

U.S. Department of Labor

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



BRB No. 20-0481 BLA

ANN B. STIPCAK )  
(o/b/o and Widow of JOHN A. STIPCAK) )

Claimant-Respondent )

v. )

HELEN MINING COMPANY )

and )

VALLEY CAMP COAL COMPANY )

Employer/Carrier- )  
Petitioners )

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

Party-in-Interest )

DATE ISSUED: 11/23/2021

DECISION and ORDER

Appeal of the Attorney Fee Order of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Attorney Fee Order (2010-BLA-05191) granting a fee petition in connection with a subsequent miner's claim filed on September 1, 2006 and survivor's claim<sup>1</sup> filed February 10, 2009 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a Decision and Order dated July 5, 2012, ALJ Thomas M. Burke awarded benefits in both the subsequent claim and survivor's claim. Pursuant to Employer's appeal, the Benefits Review Board affirmed the award of benefits in both claims. *Stipcak v. Helen Mining Co.*, BRB No. 12-0567 BLA (Aug. 29, 2013) (unpub.).

On February 27, 2020, Claimant's counsel submitted a fee petition to the Office of Administrative Law Judges requesting a fee of \$14,014.75 representing \$10,743.75 for forty-nine and one-half hours of legal services and \$3,271.00 for expenses. The case was assigned to ALJ Swank (the ALJ). In his Attorney Fee Order that is the subject of this appeal, the ALJ rejected Employer's argument that the fee petition should be denied as untimely and, after considering the criteria set forth at 20 C.F.R. §725.366, awarded the requested fee and expenses in full.

On appeal, Employer asserts the ALJ should have denied the fee petition as untimely.<sup>2</sup> Claimant responds in support of the award of attorney's fees. The Director, Office of Workers' Compensation Programs, has declined to respond to Employer's appeal, unless requested to do so by the Board.

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*

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<sup>1</sup> The Miner died on December 23, 2008. *Stipcak v. Helen Mining Co.*, BRB No. 12-0567 BLA, slip op. at 2 n.1 (Aug. 29, 2013) (unpub.). Claimant is the widow of the Miner.

<sup>2</sup> Employer has not challenged the amount of the attorney's fee awarded. Therefore this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Stipcak*, BRB No. 12-0567 BLA, slip op. at 4 n.4.

[*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).

Employer argues the ALJ abused his discretion by accepting the fee petition as timely. Employer's argument has merit. The applicable Black Lung regulation requires a fee petition be filed "within the time limits allowed by the . . . [ALJ] . . . ." 20 C.F.R. §725.366(a). In this case, ALJ Burke provided a period of thirty days from his July 5, 2012 Decision and Order awarding benefits for Claimant's counsel to file his fee petition. Claimant's counsel filed his fee petition on February 27, 2020, well after the thirty day deadline.

Although the regulations allow an ALJ to set the time limit for when a party should file a fee petition, they are silent as to the standard for evaluating whether an ALJ should allow a late-filed fee petition or the applicable penalty.

However, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules) are not silent on this issue. The OALJ Rules apply in proceedings under the Act to the extent they are not inconsistent with either the Act itself or the Act's regulations. 29 C.F.R. §18.10(a). The OALJ rules in turn adopt the Federal Rules of Civil Procedure "excusable neglect" standard for determining whether an untimely pleading should be entertained. *See* 29 CFR §18.32(b), *accord* Fed. Rule Civ. P. 6(b)(1)(B). Specifically, when an act "must be done within a specified time," the ALJ "may, for good cause, extend the time . . . if the party failed to act because of *excusable neglect*." *Id.* (emphasis added). This is a strict standard under which judges must have "good reasons for permitting litigants to exceed deadlines." *Robinson v. City of Harvey, Ill.*, 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).

The United States Supreme Court has outlined four factors to consider when determining if "excusable neglect," i.e. good cause, exists: (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.<sup>4</sup> *Pioneer Inv. Services Co.*, 507 U.S. at

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<sup>4</sup> The Third Circuit acknowledged that *Pioneer* involved a bankruptcy issue, but held that the Supreme Court's construction of "excusable neglect" applies to other federal proceedings. *George Harms Constr. Co. v. Chao*, 371 F.3d 156, 163-164 (3d Cir. 2004).

395. As the Court explained, “the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Id.*

We conclude the ALJ abused his discretion by failing to evaluate whether Claimant’s counsel met his burden to establish good cause by demonstrating “excusable neglect” for the late filing of his fee petition. *Gosnell*, 724 F.3d at 568-69; *Bankes v. Director, OWCP*, 765 F.2d 81, 82 (6th Cir. 1985). He erroneously considered only whether Employer would suffer “undue” economic harm to conclude that an award of attorney’s fees in this case is “just.” Attorney Fee Order at 3. He specifically explained:

There is no question that Claimant’s counsel either performed the work in question or prevailed on the merits; had the fee petition be[en] filed timely there is no doubt that it would have been ordered to be paid. Claimant’s request is for the rate of fees in effect during the period of 2007- 2012 which are substantially lower than the current fee structure. There is no provision for judgment interest which would be applicable between the award of benefits and the request for fees nor one requested. From an economic standpoint, Employer has had the benefit of retaining the claimed fees in question for the last eight years. Likewise, due to inflationary depreciation, the money in question is worth less now than it was eight year ago. Given the totality of the factors, the undersigned finds that despite Claimant’s counsel’s failure to abide by the terms of [ALJ] Burke’s July 5, 2012 Order, that the award of fees is just.

*Id.* Because the ALJ failed to apply the “excusable neglect” standard, we vacate the award of attorney’s fees and remand the case to him for further consideration of this issue.

The ALJ should specifically determine if Claimant’s counsel has demonstrated “excusable neglect” for filing his fee petition almost eight years after the deadline that ALJ Burke set and thus established good cause to entertain this fee petition. 29 CFR §18.32(b). He should specifically consider the four factors that the Supreme Court set forth in *Pioneer Inv. Services Co.*, 507 U.S. at 395, when evaluating this issue.

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

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge