

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 23-0025 BLA

DONNIE E. HOLCOMB )  
(Widow of JAMES E. HOLCOMB) )

Claimant-Petitioner )

v. )

CARTER ROAG COAL COMPANY )

and )

WEST VIRGINIA COAL WORKERS' )  
PNEUMOCONIOSIS FUND )

Employer/Carrier-Respondents )

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

Party-in-Interest )

DATE ISSUED: 04/03/2024

DECISION and ORDER

Appeal of the Attorney Fee Order of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk (Petsonk PLLC), Beckley, West Virginia, for Claimant.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel<sup>1</sup> appeals Administrative Law Judge (ALJ) Patricia J. Daum's Attorney Fee Order (2017-BLA-05744) issued in connection with the successful prosecution of a claim filed on February 26, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

On June 5, 2020, the ALJ issued a Decision and Order Awarding Benefits. In her Decision and Order, the ALJ allowed sixty days, until August 4, 2020, for counsel to file a fee petition. On March 25, 2022, more than nineteen months after the deadline, Mountain State Justice, Incorporated (Mountain State) filed a fee petition requesting a fee for services performed before the ALJ by Samuel B. Petsonk, Esquire, Jennifer Wagner, Esquire, and multiple paralegals. Mountain State requested a fee in the amount of \$12,168.57 for legal services performed and costs incurred between July 18, 2017 and June 5, 2020, as follows: \$8,820.00 for 28 hours of attorney services performed by Mr. Petsonk at an hourly rate of \$315.00, \$270.00 for 0.75 hours of attorney services performed by Ms. Wagner at an hourly rate of \$360.00, and \$1,843.72 for 14.75 hours of paralegal legal services performed at an hourly rate of \$125.00, plus costs totaling \$1,234.85. Claimant's Fee Petition (Mar. 25, 2022). Employer and its Carrier (Employer) responded that Mountain State's fee petition should be denied as untimely because it was unreasonable for Claimant's counsel to wait more than a year after the ALJ's deadline to file the fee petition.<sup>2</sup> Employer's Objections to Fee Petition (Apr. 4, 2022) at 2-3. In a September 19, 2022 Attorney Fee Order, which is the subject of this appeal, the ALJ denied the fee petition as untimely.

On appeal, Claimant's counsel asserts the ALJ should not have denied Mountain State's fee petition as untimely because the unprecedented circumstances caused by the COVID-19 pandemic excuse the delay. Neither Employer nor the Director, Office of Workers' Compensation Programs, have submitted response briefs.

---

<sup>1</sup> While this claim was pending before Administrative Law Judge (ALJ) Patricia J. Daum, Claimant was represented by Mr. Petsonk, who was employed as an attorney by Mountain State Justice, Incorporated (Mountain State). Fee Petition (Mar. 22, 2022), Exhibit C. After leaving Mountain State and establishing his own law practice in June of 2019, Mr. Petsonk continued to represent Claimant as co-counsel with Jennifer Wagner, an attorney employed by Mountain State. *Id.*; Notice of Appearance Clarifying Representation (Feb. 20, 2020).

<sup>2</sup> Employer further challenged the number of hours and hourly rates requested as well as the alleged expenses. Employer's Objections to Fee Petition (Apr. 4, 2022) at 3-19.

An ALJ's award of an attorney's fee is discretionary and will be upheld on appeal unless the challenging party establishes it is arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.<sup>3</sup> *E. Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 568-69 (4th Cir. 2013); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

Counsel argues the ALJ abused her discretion by denying the entirety of the fee petition given the historic disruptions caused by the COVID-19 pandemic. Claimant's Brief at 4-5. We disagree that the ALJ abused her discretion.

Pursuant to the Act's regulations, fee petitions must be filed "within the time limits allowed by the . . . [ALJ] . . . ." 20 C.F.R. §725.366(a). If the time limit has expired, the ALJ may extend the time for good cause "if the party failed to act because of excusable neglect." See 29 C.F.R. §18.32(b), accord Fed. Rule Civ. P. 6(b)(1)(B). This is a strict standard under which judges must have "good reasons for permitting litigants to exceed deadlines." *Robinson v. City of Harvey, III*, 617 F.3d 915, 918-19 (7th Cir. 2010) (citing *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 395 (1996)). Further, the moving party bears the burden of proving that its delay is excusable. *Drippe v. Tobelinski*, 604 F.3d 778, 784 (3d Cir. 2010) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 896 n.5 (1990)). Determining whether good cause exists requires consideration of (1) prejudice to the opposing party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395.

The ALJ provided a deadline of sixty days from her June 5, 2020 Decision and Order for Claimant's counsel to file a fee petition. Decision and Order at 51. Mountain State filed a fee petition on March 25, 2022, well after the sixty-day deadline. Fee Petition (Mar. 25, 2022). Mountain State explained that the filing was late because the "historic disruption in the practice of law over the past eighteen months" from the COVID-19 pandemic required it to "set aside all fee petitions in an effort to prioritize" litigation on the merits of claims for benefits. Fee Petition (Mar. 25, 2022) at 3; Claimant's Response to Employer's Objections at 5-6 (unpaginated).

---

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

The ALJ acknowledged that the loss of an attorney's fee should not be imposed "except in the most extreme circumstances." Order at 3-4 (quoting *Paynter v. Director, OWCP*, 9 BLR 1-190, 1-191 (1986)). However, she also noted that, unlike the thirty-day delay at issue in *Paynter*, Mountain State's fee petition in this case was "nearly two years after the deadline" and "almost a year after the [Benefits Review Board's] order affirming the award of benefits." *Id.* She further noted Mountain State could have requested an extension of time but did not in the period from when she set the deadline to when Mountain State filed its petition. *Id.* at 3. Finally, she noted Mountain State "had already submitted the same attorney fee petition nearly two and a half months before" she issued her Decision and Order, and thus Claimant's counsel's argument that it could not have timely submitted its current fee petition due to the pandemic was unavailing.<sup>4</sup> *Id.* Finding that Mountain State failed to establish good cause to excuse the late filing, the ALJ found the office's lack of diligence and "extreme lateness" of its petition "qualif[ies] as 'a most extreme circumstance' warranting the loss of an attorney's fee." *Id.* at 4. Thus, having taken into consideration Employer's objections and Claimant's response, the length of delay in filing the petition, Claimant's explanation as to the cause of the delay, and counsel's lack of diligence, the ALJ denied the fee request as untimely. *Id.* at 3-4; *Pioneer*, 507 U.S. at 395.

Under the facts of this case, Claimant has not explained how the ALJ abused her discretion in finding that Mountain State did not establish good cause to accept the untimely fee petition or in rejecting its argument that the COVID-19 pandemic necessitated its more than nineteen-month delay.<sup>5</sup> See *Gosnell*, 724 F.3d at 568-69; *Jones*, 21 BLR at 1-108; *Abbott*, 13 BLR at 1-16; *Bankes v. Director, OWCP*, 765 F.2d 81, 82 (6th Cir. 1985) (district director did not abuse his discretion in refusing to consider a fee petition that was filed more than fourteen months after the thirty-day filing period); see also *Meinert v.*

---

<sup>4</sup> On February 25, 2020, more than three months before the ALJ issued her Decision and Order, Ms. Wagner submitted an itemized attorney fee petition requesting a fee of \$10,968.72 for legal services performed and expenses of \$1,234.85. Order Dismissing Fee Petition as Premature (Mar. 11, 2020). By Order dated March 11, 2020, the ALJ denied that fee petition as premature because a decision in the underlying claim had not yet been issued. Counsel was advised that she would need to resubmit her fee petition if and when a Decision and Order was issued that reflected an award of benefits to Claimant.

<sup>5</sup> While Claimant's counsel points generally to disruptions in the black lung claims process caused by the COVID-19 pandemic, he does not allege that Mountain State was unaware of the deadline in this case or otherwise explain why it did not take any action on the matter, such as seeking an extension, until it filed its fee petition more than twenty-one months after the ALJ issued her order setting the deadline.

*Fraser, Inc.*, 37 BRBS 164 (2003) (abuse of discretion standard requires the Board to consider “whether there has been a clear error of judgment” because “[t]he ultimate standard of review is a narrow one”); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (review under the arbitrary and capricious standard is deferential). Thus, we reject Claimant’s counsel’s assertion to the contrary.

Accordingly, we affirm the ALJ’s Attorney Fee Order.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge