

BRB No. 11-0301 BLA

FRED HATFIELD)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ARCH OF KENTUCKY)	DATE ISSUED: 12/12/2011
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Proposed Order Supplemental Award Fee for Legal Services of Phillip K. Little, Senior Claims Examiner, Office of the District Director, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Proposed Order Supplemental Award Fee for Legal Services of Senior Claims Examiner Phillip K. Little (the district director) on a petition for fees for legal services performed in securing an award of benefits on a miner's claim, filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Claimant's counsel submitted a fee petition to the district director for 24.5 hours of professional services performed before the Office of Workers' Compensation Programs at a rate of \$225.00 an hour, for a total of \$5,512.50. Subsequent to the filing of the fee petition, claimant submitted a Motion for

Reimbursement of Pneumoconiosis Litigation Costs (Motion for Reimbursement) with the district director, requesting \$450.00 for the cost of filing a cross-appeal in the United States Court of Appeals for the Sixth Circuit. The district director approved the hourly rate and number of hours, with the exception of one hour spent preparing the Motion for Reimbursement, and awarded a fee of \$5,287.50 for 23.5 hours of services performed at an hourly rate of \$225.00. The district director also granted \$225.00 in costs, stating that they “represent[ed] a reimbursement to claimant for money he paid [his counsel] for the cross[-]appeal filing cost to the Clerk of the [Sixth Circuit].” Proposed Order Supplemental Award Fee for Legal Services at 2. Accordingly, the district director ordered employer to pay a total fee of \$5,512.50 to claimant’s counsel.

Employer initially argues that the district director erred in treating the fee petition as timely filed. In addition, employer asserts that the district director’s failure to address its specific objections to the petition violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). Employer also maintains that, because the district director did not offer a valid reason for awarding \$225.00 in costs, the Board should reverse this portion of the district director’s Proposed Order. Claimant responds, asserting that the district director’s disposition of counsel’s fee petition was appropriate and should be affirmed. The Director, Office of Workers’ Compensation Programs, has not filed a response brief in this appeal.

The amount 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. *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661, 24 BLR 2-106, 2-117 (6th Cir. 2008); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

As a threshold matter, we reject employer’s assertion that the district director erred in accepting the fee petition as timely. While employer asserts that “[a] delay of more than a year and a half after the decision to file a fee petition must be regarded as untimely under 20 C.F.R. §725.366,” the regulation does not contain a time limit for filing a petition but merely states that it must be filed “within the time limits allowed by the district director.” Employer’s Brief at 3; 20 C.F.R. §725.366(a). Employer attempts to rely on 20 C.F.R. §802.203(c), which provides that counsel is allowed sixty days to file a fee petition, stating that “[sixty] days would have been a reasonable period of time for the claimant to have filed his petition with the [d]istrict [d]irector.” Employer’s Brief at 3. However, 20 C.F.R. §802.203(c) applies only to fees requested for services performed before the Board and, therefore, it does not govern filings with the district director. In addition, while employer states accurately that, in *Bankes v. Director, OWCP*, 765 F.2d 81, 8 BLR 2-1 (6th Cir. 1985), the court affirmed the district director’s refusal to consider a fee petition filed more than fourteen months after a final award, the district director in

that case notified claimant's counsel that he had thirty days to file his petition. Because employer has not established an abuse of discretion, we reject employer's contention that the district director erred in treating counsel's fee petition as timely. *Bankes v. Director, OWCP*, 7 BLR 1-102, 1-104 (1984), *aff'd Bankes v. Director, OWCP*, 765 F.2d 81, 8 BLR 2-1 (6th Cir. 1995); *Paynter v. Director, OWCP*, 9 BLR 1-190, 1-191 (1986).

However, employer's contention that the district director's award of fees does not comply with the APA has merit.¹ See *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In his Proposed Order, the district director did not acknowledge employer's specific objections to the requested hourly rate or address employer's opposition to reimbursement for certain services and costs, with the exception of the hour counsel spent preparing the Motion for Reimbursement.² In addition, employer is correct in alleging that the district director "offered no valid reason for awarding cost[s] of \$225.00." Employer's Brief at 6. We vacate, therefore, the district director's fee award of \$5,287.50 for 23.5 hours of services performed at an hourly rate of \$225.00, as well as \$225.00 in costs. On remand, the district director must address employer's specific objections to counsel's fee petition and Motion for Reimbursement and must set forth the rationale underlying his findings, as required by the APA. *Wojtowicz*, 12 BLR at 1-165.

¹ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

² Before the district director, employer objected to the following entries: 4.00 hours on April 6, 2004, for research and review of the file as not adequately explained; 1.25 hours on April 19, 2004, for researching a decision by the United States Court of Appeals for the Sixth Circuit, reviewing claimant's file and preparing a letter to the senior claims examiner as inflated; and 1.00 hour on October 19, 2010, for preparation of the Motion for Reimbursement of Pneumoconiosis Litigation Costs, as being contrary to the regulations.

Accordingly, the district director's Proposed Order Supplemental Award Fee for Legal Services is affirmed in part and vacated in part, and the case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge