BRB No. 12-0224 BLA

GARY N. FOX (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELK RUN COAL COMPANY	)	
	)	DATE ISSUED: 01/29/2013
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Attorney Fee Order (2007-BLA-5984) of Administrative Law Judge Thomas M. Burke, granting a fee in connection with a miner's subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] Claimant's counsel submitted a fee petition

[1] Claimant's initial claim for benefits, filed in 1999, was denied in 2001. Claimant filed his subsequent claim in November 2006. In a Decision and Order issued on July 20, 2011, the administrative law judge awarded benefits. Upon review of employer's appeal, the Board affirmed the award of benefits, but modified the administrative law judge's determination of the benefits commencement date. *Fox v. Elk Run Coal Co.*, BRB No.

to the administrative law judge, requesting a total fee in the amount of $19,740.00 for work performed from August 3, 2007, to July 25, 2011, representing 95.4 hours of legal services performed by counsel at an hourly rate of $200.00 ($19,080.00), plus $660.00 in costs. Employer raised various objections to the fee petition.

The administrative law judge considered counsel's fee petition and employer's objections thereto, and found that $19,080.00 is a reasonable fee, and that counsel is entitled to $660.00 in costs. Accordingly, the administrative law judge awarded counsel $19,740.00 for work performed while the case was before the Office of Administrative Law Judges.

On appeal, employer argues that the administrative law judge erred in awarding fees for services rendered by counsel while the miner's claim was before the Board pursuant to interlocutory appeals by employer. Employer also argues that the administrative law judge erred when he awarded fees for time counsel spent consulting with other attorneys. Finally, employer contends that the administrative law judge erred in awarding fees for counsel's services rendered after employer accepted liability for benefits. Counsel responds, urging affirmance of the Attorney Fee Order. The Director, Office of Workers' Compensation Programs, has not filed a response to employer's appeal. Employer has filed a reply brief in support of its position.[2]

The amount of an attorney's fee award by an administrative law judge 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 applicable law.[3] *Jones v. Badger v. Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

Employer first argues that the administrative law judge improperly awarded counsel fees for 7.2 hours of service in May 2008 and October and November 2010,

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11-0793 BLA, slip op. at 2 n.1, 3-10 (Sept. 18, 2012) (unpub.)(Hall, J., concurring and dissenting), *appeals docketed*, Nos. 12-2387, 12-2402 (4th Cir. Nov. 14 and 15, 2012).

[2] We affirm, as unchallenged on appeal, the administrative law judge's award of $660.00 in costs. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The miner's coal mine employment was in West Virginia. *Fox*, BRB No. 11-0793 BLA, slip op. at 4 n.8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

periods of time during which the miner's claim was before the Board on interlocutory appeals. Employer's Brief at 12-14. We disagree.

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. §725.366(a); *see Helmick v. Director, OWCP*, 9 BLR 1-161 (1986); *Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). In order to determine "the jurisdictional cutoff date" for an attorney fee award, "the issue is not whether the work was performed before or after a certain date." *Matthews v. Director, OWCP*, 9 BLR 1-184, 1-186-87 (1986). Rather, the proper inquiry is whether the work performed was "reasonably integral" to the proceedings before the tribunal in which the fee petition was filed. *Id*. In this case, the administrative law judge applied *Matthews*, reviewed the tasks that counsel performed, and found that counsel rendered the 7.2 hours of services in relation to, or in preparation for, the proceedings before the administrative law judge. Attorney Fee Order at 3. Employer does not dispute that factual determination, but argues that the administrative law judge applied the wrong standard because he found that counsel's work during the 7.2 hours was "relevant" or "obviously germane" to the proceedings before the administrative law judge, rather than finding it "reasonably integral" to those proceedings. Attorney Fee Order at 3; Employer's Brief at 14. The ultimate issue was "whether the work performed was relevant to the proceedings before the administrative law judge." *Matthews*, 9 BLR at 1-186. Therefore, contrary to employer's contention, the administrative law judge did not err or abuse his discretion in overruling employer's objections to the 7.2 hours in question.

Next, employer argues that the administrative law judge erred by awarding counsel fees for consulting with other attorneys. Employer's Brief at 15-19. Employer challenges the award of fees for services rendered on August 4, 2008, when counsel included "Legal consults and research" in the 0.5 hour of work he performed after employer asked him whether claimant would pursue discovery if employer accepted liability. Claimant's Fee Petition; Employer's Brief at 17. Employer contends that the consultation was not a necessary service under 20 C.F.R. §725.367(a). The administrative law judge found that counsel adequately identified the "complex" issues that made the consultation necessary and reasonable: whether claimant would continue to pursue discovery if employer accepted liability, and whether employer might have committed fraud on the court in claimant's previous claim. Attorney Fee Order at 4; Claimant's Fee Petition at 1; Claimant's Reply to Employer's Response to Fee Petition at 6-7. The administrative law judge did not abuse his discretion in finding counsel's services on August 4, 2008, to be necessary and reasonable. *See Jones*, 21 BLR at 1-108-09; *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984).

Employer also challenges the award of fees for eleven entries, totaling 16.75 hours, in counsel's fee petition from July 17, 2010, to April 14, 2011, that include

consultations with co-counsel. Employer's Brief at 17-19. The administrative law judge credited counsel's assertion that he consulted with co-counsel about discovery issues and drafting documents, and that "only a fraction" of the time in the entries was spent on those consultations.[4] Attorney Fee Order at 4-5. Moreover, the administrative law judge found that the amounts of time counsel spent on those issues and tasks "are considered reasonable even without considering the legal consult." *Id*. at 5. Employer contends that the administrative law judge erred in finding the consultations with co-counsel necessary. Employer's Brief at 19. Employer, however, does not argue that counsel's work on discovery matters and in drafting documents was unnecessary, and it has not demonstrated an abuse of discretion in the administrative law judge's alternative finding that, even if the consultations with co-counsel were excluded, counsel spent a reasonable amount of time on that work. *See Jones*, 21 BLR at 1-108. Therefore, employer demonstrates no abuse of discretion by the administrative law judge in overruling employer's objection to counsel's 16.75 hours of services.

Finally, employer argues that the administrative law judge erred in awarding fees for all work performed by counsel after August 4, 2008, when employer accepted liability for benefits. Employer's Brief at 19-22. The relevant background on this issue is as follows: Employer conceded liability on claimant's subsequent claim after the administrative law judge granted claimant's motion to compel discovery of evidence employer had not exchanged with claimant during his previous claim. Employer conceded liability for benefits commencing as of August 2008. At claimant's request, however, the administrative law judge retained jurisdiction of the claim, and ultimately set aside the 2001 denial of claimant's previous claim, because he found that employer committed fraud on the court in the previous claim by concealing pathology reports that diagnosed claimant with complicated pneumoconiosis. With the prior final denial no longer in effect, the administrative law judge awarded benefits back to January 1, 1997, the date of the first x-ray of record that was interpreted as positive for complicated pneumoconiosis. Upon review of employer's appeal, the Board affirmed the award of benefits, but vacated the administrative law judge's finding of fraud on the court and his determination that January 1997 was the date for the commencement of benefits. The Board held that claimant is entitled to benefits as of June 2006, the onset date of his complicated pneumoconiosis, as conceded by employer. *Fox v. Elk Run Coal Co.*, BRB No. 11-0793 BLA, slip op. at 3-10 (Sept. 18, 2012) (unpub.)(Hall, J., concurring and dissenting), *appeals docketed*, Nos. 12-2387, 12-2402 (4th Cir. Nov. 14 and 15, 2012).

In a brief that was filed with the administrative law judge before the Board issued its decision in *Fox*, employer argued that counsel was not entitled to fees for the 75.45 hours of work he performed pursuing the equitable remedy of fraud on the court, because

[4] Counsel did not seek fees for co-counsel's time.

the administrative law judge lacked jurisdiction to consider that issue and impose what was, employer argued, a sanction.[5] Employer argued further that, if the administrative law judge's finding of fraud on the court was reversed on appeal, claimant's counsel would not be entitled to a fee for the work performed after employer accepted liability for benefits, because claimant "will not have derived any additional economic benefits from counsel's actions." Response to Claimant's Fee Petition at 8 n.3. In overruling employer's objections, the administrative law judge determined that the award of a "fee is not a monetary sanction but rather compensation for services provided to [c]laimant for obtaining benefits commencing [as of] January, 1997," whereas "[e]mployer's acceptance of liability was for benefits commencing on August 4, 2008." Attorney Fee Order at 5.

On appeal, in a brief filed before we decided *Fox*, BRB No. 11-0793 BLA, employer contends that if the Board "vacates the finding of fraud on the court . . . [c]laimant's counsel is not entitled to attorney's fees for the 75.45 hours billed after Elk Run accepted liability, because [claimant] will not have derived any additional economic benefit from claimant's actions." Employer's Brief at 21. Counsel is entitled to attorney fees if there has been a successful prosecution of claimant's subsequent claim. *See* 33 U.S.C. §928; *Beasley v. Sahara Coal Co.*, 16 BLR 1-6, 1-8 (1991). The administrative law judge determined that counsel was entitled to a fee for the work he performed after employer accepted liability, because counsel was successful in obtaining a benefits commencement date over eleven years earlier than the commencement date that employer accepted. We have since vacated the administrative law judge's finding of fraud on the court, and his determination that January 1997 is the benefits commencement date. Therefore, the administrative law judge should reconsider employer's objection in light of claimant's degree of success on those issues, in determining whether the fee is reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424, 435-36 (1983); *Stratton v. Weedon Eng'g Co.*, 35 BRBS 1, 8-9 (2001)(en banc).

[5] In its decision in *Fox*, the Board rejected employer's argument that the administrative law judge lacked jurisdiction to consider whether the prior final decision was procured by fraud on the court. *Fox*, BRB No. 11-0793 BLA, slip op. at 6.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge