

BRB No. 12-0241 BLA

SUSAN C. BELILES)	
(Widow of JACKIE WAYNE BELILES))	
)	
Claimant-Respondent)	
)	
v.)	
)	
PITTSBURGH & MIDWAY COAL)	
MINING COMPANY)	DATE ISSUED: 01/30/2013
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Attorney Fee Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Attorney Fee Order (2008-BLA-05911) of Administrative Law Judge Joseph E. Kane granting an attorney's fee in connection with a claim¹ filed

¹ Claimant filed a survivor's claim on August 23, 2004. In a Decision and Order Granting Modification and Awarding Benefits dated March 16, 2011, the administrative law judge awarded benefits. In a Decision and Order dated April 19, 2012, the Board affirmed the administrative law judge's award of benefits. *Beliles v. Pittsburgh & Midway Coal Mining Co.*, BRB No. 11-0493 BLA (Apr. 19, 2012)(unpub.).

pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Counsel requested a total fee of \$6,165.00 for 26.80 hours of legal services at an hourly rate of \$150.00, plus expenses in the amount of \$2,145.00. After considering employer's objections, the administrative law judge awarded the requested fee and costs in full, for a total award of \$6,165.00.

On appeal, employer contends that the administrative law judge's award of an attorney's fee was premature. Claimant's counsel responds in support of the administrative law judge's attorney's fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The amount of an 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. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

Employer contends that the administrative law judge erred in addressing the fee petition when employer's appeal of the benefits award was pending before the Board. Employer's Brief at 4-5. Employer concedes that, during the pendency of its appeal, the Board affirmed the award of benefits, *see Beliles v. Pittsburgh & Midway Coal Mining Co.*, BRB No. 11-0493 BLA (Apr. 19, 2012)(unpub.), but contends that employer has now appealed that decision to the United States Court of Appeals for the Sixth Circuit.² Employer's Brief at 4-5. Thus, employer asserts, this case has not been ultimately resolved, and an award of fees remains premature. Employer raises no additional challenges to the Attorney Fee Order.

Contrary to employer's contention, an attorney's fee may be approved pending a final award of benefits; the fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995). Thus, the administrative law judge did not err in issuing a fee award.

² The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge