BRB No. 00-1086 BLA

EARL S. WOODSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Mark E. Solomons, Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order (95-BLA-2017) of Administrative Law Judge John C. Holmes denying claimant's lay representative's application for fees and expenses for services performed before the administrative law judge on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] On appeal, claimant contends that, contrary to the administrative law judge's holding, the administrative law judge has the authority to hold employer liable for the fees of a claimant's lay representative and that the administrative law judge erred in not reviewing and evaluating claimant's lay representative's fee request for approval pursuant to 20 C.F.R. §725.366(d). Employer responds, urging that the administrative law judge's Supplemental Decision and Order be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to this appeal.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion, *see Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Claimant's lay representative requested a total fee of $2,056.60 for services performed before the administrative law judge, which included 24.8 hours of services at an hourly rate of $80.00, plus $72.60 in expenses. Employer objected, contending that there is no authorization for a non-attorney to obtain a fee under the Act. The administrative law judge held that, pursuant to the Board's holding in *Harrison v. Liberty Mutual Insurance Co.*, 3 BLR 1-596 (1981), a lay representative must be paid by the claimant, if at all, and not employer. In addition, the administrative law judge noted that it is not the sole province of the administrative law judge, even absent direct instructions by the Board, to rule on whether or not a fee may be ordered to be paid by the litigant to a lay representative, since the state in which the representation took place may also find it has an interest in licensing (authorizing) the practice of law. Thus, the administrative law judge denied the claimant's lay representative's application for fees and expenses.

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[1] The Board affirmed an award of benefits in the instant claim, which was filed on April 2, 1992, Director's Exhibit 1, and arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, *see Woodson v. Peabody Coal Co.*, BRB No. 98-1530 BLA (Aug. 19, 1999)(unpub.) and *Woodson v. Peabody Coal Co.*, BRB No. 98-1530 BLA (Apr. 13, 2000)(unpub. order on recon.). No further appeal was taken by the parties.

Claimant contends that because the administrative law judge has the authority to conduct a fair and impartial hearing, he has the authority to hold employer liable for the fees of a miner's lay representative.[2] Claimant notes that while legal representation is crucial in black lung cases, claimants are not always able to obtain an attorney to represent them and that to hold claimants liable for the fees of a lay representative deters a source of needed legal assistance available to claimants. Claimant contends that such a result is inequitable and violates the Equal Protection Clause, as a lay representative is forced to collect a fee from a claimant who may be indigent or unwilling to pay. Finally, claimant contends that other federal statutes have been found to include the work performed by non-attorneys in the award of an "attorney's fee."[3]

Contrary to claimant's contentions, Section 28 of the Longshore and Harbor Workers'

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[2] Although employer contends in its response brief filed on February 20, 2001, that claimant's Petition for Review should be dismissed as untimely filed, the Board previously accepted claimant's Petition for Review and brief as a part of the record, *see* 20 C.F.R. §§802.211, 802.217; *Woodson v. Peabody Coal Co.*, BRB No. 00-1086 BLA (Jan. 25, 2001)(order).

[3] On August 9, 2001, the United States District Court for the District of Columbia issued its decision in *National Mining Association v. Chao*, D.D.C., 00-3086 (Aug. 9, 2001), granting summary judgment defending final regulations issued on December 20, 2000, 65 Federal Register 79920-80107 under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. In its decision, the court also dissolved the Preliminary Injunction Order that it had issued on February 9, 2001. As a result of the court's decision, the issue raised by the Preliminary Injunction Order is now moot, and we will not address the briefs submitted by the parties in response to the Board's order of May 18, 2001.

Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a), applies only to the award of attorney's fees and there is no authority in either the Act or the implementing regulations for an approved fee requested by a lay representative to be assessed against an employer, the Black Lung Disability Trust Fund or as a lien against claimant's benefits, *see Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141, 145 (1999); *Madrak v. Director, OWCP*, 7 BLR 1-559, 1-561 (1984); *Harrison*, *supra*. The comments accompanying 20 C.F.R. §725.365 when originally promulgated, governing fee awards and the assessment of attorney's fees as a lien against claimant's benefits, state that "[t]he Department does not have the authority to extend by regulation the statutory lien provided for attorneys only, to representatives who are not attorneys." *See* 43 Fed. Reg. 36788 (Aug. 18, 1978); *Harrison*, *supra*. The comments accompanying 20 C.F.R. §725.367 (2000), addressing the payment of attorney's fees by a responsible operator, applicable to this claim filed prior to January, 19, 2000, *see* 20 C.F.R. §725.2(c), state that "[w]hile the Department recognizes the excellent service to claimants provided by non-attorney representatives, it does not believe that an award of fees to be paid by the operator to such individual in addition to compensation is authorized by statute." *See* 43 Fed. Reg. 36789 (Aug. 18, 1978); *Harrison*, *supra*. Similarly, the comments accompanying the revised 20 C.F.R. §725.367, applicable to claims filed after January, 19, 2000, *see* 20 C.F.R. §725.2(c), also state that "[t]he Department rejected comments suggesting that lay representatives should be entitled to collect fees from responsible coal mine operators or the fund." *See* 65 Fed. Reg. 79979 (Dec. 20, 2000). Thus, we reject claimant's contention that the administrative law judge has the authority to hold employer liable for the fees of a miner's lay representative.

Claimant also contends that requiring a lay advocate to obtain his fee from claimant may deter the lay advocate from undertaking representation because claimant may be indigent or unwilling to pay. Claimant's argument overlooks the fact that the lay advocate, like the attorney, can collect a fee only if he is successful in obtaining benefits for claimant. At that time claimant is no longer indigent and should be willing to pay for the successful prosecution of his claim. Further, claimant's contention that requiring a lay advocate to obtain his fee from claimant imposes a financial burden on claimant that is not imposed by other federal statutes is an argument to be made to Congress rather than to this tribunal.

However, while the administrative law judge properly held that employer cannot be held liable for claimant's lay representative's fees, claimant properly contends that the administrative law judge nevertheless erred in denying claimant's lay representative's application for approval of fees and expenses altogether, without reviewing and evaluating claimant's lay representative's fee request for approval pursuant to 20 C.F.R. §725.366(d), which, if approved, could be assessed against claimant, *see Madrak*, *supra*, and/or which claimant's lay representative could then submit to claimant for payment, *see Harrison*, *supra*. Consequently, we vacate the administrative law judge's denial of claimant's lay representative's application for fees and expenses and remand the case for the administrative

law judge to review and evaluate claimant's lay representative's fee request for approval pursuant to 20 C.F.R. §725.366(d), which can be assessed against claimant.

Accordingly, the administrative law judge's Supplemental Decision and Order denying claimant's lay representative's application for fees and expenses is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge