

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 15-0389 BLA

ALDA R. DAMERON)
)
 Claimant-Respondent)
)
 v.)
)
 BIG BEAR MINING COMPANY)
) DATE ISSUED: 08/16/2016
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Attorney Fee Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.¹

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

PER CURIAM:

¹ After filing a petition for review, employer's counsel withdrew from the case.

Employer appeals the Attorney Fee Order (2009-BLA-5693) of Administrative Law Judge Thomas M. Burke, granting claimant's counsel \$2,659.84 in reimbursement for costs incurred while counsel secured an award of benefits on a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The relevant procedural history of this case is as follows: The district director issued a Proposed Decision and Order awarding benefits on April 24, 2009; employer requested a hearing by letter dated April 28, 2009; and the claim was referred to the Office of Administrative Law Judges on June 24, 2009. Decision and Order Awarding Benefits at 2. The administrative law judge issued a Decision and Order Awarding Benefits on August 17, 2010. Included in the Decision and Order were his instructions regarding attorney's fees:

Claimant's counsel shall file *within 30 days* of the date of issuance of this Decision and Order *with this Office* and opposing counsel, a petition for representative's fees *and costs* in accordance with the regulatory requirements set forth at 20 C.F.R. § 725.366 (2005).

Decision and Order at 19 (emphasis added). The regulation cited by the administrative law judge requires an attorney seeking fees to include, in the fee application, "a listing of reasonable unreimbursed expenses, including those for travel, incurred . . . in establishing the claimant's case," and provides that the administrative law judge "shall consider, and shall add to the fee, the amount of reasonable and unreimbursed expenses incurred in establishing the claimant's case." 20 C.F.R. §725.366(a), (c).

Claimant's counsel filed his fee petition with the administrative law judge on August 30, 2010, seeking \$7,497.50 in fees, but seeking no reimbursement for any expenses or costs incurred while the case was before the administrative law judge. More than two months later, on November 8, 2010, counsel filed a request for \$2,669.84 in costs incurred between May 28, 2009 and December 1, 2009, in preparation for and during proceedings before the administrative law judge, but erroneously filed the request with the district director, rather than with the administrative law judge, the correct recipient. *See Matthews v. Director, OWCP*, 9 BLR 1-184, 1-186-87 (1986); 20 C.F.R. §725.366(a). Nothing in the record indicates what happened to that request, and there is no suggestion that the district director ever acted upon it. On December 21, 2010, the administrative law judge issued an order granting claimant's counsel all \$7,497.50 that he sought in attorney's fees.² Employer's Brief at 1; Claimant's Brief at 1 (unpaginated).

² That order is not contained in the record before the Board.

Claimant's counsel did not seek reconsideration of the fee award to allow the administrative law judge to consider counsel's misdirected request for costs. *See* 20 C.F.R. §725.366(d). On January 5, 2011, employer appealed the administrative law judge's fee award to the Board; claimant's counsel did not file a cross-appeal with the Board to argue that the administrative law judge should have considered his request for costs. On March 30, 2011, employer moved to withdraw its appeal of the fee award, and on April 14, 2011, the Board dismissed the appeal. Neither party took any further action regarding the administrative law judge's award of fees, and the Board's order dismissing the appeal became final. *See* 20 C.F.R. §802.406.

Meanwhile, the parties continued to litigate the underlying claim for benefits. On September 1, 2010, employer appealed the administrative law judge's award of benefits to the Board, which affirmed the administrative law judge's Decision and Order. *Dameron v. Big Bear Mining Co.*, BRB No. 10-0685 BLA (Aug. 25, 2011) (unpub.). Employer appealed to the United States Court of Appeals for the Fourth Circuit,³ but eventually moved to dismiss its appeal voluntarily. On October 3, 2013, the Fourth Circuit granted the motion and issued its mandate, making its dismissal of employer's appeal effective the same day. *Big Bear Mining Co. v. Dameron*, No. 11-2146 (4th Cir. Oct. 3, 2013)(Order); *see* Fed. R. App. P. 41(c), 42(b). Neither party took any further action on the claim for benefits.

One year and seven months later, on May 4, 2015, claimant's counsel filed a "Resubmitted Amended Fee Petition-Reimbursements" with the administrative law judge, seeking \$2,669.84 for the costs incurred before the administrative law judge between May 28 2009 and December 1, 2009. In the filing, counsel wrote that his original petition for reimbursements, dated November 8, 2010, "was erroneously sent to the District Director instead of" the administrative law judge. Employer opposed the request as untimely, and pointed out that claimant's counsel did not explain why he sent the original request for reimbursement to the district director, or why it had taken him almost five years to discover his mistake, and attempt to fix it.

In his Attorney Fee Order issued June 10, 2015, the administrative law judge allowed the filing, with this explanation:

³ Claimant's coal mine employment was in West Virginia. *Dameron v. Big Bear Mining Co.*, BRB No. 10-0685 BLA, slip op. at 2 n.1 (Aug. 25, 2011) (unpub.). Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Final action in this matter occurred five years ago. As 20 C.F.R. § 725.366(a) (2008) does not provide a penalty for a late filing of a fee petition, I will allow the late filing of the amended fee petition as it was misdirected to the District Director's office.

Attorney Fee Order at 1. After determining that all but one of claimant's counsel's expenses were reimbursable, the administrative law judge granted the petition and ordered employer to pay counsel's firm \$2,659.84 for expenses.⁴

On appeal, employer argues that the administrative law judge erred by allowing claimant's counsel to "reopen and amend" the 2010 fee order. Employer's Brief at 4-5. Employer contends that the administrative law judge had no authority to do so, and that he ignored the fact that the 2010 fee order had become final years before. *Id.* In his response brief, claimant's counsel urges affirmance of the award of costs, arguing that the award was within the administrative law judge's discretion. Claimant's Brief at 5-6 (unpaginated). The Director, Office of Workers' Compensation Programs, has not filed a response to employer's appeal.

The amount of an attorney's fee awarded by an administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See 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).

We agree with employer that the administrative law judge lacked jurisdiction to allow claimant's counsel to file his request for costs, or to consider counsel's request, and therefore erred in awarding costs. Counsel filed an "Amended Fee Petition," but, as employer has noted, the fee petition in this case had already been litigated and finally decided. Jurisdiction over counsel's fee petition was transferred from the administrative law judge to the Board in January of 2011, when employer filed its appeal of the administrative law judge's order awarding claimant's counsel \$7,497.50 in fees. At that point, the administrative law judge no longer had authority to issue orders or take any other action with respect to the fee petition. *See Bartley v. L&M Coal Co.*, 7 BLR 1-243, 1-248 (1984); *Meeks v. Director, OWCP*, 6 BLR 1-794, 1-796 n.4 (1984); *see also Colbert v. Nat'l Steel & Shipbuilding Co.*, 14 BRBS 465, 468 (1981).

Although the administrative law judge would have regained jurisdiction if the Board had remanded the fee petition to him for further consideration, the Board in this

⁴ The administrative law judge disallowed one \$10.00 expense because there was no receipt explaining why it was incurred. Attorney Fee Order at 1.

case simply dismissed employer's appeal. With no further action by either party within sixty days, the dismissal became final, *see* 20 C.F.R. §802.406, bringing litigation over the fee petition to a close. Because jurisdiction over the fee petition was never transferred back to the administrative law judge, he had no authority to reopen the litigation by granting claimant's counsel's request to "amend" his fee petition. The administrative law judge's order awarding claimant's counsel \$2,659.84 in reimbursement for costs is therefore void.⁵

⁵ The inaction of claimant's counsel at various points in this case is unexplained and therefore troubling. We note specifically counsel's failure to include a request for reimbursement in his original fee petition to the administrative law judge, contrary to both the administrative law judge's instructions and the requirements of 20 C.F.R. §725.366. We also note counsel's failure to take action before either the administrative law judge or the Board when he did not receive reimbursement for costs in the administrative law judge's December 2010 order granting attorney's fees. Finally, we note the nineteen-month gap between the Fourth Circuit's final disposition of the underlying claim, at which point the administrative law judge's fee award became enforceable, *see Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995), and counsel's filing of his "Amended Fee Petition" seeking reimbursement for costs. Because we have decided this case on procedural grounds, we need not address counsel's unexplained delay.

Accordingly, the administrative law judge's Attorney Fee Order is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge