

BRB Nos. 08-0409 BLA
and 08-0409 BLA-A

F.C.)	
(Widow of F.D.C.))	
)	
Claimant-Respondent)	
Cross-Petitioner)	DATE ISSUED: 01/27/2009
)	
v.)	
)	
WHITAKER COAL CORPORATION)	
)	
Employer-Petitioner)	
Cross-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeals of the Proposed Order - Supplemental Award – Fee for Legal Services of Mary B. Tackett, Senior Claims Examiner, Office of the District Director, United States Department of Labor.

Phyllis L. Robinson (Law Office of Phyllis L. Robinson), Manchester, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals, and claimant's counsel cross-appeals, the Proposed Order - Supplemental Award – Fee for Legal Services of Senior Claims Examiner Mary B. Tackett (the district director), awarding attorney's fees for legal services performed in securing claimant an award of benefits on a survivor's 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). Claimant filed her claim on May 23, 1997, and was awarded benefits on January 5, 2001.¹ The federal benefits award was offset by a state award that was set to expire on August 28, 2008. On November 27, 2007, claimant's counsel² filed a fee petition with the district director requesting a total fee of \$2,250.00 for eleven hours of attorney services at an hourly rate of \$200.00.³ Upon consideration of the fee petition, in a December 5, 2007, Proposed Order, the district director awarded a fee of \$1,762.50, representing 11.75 hours of attorney services at \$150.00 per hour. The district director reduced the hourly rate to \$150.00, and disallowed one-half hour of services from September 28, 1998 through April 27, 1999, as these services were not performed before the district director. The district director held employer liable for fees of \$1,125.00, representing 7.5 hours of services at \$150.00 per hour, incurred from October 24, 1997, thirty days after the date of the district director's initial finding dated September 24, 1997, and held claimant liable for fees of \$637.50, representing 4.25 hours of attorney services at \$150.00 per hour, incurred before October 24, 1997.

Subsequently, employer filed a motion for reconsideration of the fee award because it had not received the fee petition, and noted that it was unusual for a fee petition to be filed so long after the award of benefits had become final. The district director provided the fee petition to employer, and gave employer the opportunity to file objections to the fee petition. Despite employer's objection to the timeliness of the fee petition, the district director informed employer that she would consider the fee request.

¹ On April 28, 2000, the Board reversed Administrative Law Judge Joseph E. Kane's denial of benefits in claimant's survivor's claim. [*F.C.*] *v. Whitaker Coal Co.*, BRB Nos. 99-0748 BLA and 99-0748 BLA-A (Apr. 28, 2000)(unpub.). The Board denied employer's motion for reconsideration on January 5, 2001, and no subsequent appeal was taken to the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises.

² Claimant's counsel is Ms. Phyllis L. Robinson of Manchester, Kentucky.

³ Actually, claimant's counsel's fee request was for \$2,450.00, representing 12.25 hours of attorney services at \$200.00 per hour, as noted by the district director, but claimant's counsel miscalculated the number of hours requested. It appears from the record that claimant's counsel mistakenly believed that she could not request a fee until the offset for the state award expired. In response to employer's objections before the district director, she stated that, "[Claimant] has just become eligible for benefits and therefore Counsel is now entitled to benefits (sic)." Claimant's Response, February 27, 2008 at 1.

Upon receipt of employer's objections, the district director issued a second Proposed Order awarding an attorney's fee dated February 7, 2008. In that Order, the district director again awarded claimant's counsel the sum of \$1,762.50, representing 11.75 hours of attorney services at \$150.00 per hour. She again disallowed one-half hour of services performed from September 29, 1998 through April 27, 1999, because the services were not performed before the district director. She allowed a fee for one-half hour of services performed on April 14, 1998 and May 28, 1998, because the services were performed before the district director. She held employer liable for fees of \$1,125.00, representing 7.5 hours of services at \$150.00 per hour, incurred from October 25, 1997, thirty days after the date of the initial finding dated September 24, 1997, and held claimant liable for fees of \$637.50, representing 4.25 hours of attorney services at \$150.00 per hour, incurred on or before October 24, 1997.

On appeal, employer challenges the fee award, initially asserting that the district director did not address its objection to the timeliness of the fee petition. Employer also contends that the district director erred by considering the fee petition because it was untimely filed or barred by the doctrine of laches. Employer also challenges the awarded hourly rate of \$150.00. Employer further challenges the number of hours awarded. Claimant did not file a response brief. Claimant's counsel filed a cross-appeal, challenging the hourly rate awarded. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief to both employer's and claimant's appeals. Additionally, claimant's counsel filed a fee petition with the Board for services performed before it in BRB Nos. 99-0748 BLA and 99-0748 BLA-A, to which employer filed objections. We first address the appeal of the district director's fee award.

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. *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661, 24 BLR 2-106, 2-117 (6th Cir. 2008); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

Employer initially argues that the district director erred by failing to consider its objection to the fee petition as untimely filed, and that the district director erred by considering the fee petition, as it was barred by the doctrine of laches. We reject employer's arguments. The district director considered employer's objection, which was first brought to her attention by employer in its letter to her dated January 2, 2008. The district director responded to employer by letter dated January 25, 2008, stating that:

Although it is unusual for an attorney fee petition to be filed so long after the final award of benefits, we find that there is no time limitation regarding receipt of a fee petition. Ms. Robinson was successful in assisting the claimant in obtaining a favorable determination in the claim. Therefore, it

is determined that she should be compensated for her services rendered on behalf of the claimant.

District Director's Letter, January 25, 2008. Moreover, the district director implicitly considered employer's objection to timeliness in her amended fee award wherein she again stated:

That the attorney was successful in assisting the claimant in obtaining a favorable determination in the claim and should be compensated for services rendered before the District Director.

February 7, 2008 Fee Award at 1. Thus, the district director addressed employer's objection to timeliness and acted within her discretion in accepting the fee petition, after properly determining that there is no time limitation to file a fee petition before the district director⁴ and that claimant's counsel was successful in obtaining an award for claimant, and thus should be compensated for her services. *See* 20 C.F.R. §§702.132(a), 725.366(a). We, therefore, affirm the district director's determination to accept the fee petition despite its delayed filing because employer has shown no abuse of discretion in this regard. *Bankes v. Director, OWCP*, 7 BLR 1-102, 1-104 (1984), *aff'd*, 765 F.2d 81, 82, 8 BLR 2-1, 2-3 (6th Cir. 1985); *Paynter v. Director, OWCP*, 9 BLR 1-190, 1-191 (1986).

Employer next argues that the district director erred by awarding an hourly rate of \$150.00, contending that this rate exceeds both the rate that was typically approved in 1997 and 1998, and claimant's counsel's market rate for those years, when the services were performed. Claimant's counsel cross-appeals the reduced hourly rate, contending that she earned \$300.00 to \$400.00 per hour in 1997 and 1998. We reject these arguments, as employer and claimant's counsel have failed to establish that the awarded hourly rate of \$150.00 is arbitrary, capricious, or an abuse of discretion. We affirm the district director's reduced rate of \$150.00 per hour because her reduction was based on a proper application of the regulatory criteria⁵ and a proper consideration of the dates the services were performed and the rates that similarly situated attorneys charge, and neither employer nor claimant has submitted any contrary information regarding claimant's counsel's market rate, nor set forth evidence as to the market rate at the time the services were rendered which is contrary to the rate found by the district director. *See* 20 C.F.R. §725.366(b); *Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *Amax Coal Co. v. Director*,

⁴ Section 725.366(a) provides that a fee petition be filed "within the time limits allowed by the district director." 20 C.F.R. §725.366(a).

⁵ Pursuant to 20 C.F.R. §725.366(b), the district director considered the qualifications of the representative, the complexity of the legal issues, and the level of the proceedings to which the claim was raised. February 7, 2008 Fee Award at 2.

OWCP [Chubb], 312 F.3d 882, 894-95, 22 BLR 2-514, 2-535 (7th Cir. 2002); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672, 22 BLR 2-483, 2-493 (7th Cir. 2002); February 7, 2008 Fee Award at 2.

Employer further argues that the district director erred in awarding fees for services performed after March 27, 1998, the date the case was referred to the Office of Administrative Law Judges (OALJ). We reject this argument, as employer has shown no abuse of discretion in this regard. The district director allowed one-half hour of services performed on April 14 and May 28, 1998, and two hours of services on April 7, 1998, because the services were performed before receipt of the claim by the OALJ. The district director specifically found that the services performed on April 14 and May 28, 1998 were in response to correspondence initiated by the district director. Although the OALJ referral letter is the best indication of the date informal proceedings terminate, the test is whether the work performed was relevant to the proceedings before the district director. See *Matthews v. Director, OWCP*, 9 BLR 1-184, 1-186-87 (1986). Accordingly, we affirm the district director's allowance of the services performed on April 14 and May 28, 1998, based on her finding that these services were performed before the district director. However, based on the holding in *Matthews*, 9 BLR at 1-186-87, we cannot affirm the district director's allowance of the two and one-quarter hours of services performed on March 9 and April 7, 1998, for reviewing and responding to employer's interrogatories and requests for documents, as there is no indication that these services were relevant to proceedings before the district director. Accordingly, we reverse the district director's allowance of these hours, and exclude the two and one-quarter hours of services performed on March 9 and April 7, 1998.

We reject employer's remaining arguments. The district director implicitly considered and rejected employer's objection to the adequacy of the description of services itemized on the fee petition by awarding fees for services based on counsel's description of the services. With respect to employer's argument that the service described as reviewing medical records from Hazard ARH was not dated, the district director found that claimant, not employer, was liable for that service as the district director's office received the medical records on July 22, 1997, and no party has challenged that finding on appeal. Consequently, we affirm the district director's fee award in part, but modify it based on her finding as to the date for the apportionment of the liability for the fee, and our disallowance of the above two and one-quarter hours of services on March 9 and April 7, 1998, to reflect that employer is liable for 3.75 hours of services at \$150.00 per hour, totaling \$562.50, and that claimant is liable for 5.75 hours at \$150.00 per hour, totaling \$862.50.

We now address claimant's counsel's fee petition filed in connection with the services she performed before the Board in BRB Nos. 99-0748 BLA and 99-0748 BLA-A. Claimant's counsel requests a fee of \$2,350.00, representing 11.75 hours of attorney services at \$200.00 per hour. Employer has objected to the fee petition, asserting that it was not timely filed, and that an award based on this delayed fee petition is barred by the

doctrine of laches. Under the circumstances of this case, we are not persuaded by employer's objection. Although the Board's regulations impose a sixty-day time limit on the filing of a fee petition, 20 C.F.R. §802.203(c), that regulation does not specify a sanction for the failure to timely file the petition, and we are mindful that the loss of a fee is a harsh result which should not be imposed except in extreme circumstances.⁶ *Paynter*, 9 BLR at 1-191. Moreover, laches does not bar the petition, because employer has not established prejudice. Employer can assess the necessity of the work performed, and employer is not exposed to any additional liability as a result of now having to pay the fee.

Employer objects to the hourly rate, contending that it is excessive for the time when the services were performed in 1999-2001, and asserts that \$125.00 per hour is reasonable, citing *Moyer v. Director, OWCP*, 124 F.3d 1378, 1380 (10th Cir. 1997). Employer's reliance on *Moyer* is misplaced, as the court in *Moyer* was affirming a \$100.00 hourly rate for services performed before the district director in 1992 by a Colorado attorney. Here, the services were performed before the Board in 1999-2001 by a Kentucky attorney. The Board finds the hourly rate to be reasonable in light of the services performed. 20 C.F.R. §802.203(d)(4), (e). Given the absence of any contrary information from employer regarding claimant's counsel's market rate, we award counsel her requested hourly rate of \$200.00. *See Estate of J.T. Goodloe*, 299 F.3d at 672, 22 BLR at 2-493.

Employer next objects to five hours of services on May 22, 1998, one-quarter hour of services on March 31, 1999, and one-quarter hour of services performed on April 28, 2000 because they were not performed before the Board. We agree. The services performed on May 22, 1998 and March 31, 1999, pre-date the filing of claimant's notice of appeal in this case, and thus could not have been performed before the Board. Additionally, the service performed on April 28, 2000, involving work on a motion for reconsideration, could not have been performed before the Board because no motion for reconsideration was pending on that date. Consequently, we disallow five and one-half hours of services because they were not performed before the Board. *See* 20 C.F.R. §§725.366(a), 802.203(d); *Bentley*, 522 F.3d at 661, 24 BLR at 2-117. The Board finds the remaining entries to be sufficiently described to reflect the extent and character of the necessary work done. 20 C.F.R. §802.203(d)(1). We, therefore, award claimant's counsel the sum of \$1,250.00, representing 6.25 hours of attorney services at \$200.00 per hour, for work performed before the Board in BRB Nos. 99-0748 BLA and 99-0748 BLA-A, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

⁶ As we noted earlier, the record in this case indicates that claimant's counsel honestly was under the impression that she could not request her fee until the offset for the state award expired. *See* n.3, *supra*.

Accordingly, the district director's award of an attorney's fee is affirmed in part, but is modified to reflect that employer is liable for \$562.50, for 3.75 hours of attorney services at \$150.00 per hour, and that claimant is liable for 5.75 hours at that hourly rate, or \$862.50. Claimant's counsel is awarded an attorney's fee of \$1,250.00, representing 6.25 hours of attorney services at \$200.00 per hour, for work performed before the Board in BRB Nos. 99-0748 BLA and 99-0748 BLA-A, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge