BRB No. 05-0810 BLA

BOBBY R. BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/26/2006
	)	
DOUBLE B MINING INCORPORATED	)	
	)	
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 Awarding Representative's Fee of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Representative's Fee (92-BLA-1685) of Administrative Law Judge Thomas M. Burke (the administrative law judge). Claimant's counsel initially filed a fee petition dated December 29, 2003, in which he requested payment in the amount of $4287.50 for 43.5 hours of services rendered between April 19, 1989 and August 21, 2002, at hourly rates

of $100 for attorney work, $45 for paralegal work, and $35 for secretarial work. In his first Supplemental Decision and Order, issued on March 30, 2004, the administrative law judge reiterated the total fee requested, the total hours of services, and the hourly rates as set forth by claimant's counsel. With respect to identifying when the case was before the Office of Administrative Law Judges (OALJ), however, the administrative law judge stated that the relevant dates were August 28, 1992 to August 21, 2002. 2004 Supplemental Decision and Order at 2. The administrative law judge granted a fee of $2700 for twenty-seven hours of work performed before the OALJ between the dates identified by the administrative law judge. Claimant did not file a motion for reconsideration with the administrative law judge or appeal the administrative law judge's Supplemental Decision and Order to the Board.

On March 3, 2005, claimant's counsel resubmitted the fee petition, requesting that the administrative law judge grant the portion of the fee covering the period from April 19, 1989 to August 12, 1991. Employer objected on the basis that claimant's counsel failed to seek reconsideration or file an appeal of the attorney fee, and urged the administrative law judge to reject counsel's resubmission as untimely. The administrative law judge issued a second Supplemental Decision and Order, dated June 22, 2005, in which he found that the case was before the OALJ during the period identified by counsel. Citing the Board's decision in *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993), the administrative law judge further determined that in neglecting to consider the services performed before the OALJ between April 19, 1989 and August 12, 1991, he had committed a clerical error, which could be corrected at any time in accordance with Rule 60(a) of the Federal Rules of Civil Procedure.[1] The administrative law judge awarded the fee requested for the services performed during this period.

Employer argues on appeal that the administrative law judge erred in considering counsel's resubmitted fee petition because it was not timely filed. The Director, Office of Workers' Compensation Programs (the Director), has responded and urges affirmance of the fee award. Claimant has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational,

---

[1] Federal Rule of Civil Procedure 60(a) provides in relevant part that:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Fed R. Civ. P. 60(a).

and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer asserts that the administrative law judge erred in addressing the claimant's counsel's second submission because it constituted an untimely request for reconsideration of the 2004 Supplemental Decision and Order. Employer maintains that Federal Rule of Civil Procedure 60(a) does not apply in this case, as the error in the 2004 Supplemental Decision and Order was not "clerical." The Director argues in response that counsel's resubmission of the fee petition did not constitute a request for reconsideration, as the administrative law judge never considered the section of the fee petition relating to the period between April 19, 1989 and August 12, 1991. The Director further states that the regulations do not contain any time limits for the filing of fee petitions which would prohibit them from being submitted and resolved on a piecemeal basis. The Director's only comment regarding the applicability of Rule 60(a) is that "[i]t is not clear whether there was a true clerical error in this case." Director's Response Letter at 2.

Upon consideration of the facts of this case and the arguments made by the parties, we hold that the administrative law judge erred in addressing counsel's resubmitted fee petition, as it constituted an untimely request for reconsideration of the administrative law judge's 2004 Supplemental Decision and Order. As an initial matter, we are persuaded that Rule 60(a) does not apply in this case because the administrative law judge's error was not clerical. A clerical error has been defined as a mistake or omission that is mechanical in nature and that does not involve a legal issue or the rendering of a judgment. *Coleman*, 18 BLR at 1-17, citing *Johnson v. Director, OWCP*, 7 BLR 1-206 (1984); *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 BLR 1-103 (1979). Examples of these types of mistakes include typographical errors, a misstatement of the intended result that is apparent from the face of the document, or situations in which "the thing . . . written . . . is *not what the person intended to . . . write . . . .*" *Coleman*, 18 BLR at 1-18, quoting *Allied Materials Corp. v. Superior Products Co.*, 620 F.2d 224 (10th Cir. 1980)(emphasis in original). In this case, there is no indication that the administrative law judge's omission of the period between April 19, 1989 and August 12, 1991 resulted from a typographical or transcription error or that the contents of the 2004 Supplemental Decision and Order included something other than what the administrative law judge intended to write. We must reverse, therefore, the administrative law judge's determination that he committed a clerical mistake which he could correct at any time pursuant to FRCP 60(a).

According to the Director, the fact that Rule 60(a) is not applicable in this case did not preclude the administrative law judge from addressing counsel's resubmitted fee petition. In support of his position, the Director states that the regulation pertaining to

attorney fees, 20 C.F.R. §725.366, does not set forth any time limits within which a fee petition must be filed. Rather, it provides that "[t]he application shall be filed . . . within the time limits allowed by . . . the administrative law judge . . . ." 20 C.F.R. §725.366(a). With respect to motions for reconsideration of attorney fee awards, Section 725.366(d) merely indicates that "[a]ny party may request reconsideration of a fee awarded by the adjudication officer."

The Director's arguments in this regard are without merit. Although Section 725.366 does not set forth any time limits, 20 C.F.R. §725.479(b) provides that if a party wishes to seek reconsideration of an administrative law judge's Decision and Order, the party must file a request to this effect within thirty days of the filing of the Decision and Order. The thirty-day time limit applies with equal force to Decisions and Orders adjudicating attorney fee petitions in which a clerical error was not at issue. *f*, 17 BLR 1-72, 1-74 (1992)(holding that the administrative law judge did not err in rejecting counsel's separate request for enhancement of his fee award based upon delay in payment when counsel did not make this request in his initial fee petition and did not request reconsideration of the administrative law judge's Decision and Order awarding attorney fees within thirty days of its filing); *see also Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-101 (1995)(holding that because claimant's counsel failed to raise the enhancement for delay factor at the time the fee petition was filed and waited until he filed his response to employer's Petition for Review, claimant's counsel was precluded from raising the enhancement for delay issue on appeal). Thus, we hold as a matter of law that, pursuant to Section 725.479(b), the resubmitted fee petition constituted an untimely request for reconsideration of the 2004 Supplemental Decision and Order.[2] Accordingly, we reverse the administrative law judge's 2005 Supplemental Decision and Order granting counsel's request for fees for the period between April 19, 1989 and August 12, 1991.

In so doing, we reject the Director's assertion that because the administrative law judge never actually considered the omitted portion of the fee petition, claimant's resubmission cannot be treated as a motion for reconsideration. The administrative law judge's omission of the period between April 19, 1989 and August 12, 1991 from his 2004 Supplemental Decision and Order constituted an error. Treating errors of omission differently than errors of commission is inconsistent with the regulatory framework

[2] The administrative law judge's 2004 Supplemental Decision and Order is not subject to modification pursuant to 20 C.F.R. §725.310. A Decision and Order granting an attorney fee petition does not concern "compensation" or "the terms of an award or denial of benefits" as required under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Act by 30 U.S.C. §932(a) and implemented by Section 725.310. 20 C.F.R. §725.310; *see also Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997).

which allows parties to seek review of dispositions that they believe are incorrect. *See* 20 C.F.R. §§725.479(b), 725.480, 725.481, 725.482; 802.407, 802.408, 802.410. In addition, although the Director is correct in maintaining that an administrative law judge can address an attorney fee petition on a piecemeal basis, this is typically the consequence of the fact that the final award of benefits, which is a prerequisite to the enforceability of an attorney fee award, may be delayed by appeals and motions for reconsideration or modification. *See, e.g.*, *Murphy v. Director, OWCP*, 21 BLR 1-116 (1999); *Clark v. Director, OWCP*, 9 BLR 1-211 (1986); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). In this case, the "piecemeal" treatment of counsel's fee petition was due to an error in the 2004 Supplemental Decision and Order, of which counsel was required to seek review within thirty days of its filing. 20 C.F.R. §§725.479(b), 725.481.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Representative's Fee is reversed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge