BRB No. 02-0627 BLA

WILMA JEAN MORTON (Widow of HOMER S. MORTON)	)	
Claimant	)	
v.	)	
UNION CARBIDE CORPORATION	)	DATE ISSUED:
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fees of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order (1999-BLA-666) of Administrative Law Judge Richard A. Morgan granting attorney fees on a 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).[1]

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Subsequent to the issuance of the administrative law judge=s Decision and Order awarding benefits, claimant=s counsel submitted a fee petition to the administrative law judge, requesting $8,875.81 for 26.1 hours of services at $250 per hour, plus $2,350.81 in expenses. Claimant=s counsel also resubmitted the fee petition which he had previously filed with Administrative Law Judge Gerald M. Tierney, requesting $3,785.00 for 15.1 hours of services at $250 per hour, plus $10 in expenses.[2] Thereafter, employer filed objections to both petitions and renewed the earlier objections it raised before Judge Tierney, and claimant responded to employer=s objections. In his Supplemental Decision and Order, the administrative law judge disallowed $45.81 in postal expenses, but rejected employer=s objections to counsel=s hourly rate and the number of hours claimed, and approved the full amount of the fee requested. Accordingly, the administrative law judge awarded claimant=s counsel a fee of $12,615.00, representing 41.2 hours of services at $250 per hour, plus $2,315.00 in expenses.

On appeal, employer challenges the number of hours and the hourly rate approved by the administrative law judge. Claimant has not filed a response brief, and the Director, Office of Workers= Compensation Programs, has declined to participate in this appeal.

The award of an attorney=s fees pursuant to Section 28 of the Longshore and Harbor Workers= Compensation Act, 33 U.S.C. '928, as incorporated into the Act by 30 U.S.C. '932(a) and implemented by 20 C.F.R. '725.367(a), is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Employer initially maintains that the administrative law judge failed to address employer=s specific objections to the hourly rate sought by claimant=s counsel. The administrative law judge found that the hourly rate requested was not excessive, as claimant=s counsel Ahas been litigating black lung claims for nineteen years and has taught classes on black lung benefits law,@ and Ahas demonstrated that $250.00 is his customary billing rate, which is consistent with his credentials and expertise in black lung litigation.@

[2]The Board previously vacated Judge Tierney=s Decision and Order granting summary judgment, and remanded the case for adjudication on the merits of the claim. The Board also vacated Judge Tierney=s Supplemental Decision and Order Granting Attorney=s Fees and instructed him to address employer=s specific objections to the number of hours and the hourly rate requested by claimant=s counsel if, on remand, benefits were awarded. *Morton v. Union Carbide Corp.*, BRB No. 00-0277 BLA (Dec. 28, 2000)(unpub.).

Supplemental Decision and Order at 2. The administrative law judge, however, did not address employer=s objections, dated December 14, 1999, to counsel=s earlier fee petition for work performed before Judge Tierney, which employer reasserted in its January 21, 2002 objections to the current fee petition. Specifically, employer argues that counsel improperly seeks an enhancement of his usual rate in order to account for the contingent nature of his fee in black lung cases and the general delays in payment. In support of this argument, employer notes that counsel stated, in his 1999 Memorandum in support of the application to Judge Tierney for an attorney fee, that counsel=s standard rate in non-contingency cases is $150 per hour. Employer further contends that counsel has not demonstrated himself to be more expert than other highly experienced black lung attorneys who charge $150 per hour, and that the administrative law judge did not adequately discuss the criteria relevant to determining a reasonable fee. Employer=s arguments have merit.

Pursuant to 20 C.F.R. ' 725.366(b):

> Any fee approved...shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of the fee requested.

20 C.F.R. ' 725.366(b). In interpreting fee shifting provisions such as the one implemented by Section 725.366, the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit have held that multipliers or any other enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible. *See City of Burlington v. Dague*, 505 U.S. 557 (1993); *Pennsylvania v. Delaware Valley Citizens= Council for Clean Air*, 483 U.S. 711 (1987); *Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992).

Attached to his 1999 fee petition in the present case, counsel submitted a Memorandum in Support of Motion for Attorney=s Fee in which he stated that A[i]n setting an hourly rate, consideration must be given to the risk of no fee and the huge delay in collecting fees.@ Memorandum at 5. To account for these factors, counsel described a calculation which enables him to net his standard hourly rate of $150 if he assumes a Awin rate@ of fifty percent in black lung cases. *Id*. Counsel stated specifically that:

> When the contingent nature of the fee is factored into my base fee, my hourly rate for handling federal black lung cases at the Administrative Law Judge level is

> \$300.00. A fee of \$250.00 per hour, which I have requested here, is less than 2.0 times the standard \$150.00 hourly rate which is economically justified. To average a \$150.00 hourly fee, we must win almost 2 times more cases than the national average for claimants at the Administrative Law Judge level. Considering the enormous risk of no fee and the significant delays, an hourly rate of \$250.00 is reasonable.

Memorandum at 6. Because this represents the type of fee enhancement prohibited by the Supreme Court and the Fourth Circuit, we vacate the administrative law judge=s approval of counsel=s hourly rate and remand the case to the administrative law judge for reconsideration of both the 1999 and 2002 fee petitions. *See Dague, supra; Broyles, supra*. On remand, the administrative law judge must address employer=s objections and apply only those factors set forth in Section 725.366 in determining whether counsel has requested a reasonable fee for the services performed before the administrative law judge.

Employer next argues that the administrative law judge arbitrarily rejected employer=s objections to the time itemized for services performed on August 20, 2001, September 21, 2001 and September 28, 2001, and failed to address employer=s objections to the time spent for services performed on July 29, 1999 and September 5, 1999. Some of employer=s arguments have merit. Because the administrative law judge did not consider the specific arguments contained in employer=s December 14, 1999 objections to counsel=s fee petition, the administrative law judge must address them on remand. Employer, however, has failed to demonstrate an abuse of the administrative law judge=s discretion in finding that the four hours counsel spent on August 20, 2001, summarizing the evidence and reviewing the case and the hearing procedure with his associate, and the five and one-half hours counsel spent on September 21 and 28, 2001, summarizing evidence and completing his closing argument, were reasonable and necessary to establish entitlement, and were not excessive given the amount of evidence submitted by both parties and the complexity of the issue of whether the miner had complicated pneumoconiosis. Supplemental Decision and Order at 2; *see Abbott, supra*; *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Consequently, we affirm the administrative law judge=s approval of the time spent on August 20, 2001, September 21, 2001 and September 28, 2001.

Accordingly, the administrative law judge=s Supplemental Decision and Order Granting Attorney Fees is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge