

BRB No. 00-0268 BLA

RUBY C. WILLS)	
(Widow of GORDON WILLS))	
)	
Claimant-Respondent)	
v.)	
)	
CENTRAL APPALACHIAN COAL)	
COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Larry L. Rowe, Malden, West Virginia, for claimant.

David L. Yaussy (Robinson & McElwee LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order (98-BLA-0174) of Administrative Law Judge Gerald M. Tierney awarding attorney's fees on a survivor's 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). The administrative law judge awarded claimant's counsel a fee of \$6,300.00 for 31.5 hours of legal services at an hourly rate of \$200.00 for successfully litigating the case. Supplemental Decision and Order at 2.

On appeal, employer contends that the administrative law judge erred by awarding claimant's attorney an hourly rate of \$200.00 based on a contingency enhancement. Employer's Brief at 2-3. Claimant responds, urging affirmance of the administrative law judge's fee award. Employer has filed a reply brief. The Director, Office of Workers'

Compensation Programs, has declined to participate in this appeal.

The award of an attorney's fee 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).

Employer asserts that an hourly rate of \$150.00 is reasonable for the work performed by claimant's counsel and that the additional \$50.00 awarded by the administrative law judge represents a contingency enhancement, which is not allowed in federal black lung claims. Employer's Brief at 2-3. On February 19, 1999, the administrative law judge awarded survivor benefits to claimant. Claimant's counsel subsequently filed a fee petition and supplemental letter. Claimant's counsel requested a fee of \$6,300 for 31.5 hours of legal services he performed before the administrative law judge, plus \$1,824.00 in expenses.

In his decision, the administrative law judge noted that employer objected to claimant's counsel's fee petition, "arguing that the fee is excessive given the nature of the claim and the hourly fee typically commanded by attorneys in this area." Supplemental Decision and Order at 1. The administrative law judge also noted that employer urged that "the hourly rate be capped at \$150.00" in this case. *Id.* The administrative law judge cited the criteria for determining the reasonableness of a fee award outlined in 20 C.F.R. §725.366(b). *Id.* The administrative law judge noted that claimant's initial fee application provided no explanation which would allow for the larger hourly rate of \$200.00. Supplemental Decision and Order at 1-2. However, the administrative law judge found that the supplemental letter he received from claimant's attorney "contained a detailed description of the work involved in this case and a history of [claimant's counsel's] experience." Supplemental Decision and Order at 2. Therefore, the administrative law judge found,

¹We affirm the administrative law judge's finding regarding the requested number of hours for legal services as it is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

²Section 725.366(b) provides in pertinent part:

Any fee approved under paragraph (a) of this section 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 fee requested.

20 C.F.R. §725.366(b).

relying on the explanation provided by counsel in his supplemental letter, that claimant's counsel was entitled to collect the \$200.00 hourly rate. *Id.*

In claimant's attorney's supplemental letter, he stated that his credentials, the level of representation needed, and the contingent nature of this case justifies the hourly rate requested. Notwithstanding that claimant's counsel relied in part on the contingent nature of this case to justify his fee, the administrative law judge based his hourly rate finding on the other factors counsel provided in his letter, namely his credentials and the level of work involved in this case. Supplemental Decision and Order at 2.

While employer is correct that a contingency enhancement is not allowed in federal black lung claims, *see City of Burlington v. Dague*, 112 S.Ct. 2638 (1992); *see also Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995), the administrative law judge did not base his finding regarding the hourly rate on this factor. Rather, in accordance with the criteria contained in Section 725.366(b), the administrative law judge awarded claimant's counsel his requested hourly rate of \$200.00 because of the "work involved in this case and a history of [claimant's counsel's] experience." Supplemental Decision and Order at 2. Inasmuch as employer has not established that the hourly rate awarded was excessive or that the administrative law judge abused his discretion in this regard, *see Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*)(affirming an administrative law judge's award of an hourly rate of \$200 in a case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit); *see generally Broyles, supra*; *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986), we affirm the administrative law judge's finding.

Claimant's counsel also requested \$1,824.00 for expenses associated with litigating claimant's case. In his Supplemental Decision and Order, the administrative law judge ordered employer to pay the sum of \$6,300.00, representing \$200.00 per hour for 31.5 hours of work and directed this amount be paid to claimant's attorney "for costs incurred and services rendered." Supplemental Decision and Order at 2. In doing so, the administrative law judge neglected to include in his total fee award ordered to be paid to claimant's counsel the \$1,824.00 requested by counsel for reimbursement of counsel's expenses. Employer has not challenged counsel's request for reimbursement for expenses. Therefore, we modify the

³In his response brief, claimant's counsel requested that employer be ordered to pay interest on the fee award because no payment has been made since the administrative law judge issued his decision awarding attorney's fees in October of 1999. Counsel's Response Brief at 6. Any delay between the award of a black lung attorney's fee and the payment of the fee is considered as a factor in determining the reasonableness of the fee award, rather than as interest on the fee. *See Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999); *Shaffer v. Director, OWCP*, 21 BLR 1-97 (1998). However, on the facts of this case enhancement of this fee award to account for delay is not warranted.

administrative law judge's decision to include the additional amount of \$1,824.00 for expenses incurred by counsel.

Accordingly, the administrative law judge's Supplemental Decision and Order awarding attorney's fees is affirmed in part and modified to include the sum of \$1,824.00 requested for expenses.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge