

U.S. Department of Labor

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



BRB No. 24-0486 BLA

ESTATE OF JIM PETTRY

Claimant-Petitioner

v.

RALEIGH MINE & INDUSTRIAL

and

WEST VIRGINIA COAL WORKERS'
PNEUMOCONIOSIS FUND

Employer/Carrier-
Respondents

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

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 09/12/2025

DECISION and ORDER

Appeal of the Attorney Fee Order of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk (Petsonk PLLC), Beckley, West Virginia, and Bren J. Pomponio (Mountain State Justice, Inc.), Charleston, West Virginia, for Claimant.

Christopher M. Green and Wesley A. Shumway (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

William M. Bush, Acting Counsel for Administrative Appeals (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, JONES, Administrative Appeals Judge, and ULMER, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant's counsel (Counsel), Samuel B. Petsonk, appeals the Attorney Fee Order (2020-BLA-05465) of Administrative Law Judge (ALJ) Patricia J. Daum rendered on an attorney's fee petition filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

On March 18, 2024, Counsel filed an Unopposed Motion to File Joint Fee Petition in Miner's and Survivor's Claims to the ALJ. The ALJ's office responded by e-mail, informing Counsel the motion had been filed only under the miner's claim number. The office directed Counsel to file a fee petition under both the miner's claim and survivor's claim numbers and their respective captions, as well as to conform to several specific requirements including providing "two separate and detailed lists of itemized fees clearly marked with the case number of the claim for which the services were performed" and separately listing costs. *See* Attorney Fee Order at 2.

On May 24, 2024, Counsel filed an Unopposed Application and Motion to Approve Fees and Costs to the ALJ. Counsel requested \$4,457.03 in attorney's fees and \$3,050.81 in expenses, and he provided a sample of several fee awards from Office of Workers' Compensation Programs (OWCP) district directors and one from another ALJ. Counsel identified his customary billing rate as \$400.00 per hour but did not provide specific time entries. Instead, Counsel included a list of generic tasks involved in representing Claimant. *See* Claimant's Unopposed Motion to Approve Fees and Costs at 2.

The ALJ's office responded by e-mail to Counsel on May 28, 2024, informing Counsel his application "did not include the itemized list of fees for Attorney Petsonk or Jackie Lane or the itemized list of unreimbursed expenses as . . . instructed in the March 26, 2024 email." Further, the ALJ's office inquired whether Counsel had filed the "required documents" under separate cover. Attorney Fee Order at 2. Counsel replied in an email indicating no other documents had been filed because the parties had reached an agreement as to the attorney's fees and costs. *Id.*

On August 29, 2024, the ALJ issued an Attorney Fee Order. Noting “Petitioner has not filed the proper documentation as requested and does not intend to do so,” the ALJ reduced Claimant’s requested attorney’s fees by 48.75%. Attorney Fee Order at 3. The ALJ based the reduction on an hourly rate of \$275.00 and “the fact that [she was] unable to evaluate the actual services performed to determine the necessity of such work in the successful adjudication of the claim” or whether each service was performed by Counsel or his associate, Jackie Lane. Attorney Fee Order at 6. Further, the ALJ declined to award any costs in the absence of an itemized list. *Id.*

On appeal, Counsel contends the ALJ erred in reducing the awarded fee when the parties had previously stipulated to an agreed-upon fee, in finding the prevailing rates to be unsupported, and in denying the associated costs. Employer and its Carrier and the Acting Director, Office of Workers’ Compensation Programs (the Director), respond in support of the ALJ’s fee order.

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, based on an abuse of discretion, or not in accordance with applicable law.¹ *See Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

Counsel contends the ALJ erred in failing to award the entirety of the requested fees and costs when they were agreed to by both parties and in not finding the list of awards he provided to be probative of a reasonable hourly rate. We disagree.

Contrary to Counsel’s contention, an ALJ is not obliged to approve an agreement between the parties. *See Eifler v. Peabody Coal Co.*, 13 F.3d 236, 238 (7th Cir. 1993) (“an award of fees requires administrative or judicial approval even if the employer agrees with the claimant’s lawyer on the appropriate award”); *see also U.S. Dep’t of Labor v. Triplett*, 494 U.S. 715, 717-18 (1990) (noting that the statute “prohibits an attorney from receiving a fee . . . from the employer . . . unless approved by the appropriate agency or court”).

Further, the regulations set out specific requirements for a fee petition, including the extent and character of the necessary work performed, the professional status of the person performing such work, the customary billing rates, and a listing of all reasonable unreimbursed expenses, and any approved fee “shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 5.

qualifications of the representative, [and] the complexity of the legal issues involved,” along with any other requested information. 20 C.F.R. §725.366(a)-(b).

The ALJ permissibly provided detailed instructions for Counsel to provide documentation necessary to assess the parties’ settlement; the ALJ requested Counsel provide “the case captions and case number of both claims as well as . . . two separate and detailed lists of itemized fees clearly marked with the case number of the claim for which the services were performed,” and she instructed that any unreimbursed costs be separately listed for each case. *See* Attorney Fee Order at 2. The party seeking an attorney’s fee has the burden to establish that the claimed rate is reasonable and the hours expended were necessary in the underlying claim. *E. Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 569 (4th Cir. 2013) (starting point for calculating a reasonable attorney’s fee is the “lodestar” method, under which a “reasonable hourly rate” is multiplied by “the number of hours reasonably expended on the litigation”) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The ALJ reasonably found Counsel failed to provide the professional status or any other information regarding Jackie Lane, a complete statement of the extent and character of the necessary work performed, or a listing of unreimbursed expenses, which thus rendered the ALJ unable to perform the “lodestar” calculation and determine a reasonable fee from the information provided. Attorney Fee Order at 3-4.

The ALJ also reasonably determined the evidence Counsel submitted was insufficient to demonstrate a prevailing market rate. While prior fee awards can be used as evidence to support an attorney’s hourly rate, “prior fee awards are not controlling authority establishing a prevailing market rate for later cases.” *Gosnell*, 724 F.3d at 573. Counsel did not submit any evidence as to the prevailing market rate but rather identified one case before the Office of Administrative Law Judges and several others before the district director showing the previous hourly rate he had been awarded. *See* Claimant’s Unopposed Application and Motion to Approve Fees and Expenses at 1-2. Considering the deficiencies in Counsel’s fee petition, the ALJ acted within her discretion in reducing Counsel’s fees and denying reimbursement for unlisted expenses. *See generally* *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS111, 120 (1999); *see also* *Jones*, 21 BLR at 1-108; 20 C.F.R. §725.366.

Accordingly, we affirm the ALJ's Attorney Fee Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge