



BRB No. 24-0286 BLA

DAVID PUCCETTI
(o/b/o ALBERT PUCCETTI)

Claimant-Petitioner

v.

HERITAGE COAL COMPANY, LLC
c/o PEABODY ENERGY CORPORATION

Employer-Respondent

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

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 05/08/2025

DECISION and ORDER

Appeal of the Order Denying Motion for Leave to File Reply and Order Awarding Attorney's Fees of William P. Farley, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (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, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel (Counsel) appeals Administrative Law Judge (ALJ) William P. Farley's Order Denying Motion for Leave to File Reply and Order Awarding Attorney's Fees (Fee Award) (2020-BLA-05016) issued in connection with the successful prosecution of a subsequent claim filed on May 1, 2017,¹ pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). In an Order dated October 18, 2023, the ALJ remanded the claim to the district director for the payment of benefits.

Subsequently, on December 2, 2023, Counsel filed an itemized fee petition requesting \$20,031.25 for attorney's fees and expenses, representing \$6,300.00 for 21 hours of attorney services by Austin P. Vowels at an hourly rate of \$300.00; \$1,787.50 for 7.15 hours of attorney services by M. Alexander Russell at an hourly rate of \$250.00; \$2,795.00 for 13 hours of attorney services by Lindsey Zielinski at an hourly rate of \$215.00; \$1,595.00 for 11 hours of paralegal services by Desire Smith at an hourly rate of \$145.00; \$2,863.75 for 19.75 hours of legal assistant services by Sarah Agnew at an hourly rate of \$145.00; \$25.00 for 0.25 hour of legal assistant services by Shawna Brown at an hourly rate of \$100.00; \$50.00 for 0.5 hour of legal assistant services by Maci Uffelman at an hourly rate of \$100.00; and \$735.00 for 5.25 hours of paralegal services by Leslie Jackson at an hourly rate of \$140.00.² Counsel also requested \$3,880.00 in expenses. Motion for Attorney's Fees and Expenses Before Administrative Law Judge (Fee Petition) at 1-2, 25-34. Employer objected to the use of quarter-hour billing and to multiple billing entries which it alleged were administrative/clerical, redundant, or excessive. Employer's Response to Claimant's Motion for Attorney Fees (Employer's Objections) at 2-8. Counsel replied to Employer's objections. Puccetti's Reply to the Employer's Opposition to Attorney Fees and Expenses Before the Administrative Law Judge (Counsel's Reply). The ALJ denied Counsel's request for leave to file his reply. Order Denying Motion for Leave to File Reply dated March 21, 2024.

In his subsequent April 10, 2024 Order Awarding Attorney's Fees (Fee Award), the ALJ found nine entries were excessive with respect to the time billed, and thus he reduced those nine entries from 0.25 hour to 0.10 hour, which resulted in a total reduction of 1.35 hours. Fee Award at 6. The ALJ also disallowed two 0.25 hour entries that he found were

¹ Claimant is the son of the Miner, who died on January 9, 2023. On April 24, 2023, the ALJ granted Claimant's Motion to Substitute Party and reformed the caption to reflect David Puccetti as Claimant on behalf of the deceased Miner. *See* Motion to Substitute Party dated April 24, 2023.

² Counsel arrived at the requested hourly rates as a result of a compromise with Employer's counsel on November 27, 2023. Motion for Attorney's Fees and Expenses Before Administrative Law Judge at 1 n.1.

clerical, which resulted in a disallowance for that time of 0.5 hour. *Id.* at 7. Thus, the ALJ awarded a total of \$19,720.00, representing \$15,840.00 in attorney's fees and the requested \$3,880.00 in expenses. *Id.* at 7-8.

On appeal, Counsel contends the ALJ erred in rejecting his reply to Employer's objections. In addition, Counsel argues the ALJ erred in finding multiple 0.25 hour billing entries were excessive and that one entry by Attorney Zielinski was clerical. Employer responds urging affirmance of the ALJ's fee award. The Acting Director, Office of Workers' Compensation Programs, did not file a response brief.

The amount of an attorney's fee award is discretionary. The Benefits Review Board will uphold an award on appeal unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.³ *See 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).

Counsel's Reply to Employer's Objections

On December 29, 2023, Counsel filed his reply to Employer's objections. Relying on 29 C.F.R. §18.33(d),⁴ the ALJ denied Counsel the right to file his reply, noting that while Counsel sought to "reply to [Employer's] Response to Claimant's Motion for Attorney Fees," "Claimant could have made such information known in the application"

³ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit as the Miner performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 7.

⁴ The regulation at 29 C.F.R. §18.33(d) states:

(d) *Opposition or other response to a motion filed prior to hearing.* A party to the proceeding may file an opposition or other response to the motion within 14 days after the motion is served. The opposition or response may be accompanied by affidavits, declarations, or other evidence, and a memorandum of the points and authorities supporting the party's position. Failure to file an opposition or response within 14 days after the motion is served may result in the requested relief being granted. Unless the judge directs otherwise, no further reply is permitted and no oral argument will be heard prior to hearing.

29 C.F.R. §18.33(d).

(i.e., Counsel could have given notice in his Fee Petition that he intended to reply to any objections Employer may file in response) but did not, so Counsel did not establish good cause to file a reply. Order Denying Motion for Leave to File Reply. Based on this Order, the ALJ refused to consider Counsel's reply to Employer's Objections in his fee award.

Counsel argues he should have been permitted to file the reply, and the ALJ should have considered it and the fees Counsel requested for preparing the fee petition and reply before awarding the fee. Counsel's Brief at 4-7. Specifically, Counsel correctly asserts the regulation at 29 C.F.R. §18.33(d) applies to pre-hearing motions and does not apply to this case because the merits of this case were resolved prior to his filing of the fee petition. Counsel's Brief at 4-7. Counsel avers the applicable regulation in this case is 29 C.F.R. §18.90(c),⁵ which applies to motions after the decision, but Counsel concedes that the regulation "does not explain whether responses or replies are allowed." *Id.* at 4-5.

An ALJ has broad discretion in resolving procedural matters. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-55 (2004) (en banc). While the ALJ cited an inapplicable regulation in determining whether Counsel was permitted to reply to Employer's objections, any error by the ALJ was harmless as it was within the ALJ's discretion to not consider Counsel's reply, as Counsel did not have an entitlement to submit a reply brief, did not seek prior approval to file such a brief, and had not shown good cause to do so. 29 C.F.R. §18.90(c); *see Dempsey*, 23 BLR at 1-55. Thus, we also reject Counsel's contention that the ALJ should also have considered his supplemental fee request for preparing his fee petition and reply.

Allowable Hours

Counsel next argues the ALJ erred in finding eight entries requested by himself and one entry requested by Attorney Russell to be excessive. Counsel's Brief at 7-9. The ALJ reduced the time allowed for the following entries: February 24, 2022, April 18, 2022, June 27, 2022, December 20, 2022, April 25, 2023, July 13, 2023, September 6, 2023, and September 18, 2023 (Attorney Vowels's entries) and September 9, 2022 (Attorney

⁵ The regulation at 29 C.F.R. §18.90(c) states:

(c) *Motions after the decision.* After the decision and order is issued, the judge retains jurisdiction to dispose of appropriate motions, such as a motion to award attorney's fee and expenses, a motion to correct the transcript, or a motion for reconsideration.

29 C.F.R. §18.90(c).

Russell's entry), from 0.25 hour to 0.10 hour, which resulted in a total reduction of 1.35 hours. Fee Award at 6.

Services that counsel billed are compensable if the amount of time is not excessive and, at the time the work was performed, counsel reasonably regarded it as necessary to establish Claimant's entitlement. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984).

The ALJ reduced the time entries because he found merit in Employer's objection that they were excessive. Fee Award at 6. The ALJ reviewed Counsel's requests and carefully considered whether the time entries were reasonable. Counsel has failed to show how the ALJ abused his discretion in reducing the time required for these tasks, and thus we affirm the ALJ's reduction of these 1.35 hours as excessive. *See Hawker*, 326 F.3d at 903; *Lanning*, 7 BLR at 1-317 (ALJ has broad discretion to determine reasonableness of time entries).

Finally, Counsel argues the ALJ erred in finding one entry by Attorney Zielinski was clerical.⁶ Counsel's Brief at 9-11. We agree.

Attorney Zielinski billed 0.25 hour on March 29, 2022, for sending a follow up electronic mail to opposing counsel regarding a "missing C[hest] X[-]R[ay] disc." Fee Petition at 29. The ALJ summarily disallowed the entry as "[c]lerical in nature." Fee Award at 7. Because the ALJ did not fully explain why this entry was clerical and did not disallow very similar entries requested by Attorney Zielinski on March 16, 2022, March 17, 2022, and April 13, 2022, we vacate his disallowance of the time requested, and reverse the ALJ's disallowance of that entry.⁷ *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

⁶ Counsel concedes on appeal that Paralegal Jackson's entry on June 23, 2023, for 0.25 hour saving electronic mail (email) from Employer's counsel in response to a medical authorization is "[c]lerical in nature," as the ALJ found, and thus we affirm that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Fee Award at 7; Counsel's Brief at 11 n.2.

⁷ Counsel explains that Attorney Zielinski's follow up by email was "necessary to locate the disc that had not been properly stored with the [Director, Office of Workers' Compensation Programs]." Counsel's Brief at 9.

Accordingly, we affirm in part and reverse in part the ALJ's Order Awarding Attorney's Fees, and we modify the ALJ's fee award to include the 0.25 hour of Attorney Zielinski's time on March 29, 2022, at the hourly rate of \$215, consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge