

BRB No. 00-0412 BLA

JACKIE P. RANDOLPH)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CLINCHFIELD COAL COMPANY)	DATE ISSUED:
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Representative's Fees of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Vernon Williams (Wolfe and Farmer), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Representative's Fees (99-BLA-0552) of Administrative Law Judge Thomas M. Burke on an attorney fee petition filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge awarded claimant's counsel a fee in the amount of \$1,000.00, which reflected 4.75 hours of legal services rendered at \$175.00 per hour by Joseph E. Wolfe, 0.75 hour of legal services rendered at \$150.00 per hour by Vernon M. Williams, 0.25 hour of legal services rendered at \$125.00 per hour by Bobby Belcher, and 0.50 hour of services rendered at \$50.00 per hour by a legal assistant.

In challenging this award, employer contends that the administrative law judge erroneously failed to support his approval of the attorney hourly rates requested, awarded fees for services not performed before the Office of Administrative Law Judges, awarded fees for services performed subsequent to the administrative law judge's order remanding the case back to the district director for the initiation of payment of benefits to claimant, and failed to address adequately the request of fees for duplicative services. Claimant's counsel has not responded to this appeal. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not participate in this appeal.

The award of attorney's fees pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a), is discretionary and will be sustained on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); see also *Jones v. Kaiser Steel Corp.*, 8 BLR 1-339, 1-343 (1985). *Marcum* requires a two-tier analysis; the adjudicating official before whom the service was performed must first determine whether the service was necessary to the proper conduct of the case and, if so, whether the time expended performing the service was excessive or unreasonable. See 20 C.F.R. §725.366(b); *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984).

Employer argues that the administrative law judge erred by failing to support his finding that the requested hourly rates were reasonable. Specifically, although employer does not contest the administrative law judge's reliance on the *1998 Survey of Law Firm Economics* by Altman & Weil, Inc., and his finding that "an attorney practicing law in the South region with 21 or more years of experience earns an average of \$198.00 per hour," Supplemental Decision and Order at 2, it does challenge the administrative law judge's lack of explanation regarding whether any of the attorneys in the case *sub judice* had "21 or more years" of experience. The administrative law judge properly listed several factors routinely considered in determining an appropriate hourly rate of compensation, including the complexity of the issues involved, the level reached in the adjudication process, the quantity of work that was necessary to establish entitlement, the potential risk of loss, the attorney's

¹ Claimant, Jackie P. Randolph, filed his application for benefits on March 26, 1998. Director's Exhibit 1.

² Inasmuch as the administrative law judge's award of fees for services rendered from February 3, 1999 to March 31, 1999 and his award of \$50.00 for 0.50 hour of service by a legal assistant are unchallenged on appeal, we affirm these findings. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); see also *Barr v. Director, OWCP*, 7 BLR 1-367, 1-369 (1984); *Robel v. Director, OWCP*, 7 BLR 1-358 (1984); Supplemental Decision and Order at 2.

legal expertise, and the quality of representation. See 20 C.F.R. §725.366(b); *U.S. Department of Labor v. Triplett*, 494 U.S. 715, 13 BLR 2-364 (1990); *accord Velasquez v. Director, OWCP*, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988); *Esselstein v. Director, OWCP*, 676 F.2d 228, 4 BLR 2-71 (6th Cir. 1982); *Blankenship v. Schweiker*, 67 F.2d 116 (4th Cir. 1982). Next, the administrative law judge noted the average hourly rate in the *1998 Survey of Law Firm Economics*, and, within a rational exercise of his discretion, found that the hourly rates requested were reasonable. Supplemental Decision and Order at 2. Inasmuch as it is within the purview of the administrative law judge to approve an hourly rate that is commensurate with all of the necessary factors enunciated in *Triplett* and Section 725.366(b), we affirm the administrative law judge's determination that the hourly rates of \$175.00 for Joseph E. Wolfe, \$150.00 for Vernon M. Williams, and \$125.00 for Bobby Belcher were reasonable and hold that the administrative law judge did not abuse his discretion in rendering this finding. See *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *Robel v. Director, OWCP*, 7 BLR 1-358 (1984); *Barr v. Director, OWCP*, 7 BLR 1-367 (1984).

Employer contends further that the administrative law judge improperly awarded fees for services performed after the administrative law judge remanded the case back to the district director for the initiation of payment of benefits to claimant because these services were not performed before the Office of Administrative Law Judges (OALJ) since the administrative law judge no longer had jurisdiction over the case. We disagree. On April 1, 1999, the administrative law judge granted employer's Motion for Remand to the district director, in which employer admitted liability and agreed to commence the payment of benefits to claimant. The administrative law judge properly considered employer's objection to the seven entries dated after March 30, 1999 and permissibly found that they were necessary to establish entitlement. Supplemental Decision and Order at 1, 2. Inasmuch as all seven entries involve work performed regarding employer's Motion for Remand, the administrative law judge's Order of Remand, or the consequential processing of the case, the administrative law judge's determination was rational and not an abuse of his discretion. See *Lanning*, 7 BLR at 1-316; *Marcum, supra*.

Employer asserts, assuming that the administrative law judge retained jurisdiction over the fee petition subsequent to March 31, 1999, his award of payment for services after March 30, 1999 was an abuse of his discretion because he failed to apply the proper standard, review the individual entries to determine whether the work in question was necessary to establishing entitlement, and provide a justification for his findings. Contrary to employer's argument, the administrative law judge properly conducted the two-tiered analysis inasmuch as he first, determined whether the services were necessary to the proper conduct of the case and therefore, compensable, and second, determined whether the amount of time expended by the attorney in performance of said services was excessive or unreasonable. See *Lanning*, at 7 BLR 1-316; Supplemental Decision and Order at 2. The Board has held that, in applying this standard, "It is error to disallow time for work performed by counsel solely because it is not helpful in determining the outcome and does not affect the ultimate decision." *Lanning*,

7 BLR at 1-316; *McNulty v. Director, OWCP*, 4 BLR 1-128, 1-132 (1981). The administrative law judge reasonably found that, after reviewing the fee petition entries, claimant's counsel had "sufficiently documented that the services rendered to Claimant, including reviewing the file and conferring with Claimant, were necessary in the pursuit of benefits." See *Lanning, supra*; Supplemental Decision and Order at 2. Furthermore, the administrative law judge properly found that the time spent performing such services was reasonable. *Ibid.* Inasmuch as the administrative law judge provided a sufficient explanation and addressed the employer's objections in a reasonable manner, we reject employer's argument that the administrative law judge should have addressed each individual entry. See *Busbin v. Director, OWCP*, 3 BLR 1-374, 1-375, 376 (1981).

Finally, employer avers that even though the administrative law judge noted employer's objection to some of the entries as duplicative, he failed to discuss these entries in light of employer's objection or to discuss how the entries were not duplicative. The Board has held that a finding that work is duplicative is not tantamount to a finding that the work was not reasonably necessary to establishing claimant's entitlement, for duplicative work may be regarded as reasonably necessary to establish entitlement. *Bradley v. Director, OWCP*, 4 BLR 1-241, 1-244 (1981). Consequently, we affirm the administrative law judge's allowance of these entries inasmuch as the administrative law judge applied the proper standard to these hours and did not abuse his discretion in allowing these entries. See *Bradley, supra*; Supplemental Decision and Order at 1, 2.

Inasmuch as the administrative law judge addressed the specific objections to the fee petition and provided a rational explanation supporting his determination, the administrative law judge's analysis contains an adequate rationale, and accordingly, we affirm the administrative law judge's approval of fees in the amount of \$1,000.00 for legal services rendered before the OALJ.

Accordingly, the Supplemental Decision and Order Awarding Representative's Fees of the administrative law judge is affirmed.

SO ORDERED.

3 Specifically, employer contends that the entries on April 6, 1999 for 0.50 hour is duplicative of the entry on April 13, 1999 for 0.25 hour because the attorney stated that on both occasions he reviewed the administrative law judge's Order of Remand. Employer's Brief at 4.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge