



BRB No. 23-0387 BLA

THOMAS W. CULVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY, LLC	)	
	)	DATE ISSUED: 11/20/2024
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 Letter Denying Reconsideration of Dennis Glaze, Claims Examiner, United States Department of Labor.

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

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals) for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant's counsel (Counsel) appeals Claims Examiner Dennis Glaze's (the district director's) Proposed Order Supplemental Award Fee for Legal Services (Fee Award on Remand) and Letter Denying Reconsideration rendered in connection with an attorney's fee petition filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This matter is before the Benefits Review Board for the second time.

Initially, Counsel filed a complete, itemized fee petition on August 4, 2020, requesting \$1,819.00 for legal services performed before the district director from October 8, 2019 to May 29, 2020. The total fee requested represented \$750.00 for 3.0 hours of services performed by Counsel at an hourly rate of \$250.00, \$37.50 for 0.25 hours of services performed by a paralegal at an hourly rate of \$150.00, \$1,025.00 for 10.25 hours of services performed by a legal assistant at an hourly rate of \$100.00, and \$6.50 in expenses. Employer did not file any objections to the fee petition before the district director.

In his first fee order dated October 13, 2020, the district director awarded attorney's fees in the amount of \$1,275.00, representing \$750.00 for 3.0 hours of attorney services at an hourly rate of \$250.00 and \$525.00 for 10.50 hours of paralegal and legal assistant services at an hourly rate of \$50.00, and he denied reimbursement for the requested expense. He did not reduce or exclude any time entries.

Counsel appealed that fee order, contending the district director erred in reducing the requested hourly rates of his paralegal and legal assistant and in disallowing the requested expense. The Board affirmed the district director's award of an hourly rate of \$250.00 for Counsel's services but vacated his reduction of the requested hourly rates for paralegal and legal assistant services to \$50.00 and his disallowance of the \$6.50 expense.<sup>1</sup> *Culver v. Peabody Coal Co.*, BRB No. 21-0033 BLA, slip op. at 2 n.2, 4 (Nov. 9, 2021) (unpub.). The Board remanded the case to the district director to address the evidence Counsel submitted in support of the requested hourly rates and to address whether the requested expense was reasonable and necessary to establish Claimant's entitlement to benefits at the time Counsel incurred the expense. *Id.* at 4-5.

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<sup>1</sup> The Board declined to consider Employer's objections to various time entries, as it did not object to the fee petition before the district director. *Culver v. Peabody Coal Co.*, BRB No. 21-0033 BLA, slip op. at 2 n.2 (Nov. 9, 2021) (unpub.).

On remand, the district director again found \$50.00 per hour to be the appropriate rate for the paralegal's and the legal assistant's services, denied reimbursement for the requested expense and, for the first time, excluded several time entries for "legal assistant" services, reducing the total hours for both paralegal and legal assistant services to 2.6 hours. Fee Award on Remand. Thus, he awarded attorney's fees in the amount of \$880.00 representing \$750.00 for 3.0 hours of attorney services at an hourly rate of \$250.00, and \$130.00 for 2.6 hours of both paralegal and legal assistant services at an hourly rate of \$50.00.<sup>2</sup> *Id.* Counsel moved for reconsideration of the fee award, submitted additional evidence in support of the requested rates for the paralegal and legal assistant, and alleged the district director erred in reducing the requested hourly rates and time entries. *See* 20 C.F.R. §725.366(d), (e); Request for Reconsideration. Further, Counsel requested that a different claims examiner be assigned to review the fee petition. *Id.* The district director declined to consider Counsel's request for reconsideration, stating that Counsel's only remedy was an appeal to the Board. Letter Denying Reconsideration.

In the current appeal, Counsel contends the district director lacked the authority to decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution.<sup>3</sup> Counsel also argues the district director erred in reducing the hourly rates of the paralegal and legal assistant, in reducing time entries on remand, and in disallowing the requested expense. Employer responds in support of the district director's findings. The Director, Office of Workers' Compensation Programs (Director), filed a limited response, contending that Counsel forfeited his constitutional argument.

The amount of an attorney's fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion,

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<sup>2</sup> In the Fee Award on Remand, the district director incorrectly indicated that Counsel requested a total fee of \$1,798.00.

<sup>3</sup> 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.

or not in accordance with applicable law.<sup>4</sup> 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).

### **Appointments Clause - District Director and Claims Examiner**

Citing *Lucia v. SEC*, 585 U.S. 237 (2018), Counsel contends the district director lacked the authority to process this case because he is an “inferior officer” of the United States not properly appointed under the Appointments Clause. Counsel’s Brief at 14-16. As the Director submits, Counsel forfeited this argument as he failed to raise it until this appeal. See *Lucia*, 585 U.S. at 251 (requiring “a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party’s] case”); *Joseph Forrester Trucking v. Director, OWCP [Davis]*, 987 F.3d 581, 588 (6th Cir. 2021); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Edd Potter Coal Co. v. Director, OWCP [Salmons]*, 39 F.4th 202, 206-08 (4th Cir. 2022).

### **Attorney’s Fee**

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). 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. *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.

### **Hourly Rates**

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 prevailing market rate is “the rate that [professionals] 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 (6th Cir. 2004); see also *Bentley*, 522 F.3d at 663. The burden falls on

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<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 3.

the fee applicant to produce satisfactory evidence that the requested rates are in line with those for similar services by persons 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).

Counsel stated he customarily bills at between \$100.00 and \$150.00 for his paralegal's hourly rate and between \$75.00 and \$100.00 for his legal assistant's hourly rate. Amended Fee Motion at 7, 9. He submitted the following as evidence in support of the requested rates: (1) one prior fee award from the United States Court of Appeals for the Sixth Circuit where his fee petition was opposed, awarding the paralegal \$150.00 per hour and the legal assistant \$100.00 per hour; (2) three prior fee awards from the Office of Administrative Law Judges (OALJ) where his fee petition was unopposed, awarding the paralegal \$150.00 per hour, and one where his fee petition was opposed also awarding the legal assistant \$100.00 per hour; and (3) the National Association of Legal Assistants (NALA) 2018 and 2020 National Compensation and Utilization Survey Reports showing the most common hourly rate for a paralegal is \$146.00 to \$150.00 per hour and showing an hourly rate of \$140.00 per hour is common for a legal assistant without any specialized training. *Id.* at 9-10. Counsel also identified prior fee awards from the OALJ where his fee petition was opposed in which his paralegal was awarded a rate of \$100.00 or \$96.00 per hour. *Id.* at 8.

In his Fee Award on Remand, the district director found the prior fee awards from the Sixth Circuit and OALJ insufficient to support the requested rates because those awards were not granted at the district director level, which he found involved less complex proceedings. Fee Award on Remand at 5-9. He also declined to rely on fee award orders where Counsel's fee petition had been unopposed. *Id.* at 6. Further, he found the NALA report inappropriate as supporting evidence because of the document's disclaimer that it should not be used for market purposes and because it was not publicly available. *Id.*

Having found Counsel's evidence insufficient, the district director relied on "more current practitioner fee data" from various sources showing average salaries for paralegals and legal assistants.<sup>5</sup> *Id.* at 7. He also cited prior fee awards from 2020 to 2022 at the district director level awarding \$50.00 per hour to other paralegals and legal assistants without objection, and cases from the 1980s in which the Board affirmed the district

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<sup>5</sup> The district director noted the following: (1) a 2018 Forbes report showing paralegals make \$22.20 per hour on average; (2) a report stating that the average salary for Kentucky paralegals in 2020 was \$22.45 per hour; (3) data from the Bureau of Labor Statistics showing the median pay for paralegals and legal assistants in 2021 was \$27.03 per hour; and (4) data from the Economic Rights Institute showing the average paralegal salary is \$28.00 per hour. Fee Award on Remand at 6-7.

director's reductions of attorneys' requested hourly rates from \$100.00 to \$65.00. *Id.* at 8. Thus, he again reduced the hourly rate to \$50.00 for both the paralegal and the legal assistant. *Id.* at 9.

Counsel timely moved for reconsideration and provided additional evidence in support of the requested hourly rates for the paralegal and the legal assistant. Request for Reconsideration. He submitted two fee awards at the district director level from 2020 and 2022 awarding the paralegal and legal assistant an hourly rate of \$150.00 and \$100.00 for their services, respectively.<sup>6</sup> *Id.* at 7-11. Counsel also submitted an order from the Sixth Circuit awarding the paralegal and the legal assistant hourly rates of \$165.00. *Id.* at 13-14. The district director declined to address reconsideration. He asserted that because his Fee Award on Remand was not the initial fee award, Counsel's only remedy was an appeal to the Board. Letter Denying Reconsideration.

Counsel argues the district director erred in reducing the hourly rates for his paralegal and legal assistant. Specifically, Counsel contends the district director relied on his own opinion and evidence outside the record in setting the paralegal's and the legal assistant's hourly rates, and he failed to explain why the evidence Counsel submitted was insufficient to support the requested hourly rates or how the evidence of record supported a reduction in their hourly rates to \$50.00. Counsel's Brief at 7-18. We agree, in part.

To begin, contrary to Counsel's argument, the district director explained why he found the evidence Counsel submitted in support of the hourly rates in the initial fee petition is inadequate. Considering 20 C.F.R. §725.366(b), he indicated none of the evidence demonstrated rates awarded at the district director level, which is at a lower and less complex level of adjudication than the level of the awards Counsel provided. Fee Award on Remand at 5-9. He was also within his discretion to decline to rely on fee awards where Counsel's fee petition had been unopposed to determine the appropriate rate. *Maddox v. Lodestar Energy, Inc.*, 726 F. App'x 269, 272 (6th Cir. 2019) (unpub.); *see Jones*, 21 BLR at 1-108; Fee Award on Remand at 6. In addition, the district director was not required to rely on evidence in the NALA report. *See Bentley*, 522 F.3d at 664 (noting surveys provide inferential evidence but do not set the market rate); Fee Award on Remand at 6.

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<sup>6</sup> In his first appeal to the Board, Counsel indicated he submitted a fee award from the district director awarding an hourly rate of \$150.00 to his paralegal and \$100.00 to his legal assistant, but the Board noted the document was not in the record at that time. *Culver*, BRB No. 21-0033 BLA, slip op. at 4 n.5.

However, we agree that the district director did not adequately explain why he reduced the paralegal's and the legal assistant's hourly rates to \$50.00. He impermissibly relied on evidence not in the record to support this reduction.<sup>7</sup> See *Hall v. Director, OWCP*, 12 BLR 1-80, 1-81-82 (1988) (en banc) (The fact finder's decision must "withstand scrutiny on the four corners of the document."). In the absence of satisfactory, specific evidence of the prevailing market rate, a tribunal cannot, by itself, determine the hourly rate. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010); see also *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228 (4th Cir. 2009). The record contains no evidence to support the district director's selection of \$50.00 as the appropriate hourly rate.<sup>8</sup>

Moreover, we note Counsel provided additional evidence with his request for reconsideration, including two awards approving the requested rates for his paralegal and legal assistant for work performed before the district director. Request for Reconsideration at 2, 7-11. Although the district director acknowledged that the regulations allow any party to request reconsideration of a fee award and to provide "supporting statements or information pertinent to any increase or decrease requested," 20 C.F.R. §725.366(e), he declined to consider Counsel's request and thus did not determine if this evidence was sufficient to meet Counsel's burden. See Fee Award on Remand at 1; Letter Denying Reconsideration. Counsel requests that we reverse the district director's finding and modify his fee award to grant the \$150.00 and \$100.00 hourly rates that were awarded in the attorney fee awards he submitted on reconsideration. Claimant's Brief at 18, 20.

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<sup>7</sup> Given the district director's citation to attorney fee awards approved at \$65.00 per hour dating from the 1980s, the district director also, as Counsel argues, apparently failed to consider that adjustments should be made to the market rate based on inflation, particularly given the cases the district director considered were issued more than forty years ago. See *Missouri v. Jenkins ex rel. Agyei*, 491 U.S. 274, 283-84 (1989); *Anderson v. Director, OWCP*, 91 F.3d 1322 (9th Cir. 1996); Counsel's Brief at 17; Fee Award on Remand at 8.

<sup>8</sup> The district director could have potentially taken official notice of publicly available records in making his determination. However, if he intended to do so, to avoid acting arbitrarily, he should have given the parties notice and an opportunity to respond. See generally 5 U.S.C. §556(e) (when an "agency decision" rests on official notice, the parties are entitled to "an opportunity to show the contrary"); 29 C.F.R. §18.84 (providing ALJs discretion to take official notice "of any adjudicative fact or other matter subject to judicial notice," provided the parties are "given an adequate opportunity to show the contrary of the matter noticed"); *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990).

However, given the district director's other findings, we decline to reverse. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) ("When the [fact-finder] fails to make important and necessary factual findings, the proper course for the Board is to remand the case . . . rather than attempting to fill the gaps in [his] opinion."). Instead, we vacate the district director's finding regarding the hourly rate for the paralegal and the legal assistant and remand the case for him to again address reasonable hourly rates based on the evidence before him.

### **Time Entries**

In his Fee Award on Remand, the district director also identified certain time entries as excessive or duplicative, further reducing the fee award. Fee Award on Remand at 8-9. Counsel argues the district director exceeded his authority on remand in reducing the time entries, as he previously found the entries reasonable and the Board did not instruct him to reconsider those entries. Counsel's Brief at 4, 7. We agree.

In his initial fee award, the district director did not reduce or exclude any of Counsel's time entries. The Board declined to address Employer's arguments regarding the time entries in the prior appeal given its failure to raise any such objections below.<sup>9</sup> *Culver*, BRB No. 21-0033 BLA, slip op. at 2 n.2. We instructed the district director to consider only the reasonableness of the requested hourly rates for the paralegal and legal assistant and Counsel's requested expense. *Id.* at 4-5. The district director exceeded the mandate on remand in also considering and denying the previously approved and unopposed time entries; therefore, we reverse his findings. *See* 20 C.F.R. §§802.404(a) (Board remands claims for actions "consistent with the decision of the Board"), 802.405(a) ("Where a case is remanded, such additional proceedings shall be initiated and such other action shall be taken *as is directed by the Board.*") (emphasis added); *Salmons*, 39 F.4th at 209-10 (when a claim is remanded by the Board, the scope of remand is limited; "the [lower tribunal must] follow orders rather than to go rogue" by introducing a new issue).

### **Expenses**

Finally, Counsel argues the district director erred in denying his request for expenses in the amount of \$6.50 for obtaining medical records. Counsel's Brief at 18-19. Counsel explains that he requested medical records from Claimant's treatment providers on October 22, 2019, the day Claimant hired him and while the case was pending before the district director, and that at the time, he expected them to be relevant to establishing Claimant's entitlement to benefits. *Id.* Further, Counsel explains he was unable to review and submit

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<sup>9</sup> There is also no indication Employer raised any objections on remand.



the medical records before the November 26, 2019 deadline for the submission of evidence to the district director. *Id.*

As with his initial fee award, the district director denied the expense associated with obtaining the medical records in anticipation of litigation merely because Counsel did not submit the documents into the record.<sup>10</sup> Fee Award on Remand at 8. However, the proper inquiry is whether the expenses were reasonable to establish Claimant's entitlement to benefits *at the time the expenses were incurred*. See *Ziegler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 899-902 (7th Cir. 2003); *Branham v. E. Assoc. Coal Corp.*, 19 BLR 1-1, 1-3-4 (1994). Counsel explained the expense was reasonable and necessary at the time it was incurred to develop medical evidence in support of the claim for benefits. Counsel's Brief at 18-19. The requested expense was unopposed and no party submitted contrary evidence. We therefore reverse the district director's denial of the requested expense. See *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (reversal is warranted where no factual issues remain to be determined and no further factual development is necessary).

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<sup>10</sup> The district director also referenced 20 C.F.R. §725.413, which requires disclosure of certain medical evidence even if it is not submitted into evidence. Fee Award on Remand at 8. However, the regulation does not require disclosure of medical treatment records. 20 C.F.R. §725.413(b).

Accordingly, we affirm in part, vacate in part, and reverse in part the Proposed Order Supplemental Award Fee for Legal Services and Letter Denying Reconsideration and remand this case to the district director for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge