PART XI

ATTORNEY FEES

A. BOARD REVIEW OF ATTORNEY FEE AWARDS MADE BELOW

1. GENERAL OVERVIEW

Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Black Lung Benefits Act at Section 422(a), 30 U.S.C. §932(a), provides for the award of attorney fees to claimant's counsel. The implementing regulations set forth at 20 C.F.R. §§725.365 through 725.367 outline how an attorney fee is to be requested and what factors will be considered in fixing the amount of the fee. The regulations in effect at the time of the fee application govern the fee award. ***McKee v. Director, OWCP***, 6 BLR 1-233, 1-235 n.3 (1983). The United States Supreme Court has ruled on the validity of the fee structure established for the Federal Black Lung Program. *See* ***United States Department of Labor v. Triplett***, 110 S.Ct. 1428, 13 BLR 2-364 (1990). The Board has consistently held that the Department of Labor's regulations do not constitute an unlawful interference with the practice of law. *See e.g.*, ***McKee*** at 1-236.

In order to receive compensation for legal services performed on a claimant's behalf, counsel must successfully prosecute the claim. 30 U.S.C. §928(a), as incorporated 30 U.S.C. §932(a); ***Yates v. Harman Mining Co.***, 12 BLR 1-175 (1989), *reaff'd on recon. en banc*, 13 BLR 1-56 (1989); ***Markovich v. Bethlehem Mines Corp.***, 11 BLR 1-105 (1987). In addition, all fee petitions must be filed with and approved by the adjudicating officer or tribunal before whom the services were performed. 20 C.F.R. §§725.365; 725.366(a); ***Abbott v. Director, OWCP***, 13 BLR 1-15 (1989); ***Helmick v. Director, OWCP***, 9 BLR 1-161 (1986); ***Vigil v. Director, OWCP***, 8 BLR 1-99 (1985). Contingent or stipulated fee agreements are invalid. 20 C.F.R. §725.365. The Board has routinely held that the regulatory prohibition against contingent fee agreements does not violate the nature and purpose of the Act. *See e.g.*, ***Wells v. Director, OWCP***, 9 BLR 1-63 (1986). Counsel is not prohibited, however, from resubmitting an appropriate fee petition in compliance with Section 725.366, which the adjudication officer should consider under the standard test of whether the work was reasonably necessary to the establishment of entitlement. *Id.*

As a general rule, Section 725.366(a) provides only for the compensation of necessary legal services, thus the fee petition must include a complete statement of the extent and character of the work done, the professional status of the person performing such work, and the customary billing rate for that person. ***Ball v. Director, OWCP***, 7

BLR 1-617 (1984); ***Cox v. Director, OWCP***, 7 BLR 1-810 (1985). The opposing party must submit any objections to the fee petition when it is filed with the adjudicatory officer. If the opposing party fails to object to the fee petition when it is filed, he cannot subsequently contest the fee award on appeal. ***Abbott***, ***supra*** (where there was also no evidence that the Director had timely requested reconsideration of the fee).

Attorney fees do not constitute "costs" under Section 26 of the LHWCA, 33 U.S.C. §926. *See* ***Toscano v. Sun Ship, Inc.***, 24 BRBS 207 (1991). ***Beasley v. Sahara Coal Co.***, 16 BLR 1-6 (1991).

In some circumstances, a fee may be enhanced to compensate for delay in payment. ***Bennett v. Director, OWCP***, 17 BLR 1-72 (1992).

Counsel's request for enhancement due to delay is, in essence, a request for interest to be paid by the Black Lung Disability Trust Fund. The Act and its implementing regulations, *see* 20 C.F.R. §725.608(d), do not authorize an award of interest against the Trust Fund. ***Bennett v. Director, OWCP***, 17 BLR 1-72 (1992).

An award of attorney fees becomes a final order when no appeal or motion for reconsideration is filed. The award of attorney fees, however, does not become enforceable until there is successful prosecution of the claim. ***Coleman v. Ramey Coal Co.***, 18 BLR 1-9 (1993).

The United States Supreme Court has held in ***City of Burlington v. Dague***, 112 S.Ct. 2638 (1992), that enhancement of an award of attorney fees on the basis of contingency is not permitted under various fee-shifting statutes. *See* ***Goodloe v. Peabody Coal Co.***, 19 BLR 1-91 (1995).

Since claimant's counsel failed to raise the enhancement for delay factor at the time the fee petition was filed and waited until filing his response with the Board to employer's petition for review, claimant's counsel is precluded from now raising the enhancement for delay issue on appeal. ***Goodloe v. Peabody Coal Co.***, 19 BLR 1-91 (1995), *see* ***Bennett v. Director, OWCP***, 17 BLR 1-72, 1-73-4 (1992).

In ***Missouri v. Jenkins***, 109 S.Ct 2463 (1989), the United States Supreme Court held that an adjustment for delay in payment is an appropriate factor in determining what constitutes a reasonable attorney fee, *see* 20 C.F.R. §725.366(b); Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928; *see also* ***Hobbs v. Stan Flowers Co.***,18 BRBS 65 (1986), *aff'd*, 820 F.2d 1528, 1530 (9th Cir. 1987); ***U.S. Department of Labor v. Triplett***, 110 S.Ct 1428, 13 BLR 2-364 (1990); ***Goodloe v. Peabody Coal Co.***, 19 BLR 1-91 (1995); ***Cox v. Brady-Hamilton Stevedore Co.***, 25 BRBS 203, 208-209 (1991); ***Bennett v. Director, OWCP***, 17 BLR 1-72, 1-73-4 (1992).

The Board, citing ***Missouri v. Jenkins***, 109 S.Ct 2463 (1989), held that to the extent that ***Fisher v. Todd Shipyards Corp.***, 21 BRBS 323, 327-328 (1988) and ***Blake v. Bethlehem Steel Corp.***, 21 BRBS 49, 55 (1988), Longshore cases in which the Board stated that "[a]ugmentation of the hourly rate to reflect delay in payment constitutes an abuse of discretion under the Act because factors such as risk of loss and delay of payment occur generally in Longshore cases and are considered to be incorporated into the normal hourly rate charged by counsel," ***Blake***, 21 BRBS at 55; ***Fisher***, 21 BRBS at 328, are inconsistent with ***Jenkins***, those decisions are overruled. ***Goodloe v. Peabody Coal Co.***, 19 BLR 1-91 (1995).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.366(b), pertaining to attorney's fees, is consistent with the holding of the United States Supreme Court in ***Burlington v. Dague***, 505 U.S. 557, 562 (1992), that attorney fees be calculated according to the "lodestar" method, as the regulation requires consideration of no factors not already included in the lodestar analysis, and further does not supplant the lodestar method of calculating reasonable fees or enhance the lodestar fee once it is calculated. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 874-875, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The Sixth Circuit held that the "lodestar method" of calculating fees, *i.e.* where the fee amount equals the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, is the appropriate starting point for calculating fee awards in black lung benefits cases. In so holding, the court noted that there was no binding precedent on this issue in the 6th Circuit, but that this approach was consistent with the fee-shifting provision of the Longshore Act, and with other federal fee-shifting statutes, as well as with the Secretary of Labor's position in *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001), that the factors identified at Section 725.366(b) do not supplant or enhance the lodestar method but, rather, are already reflected in the lodestar method. ***B&G Mining, Inc. v. Director, OWCP* [*Bentley*]**, 522 F.3d 657, BLR (6th Cir. 2008).

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