

BRB No. 05-0623 BLA

DONALD L. ELDRIDGE)

Claimant-Petitioner)

v.)

DATE ISSUED: 11/30/2005

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR)

Party-in-Interest/Respondent

DECISION and ORDER

Appeal of the Proposed Order and the Supplemental Award Fee for Legal Services of the District Director, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel appeals the Proposed Order and the Supplemental Fee for Legal Services (Supplemental Fee Award) awarding attorney fees for legal services performed on behalf of claimant in pursuit of a waiver of overpayment 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 July 13, 2004, claimant's

¹ Claimant filed a claim for benefits on October 31, 1990. Director's Exhibit 1. In a Decision and Order dated October 31, 1990, Administrative Law Judge Richard D. Mills awarded benefits. *Id.* The Black Lung Disability Trust Fund (the Fund) began paying interim benefits after the responsible operator declined to commence payments.

counsel, Sandra Fogel, filed an application for attorney fees with the district director, requesting a total of \$2,600.00 for 13 hours of work performed at the rate of \$200.00 per hour. The district director determined to reduce Ms. Fogel's hourly rate to \$160.00, noting that the case was "routine" and "did not call for special ability and effort; and most of the evidence was in file prior to representation." Proposed Order dated January 4, 2005. The district director further noted that "the approved rate is comparable to that being charge by other highly qualified attorneys within the same geographical location who also have considerable expertise in the handling of Federal Black Lung claims." *Id.* The district director found that the original total of hours billed was erroneously computed and was 11 hours. However, the district director disallowed 5.5 hours of work claimed by Ms. Fogel on the grounds that the work was performed "prior to the denial of the waiver of overpayment." *Id.* The district director thus approved attorney fees for 5.5 hours of work at the rate of \$160.00 per hour, for a total of \$880.00. *Id.*

On January 10, 2005, Ms. Fogel challenged the reduction of her hourly rate, and submitted an amended application for attorney fees, requesting that she be reimbursed for 15.25 hours of legal work at the rate of \$200.00 per hour for a total of \$3050.00. She additionally claimed \$1000.00 for expenses incurred in obtaining a certified public accountant (C.P.A.), who acted as claimant's expert witness.

On January 31, 2005, the district director informed Ms. Fogel that a 20 percent or less reduction of the hourly rate was "not substantial or subject to reconsideration based on prior legal precedents." Department of Labor (DOL) Letter dated January 31, 2005. Ms. Fogel was asked to provide documentation regarding the services performed by the C.P.A. *Id.* She was also informed that the attorney fee award would be recalculated to include the additional two hours that had been previously deducted in error. *Id.*

On appeal, the Board vacated the award and the case was remanded for further consideration. Director's Exhibit 5. In a Decision and Order on Remand dated August 26, 1997, the administrative law judge denied benefits. Director's Exhibit 6. As a result of the denial, and because claimant did not further pursue his claim, the district director informed claimant that he owed an overpayment in the amount of \$42,837.48 for benefits paid by the Fund while the award was in effect. Claimant requested waiver of the overpayment, which was denied by the district director and by Administrative Law Judge Donald Mosser. Following an appeal to the Board, the overpayment case was remanded for further consideration, *Eldridge v. Director, OWCP*, BRB No. 01-0613 BLA (Apr. 17, 2002) and reassigned to Administrative Law Judge Thomas Phalen, who issued a Decision and Order on Remand on June 25, 2004 granting claimant's request for waiver of recovery of the overpayment.

On February 10, 2005, Ms. Fogel provided a copy of an invoice for the services of the C.P.A. The district director subsequently issued a Supplemental Fee Award on March 31, 2005. The district director noted that the reduction of the hourly rate was discretionary and would not be further explained. *See* Fee Award. The district director disallowed 6.5 hours of claimed work time included on the amended attorney fee application that was prior to the July 15, 1998 denial of waiver, as well as the \$1000.000 in expenses claimed for the services of the C.P.A. *Id.* The district director thus awarded Ms. Fogel attorney fees in the amount of \$1400.00 for 8.75 hours of services from July 20, 1998 to October 1, 1999 at the rate of \$160.00 per hour.² *Id.*

On appeal, claimant's counsel asserts that the district director's reduction in the requested hourly rate is "arbitrary, an abuse of discretion and not in accordance with law." Claimant's Brief at 4. She further challenges the district director's decision to disallow the \$1000 expert witness fee. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, which is further discussed in detail below.

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, an abuse of discretion or not in accordance with law, *see Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

In this case, the Director concedes that "the district director erred in reducing Ms. Fogel's hourly fee to \$160.00, and agrees to compensate her work before the district director at her requested \$200.00 hourly rate." Director's Brief at 6. The Director also acknowledges that the district director erred in declining to pay the \$1,000.00 expense Ms. Fogel incurred in hiring a C.P.A. to provide expert testimony regarding claimant's financial situation and his ability to repay the overpayment. *Id.*

Based on the Director's concession, we vacate the district director's fee award and remand this case for further consideration. We note that the district director disallowed "6.5 hours of time prior to the denial of the waiver, but that Ms. Fogel concedes that the district director properly disallowed 5.5 hours of legal services that were performed prior to the denial of waiver of overpayment. Claimant's Brief at 4. On remand, the district director should address the concessions of the Director and determine the actual number of hours to be awarded for legal services.

Accordingly, the Proposed Order and the Supplemental Award Fee for Legal Services of the district director is vacated, and the case is remanded for further consideration consistent with this opinion.

² This award was subject to the \$880.00 previously paid on the fee petition.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge