



BRB No. 23-0066 BLA

MARSHALL A. TEASTER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MINGO LOGAN COAL COMPANY)	
)	
and)	DATE ISSUED: 05/09/2024
)	
WEST VIRGINIA COAL WORKERS’)	
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-)	
Petitioners)	
)	
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 Attorney’s Fees and Costs of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Scott A. White (White & Risse, LLC), Arnold, Missouri, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lystra A. Harris's Supplemental Decision and Order Awarding Attorney's Fees and Costs (2018-BLA-06232) (Attorney Fee Order), issued in connection with the successful prosecution of a subsequent claim filed on February 8, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

On June 29, 2020, the ALJ issued a Decision and Order Awarding Benefits.¹ On August 31, 2020, Claimant's counsel (Counsel) submitted an itemized fee petition to the ALJ requesting \$15,533.08 for attorney fees and expenses, as follows: \$4,462.50 for 12.75 hours of attorney services by Joseph E. Wolfe at a rate of \$350.00 per hour; \$600.00 for 2.0 hours of attorney services by W. Andrew Delph, Jr. at a rate of \$300.00 per hour; \$3,400.00 for 17.0 hours of attorney services by Brad A. Austin at a rate of \$200.00 per hour; \$1,162.50 for 7.75 hours of attorney services by Victoria S. Herman at a rate of \$150.00 per hour; \$375.00 for 2.5 hours of attorney services by Rachel Wolfe at a rate of \$150.00 per hour; \$1,650.00 for 16.5 hours of legal assistant services at a rate of \$100.00 per hour; and \$3,883.08 in expenses. Claimant's Motion for Approval of Attorney Fees (Aug. 31, 2020) (Fee Petition).

On September 21, 2020, Employer submitted its Opposition to the Fee Petition asserting it should be denied as untimely filed. Alternatively, it objected to the hourly rate requested for attorney services Mr. Wolfe performed, the use of quarter-hour billing increments in the Fee Petition, certain entries of time for work performed before the district director, as well as for certain costs. On October 26, 2022, the ALJ issued an Attorney Fee Order reducing the requested fee to \$10,643.75, reflecting a reduction in the hourly rate for Attorney Wolfe to \$325.00 and disallowing 1.0 hour of attorney services by Mr. Wolfe, 2.75 hours of attorney services by Mr. Austin, 0.75 hours of attorney services by Ms. Herman, and 2.5 hours of legal assistant services. She awarded the full \$3,883.08 in costs.

On appeal, Employer argues the ALJ should have denied Counsel's fee petition because it was untimely filed. Alternatively, it contends the ALJ should have reduced the

¹ On January 24, 2022, the Benefits Review Board affirmed the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim as well as the district director's Proposed Order Supplemental Award Fee for Legal Services. *Teaster v. Mingo Logan Coal Co.*, BRB Nos. 20-0433 BLA and 21-0087 BLA (Jan. 24, 2022) (unpub.).

hourly rate for attorney services Mr. Wolfe performed, rejected Counsel's use of quarter-hour billing increments, and rejected reimbursement of certain costs. Counsel responds in support of the fees and costs awarded. Employer filed a reply brief reiterating its contentions. The Director, Office of Workers' Compensation Programs, has not filed a response.

The amount of an ALJ's attorney fee award is discretionary. 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.² See *E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 568-69 (4th Cir. 2013); *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); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Timeliness

In her June 29, 2020 Decision and Order awarding benefits, the ALJ provided thirty days for Counsel to file a fee petition. Decision and Order at 36; see 20 C.F.R. §725.366(a) (requiring the documents to be filed "within the time limits allowed by the . . . [ALJ]"). The ALJ stated: "after time has expired, a judge may grant an extension only on motion and if the party failed to act because of excusable neglect." Decision and Order at 36 n.20 (citing 29 C.F.R. §18.32(b)).

On August 31, 2020, Counsel filed the Fee Petition along with a Motion to Submit Fee Petition out of Time, explaining a caseload backlog and the effects of the COVID-19 pandemic prevented him from submitting the Fee Petition within the deadline set by the ALJ. Upon consideration of Counsel's motion, the ALJ concluded denial of the Fee Petition due to untimeliness would be an "unduly harsh result" and found Claimant established "good cause" for the late filing. Attorney Fee Order at 1 n.1 (unpaginated). She therefore accepted and considered the untimely Fee Petition. *Id.*

On appeal, Employer argues the fee petition was untimely filed and, therefore, contends the ALJ erred in accepting it. Employer asserts Counsel failed to adequately

² The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his last coal mine employment in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19; Director's Exhibit 4.

explain why the effects of the COVID-19 pandemic amount to excusable neglect.³ Employer’s Brief at 2-4; Employer’s Reply Brief at 2-4. We disagree.

Although the regulations allow an ALJ to set the time limit for when a party should file a fee petition, they are silent as to the standard for evaluating whether an ALJ should allow a late-filed fee petition or the applicable penalty. 20 C.F.R. §725.366.

However, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules) are not silent on this issue. The OALJ Rules apply in proceedings under the Act to the extent they are not inconsistent with either the Act itself or the Act’s regulations. 29 C.F.R. §18.10(a). The OALJ Rules in turn adopt the Federal Rules of Civil Procedure “excusable neglect” standard for determining whether the time for filing a pleading should be extended. *See* 29 C.F.R. §18.32(b), *accord* Fed. R. Civ. P. 6(b)(1)(B). Specifically, when an act “must be done within a specified time,” the ALJ “may, for good cause, extend the time . . . if the party failed to act because of *excusable neglect*.” *Id.* (emphasis added). This is a strict standard under which judges must have “good reasons for permitting litigants to exceed deadlines.” *Robinson v. City of Harvey, Ill.*, 617 F.3d 915, 918-19 (7th Cir. 2010) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1996)). Further, the moving party bears the burden of proving that its delay is excusable. *Drippe v. Tobelinski*, 604 F.3d 778, 784 (3d Cir. 2010) (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 896 n.5 (1990)).

The United States Supreme Court has outlined four factors to consider when determining if “excusable neglect” exists: (1) prejudice to the opposing party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. *Pioneer Inv. Servs. Co.*, 507 U.S. at 395. As the Court explained, “the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Id.*

Although the ALJ did not specifically outline the *Pioneer* factors for determining excusable neglect, *see Pioneer Inv. Servs. Co.*, 507 U.S. at 395, her decision is nevertheless rationally based on the relevant factors.

The ALJ found Counsel established good cause for the late filing of his fee petition based on the COVID-19 pandemic, and that excluding the petition would be unduly harsh.

³ Employer points to Counsel’s requested billed hours between receipt of the ALJ’s Decision and Order on June 29, 2020, and August 31, 2020, when Counsel filed his fee petition, as indicating Counsel could have remediated the timeliness issue by filing a motion for an extension. Employer’s Brief at 2-3.

Attorney Fee Order at 1 n.1 (unpaginated). Employer does not assert it was prejudiced by the thirty-day delay, and the ALJ reasonably recognized the reason for Counsel's delay was a caseload backlog and the COVID-19 pandemic, which was outside of Counsel's control, and she permissibly determined that, under the circumstances, denial of the Fee Petition as untimely would be unduly harsh. *See Pioneer Inv. Servs. Co.*, 507 U.S. at 395; Employer's Brief at 1-4.

Thus, the ALJ's findings support her determination to accept the untimely Fee Petition under the "excusable neglect" standard. *Robinson*, 617 F.3d at 918-19 (citing *Pioneer Inv. Servs. Co.*, 507 U.S. at 395); *see also Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316 (4th Cir. 2012) (ALJ's duty to explain is satisfied as long as a reviewing court can discern what the ALJ did and why she did it). Consequently, Employer has not established the ALJ abused her discretion in accepting Counsel's untimely Fee Petition. *See Gosnell*, 724 F.3d at 568-69; Attorney Fee Order at 1 n.1 (unpaginated).

Hourly Rate

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. *See Gosnell*, 724 F.3d at 572; *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289 (4th Cir. 2010).

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 B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664 (6th Cir. 2008). 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; *see Gosnell*, 724 F.3d at 571. Further, the regulation states:

[a]ny fee approved under . . . this section shall be reasonably commensurate with the necessary work done and shall 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 fee requested.

20 C.F.R. §725.366(b).

Employer contends Counsel's requested hourly rate of \$350.00 for attorney services Mr. Wolfe performed is unsupported because he does not identify market rates paid by fee-paying clients or what similarly qualified attorneys are paid for similar work. Employer's Brief at 4-7; Employer's Reply Brief at 7-8. It argues that rates awarded in prior black lung cases are not direct evidence of the market rate for similar work and are therefore not controlling. We disagree.

Initially, we note the ALJ did not award Counsel's requested rate of \$350.00 per hour for attorney services performed by Mr. Wolfe but rather reduced his rate to \$325.00 per hour. Attorney Fee Order at 3 (unpaginated). Further, 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 Gosnell*, 724 F.3d at 572; *Cox*, 602 F.3d at 290; *Bentley*, 522 F.3d at 664; Employer's Brief at 4-7. "[T]he most reliable indicator of prevailing market rates in a black lung case will be evidence of rates allowed in other black lung cases." *Gosnell*, 724 F.3d at 573.

The ALJ noted Counsel submitted the National Law Journal's 2014 Survey of Law Firm Economics for the South Atlantic region, reflecting a median hourly rate of \$425.00 for attorneys with thirty-one or more years of experience, like Mr. Wolfe, and a list of seventy prior fee awards in which an ALJ or the Board awarded him an hourly rate of between \$300.00 and \$425.00. Attorney Fee Order at 2-3 (unpaginated). She further found Counsel did not establish that the legal issues presented in this case were particularly complex. *Id.* at 3 (unpaginated). Thus, having considered the relevant factors, the ALJ permissibly found the evidence supports a reasonable market rate of \$325.00 per hour for Mr. Wolfe's services. *See Gosnell*, 724 F.3d at 572-73; *Cox*, 602 F.3d at 289; *Bentley*, 522 F.3d at 664-65; Attorney Fee Order at 3 (unpaginated).

Therefore, we affirm the ALJ's approval of Mr. Wolfe's hourly rate of \$325.00 for services performed in this case. We further affirm, as unchallenged on appeal, the ALJ's approval of \$300.00 per hour for attorney services by Mr. Delph, \$200.00 per hour for attorney services by Mr. Austin, \$150.00 per hour for attorney services by Ms. Herman, \$150.00 per hour for attorney services by Ms. Wolfe, and \$100.00 per hour for legal assistant services. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Attorney Fee Order at 3 (unpaginated).

Quarter-Hour Billing Increments

Employer challenges Counsel's use of quarter-hour minimum billing increments. Employer's Brief at 9-12; Employer's Reply Brief at 4-8. Contrary to Employer's contention, an ALJ has discretion to award a fee based on quarter-hour minimum increments. *See Gosnell*, 724 F.3d at 576; *Bentley*, 522 F.3d at 666. In addition, the ALJ appropriately evaluated each quarter-hour entry to determine whether the amount billed was reasonable and necessary to establish entitlement to benefits. *Bentley*, 522 F.3d at 666-67; Attorney Fee Order at 5-6 (unpaginated). In reviewing the itemized time charges, she found certain entries were vague or clerical and reduced them. Attorney Fee Order at 5-6 (unpaginated). She awarded the remaining time as reasonable. *Id.* As Employer identifies no specific error in these findings, we reject Employer's argument that the ALJ erred in permitting quarter-hour billing. 20 C.F.R. §725.366; *see Lanning v. Director, OWCP*, 7 BLR 1-314, 316 (1984).

We also reject Employer's assertion that an excessive number of hours were billed because Counsel did not efficiently use junior associates, paralegals, or legal assistants to reduce fees and costs. Employer's Brief at 12-13; Employer's Reply Brief at 9-13. The question in determining a compensable fee is not whether it would have been less costly 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."). Rather, it is whether the work and time that counsel requested were reasonable and necessary to establish Claimant's entitlement to benefits at the time counsel performed the work. *See Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999). Because Employer has not shown the ALJ abused her discretion, we affirm her determination to allow the challenged time entries. *See Bentley*, 522 F.3d at 666-67; *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217 (1986).

As Employer raises no further challenge to the ALJ's fee award, we affirm the ALJ's award of \$10,643.75 in fees for legal services.

Reimbursable Expenses

Employer asserts the ALJ erred in awarding reimbursement for various expenses, including travel expenses incurred by Claimant, attorney travel mileage, and obtaining records and medical examinations. Employer's Brief at 13; Employer's Reply Brief at 12-13. We disagree.

Employer initially asserts the ALJ erred in awarding costs associated with Claimant undergoing two independent medical examinations, obtaining medical records, and for

attorney travel mileage. Employer's Brief at 13. To support its assertion, Employer offers only the conclusory statement that these costs are "not reimbursable." *Id.* We decline to consider this argument as inadequately briefed. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

Employer further contends the ALJ erred in awarding \$164.59 in costs for Claimant's mileage for travel to and from the September 18 and 19, 2018 independent medical evaluations, asserting the regulations authorize reimbursement only for attorney travel expenses. Employer's Brief at 13 (quoting 20 C.F.R. §725.366(a)). Contrary to Employer's contention, the ALJ rationally applied 20 C.F.R. §725.366(c) to find Claimant's travel costs were reasonable, unreimbursed expenses incurred in establishing his case. Therefore, we affirm her award of \$3,883.08 in expenses. *See Jones*, 21 BLR at 1-108.

Accordingly, we affirm the ALJ's Supplemental Decision and Order Awarding Attorney's Fees and Costs.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge