



BRB No. 23-0100 BLA

CHRIS MEZO)	
(o/b/o/ ROBBIE J. MEZO (deceased)))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KERR MCGEE COAL)	
CORPORATION/AMERICAN COAL)	DATE ISSUED: 03/11/2024
COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Attorney's Fees of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Stone Piper Law, LLC), Birmingham, Alabama, for Claimant.

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

PER CURIAM:

Claimant's Counsel (Counsel) appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order on Remand Awarding Attorney's Fees (2018-BLA-

06098) rendered in connection with the successful prosecution of a miner's claim¹ filed on January 11, 2016, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.²

On October 3, 2020, Counsel filed a complete, itemized fee petition requesting \$18,720.00 for 62.40 hours of legal services at an hourly rate of \$300.00 from October 10, 2019 to September 8, 2020.³ Employer did not file any objections.

In her initial Decision and Order Awarding Attorney's Fees, the ALJ reduced Counsel's requested hourly rate to \$275.00 per hour, and "reduced and removed" unspecified charges from the hours of legal services requested. Thus, the ALJ awarded Counsel a total fee of \$3,946.25 in attorney's fees for 14.35 hours of legal services at the rate of \$275.00 per hour. ALJ's Fee Award dated December 15, 2020.

Upon consideration of Counsel's appeal, the Board vacated the ALJ's reduction of the hourly rate from \$300.00 to \$275.00 and the ALJ's disallowance of 48.05 hours of legal services as the ALJ failed to adequately explain her reasons for the hourly rate reduction or the disallowance of hours. *Mezo v. Kerr McGee Coal Corp./Am. Coal Co.*, BRB No. 21-0200 BLA, slip op. at 3-5 (Dec. 29, 2021) (unpub.).

On remand, the ALJ awarded Counsel an hourly rate of \$300.00, but she disallowed 14.45 hours requested for drafting Claimant's closing brief and 12.375 hours requested for reviewing certain documents. Attorney Fee Award on Remand at 3-4 (unpaginated). She also disallowed 2.85 hours from October 10, 2019 to October 23, 2019, which were performed before Counsel entered her appearance before the ALJ. *Id.* at 3 (unpaginated). Ultimately, she ordered Employer to pay Counsel \$9,607.50 in attorney's fees for 32.025 hours of legal services at the rate of \$300.00 per hour. *Id.* at 4 (unpaginated).

¹ The ALJ issued a Decision and Order Granting Benefits on May 29, 2020. In its prior decision, the Board noted Claimant is the Miner's son, who pursued the miner's claim on her behalf after her death. *Mezo v. Kerr McGee Coal Corp./Am. Coal Co.*, BRB No. 21-0200 BLA, slip op. at 2 n.1 (Dec. 29, 2021) (unpub.).

² We incorporate by reference the relevant procedural history set forth in our prior decision in this case. *Mezo*, BRB No. 21-0200 BLA, slip op. at 2.

³ Counsel actually itemized 63.40 hours in her fee petition, although she requested \$18,720.00, representing 62.40 hours at an hourly rate of \$300.00.

On appeal, Counsel contends the ALJ erred in disallowing one-half of the hours requested to draft Claimant's closing brief and to review certain documents. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.⁴

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.⁵ 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); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

Disallowance of Hours

Claimant's Closing Brief

The ALJ found Counsel's request for 28.90 hours for drafting Claimant's closing brief was "excessive and unreasonable," and reduced the request by one-half to 14.45 hours. Attorney Fee Award on Remand at 4 (unpaginated). Counsel asserts the ALJ did not adequately explain the basis for the reduction. Counsel's Brief at 4-6. We agree.

In reducing the time requested for drafting Claimant's closing brief, the ALJ noted "Counsel submitted a nine-page closing brief, with no new evidence procured or developed." Attorney Fee Award on Remand at 4 (unpaginated). However, review of Claimant's closing brief indicates that it is twenty pages long and evidence was submitted with it, including Dr. Istanbuly's supplemental report dated July 30, 2018, which formed the basis for the ALJ's award of benefits.⁶

⁴ We affirm, as unchallenged on appeal, the ALJ's disallowance of 2.85 hours from October 10, 2019 to October 23, 2019, and her award of an hourly rate at \$300.00. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Attorney Fee Award on Remand at 2-3 (unpaginated).

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because the Miner performed her coal mine employment in Illinois. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Mezo*, BRB No. 21-0200 BLA, slip op. at 3 n.3.

⁶ Claimant's closing brief sets out the case's procedural background, the Miner's personal and employment histories, and the medical evidence consisting of the chest x-rays, pulmonary function and blood gas studies, and the medical opinions of record.

Because the ALJ misstated the length of counsel’s brief and the evidence submitted with it, and as she failed to provide an adequate explanation for her reduction of 14.45 hours from the total 28.90 hours requested, we vacate the ALJ’s determination. *See Small v. Richard Wolf Medical Instruments Corp.*, 264 F.3d 702 (7th Cir. 2001), *citing People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307 (7th Cir. 1996) (court must provide a concise but clear explanation of its reasons for any reduction, and the court cannot simply “eyeball the fee request and cut it down by an arbitrary percentage because it seemed excessive to the court”); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder’s failure to discuss relevant evidence requires remand).

Counsel’s Document Review

The ALJ also found Counsel’s request for 24.75 hours for reviewing documents was “excessive and unreasonable,” and reduced it by one-half to 12.375 hours. Attorney Fee Award on Remand at 3-4 (unpaginated). In disallowing that time, the ALJ stated:

Restating that Counsel failed to appear at the formal hearing, and assuming that Counsel received the Director’s exhibits, which were [numbered] 1 through 75, 24.75 hours to review is excessive and unreasonable for these matters and particularly for someone with extensive experience in black lung matters. Having reviewed the itemized time charges, I am reducing them [by] fifty percent finding such reasonable.

Id. at 4 (unpaginated).

Counsel asserts the ALJ failed to consider that, although Counsel is an experienced black lung counsel, the facts and medical evidence are different in each case. Counsel’s Brief at 3. In addition, Counsel asserts the ALJ’s assumption that her review of documents was limited to Director’s Exhibits 1 to 75 is mistaken. *Id.* at 3-4. Counsel contends that, while she “did eventually receive a copy of [the Director’s Exhibits], most of the hours she spent reviewing records was spent reading and making notes on the three banker’s boxes and correspondence that she received from Claimant’s roommate,” explaining that “[t]hose records were not organized and took a prodigious amount of time to review.” *Id.* at 4. Further, Counsel argues that the ALJ’s reliance on her failure to appear at the hearing is

Claimant’s Closing Brief at 1-13. It discusses the relevant evidence on disability and legal pneumoconiosis, and provides a discussion of the cases for the ALJ to consider in evaluating the opinions. *Id.* at 13-19. Counsel argues that Claimant established the Miner was totally disabled due to legal pneumoconiosis. *Id.* at 19-20.

irrelevant as to whether her 24.75 hours charged for document review is reasonable. *Id.* We agree with Counsel that the ALJ's explanation for her reduction in the time requested does not indicate she considered the time Counsel spent in review of documentation not included in the Director's exhibits.

We cannot discern the relevance in the ALJ's disallowance of hours for document review because Counsel failed to appear at the hearing.⁷ Moreover, as the Board noted in the prior appeal, "[a]lthough the ALJ noted Claimant's counsel did not appear at the November 5, 2019 hearing, review of her fee petition reflects that she did not request a fee for any services on that date." *Mezo*, BRB No. 21-0200 BLA, slip op. at 5 n.6.

It also appears the ALJ erroneously assumed the hours requested were limited solely to Counsel's review of Director's Exhibits 1 to 75, despite Counsel's fee petition specifically itemizing that the hours were spent reviewing other records and files as well. For example, the October 23, 2019 entry for 4.25 hours was for "Began reviewing, sorting, and making notes on client's records," after Counsel's entry on October 19, 2019 billing for "Received and unpacked [three] banker's boxes of records and correspondence from client's roommate in Florida." Counsel's Fee Petition at 2 (unpaginated). Similarly, the October 25, 2019 entry billed 5.00 hours for "Additional review of records re client's medical problems." *Id.* at 3 (unpaginated). The 6.75 hours on October 27, 2019, billed for "Further review [of] records," the November 2, 2019 entry of 3.25 hours billed for "Continued reviewing files and making notes," and the 5.50 hours on November 9, 2019, billed for "More review of medical evidence. Made notes." *Id.*

Furthermore, despite the ALJ's acknowledgment of Counsel's "extensive experience in black lung matters," Attorney Fee Award on Remand at 4 (unpaginated), Counsel notes she still needed "to learn the facts and the idiosyncrasies of Claimant's case." Counsel's Brief at 3. As the preamble to the 2001 revised regulations states: "Whether a particular miner's disability is due to [her] coal mine employment . . . must be resolved on a claim-by-claim basis . . ." 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000). Thus, the award of a reasonable amount of time to a newly-assigned attorney to get "up to speed" on a case by reviewing the facts and underlying documents is compensable. *See Planned Parenthood of Cent. N.J. v. Atty Gen. of State of N.J.*, 297 F.3d 253, 271-72 (3d Cir. 2002).

As the ALJ failed to provide an adequate explanation for disallowing one-half of the time requested for Counsel's review of certain documents relevant to the facts of this

⁷ The record reflects Claimant's counsel requested that the hearing be cancelled following the death of her client, but the ALJ did not respond to her motion. Counsel's Brief at 4; Hearing Transcript at 4-6.

case based on her experience in black lung matters, we vacate her disallowance of 12.375 hours requested for document review. On remand, the ALJ must consider Counsel's request for 24.75 hours for document review in its proper and accurate context. The proper inquiry in determining a compensable fee is whether the work and time that Counsel requested were reasonable and necessary to establish Claimant's entitlement to benefits *at the time the work was performed*.⁸ See *Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999) (standard test for the ALJ to consider in determining whether the services an attorney performs were necessary is whether the attorney, at the time the work was performed, could reasonably regard the work as necessary to establish entitlement).

Counsel's Requests to the Board

Finally, Counsel requests that we adjudicate this matter ourselves or reassign her fee petition to another ALJ for consideration. Counsel's Brief at 7. We decline Counsel's requests. As an appellate tribunal, we cannot decide what a reasonable number of hours would be for the legal services performed. *Hawker*, 312 F.3d at 902. That is best left to the ALJ who is "in a much better position than [the Board] to make [that] determination." *Id.* Moreover, the ALJ's continued participation in this case serves the interest of judicial economy, due to her familiarity with the adjudication of the merits of this case, and does not present a significant risk to the fair administration of justice. See *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107-08 (1992).

Remand Instructions

On remand, the ALJ must adequately explain her allowance and disallowance of the hours Counsel requested for drafting Claimant's closing brief and reviewing certain documents. She must award a reasonable number of hours and explain her determination as the Administrative Procedure Act⁹ requires. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

⁸ All work claimed by Counsel need not be reflected in the administrative agency file in order to be compensable. *Gibson v. Director, OWCP*, 9 BLR 1-149, 1-151 (1986); *Cox v. Director, OWCP*, 7 BLR 1-810, 1-812 (1985). Counsel is not required to submit copies of all documents, but must provide a sufficient description for the ALJ to evaluate the work performed. See *Bash v. Director, OWCP*, 6 BLR 1-419, 1-421-22 (1983).

⁹ The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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).