

amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Claimant's counsel submitted a fee petition to the administrative law judge, requesting \$20,438.50 for work performed from August 25, 2006 to December 7, 2010, representing 44.75 hours of legal services by Joseph W. Wolfe at an hourly rate of \$300; .25 hours of legal services by Bobby S. Belcher, Jr. at an hourly rate of \$250; 1.00 hour of legal services by W. Andrew Delph at an hourly rate of \$200; 20.00 hours of legal services by Ryan C. Gilligan at an hourly rate of \$175; 31.40 hours of services by full-time legal assistants at an hourly rate of \$100; and 1.85 hours of services by a part-time legal assistant at an hourly rate of \$60, plus costs in the amount of \$2,206.95. Employer raised various objections to the fee petition, and filed a motion to dismiss the fee petition or for discovery, including a request for admissions concerning fees. On March 11, 2011, the administrative law judge issued an Order denying employer's motion to dismiss the fee petition. While noting that claimant's counsel had responded to the request for admissions, the administrative law judge denied employer's motion for discovery, but allowed the parties the opportunity to provide further briefing on the issues presented, and directed claimant's counsel to submit receipts or support for the expenses incurred. Following receipt of documentation from claimant's counsel and consideration of the fee petition and employer's objections thereto, the administrative law judge found the requested hourly rates to be reasonable and sufficiently documented, but accepted employer's recalculation of the number of hours requested,¹ as unchallenged by claimant's counsel, and disallowed 0.75 hour of services by the full-time legal assistants and 0.25 hour of services by the part-time legal assistant, as clerical in nature. The administrative law judge also disallowed mileage claimed in the amount of \$48.00. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$20,242.50 for legal services performed while the case was before the Office of Administrative Law Judges, plus costs in the amount of \$2,158.94.

On appeal, employer contends that the administrative law judge failed to consider appropriate market rate evidence and apply the correct standard in approving counsel's requested hourly rates. Employer also challenges the number of hours approved, and contends that the administrative law judge improperly excluded claimant's counsel's response to employer's request for admissions from consideration. Employer requests that the case be reassigned to a new administrative law judge if remand is appropriate. Claimant responds in support of the award of attorney fees. The Director, Office of

¹ The number of hours requested in the fee petition, as calculated by employer, total 44.25 for Attorney Wolfe; 0.25 for Attorney Belcher; 1.00 for Attorney Delph; 20.00 for Attorney Gilligan; 31.75 for the full-time legal assistants; and 2.00 for the part-time legal assistant, for a total fee of \$20,332.50. Order Awarding Attorney Fees at 6; Employer's Objections to Fee Petition at 1.

Workers' Compensation Programs, has not filed a response to employer's appeal. Employer has submitted a reply brief in support of its position.²

The amount of an attorney fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.³ *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); see also *Jones v. Badger v. Coal Co.*, 21 BLR 1-102, 1-108 (1998)(en banc).

Initially, we reject employer's argument that the administrative law judge impermissibly excluded claimant's counsel's responses to employer's request for admissions from consideration in denying employer's motion for discovery. While employer asserts that it has a "basic due process right" to obtain admissions relevant to prevailing market rates, Employer's Brief at 10, the administrative law judge acted within her discretion in denying discovery in this case, as employer provided its objections to the rates requested, and the administrative law judge found that counsel's fee petition was complete and sufficient to support the requested hourly rates. Order Denying Motion at 4-5; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

Employer next challenges the hourly rates approved herein, arguing that the administrative law judge failed to require claimant's counsel to produce market evidence to support the requested rates, and erred in according "preclusive effect" to prior fee awards in unrelated cases. Employer further contends that the administrative law judge's consideration and valuation of various factors did not comply with law, and that her treatment of the evidence proffered by claimant's counsel and employer was inconsistent, suggesting a lack of impartiality. Employer's arguments are without merit.

The Act provides that when a claimant wins a contested case, the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The regulation governing fees provides, in part, that:

Any fee approved . . . shall take into account the quality of the representation, the qualifications of the representative, the complexity of

² We affirm, as unchallenged on appeal, the administrative law judge's allowance of \$2,158.94 for costs incurred. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibits 4, 6.

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 fee requested.

20 C.F.R. §725.366(b); *see Pritt v. Director, OWCP*, 9 BLR 1-159 (1986). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has recognized that the “lodestar method” is the appropriate starting point for calculating fee awards under the Act, *i.e.*, the fee amount equals the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008). The factors identified at Section 725.366(b) do not supplant or enhance the lodestar method; rather, they are already reflected therein. *Id.*, 522 F.3d at 664-65, 24 BLR at 2-124.

In the present case, the administrative law judge properly considered all of the relevant evidence provided by both parties as to the prevailing market rate for black lung attorneys in the relevant geographic area, in conjunction with the factors set forth in Section 725.366(b), and adequately explained her determination that hourly rates of \$300, \$250, \$200, \$175, \$100, and \$60 for work performed by Attorneys Wolfe, Belcher, Delph, and Gilligan and the full-time and part-time legal assistants were reasonable under the facts of this case. Taking all factors into account, and finding that employer’s evidence of lower fee awards did not undermine the market rate evidence supplied by claimant’s counsel, the administrative law judge permissibly relied on the following considerations: multiple prior fee awards to claimant’s counsel at their requested hourly rates, which the administrative law judge found were not excessive for attorneys with comparable levels of experience in counsel’s geographic area; the level of the proceedings; the average or greater level of complexity of this case; the nature of the issues involved and the applicability of the legislative changes to the Act occasioned by the enactment of Pub. Law No. 111-148, §1556 (2010); and the expertise of counsel in handling the case. Order Denying Motion at 2-4; Order Awarding Attorney Fees at 2-5; *see Bentley*, 522 F.3d at 665-666, 24 BLR at 2-124; *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010). Contrary to employer’s argument, the administrative law judge did not give “preclusive effect” to counsel’s prior fee awards; rather, such evidence provides some guidance as to what the market rate is, and is appropriately included within the range of sources from which to ascertain a reasonable rate. *See Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124; *Cox*, 602 F.3d at 289, 24 BLR at 2-291. As employer has demonstrated no abuse of the administrative law judge’s discretion, and we have not discerned any evidence of bias, *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1999), we affirm the administrative law judge’s approval of the requested hourly rates as reasonable.

Employer next challenges the number of hours approved by the administrative law judge as excessive or inappropriate. Specifically, employer maintains that the administrative law judge incorrectly characterized twenty-one hours of legal assistant time as compensable legal work rather than clerical work, and irrationally found no duplication of effort in the work performed by the attorneys and legal assistants. Employer asserts that claimant's counsel staffed the case inefficiently, resulting in an inflation of the time spent overall in litigating the case. Employer's arguments lack merit.

The administrative law judge acknowledged that services performed by counsel and/or legal assistants that are clerical in nature should be disallowed, as clerical services are considered part of overhead expenses and are figured into the hourly rate. Order Awarding Attorney Fees at 5; *see Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-218 (1986); *McKee v. Director, OWCP*, 6 BLR 1-233 (1983). Additionally, she noted that fees that are demonstrated to be excessive, duplicative or otherwise inappropriate are properly disallowed. *Id.* Once a service has been found to be compensable, the adjudicating officer must decide whether the amount of time expended in performance of the service is excessive or unreasonable. *See Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

With respect to the specific time entries challenged by employer, the administrative law judge disallowed .75 hours of full-time legal assistant time claimed, and .25 hour of part-time legal assistant time claimed, as clerical in nature, but "disagree[d] that the [remaining twenty-one hours of] disputed entries, which relate to client or expert witness contact, scheduling/calendaring, or file analysis [], were clerical or otherwise inappropriate." Order Awarding Attorney Fees at 5. She explained that, while certain of the disputed entries might be considered clerical tasks standing alone, "that does not mean that they would be disallowable if those tasks were merely incidental to professional tasks." *Id.* Moreover, she specifically rejected employer's "challenge to some of the legal assistant charges as duplicative or excessive because Mr. Wolfe was also involved in the same or similar activities." *Id.* Periodic review of the file for deadlines and briefing schedules is a legitimate recurring activity in prolonged cases, and is therefore compensable. *McNulty v. Director, OWCP*, 4 BLR 1-128 (1981). Similarly, work performed by a legal assistant in analyzing the file and calendaring relevant dates constitutes services that are not purely clerical in nature, and may, as here, be found necessary and not excessive or duplicative. *Id.*; *Whitaker*, 9 BLR at 1-127-28; *Bentley*, 522 F.3d at 663, 24 BLR at 2-121. The administrative law judge acted within her discretion in finding that the number of legal professionals involved in this case was not excessive and that, with the exception of the disallowed entries, the services provided constituted compensable legal work that was not excessive or duplicative. Order Awarding Attorney Fees at 5-6; *see Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Abbot*, 13 BLR at 1-16; *Lanning*, 7 BLR at 1-316. As employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused her discretion, we

affirm her approval of 44.25 hours of legal services by Attorney Wolfe; 0.25 hours of legal services by Attorney Belcher; 1.00 hour of legal services for Attorney Delph; 20.00 hours of legal services by Attorney Gilligan; 31.00 hours of services by the full-time legal assistants; and 1.75 hours of services by the part-time legal assistant, as reasonable under the circumstances of this case. Thus, we affirm her award of a total fee of \$20,242.50 for legal services performed while the case was before the Office of Administrative Law Judges, plus costs in the amount of \$2,158.94.⁴

Accordingly, the Order Awarding Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴ In view of our affirmance of the award of attorney fees in this matter, employer's request that, if remand is appropriate, the case be reassigned to a different administrative law judge, is moot.