

U.S. Department of Labor

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



BRB No. 16-0270 BLA

CHARLIE E. SALYERS)
)
 Claimant-Respondent)
)
 v.)
)
 KNOX CREEK COAL CORPORATION) DATE ISSUED: 08/16/2017
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney Fees of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Sarah M. Hurley (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appealed the Decision and Order Awarding Attorney Fees (2012-BLA-05519) of Administrative Law Judge Christine L. Kirby, in connection with a claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). After filing a brief, challenging the fee award on multiple grounds, employer's counsel withdrew from the case due to the bankruptcy of employer's parent company. The Black Lung Disability Trust Fund (the Trust Fund) assumed liability for the underlying award of benefits, n.l, *supra*, and the Director, Office of Workers' Compensation Programs (the Director), responds in this appeal that the Trust Fund is also liable for the payment of claimant's attorney's fees.

The Director informs the Board that he agrees with one of employer's allegations of error in the administrative law judge's calculation of the fee, but otherwise has no objection to the fee award. We therefore summarize the proceedings below only as they relate to the issue raised by the Director.

Claimant's counsel requested attorney's fees and expenses totaling \$18,423.61. After considering employer's objections, the administrative law judge disallowed some of the time entries claimed, and awarded a total fee of \$18,093.61, payable by employer. The total included \$2,212.50 in attorney's fees for Victoria S. Herman, for 14.75 hours of work performed at an hourly rate of \$150.00.

On appeal, the Director contends that the administrative law judge erred in awarding a fee for 14.75 hours of work performed by Ms. Herman at the rate of \$150.00 per hour. The Director states that the fee petition reveals that those 14.75 hours of work were actually performed by Valerie C. Stanley, a paralegal whose hourly rate is \$100.00. The Director therefore argues that the fee for those services should have been \$1,475.00, not \$2,212.50. Claimant responds, agreeing that the administrative law judge erred in awarding fees for work performed by Ms. Herman, when the work was actually

¹ In a Decision and Order dated October 27, 2015, the administrative law judge awarded claimant benefits. Employer appealed, but thereafter instructed its counsel to withdraw due to the bankruptcy of employer's parent company. Thereafter, at the request of the Director, Office of Workers' Compensation Programs (the Director), the Board dismissed the appeal and remanded the case to the district director for the payment of benefits by the Black Lung Disability Trust Fund. *Salyers v. Knox Creek Coal Corp.*, BRB No. 16-0106 BLA (Nov. 22, 2016)(Order)(unpub.).

performed by Ms. Stanley.² Claimant and the Director request that the Board make the appropriate mathematical calculation, correct the total fee award, and affirm the fee award as modified.

The amount of an award of an attorney's fee by the 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 law. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(en banc).

As the parties contend, the record reflects that Ms. Stanley, a paralegal, performed the 14.75 hours of services in question, at the hourly rate of \$100.00.³ Therefore, the fee for her services should have been \$1,475.00. To correct the administrative law judge's error, we modify the fee award by subtracting \$737.50 (\$2,212.50 - \$1,475.00) from the \$18,093.61 fee awarded by the administrative law judge. Thus, we modify the total fee award to \$17,356.11. In addition, in light of the Director's position on appeal, we modify the fee award to reflect that the Trust Fund is liable for payment of the fee. In all other respects, we affirm the administrative law judge's fee award.

² Claimant states that the administrative law judge's mistake likely resulted from the similarity of the initials of Victoria S. Herman (VSH) and Valerie C. Stanley (VCS). Claimant's Brief at 4, 9-10. The Director notes that the first page of counsel's fee petition requested \$2,212.50 in fees for Victoria S. Herman, although the time entries documented in the fee petition do not reflect any work performed by Ms. Herman on the case. Director's Brief at 2 n.1.

³ The administrative law judge found that \$100.00 was a reasonable hourly rate for counsel's legal assistants. Decision and Order at 5.

Accordingly, the administrative law judge's Decision and Order Awarding Attorney Fees is affirmed, as modified to reflect a total fee of \$17,356.11, payable by the Trust Fund.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge