

BRB No. 98-1207 BLA

ANNA FRAME)	
(Widow of WINFRED FRAME))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
SEWELL COAL COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant's counsel appeals the Decision and Order on Remand (96-BLA-1657) of Administrative Law Judge Vivian Schreter-Murray (the administrative law judge) awarding attorney's fees on a claim 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). In its prior decision, the Board vacated the administrative law judge's finding that claimant's counsel is not entitled to attorney's fees. *Frame v. Sewell Coal Co.*, BRB No. 97-0848 BLA (Mar. 13, 1988)(unpub.). The Board held that since claimant received an economic benefit by reaching a settlement with

employer for an increase in the amount of the offset of benefits calculated by the district director, claimant's counsel was entitled to attorney's fees. *Id.* The Board, therefore, remanded the case to the administrative law judge to determine an appropriate award for attorney's fees to be paid by employer. On remand, the administrative law judge awarded \$112.50 in attorney's fees. Claimant's counsel appeals, arguing that the administrative law judge abused her discretion and requesting that the Board order employer to pay \$487.50 in attorney's fees. Employer responds, urging the Board to affirm the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The award of an attorney's fee is discretionary and will be upheld on appeal unless it is shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

In her Decision and Order on Remand, the administrative law judge noted her disagreement with the Board's instruction that she determine an appropriate award of attorney's fees. Decision and Order at 2. The administrative law judge noted that claimant's counsel initially submitted a request for compensation for 3.25 hours of work in the amount of \$562.50, which, she found, reflects an hourly rate of \$173.08, although the administrative law judge noted the petition indicated that claimant's counsel charges \$150.00 per hour for office work and \$200.00 per hour for hearings. *Id.* The administrative law judge held that there is neither a basis or justification for an hourly rate of \$173.08, that claimant's counsel never appeared before her, and that his fee petition indicates that his "negotiations in this matter, if indeed he did negotiate, did not exceed 15 minutes, by his own estimate." *Id.*

Additionally, the administrative law judge, citing the attorney's fee decision of the United States Court of Appeals for the Fourth Circuit in *Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir.1992), noted that claimant's counsel charged in no less than one-quarter hour increments, and the administrative law judge found that "as to the majority of services described [one quarter hour] exceeds any reasonable estimate of the time required for the particular task and suggests that all services took the same minimal time as the majority of them reasonably require." *Id.* After examining the itemized fee petition, the administrative law judge determined an appropriate fee of \$195.00 for 1 hour and 30 minutes of services, if an hourly rate of \$150.00 were found applicable. Decision and Order on Remand at 3. Nonetheless, the administrative law judge concluded that, because claimant's counsel in his brief on prior appeal, requested the Board to reverse the administrative law judge's denial of attorney's fees and award a fee in

the amount of \$112.50, she would award that fee of \$112.50.

Claimant's counsel concedes that he erroneously made reference to the \$112.50 fee he requested for work performed before the *district director*, rather than the fee requested for work before the administrative law judge in his brief before the Board, but contends that the administrative law judge's decision is erroneous and should be set aside. We agree. The Board, in its prior decision, noted that claimant's counsel requested compensation for 3.25 hours of legal services for work performed before the Office of Administrative Law Judges at hourly rates of \$150.00 and \$200.00, amounting to \$562.50. *Frame, supra* at 2, 3. The record contains itemized fee petitions for services performed before the district director in the amount of \$112.50, and for services performed before the administrative law judge in the amount of \$562.50. Despite claimant's counsel's error in referring to the \$112.50 fee request for work before the district director, the record is clear that claimant's counsel requested the administrative law judge to award a fee of \$562.50. As noted *supra*, the administrative law judge acknowledged this fact in her decision. Decision and Order on Remand at 2. Thus, as set forth, *infra*, we modify the administrative law judge's award of attorney's fees.

Claimant's counsel argues that the administrative law judge, with no factual basis, arbitrarily reduced the fee and "speculated" that, because time is claimed to the nearest quarter-hour, the time requested was excessive. We agree. The administrative law judge's reliance on *Broyles, supra*, to support her opinion is misplaced, inasmuch as the United States Court of Appeals for the Fourth Circuit did not dispose of the issue at hand in *Broyles*. Furthermore, we hold that the administrative law judge abused her discretion in reducing or disallowing ten of the thirteen items claimed by claimant's counsel, Decision and Order on Remand at 2, 3, which represents more than half of the fees requested, and amounts to a substantial reduction in counsel's fee request. Inasmuch as counsel's fee request reasonably recorded time claimed in quarter hour increments, *see generally Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); *Jarrell v. Newport News Shipbuilding and Dry Dock Co.*, 14 BRBS 883 (1983), we modify the administrative law judge's award of attorney's fees to approve the fee request for work performed before the administrative law judge in full.

Accordingly, we modify the administrative law judge's award of attorney's fees to reflect that employer is liable to claimant's counsel for \$487.50 for 3.25 hours at

an hourly rate of \$150.00, for services performed before the Office of Administrative Law Judges from October 29, 1996 through December 2, 1996. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge