerical task that is not separately compensable. *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217-18 (1986) (clerical services are considered part of office overhead and are figured into the hourly rate); Attorney Fee Order at 5, 6.

Counsel further asserts that although the following service was clerical it nonetheless should have been awarded:

7/22/2016	Online research [for] address of Waynesburg Hospital address etc.	0.25
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Counsel's Brief at 14, 15. The ALJ properly disallowed this 0.25 hour of service as clerical work because it involved looking up an address. *See Whitaker*, 9 BLR at 1-217-18; Attorney Fee Order at 6. Thus, we affirm the ALJ's disallowance of the above hour of services as clerical work.

**ALJ Improperly Disallowed**

Counsel argues the ALJ erred in disallowing as clerical certain services he performed because they were reasonable and necessary to establish entitlement. Counsel argues that these services include time spent obtaining the Director's Exhibits, medical

authorizations, medical records, autopsy slides, and the Curriculum Vitae of the Miner’s medical experts and ensuring the timeliness of his evidence and pleadings submitted to the ALJ. Counsel’s Brief at 10-16. Attorney Fee Order at 4 (first, second, fourth through sixth, eighth, twelfth through fourteenth, and sixteenth entries); 5 (first, second, fourth through seventh, ninth through fourteenth, nineteenth, twentieth, and twenty-third entries); 6 (fourth, fifth, eighth through thirteenth, eighteenth and nineteenth entries, twenty-first through twenty-seventh entries); 8 (last entry).

Accepting Employer’s objections, the ALJ summarily disallowed as clerical the 11.25 hours described above. Because the ALJ provided no rationale for disallowing these services, we vacate his disallowance of the time requested for these services. On remand, the ALJ must reconsider Counsel’s request for a fee for the time spent on these services, Employer’s objections, and Counsel’s response to them; he must then explain why he allows or disallows them. *See Bentley*, 522 F.3d at 666; *Whitaker*, 9 BLR at 1-217-18.

While Employer characterizes many of the above services as clerical, we note that services relating to drafting, revising, and reviewing correspondence or documents and communicating with clients about the case can constitute compensable legal work. *See Bentley*, 522 F.3d at 666; *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984). Moreover, conducting telephone conferences with doctors and reviewing their reports can also constitute compensable legal work. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894, 902-03 (7th Cir. 2003). While the payment of a medical bill is a clerical task, as Counsel concedes, the review of medical bills for information concerning the Miner’s additional medical treatment can be compensable. *Id.* Therefore, an analysis of the charges is necessary.

### **Vague and Unexplained Entries**

The ALJ disallowed the following sixteen entries totaling 4.0 hours as vague and unexplained. Attorney Fee Order at 8-9.

9/5/2014	Telephone conference w/ Atty Bluer USDOL	0.25
3/24/2016	Telephone conference w/ Ebony Jones Paralegal USDOL Philadelphia	0.25
5/16/2016	Telephone conference w/ DOL Atty	0.25
5/17/2016	Telephone conference w/ Atty Gayle Green Solicitor Office USDOL	0.25
5/17/2016	Telephone conference w/ Ebony Jones -paralegal at Phila. USDOL office	0.25

6/7/2016	Telephone Conference w/ Atty Rutledge USDOL Solicitor's Office	0.25
6/7/2016	Second Telephone Conference w/ Atty Rutledge USDOL Solicitor's Office	0.25
7/5/2016	Telephone Conference w/ USDOL Atty	0.25
7/6/2016	Telephone Conference w/UDSOL (sic) Atty Matthew Epstein	0.25
11/8/2016	Draft Email Correspondence to Atty Epstein	0.25
11/17/2016	Telephone Conference w/ Ebony Jones Paralegal USDOL Philadelphia Office	0.25
11/18/2016	Telephone Conference w/ USDOL Atty	0.25
5/28/2017	Telephone Conference w/ ALJ Burke office	0.25
9/4/2019	Telephone Conference w/ ALJ Swank office	0.25
9/5/2019	Telephone conference w/ Sarah Hurley from USDOL Solicitor	0.25
10/28/2019	Telephone conference w/ ALJ Swank office	0.25

Relying on *Sharpe v. Westmoreland Coal Co.*, BRB Nos. 14-0136 BLA, 14-0136 BLA-A, 14-0156 BLA, and 14-0156 BLA-A (Nov. 6, 2014) (unpub.), Counsel argues he does not need to provide further information regarding the content of his telephone calls or email to the DOL because the entries are “self-explanatory.” Counsel’s Brief at 16-18. In *Sharpe*, the Board affirmed the ALJ’s award of time for conference calls to the DOL because the Board held the ALJ permissibly found it was unnecessary for the claimant’s counsel to provide a detailed statement with regard to those “self-explanatory” entries. *Sharpe*, BRB Nos. 14-0136 BLA, 14-0136 BLA-A, 14-0156 BLA, and 14-0156 BLA-A, slip op. at 8.

Here, however, the ALJ did not find the entries “self-explanatory.” Attorney Fee Order at 8-9. The relevant regulation mandates that a representative seeking a fee must file an application “supported by a complete statement of the extent and character of the necessary work done . . . .” 20 C.F.R. §725.366(a). In the absence of any explanation from Counsel as to the subject matter or content of these telephone conferences or email to the DOL, the ALJ committed no abuse of discretion in not finding the entries “self-explanatory.” *See Bentley*, 522 F.3d at 666-67; *Ball v. Director, OWCP*, 7 BLR 1-617, 1-619 (1984) (affirming disallowance of a requested fee where “repeated entries involving communications with the client do not, for the most part, explain either the purpose or necessity of the particular communication”). Thus, we affirm the ALJ’s disallowance of the sixteen entries totaling 4.0 hours as vague and unexplained. 20 C.F.R. §725.366(a); *see Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (Counsel “seeking an award of fees should submit evidence supporting the hours worked . . . . Where the documentation of

hours is inadequate, the [ALJ] may reduce the [fee] award accordingly.”); Attorney Fee Order at 8-9.<sup>8</sup>

### **Remand Brief**

The ALJ disallowed 21.75 of the 24.50 hours Counsel requested for drafting Claimant’s November 11, 2019 remand brief.<sup>9</sup> Order Granting Employer’s Reconsideration at 2-3. Relying on the Board’s unpublished decision in *Sharpe*, BRB Nos. 14-0136 BLA, 14-0136 BLA-A, 14-0156 BLA, and 14-0156 BLA-A, slip op. at 6-7, Counsel argues the ALJ erred in disallowing these hours. Counsel’s Brief at 18-31. We disagree.

The ALJ determined approximately 37 pages of the 41.5-page remand brief were duplicated from Counsel’s Closing Argument to him and Counsel’s Response Brief to the Board (the prior briefs) – specifically identifying pages 10 through 41<sup>10</sup> – and only 11 percent of the remand brief was “new work;” thus, the ALJ awarded 11 percent of the 24.75 hours requested, or 2.75 hours. Order Granting Employer’s Reconsideration at 2-3. Our review of the two prior briefs – Counsel’s Closing Argument to the ALJ filed on May 31, 2017, and Counsel’s Response Brief to the Board filed on April 26, 2018 – supports the ALJ’s finding that the 2019 remand brief is substantially similar to them, as at least 37 pages of the 41.5-page remand brief are identical. *Id.*

Based on Counsel’s generous use of cutting and pasting from the prior briefs, and the highly deferential standard for our review, we cannot say the ALJ committed an abuse of discretion in disallowing 21.75 hours of the requested 24.50 hours, and thus we affirm

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<sup>8</sup> Moreover, we note that *Sharpe* is an unpublished case and thus is not precedential. Further, it is not persuasive support for Counsel’s contention. Upholding an ALJ’s exercise of discretion to award fees under the facts in *Sharpe* does not indicate the ALJ’s exercise of discretion to disallow fees under the facts of this case was error.

<sup>9</sup> The ALJ incorrectly totaled 24.75 hours of time Counsel spent preparing the remand brief and this led him to incorrectly disallow 22 of those hours. Attorney Fee Order at 10; Order Granting Employer’s Reconsideration at 2.

<sup>10</sup> The remand brief is also duplicated from other prior briefs Counsel filed; specifically pages 1 to 3, 6 to 7, and 9 of the remand brief are substantially similar in wording to Counsel’s Closing Argument and Counsel’s Response Brief. *Compare* Claimant’s Brief on Remand dated November 11, 2019 at 1-3, 6-7, 9, 10-41, *with* Claimant’s Response Brief dated April 26, 2018 at 2-4, 6-7, 11-23; *and* Claimant’s Closing Brief dated May 31, 2017 at 2-3, 8-24, 25-29.

that disallowance.<sup>11</sup> See *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 950 (9th Cir. 2007), citing *Hyland v. Indicator Lites, Inc.*, 160 F. Supp. 2d 981, 986 (N.D. Ill. 2001) (holding that a reduction in hours billed by a prevailing party’s attorney for drafting a complaint was warranted where the complaint contained standard formulations and was drafted using “cutting and pasting”); Order Granting Employer’s Reconsideration at 2-3.

Accordingly, we affirm in part and vacate in part the ALJ’s Attorney Fee Orders and remand this case to the ALJ for further consideration consistent with this opinion. On remand, the ALJ must consider only those charges the Board held were improperly disallowed.

SO ORDERED.

JUDITH S. BOGGS  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge

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<sup>11</sup> As we noted *supra*, *Sharpe* is unpublished and thus not precedential. However, unlike the ALJ in *Sharpe*, the ALJ here explained his reduction in the number of hours Counsel requested for drafting the remand brief. Consequently, the two cases are distinguishable.