

U.S. Department of Labor

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



BRB No. 22-0532 BLA

CHARLES W. PERDUE, JR.)

Claimant-Petitioner)

v.)

SELAH CORPORATION)

and)

DATE ISSUED: 03/12/2024

BRICKSTREET MUTUAL INSURANCE)
COMPANY)

Employer/Carrier-)
Respondents)

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

Party-in-Interest)

DECISION and ORDER

Appeal of the Order Denying Attorney Fee Petition of Sean M. Ramaley,
Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk (Petsonk PLLC), Beckley, West Virginia, and Laura
Davidson and Bren Pomponio (Mountain State Justice, Inc.), Charleston,
West Virginia, for Claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia for
Employer and its Carrier.

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

PER CURIAM:

Claimant's counsel appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Order Denying Attorney Fee Petition (2018-BLA-05769) issued in connection with the successful prosecution of a claim filed on March 6, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

On June 23, 2020, the ALJ issued a Decision and Order Awarding Benefits. In his Decision and Order, the ALJ allowed sixty days, until August 22, 2020, for Claimant's counsel¹ to file a fee petition. On August 9, 2021, nearly a year 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 a paralegal. Mountain State requested a fee in the amount of \$8,332.16 for legal services performed between June 7, 2017 and June 23, 2020, representing \$5,906.25 for 18.75 hours of attorney services performed by Mr. Petsonk at an hourly rate of \$315.00, \$270.00 for 0.75 hour of attorney services performed by Ms. Wagner at an hourly rate of \$360.00, and \$2,155.91 for 17.25 hours of paralegal legal services performed at an hourly rate of \$124.98, plus costs totaling \$528.38. 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 file the fee petition nearly a year after the ALJ's deadline. In an August 29, 2022 Order Denying Attorney Fee Petition, which is the subject of this appeal, the ALJ denied the fee petition as untimely.

On appeal, Claimant's counsel asserts that the ALJ should not have denied Mountain State's fee petition as untimely because the unprecedented circumstances involving the COVID-19 pandemic excused the delay. Employer responds, asserting the ALJ acted within his discretion and in accordance with the law, and therefore his decision should be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a response.

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

¹ While this claim was pending before the ALJ, Claimant was represented by Mr. Petsonk, who was employed as an attorney by Mountain State Justice, Incorporated (Mountain State). Fee Petition, 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.*

not in accordance with applicable law.² *E. Associated 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 his discretion by denying the entirety of Counsel's fee petition given the historic disruptions caused by the COVID-19 pandemic. Claimant's Brief at 4-5. We disagree.

Pursuant to the black lung 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. R. 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). Determination of 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 period of sixty days from his June 23, 2020 Decision and Order for Claimant's counsel to file a fee petition. Decision and Order at 30. Mountain State filed a fee petition on August 9, 2021, well after the sixty-day deadline. 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 at 2-3; Response to Employer's Objections at 1-2.

The ALJ acknowledged that the loss of an attorney's fee should not be imposed "except in the most extreme circumstances." Order at 3, citing *Paynter v. Director, OWCP*, 9 BLR 1-190, 1-191 (1986). However, he also noted that, unlike the one-month delay presented in *Paynter*, in the present case Mountain State's fee petition was almost a year

² The Benefits Review Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 33-34; Director's Exhibit 4.

late. *Id.* He further noted that Mountain State could have requested an extension of time or reached an agreement with Employer but did neither in the nearly fourteen-month period from when he set the deadline to when Mountain State filed its petition. *Id.* at 3-4. In addition, he noted that the Decision and Order was issued three months after the pandemic began, giving Mountain State's office time to adjust to the new work conditions and take action in furtherance of protecting its entitlement to a fee. *Id.* at 3. Finally, while Mountain State asserted that the office was disrupted by the COVID-19 pandemic, the ALJ found that it did not present sufficient evidence of an increased workload to justify a delay of a year. *Id.* Finding that Mountain State disregarded the time set forth in the Decision and Order "on [its] own volition," the ALJ found the office's lack of due diligence "constitutes 'the most extreme circumstances' warranting the loss of an attorney's fee" and denied the request. *Id.* at 4. Thus, the ALJ took into consideration the prejudice to the parties, the length of delay in filing the petition, the cause of the delay, and Counsel's lack of diligence in denying the fee request. Order at 3-4; *Pioneer*, 507 U.S. at 395.

Under the facts of this case, Counsel has not explained how the ALJ abused his 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 nearly one-year delay.³ 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. 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 Counsel's assertion to the contrary.

³ 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 nearly fourteen months after the ALJ issued his order setting the deadline.

Accordingly, the ALJ's Order Denying Attorney Fee Petition is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge