

U.S. Department of Labor

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



BRB No. 18-0233 BLA

ANNIS G. MORRIS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	DATE ISSUED: 12/21/2018
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Proposed Order Supplemental Award - Fee for Legal Services and Reconsideration of Fee for Legal Services of Jessica Hughes, Claims Examiner, United States Department of Labor.

Roger D. Forman (Roger D. Foreman Law Office), Buckeye, West Virginia, for claimant.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel (counsel) appeals the Proposed Order Supplemental Award - Fee for Legal Services and Reconsideration of Fee for Legal Services of Claims Examiner Jessica Hughes (the district director) on an attorney's fee petition filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Counsel filed a complete, itemized fee petition requesting \$14,918.66 for legal services he performed before the district director between January 12, 2013 and November 25, 2014.¹ Director's Exhibit 4. The total fee requested represents 46.25 hours of legal services at an hourly rate of \$275.00 and \$2,199.91 in expenses. *Id.* After considering the regulatory criteria at 20 C.F.R. §725.366(b), in a November 21, 2017 Proposed Order Supplemental Award - Fee for Legal Services (Supplemental Award) the district director found the hourly rate of \$275.00 to be reasonable.² Director's Exhibit 5. The district director disallowed the hours requested for certain services, however, including all 23 hours associated with a January 14, 2014 deposition of claimant and a May 30, 2014 deposition of Dr. Lenkey, who examined claimant on behalf of the Department of Labor. She also disallowed all claimed expenses as undocumented. *Id.* Thus, the district director awarded a total fee of \$5,637.50 representing 20.5 hours of legal services at the rate of \$275.00 per hour.³ *Id.*

Counsel requested reconsideration of the district director's Supplemental Award, challenging most of the disallowed hours, including those associated with the two depositions. Director's Exhibit 6. He also submitted documentation in support of his expenses. *Id.* On reconsideration, the district director declined to increase the requested number of hours for counsel's legal services. Director's Exhibit 7. While she allowed certain expenses in the amount of \$1,713.00, the district director disallowed the \$661.91 in expenses associated with the two depositions. *Id.*

On appeal, counsel contends that the district director erred in disallowing all hours and expenses associated with preparing for and participating in the two depositions.

¹ Claimant's counsel (counsel) initially requested a total fee of \$15,368.66 but subsequently amended his petition after he could not locate the necessary documentation for certain expenses claimed. Claimant's Request for Reconsideration at 1.

² The regulations provide that an approved fee must take into account "the quality of the representation, the qualifications of the representative, the complexity of 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 the fee requested." 20 C.F.R. §725.366(b).

³ The Proposed Order Supplemental Award - Fee for Legal Services (Supplemental Award) does not indicate whether employer filed objections to counsel's attorney fee petition.

Neither employer, nor the Director, Office of Workers' Compensation Programs, has filed a response brief in this appeal.⁴

The amount of an award of an attorney's fee 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. *See Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989). The award must be reasonably commensurate with the necessary work done. 20 C.F.R. §725.366(b).

Counsel argues that the district director erroneously reduced his fee in the amount of \$6,325.00, for all services and expenses claimed on January 13, 2014, January 14, 2014, and May 30, 2014, preparing for and participating in the depositions of claimant and Dr. Lenkey.⁵ The district director disallowed the hours and expenses claimed because the services rendered by counsel "were not reasonably necessary in the representation of the claimant." Director's Exhibit 5 at 2.

The test of whether or not work is necessary is whether an attorney, at the time the work is performed, could reasonably regard the work as necessary to establish entitlement to benefits. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984). Any disallowance of time spent for requested services, or disallowance of associated expenses, as unnecessary, must be supported by sufficient reasoning. *See Lanning*, 7 BLR at 1-316; *Barr v. Director, OWCP*, 7 BLR 1-367, 1-369 (1984) (adjudication officer must provide a rationale for any substantial reduction in the amount requested); *Robel v. Director, OWCP*, 7 BLR 1-358, 1-359 (1984).

⁴ Counsel states that he does not challenge the district director's decision to disallow, as duplicative, his time on March 3, 2014, April 3, 2014, April 15, 2014, October 16, 2014, and November 20, 2014. Nor does counsel challenge the disallowance, as clerical, of his time on March 12, 2014. Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Director's Exhibit 5.

⁵ Counsel requested compensation for 5.5 hours on January 13, 2014 to travel to Wheeling, West Virginia and prepare for claimant's deposition, 8.5 hours on January 14, 2014 to participate in claimant's deposition and travel back to Buckeye, West Virginia, and 9.0 hours on May 30, 2014 to travel to Wheeling, West Virginia to discuss, prepare for, and participate in Dr. Lenkey's deposition. Director's Exhibit 4 at 4-5. In addition, counsel requested \$307.41 for mileage and travel expenses incurred on January 13, 2014 and \$354.50 for mileage and travel expenses incurred on May 30, 2014. *Id.*

Here, in requesting reconsideration of the disallowed hours and expenses counsel explained that claimant's deposition was scheduled by employer before counsel began representing claimant and, at the time, he and claimant had only met once before, for one hour. Director's Exhibit 6 at 3. Counsel asserted that he would have been remiss in his duty as claimant's attorney if he allowed claimant to give testimony crucial to his case without adequate preparation, or if he was not present at the deposition to provide claimant advice as needed. *Id.* Counsel similarly asserted that it was absolutely necessary to participate in Dr. Lenkey's deposition in order to protect his client's interests. *Id.*

We agree. Preparing for, traveling to, and participating in depositions are essential elements of basic client representation, and counsel is entitled to compensation and the reimbursement of expenses incurred for those services, to include mileage costs at the customarily allowed rate. *See, e.g., Branham v. Eastern Assoc. Coal Corp.*, 19 BLR 1-1, 1-4 (1994) (mileage costs and travel expenses were properly awarded, in addition fees for participating in depositions, because those costs are necessary in establishing entitlement). We therefore reverse the district director's disallowance of all services and expenses claimed on January 13, 2014, January 14, 2014, and May 30, 2014, for preparing for and participating in the depositions of claimant and Dr. Lenkey.

Accordingly, the district director's Proposed Order Supplemental Award - Fee for Legal Services and Reconsideration of Fee for Legal Services are affirmed in part and reversed in part, consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge