U.S. Department of Labor

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

BRB Nos. 20-0560 BLA
and 21-0163 BLA

KERMIT PIPHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN COAL COMPANY, LLC c/o ARCH COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 02/24/2022
UNDERWRITER SAFETY AND CLAIMS	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Attorney Fee Order of Stewart F. Alford, Administrative Law Judge, United States Department of Labor.

Scott A. White (White & Risse, L.L.C.), Arnold, Missouri, for Employer and its Carrier.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Stewart F. Alford's Decision and Order Awarding Benefits (2019-BLA-05009) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on August 3, 2015. Employer also appeals the ALJ's Attorney Fee Order granting Claimant's counsel a fee and expenses.

The ALJ credited Claimant with thirty-one years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. He thus determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution.[2] It further asserts the removal provisions applicable to the ALJ rendered his appointment unconstitutional. Employer also challenges his findings that it did not rebut

[1] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

the Section 411(c)(4) presumption. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a response asserting the ALJ had authority to decide the case and properly evaluated the medical opinions in light of the preamble to the 2001 revised regulations, but declined to address Employer's remaining challenges. Employer filed a reply brief reiterating its arguments.[3]

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause Challenge

Employer requests the Board vacate the Decision and Order and remand this case to be heard by a constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S.   , 138 S. Ct. 2044 (2018).[5] Employer's Brief at 12-14; Employer's Reply Brief at 1-2. It notes the United States Supreme Court held in *Lucia* that Securities and Exchange Commission ALJs were not properly appointed in accordance with the Appointments Clause of the

[3] We affirm, as unchallenged on appeal, the ALJ's findings of thirty-one years of underground coal mine employment, that Claimant has a totally disabling respiratory or pulmonary impairment and invoked the Section 411(c)(4) presumption, and that Claimant smoked over forty-two years. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 26.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, as Claimant performed his coal mine work in Colorado. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 19 n.8; Hearing Transcript at 22.

[5] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to the Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S.   , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

Constitution. Employer's Brief at 12-13. It argues the ALJ in this case similarly was not properly appointed.

The Director argues the Secretary of Labor's (Secretary's) appointment of ALJ Alford[6] conforms to the Appointments Clause and is presumptively valid, and Employer has failed to demonstrate otherwise. Director's Brief at 3-4. We agree with the Director's argument.

The Secretary specifically appointed Judge Alford as an ALJ at the Department of Labor (DOL) to "execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office." Secretary's September 12, 2018 Letter to ALJ Alford (citing U.S. Cons. Art. II, § 2, cl. 2; 5 U.S.C. §3105); Director's Brief at 3. Congress authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 3 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016) (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)). Employer has failed to demonstrate that the Secretary's action was not open or unequivocal, or otherwise explain how it was improper. Thus Employer has failed to meet its burden to overcome the presumption of regularity. *Butler*, 244 F.3d at 1340.

Thus we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

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[6] The Secretary of Labor issued a letter to the ALJ on September 12, 2018, stating:

> Pursuant to my authority as Secretary of Labor, I hereby appoint you as an [ALJ] in the U.S. Department of Labor, authorized to execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office. U.S. Cons. Art. II, § 2, cl. 2; 5 U.S.C. §3105. This action is effective upon transfer to the U.S. Department of Labor.

Secretary's September 12, 2018 Letter to ALJ Alford.

Employer also challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 15-18; Employer's Reply Brief at 3-4. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* It also relies on the Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020). *Id.*

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [ALJs]" who, "unlike members of the [PCAOB] . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[7] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970, 1988 (2021), the Supreme Court vacated the Federal Circuit's judgment. The Court in *Arthrex* explained "the *unreviewable authority* wielded by [Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." 141 S. Ct. at 1985 (emphasis

[7] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Although Employer generally summarizes *Free Enterprise Fund* and *Seila Law*, it has not explained how or why these legal authorities or *Arthrex* should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (a reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional either facially or as applied. *Pehringer*, 8 F.4th at 1137-38.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[8] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in

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[8] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[9]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 155 n.8 (2015).

Employer relies on the opinions of Drs. Farney and Tuteur.[10] Decision and Order at 28-31. Dr. Farney diagnosed Claimant with moderately severe chronic obstructive pulmonary disease (COPD) with a mixed phenotype (chronic obstructive bronchitis, emphysema, and some manifestations of reversible airway disease consistent with asthmatic bronchitis) attributable to smoking and not coal mine dust exposure. Employer's Exhibits 6 at 19; 11 at 5, 35. Dr. Tuteur diagnosed Claimant with disabling COPD due to smoking and not coal mine dust exposure. Director's Exhibit 22 at 3. The ALJ found their opinions not well-reasoned. Decision and Order at 29-31.

Employer contends the ALJ erred in relying on the preamble to the 2001 revised regulations in evaluating the credibility of its medical experts. Employer's Brief at 18-23; Employer's Reply Brief at 5-7. It alleges the ALJ erroneously applied the preamble as a legislative rule, though it was not subject to notice and comment. Employer's Brief at 23. In addition, Employer contends the ALJ did not give valid reasons for finding its evidence insufficient to disprove legal pneumoconiosis. *Id.* at 23-31. We disagree.

An ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1225 (10th Cir. 2018); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1127 (9th Cir. 2014); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Harman*

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[9] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 27-28.

[10] Dr. Rose diagnosed Claimant with legal pneumoconiosis. Director's Exhibits 17 at 18, 23; 28 at 5; Claimant's Exhibit 3 at 5. Her opinion does not aid Employer on rebuttal. Therefore, we need not address Employer's contention that the ALJ erred in crediting her opinion that Claimant has legal pneumoconiosis. Employer's Brief at 19-20, 23-26, 28, 30.

Mining Co. v. Director, OWCP [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). The ALJ accurately characterized the scientific evidence that the DOL relied upon when it revised the definition of legal pneumoconiosis to include obstructive impairments arising out of coal mine employment and he permissibly evaluated the medical opinions of record in light of the DOL's interpretation of those studies. *See McLean*, 881 F.3d at 1225; Decision and Order at 29-31, citing 65 Fed. Reg. 79,920, 79,938-43 (Dec. 20, 2000).

Dr. Farney opined Claimant's obstructive lung disease is due solely to smoking because it is more toxic than coal mine dust exposure, Claimant smoked longer than he worked in the coal mines, and the prevalence of COPD is consistently higher in smokers. Employer's Exhibits 6 at 19-21; 11 at 15, 78. The ALJ permissibly found Dr. Farney's opinion unpersuasive because he acknowledged that the severity of Claimant's COPD is rarely seen in non-mining smokers. *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 29; Employer's Exhibits 6 at 20; 11 at 78-84. The ALJ also permissibly found Dr. Farney's rationale that smoking is generally more toxic than coal mine dust exposure fails to adequately account for the possible additive effects of both factors in Claimant's respiratory impairment. 65 Fed. Reg. at 79,939-41; *see McLean*, 881 F.3d at 1224-25; *Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017); Decision and Order at 29; Director's Exhibit 21; Employer's Exhibits 6, 11.

Additionally, the ALJ correctly observed that Dr. Farney provided no support for his assertion that the medical studies in the preamble relating COPD to coal mine dust exposure were flawed.[11] *See Opp*, 746 F.3d at 1122-23; *Pickup*, 100 F.3d at 873; *Hansen*,

[11] The ALJ noted Dr. Rose's reliance on recent medical studies by Drs. Cohen, Gandhi, and Sood regarding the prevalence of COPD in miners applying for federal black lung benefits. Decision and Order at 29. Dr. Farney acknowledged that some medical studies relate coal mine dust exposure to COPD and some suggest the effect is similar to that of tobacco smoking, pointing to the Marine, Attfield & Hodous, and Seixas studies. Employer's Exhibits 6 at 21-22; 11 at 88-89, 92. Dr. Farney criticized those studies but testified by deposition that he has not written any papers critical of the above studies and was not familiar with any such papers; he also said he was not familiar with Drs. Sood's and Cohen's papers on the prevalence of obstructive lung disease among coal miners. Employer's Exhibit 11 at 88-89, 94-95. Dr. Farney found it "irrelevant" that the National

984 F.2d at 370; Decision and Order at 28-29; Employer's Exhibits 6 at 21-22, 31; 11 at 16, 88-89, 91-92, 94-95.

Dr. Tuteur acknowledged the clinical picture of COPD is similar whether the cause is smoking or coal mine dust exposure, yet he attributed Claimant's COPD to smoking based on statistics showing non-smoking miners develop COPD one percent of the time whereas non-mining smokers develop COPD about twenty percent of the time. Director's Exhibit 22 at 3; *see also* Employer's Exhibit 10 at 14, 28. The ALJ permissibly rejected Dr. Tuteur's opinion because it fails to explain why Claimant's coal mine dust exposure could not be a contributing or aggravating factor in his COPD, in view of DOL's recognition that the effects of smoking and coal mine dust exposure may be additive in causing COPD. 65 Fed. Reg. at 79,939-41; *McLean*, 881 F.3d at 1224-25; *Estate of Blackburn*, 857 F.3d at 828-29; Decision and Order at 31.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ adequately explained his credibility findings in accordance with the APA,[12] we affirm his determination that Employer did not disprove Claimant has legal pneumoconiosis. *See Pickup*, 100 F.3d at 873*; Hansen*, 984 F.2d at 368; Decision and Order at 29-31. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ found Drs. Farney's and Tuteur's opinions lacked credibility on disability causation because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *See McLean*, 881 F.3d at 1226; *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1346 (10th Cir. 2014); *Big Branch*

Institute for Occupational Safety & Health (NIOSH) endorsed and accepted the Marine, Attfield & Hodous, and Seixas studies. *Id.* at 91.

[12] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Res., Inc. v. Ogle, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 32. Employer raises no specific allegations of error regarding the ALJ's findings other than its assertion that Claimant does not have legal pneumoconiosis, which we have rejected. Thus, we affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 32. We therefore affirm the ALJ's finding Employer did not rebut the Section 411(c)(4) presumption and the award of benefits.

Attorney Fee Order

On September 18, 2020, counsel[13] filed a complete, itemized fee petition requesting $33,242.75 for legal services performed, and expenses incurred, before the Office of Administrative Law Judges from September 18, 2018 to September 9, 2020. The total fee requested represents: $30,600 for 102 hours of legal services by Attorney Thomas Johnson at an hourly rate of $300; $680 for 3.4 hours of legal services by Attorney Robert Seer at an hourly rate of $200; and expenses in the amount of $1,962.75. ALJ Fee Request at 1-2, 11-16.

Employer objected to Attorney Johnson's hourly rate, and certain services and expenses. Employer's Objections at 2-3, 4-6. The ALJ awarded the requested hourly rates and found the time charged compensable, but he disallowed certain expenses. The ALJ awarded costs in the amount of $1,251.91.[14]

On appeal, Employer contends the ALJ erred in approving Attorney Johnson's hourly rate of $300 and in finding all of Claimant's counsel's legal services compensable. Neither Claimant nor the Director responded to Employer's appeal of the ALJ's fee award.[15]

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[13] Mr. Seer filed the fee petition on behalf of himself and Mr. Johnson, who died in April 2020. Attorney Fee Order at 1.

[14] The ALJ denied counsel's request for additional fees for time spent responding to Employer's objections. Attorney Fee Order at 8 n.10.

[15] We affirm, as unchallenged on appeal, the ALJ's award of $680 for 3.4 hours of legal services by Attorney Seer at the hourly rate of $200, and $1,251.91 in expenses. *See Skrack*, 6 BLR at 1-711; Attorney Fee Order at 6 n.8; Employer's Brief at 31, 35.

The amount of an attorney's fee award is discretionary, and the Board will uphold an award on appeal unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 661 (6th Cir. 2008); *Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998) (en banc). The regulations provide that an approved fee must account for "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).

Hourly Rates

Employer first argues the ALJ erred in approving an hourly rate of $300 for Attorney Johnson. Employer's Brief at 31-34. We disagree.

Under fee-shifting statutes, the United States Supreme Court has held that courts must determine the number of hours reasonably expended in preparing and litigating the case, and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *Bentley*, 522 F.3d at 663.

An attorney's reasonable hourly rate is "calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). "[T]he rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record" comprises the market rate. *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); *see also Bentley*, 522 F.3d at 663. The fee applicant has the burden to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Gonter v. Hunt Valve Co.*, 510F.3d 610, 617 (6th Cir. 2007).

Employer contends Claimant's counsel failed to support the hourly rates requested for Attorney Johnson with market evidence, i.e., what fee-paying clients pay counsel or similarly-qualified attorneys charge by the hour in comparable cases, and that a "description of past fee awards does not satisfy a [claimant's counsel's] burden." Employer's Brief at 32-34. It further asserts the ALJ's reliance on counsel's past fee awards contravenes the APA because he failed to explain why the awards support an hourly rate of $300.00 for Attorney Johnson.

Contrary to Employer's argument, evidence of fees received in other black lung cases may be an appropriate consideration in establishing a market rate. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010); *Bentley*, 522 F.3d at 664. Noting Mr. Johnson was "an experienced black lung attorney" and a "well-respected attorney with significant black lung experience" who had "practiced law for over forty years," the ALJ considered the fee awards from other ALJs as market rate evidence and found they support an hourly rate of $300.[16] Attorney Fee Order at 5-6. The ALJ's decision complies with the APA as he stated the evidentiary basis for his conclusion, and Employer has failed to establish he abused his discretion. *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989). Therefore, we affirm the ALJ's approval of Attorney Johnson's hourly rate of $300 for services performed in this case. *See Bentley*, 522 F.3d at 666.

Billable Hours

Regarding the compensability of the legal services performed, Employer challenges the use of quarter-hour billing. Employer's Brief at 33-34. Contrary to Employer's contention, an ALJ may permissibly award a fee based on quarter-hour minimum increments. *See Gosnell*, 724 F.3d at 576; *Bentley*, 522 F.3d at 666; Attorney Fee Order at 6-7. But the ALJ correctly noted here that he "need not even address this issue" because Attorney Johnson billed in increments of six and twelve minutes and not quarter hours. *See Bentley*, 522 F.3d at 666-67; Attorney Fee Order at 7; ALJ Fee Request at 7 n.3 (unpaginated); Exhibit A to Fee Request at 4-6.

Employer also challenges counsel's use of "block billing" – when an attorney bills for large blocks of time spent on a case instead of the number of hours spent on a specific task. Attorney Fee Order at 7; Employer's Brief at 33-34. The ALJ reasonably found

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[16] The ALJ observed counsel cited five ALJ orders awarding Attorney Johnson $300 an hour for his work in black lung cases. *See* Attorney Fee Order at 6; ALJ Fee Request at 8-9 (unpaginated) (citing *Jeskey v. McElroy Coal Co.*, Case No. 2017-BLA-05828 (Attorney Fee Order dated June 18, 2019) (Merck, ALJ); *Hanley v. Central Ohio Coal*, Case No. 2017-BLA-05670 (Attorney Fee Order dated Nov. 5, 2018) (Sellers, ALJ); *Bailey v. Director, OWCP*, Case Nos. 2017-BLA-05786, 2017-BLA-05787 (Decision and Order Awarding Attorney's Fees dated Aug. 13, 2018) (Henley, Chief ALJ); *Levan v. Knight Hawk Coal LLC*, Case No. 2015-BLA-05564 (ALJ's Supplemental Decision and Order dated Aug.7, 2018) (Bland, ALJ)). Counsel also cited a Board decision awarding Attorney Johnson an hourly rate of $300 over the employer's objections. *See Vance v. Lee Sartin Trucking Co.*, BRB No. 19-0127 BLA (June 9, 2020) (Order) (unpub.); Fee Request at 9 (unpaginated).

counsel's fee petition did not reflect "block billing" to the extent that the records show the time Attorney Johnson billed for specific tasks and the ALJ was able to "scrutinize the reasonableness of [his] time." Attorney Fee Order at 7-8.

Employer also contends the ALJ erred in finding 34.5 hours counsel billed for post-hearing briefing to be reasonable. Employer's Brief at 34-35. We disagree. The record shows counsel filed a post-hearing brief and a corrected post-hearing brief detailing why Claimant was totally disabled, entitled to the Section 411(c)(4) presumption and why Employer did not rebut it. Counsel also filed a reply to Employer's post-hearing brief, clarifying the determinative issue on rebuttal is whether Claimant has legal pneumoconiosis and evaluating all of the medical opinions. Because we discern no abuse of discretion, we affirm the ALJ's allowance of 34.5 hours for time spent on post-hearing briefing, and his finding the time Attorney Johnson spent "preparing the closing brief, conducting legal research, and preparing the reply brief" was reasonable and compensable. Attorney Fee Order at 8.

Finally, Employer argues the fee should be reduced because Claimant's counsel could have utilized a legal assistant and thereby limited the fee amount. Employer's Brief at 34. Before the ALJ, counsel explained that Attorney Johnson's paralegal was initially unavailable to assist with this case because she was assigned mostly to non-black lung matters before her death in 2018 or 2019. Counsel's Response to Employer's Objections at 9. Having not hired a new paralegal, Attorney Johnson was unable to delegate any work. Because Employer has not explained what services were improperly billed by an attorney, as opposed to a paralegal or legal assistant, we reject Employer's contention of error. *See Daggett v. Kimmelman*, 811 F.2d 793, 799 (3d Cir. 1987) (vacating the district court's reduction in the number of hours because, in the absence of the identification of specific "tasks and the hours devoted to them that should have been performed by . . . paralegals," it could not "say on this record that the staffing of this case was top-heavy"); Attorney Fee Order at 8.

The proper inquiry in determining a compensable fee is whether the work and time that counsel requested were reasonable and necessary to establish the claimant's entitlement to benefits *at the time the work was performed. See Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999) (standard test for the ALJ to consider in determining whether the services an attorney performs were necessary is whether the attorney, at the time the work was performed, could reasonably regard the work as necessary to establish entitlement). The question is not whether it would have been cheaper for counsel to delegate his work to paralegals or legal assistants. *See, e.g., Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008) ("The court may permissibly look to the hourly rates charged by comparable attorneys for similar work, but may not attempt to impose its own

judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests.”).

Because Employer has not shown the ALJ abused his discretion, we affirm the attorney’s fee award in all respects. *See Bentley*, 522 F.3d at 666-67; *Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986).

Accordingly, we affirm the ALJ’s Decision and Order Awarding Benefits and Attorney Fee Order.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge