



BRB No. 23-0199 BLA

BILLY G. NELSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PEABODY COAL CORPORATION)	DATE ISSUED: 07/08/2024
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Awarding Attorney Fees and Expenses of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Eirik Cheverud (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer L. Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel (Counsel) appeals Administrative Law Judge (ALJ) Steven D. Bell's Order Awarding Attorney Fees and Expenses (Attorney Fee Order) (2020-BLA-05476), issued in connection with the successful prosecution of a claim filed on October 10, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

On November 29, 2022, the ALJ issued a Decision and Order Awarding Benefits.¹ On January 20, 2023, Counsel filed an itemized fee petition requesting \$24,726.50 for attorney fees and expenses, representing \$9,680.00 for 35.2 hours of attorney services by Austin P. Vowels at an hourly rate of \$275.00; \$247.50 for 0.9 hours of attorney services by M. Alexander Russell at an hourly rate of \$275.00; \$8,052.00 for 48.8 hours of paralegal services by Desiré Smith at an hourly rate of \$165.00; \$6,732.00 for 40.8 hours of legal assistant services by Sarah Agnew at an hourly rate of \$165.00; and \$15.00 for 0.2 hours of legal assistant services by Jolie DiVietro at an hourly rate of \$75.00. Counsel also requested \$1,575.00 for expenses. Motion for Attorney’s Fees and Expenses for Work Performed Before the Administrative Law Judge (Fee Petition) at 2-3, 19-29. Neither Employer nor the Director submitted a substantive response to the Fee Petition.²

In his February 15, 2023 Attorney Fee Order, the ALJ found all time entries compensable but reduced Mr. Vowel’s hourly rate to \$250.00, Mr. Russell’s to \$150.00, Ms. Smith’s to \$150.00, and Ms. Agnew’s to \$110.00. Thus, the ALJ awarded \$20,758.00 in attorney’s fees and the requested \$1,575.00 in expenses.³ *Id.*

¹ The Director, Office of Workers’ Compensation Programs (the Director), appealed, and Employer cross-appealed, the ALJ’s Decision and Order. Claimant separately appealed the Fee Order. The Benefits Review Board assigned the Director’s appeal case number BRB No. 23-0089 BLA, Employer’s cross-appeal case number BRB No. 23-0089 BLA-A, and Claimant’s appeal BRB No. 23-0199 BLA; it consolidated those appeals for purposes of decision only. *Nelson v. Peabody Coal Co.*, BRB Nos. 23-0089 BLA, 23-0089 BLA-A, and 23-0199 BLA (Apr. 12, 2023) (Order) (unpub.). Pursuant to the requests of the Director and Employer, the Board dismissed the appeals in BRB Nos. 23-0089 BLA and 23-0089 BLA-A on February 2, 2024. *See Nelson v. Peabody Coal Co.*, BRB Nos. 23-0089 BLA and 23-0089 BLA-A (Feb. 2, 2024) (Order) (unpub.). Consequently, we now address only Counsel’s appeal of the ALJ’s fee award.

² The ALJ dismissed Employer as the responsible operator, and the Director had appealed the liability issue to the Board. Employer thus contended it did not have standing to respond to the Fee Petition but would have standing should the Board vacate the ALJ’s responsible operator findings, and thus requested the ALJ delay resolution of the fee petition issue until after appeals had been resolved. Employer’s Response to Claimant’s Attorney Fee Motion (Feb. 15, 2013); Employer’s Motion to Place Attorney Fee Issue in Abeyance (Jan 25, 2023).

³ The ALJ further denied Employer’s Motion to Place Attorney Fee Issue in Abeyance. Attorney Fee Order at 1.

On appeal, Counsel contends the ALJ erred in reducing Mr. Vowels's, Mr. Russel's, Ms. Smith's, and Ms. Agnew's hourly rates.⁴ Employer did not file a response brief. The Director responds urging affirmance of the ALJ's Attorney Fee Order.

The amount of an attorney's fee award is discretionary. The Board will uphold an ALJ's award unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.⁵ 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).

When attorneys prevail on behalf of a claimant under the Act, they are entitled to a "reasonable attorney's fee" paid by the responsible party. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a) of the Longshore and Harbor Workers' Compensation Act. 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).

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 a 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.

A reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791

⁴ We affirm, as unchallenged on appeal, the ALJ's approval of Legal Assistant DiVietro's requested hourly rate of \$75.00; his approval of all the requested attorney time and paralegal/legal assistant time as compensable; and his granting of expenses in the amount of \$1,575.00. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Attorney Fee Order at 3.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as Claimant performed his coal mine employment in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 6-10.

(6th Cir. 2004); *see 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.*, 510 F.3d 610, 617 (6th Cir. 2007). 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.

Hourly Rate of Attorney Austin P. Vowels

Counsel requested an hourly rate of \$275.00 for his work in this case, noting he had routinely requested \$250.00 per hour for the years prior to 2022, but that he was raising his hourly rate to \$275.00 per hour after ten years of litigating black lung cases and to account for inflation. Fee Petition at 4-6. He cited three cases in which he was awarded an hourly rate of \$275.00 in 2022. *Id.* at 5. Counsel further cited market research as well as the Laffey Matrix, a fee structure applicable to the Washington, D.C. region, with Counsel’s calculation as to what a comparable hourly rate would be in his locality in Kentucky.⁶ *Id.* at 7-8.

The ALJ noted this “was a complicated Black Lung case” with “issues involving the nature and length of Claimant’s employment.” Attorney Fee Order at 2. The ALJ did not, however, discuss Counsel’s arguments or the evidence he cited to support his requested fee. Rather, relying on an unpublished 2019 Board decision which affirmed as unchallenged an ALJ’s award of an hourly rate of \$250.00 for Counsel, the ALJ awarded Counsel an hourly rate of \$250.00 in this case. *Id.* (citing *Dennis v. Mountain Edge Mining, Inc.*, BRB Nos. 18-0450 BLA and 18-0450 BLA-A (Mar. 25, 2019) (unpub.)).

We agree with Counsel that the ALJ did not adequately address his contentions that he is entitled to an hourly rate of \$275.00 based on the length of his black lung litigation experience, the cited cases in which he was awarded an hourly rate of \$275.00, and the effects of inflation.⁷ Claimant’s Brief at 9-12. The ALJ has discretion in awarding fees.

⁶ *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 229 n.11 (4th Cir. 2009) (“The Laffey Matrix . . . is a fee schedule purporting to provide hourly rates for attorneys of a broad spectrum of practice experience and expertise in Washington, D.C.”) (citations omitted).

⁷ Counsel asserts the Laffey Matrix provides further support for ten years of practice being an “appropriate point for rates to increase.” Claimant’s Brief at 10; *see also* Fee Petition at 7-8.

See Missouri v. Jenkins, 491 U.S. 274, 282-84 (1989); *Anderson v. Director, OWCP*, 91 F.3d 1322, 1324-25 (9th Cir. 1996); *Nelson v. Stevedoring Services of America*, 29 BRB 90, 97 (1995). However, the Administrative Procedure Act (APA)⁸ requires the ALJ to explain the bases for his determinations. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Consequently, the ALJ erred by not addressing Counsel’s requested hourly market rate of \$275.00 and the reasons Counsel set forth supporting it. *See Gosnell*, 724 F.3d at 572-73; *Cox*, 602 F.3d at 289; *Bentley*, 522 F.3d at 664-65; *Wojtowicz*, 12 BLR at 1-165; Attorney Fee Order at 2. He also did not explain why another ALJ’s award of a \$250.00 hourly rate to Mr. Vowels for work performed in 2017 and early 2018 establishes the market rate in this case for work Counsel performed between late 2020 and early 2023.

Thus, we vacate the ALJ’s award of an hourly rate of \$250.00 for Mr. Vowels’s services and remand this case for the ALJ to consider Counsel’s arguments and evidence and to explain his determination regarding what constitutes a reasonable hourly rate for Mr. Vowels in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Hourly Rate of Attorney M. Alexander Russell

In support of his fee petition, Counsel asserted Mr. Russell has been licensed to practice law since 2016 and customarily bills between \$175.00 and \$275.00 per hour. Fee Petition at 10-12. Counsel requested an hourly rate of \$275.00 because of Mr. Russell’s increased experience and history of receiving similar rates. *Id.* at 12.

The ALJ recognized Mr. Russell has substantially less experience than Attorney Vowels. Attorney Fee order at 2. He further stated he had awarded an hourly rate of \$125.00 to \$150.00 to other attorneys with comparable experience. *Id.* He thus awarded Mr. Russell an hourly rate of \$150.00. *Id.*

We agree with Counsel’s argument that the ALJ arbitrarily reduced Mr. Russell’s requested hourly rate without adequate explanation. In support of his request, Counsel identified Mr. Russell’s customary hourly rate as between \$175.00 and \$275.00 and identified previous cases where he had been awarded \$200.00 and \$250.00 per hour. While the ALJ permissibly found Mr. Russell was not entitled to the same hourly rate as Attorney Vowels due to his having less experience than Mr. Vowels in black lung claims, the ALJ did not explain how he determined \$150 per hour was appropriate as the market rate, aside

⁸ The APA requires every adjudicatory decision include “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.” 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

from his vague and uncited reference to fees he has awarded to other unnamed attorneys with allegedly similar experience.⁹ *See Geier*, 372 F.3d at 791; *see also Peabody Coal Co. v. McCandless*, 255 F.3d 465, 470 (7th Cir. 2001) (ALJ must award an hourly rate that is market-based and not “a number plucked from a hat”).

Thus, we vacate the ALJ’s award of an hourly rate of \$150.00 for Mr. Russell and remand this case to the ALJ to determine a reasonable, market-based hourly rate for his services, with an adequate explanation for that determination. *See Wojtowicz*, 12 BLR at 1-165.

Paralegal Desiré Smith

Counsel requested an hourly rate of \$165.00 for Ms. Smith’s paralegal services. Fee Petition at 2, 22. In his fee petition, Counsel specified that, as of 2020, Ms. Smith was one of eighteen paralegals from Kentucky certified by the National Association of Legal Assistants (NALA) and had accepted an appointment to its Continuing Education Committee. *Id.* at 13-14. Counsel also cited cases in which Ms. Smith was awarded an hourly rate of \$150.00, an unopposed (and therefore not precedential) award by the Board of a different paralegal’s hourly rate of \$200.00 in a Longshore Act case, an award of an hourly rate of \$165.00 to Ms. Smith by the United States Court of Appeals for the Tenth Circuit, and the 2018 and 2020 NALA Compensation and Utilization Survey and Study showing a national average billing for paralegals of \$61.00 to \$215.00 an hour. *Id.* at 14-16. Counsel requested a higher rate for Ms. Smith based on inflation as well as her education, experience, and certification. *Id.* at 15.

The ALJ acknowledged that Ms. Smith has an excellent background, that she has been awarded an hourly rate of \$150.00 in some prior cases, and that he had previously awarded her \$125.00 per hour for her work. Attorney Fee Order at 2. Stating that, in this case, she “performed tasks typical of an experienced paralegal,” the ALJ awarded Ms. Smith an hourly rate of \$150.00.

We agree with Counsel’s argument that the ALJ arbitrarily reduced Ms. Smith’s requested hourly rate without adequate explanation. Claimant’s Brief at 21. While the ALJ vaguely noted cases in which Ms. Smith had been awarded between \$125.00 and \$150.00 per hour, Attorney Fee Order at 2, he did not address Counsel’s arguments or citations as to the requested rate of \$165.00. Consequently, the ALJ failed to adequately explain the basis upon which he determined the rate. *See Gosnell*, 724 F.3d at 572-73;

⁹ Nor did the ALJ explain why Attorney Russell is entitled to the same hourly rate for his legal services (\$150) as Ms. Smith is for her paralegal services (also \$150).

Cox, 602 F.3d at 289; *Bentley*, 522 F.3d at 664-65; *Wojtowicz*, 12 BLR at 1-165. We therefore vacate his determination.

Legal Assistant Agnew

Finally, Counsel requested an hourly rate of \$165.00 for Ms. Agnew's services. In support of his fee petition, he noted Ms. Agnew was an administrative assistant for twelve years before joining Counsel's firm in January 2019, where she works on black lung claims and customarily bills between \$75.00 and \$165.00 per hour. Fee Petition at 17-19. Counsel provided copies of ALJ attorney fee decisions awarding Ms. Agnew \$125.00 and \$150.00 per hour, and a Tenth Circuit order awarding her \$165.00 per hour. *Id.* at 18-19.¹⁰ Counsel requested the higher rate on the basis that Ms. Agnew has become more experienced and has specialized training, and because of inflation. *Id.* at 19.

The ALJ described Ms. Agnew's qualifications as "excellent" but noted her requested rate of \$165.00 "is well above what is paid to office staff in other cases," and instead summarily awarded her an hourly rate of \$110. Attorney Fee Order at 3.

Because the ALJ provided no explanation for how he arrived at the reduced hourly rate for Ms. Agnew, his determination fails to satisfy the APA. *See Wojtowicz*, 12 BLR at 1-165; Attorney Fee Order at 2. Thus, we vacate the ALJ's award of an hourly rate of \$110 to Ms. Agnew and remand this case for him to determine a reasonable hourly rate based on Counsel's evidence and the regulatory criteria.

Remand Instructions

On remand, the ALJ must reconsider the requested hourly rates of Mr. Vowels, Mr. Russell, Ms. Smith, and Ms. Agnew, taking into account the documentation supplied in the Fee Petition and Counsel's arguments in support of the requested rates. The ALJ must explain the bases for his determinations as the APA requires. *See Gosnell*, 724 F.3d at 572-73; *Cox*, 602 F.3d at 289; *Bentley*, 522 F.3d at 664-65; *Wojtowicz*, 12 BLR at 1-165.¹¹

¹⁰ Counsel also referenced the 2018 NALA National Utilization and Compensation Survey Report, which included rates up to \$140.00 per hour for legal assistants without special training. Fee Petition at 16.

¹¹ We take no position as to the merits of Counsel's arguments and evidence; weighing the evidence is the province of the ALJ. Rather, we remand for the required consideration and explanations for the ALJ's determinations.

Accordingly, we affirm in part and vacate in part the Order Awarding Attorney Fees and Expenses, and we remand this case for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge