

U.S. Department of Labor

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



BRB Nos. 16-0187 BLA
and 16-0523 BLA

BRUCE I. NEUMEISTER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
RONALD BUSH COAL COMPANY)	DATE ISSUED: 02/28/2017
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the denial of petition for attorney's fees of Claims Examiner Lorraine Poletini, denial of motion for reconsideration of Colleen Smalley, District Director, and the denial of the supplemental petition for attorney's fees of Claims Examiner Harold Bloomfield, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman and Goggin), Allentown, Pennsylvania, for employer.

Rita Roppolo (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel appeals the denial of her petition for attorney's fees and the denial of her request for reconsideration, BRB No. 16-0187 BLA, as well as the denial of her supplemental petition for attorney's fees, BRB No. 16-0532 BLA, issued with respect to legal services she performed in a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (the Act). These appeals have been consolidated for the purpose of a decision only. 20 C.F.R. §802.104(a). The relevant procedural history is as follows.

Claimant filed a claim for benefits on August 6, 1999. After a protracted procedural history, employer ultimately accepted liability for benefits and withdrew its controversion. Administrative Law Judge William S. Colwell issued an Order of Remand For Payment of Benefits on June 8, 2012. The district director issued an Award of Benefits on November, 8, 2012, wherein claimant was notified that no monetary benefits would be paid to him until such time as the issue of an outstanding overpayment due the Black Lung Disability Trust Fund was resolved. In a letter issued on February 12, 2013, Claims Examiner Harold Bloomfield notified claimant that the overpayment would be recouped by withholding future benefits due to him. In the same letter, Mr. Bloomfield wrote: "Finally, *as you requested* you are hereby granted thirty (30) days in which to compile and submit your request for representative fees to this office."¹

Approximately two and one-half years later, on September 4, 2015, counsel filed a fee petition for services performed before the district director in pursuing benefits for claimant. Counsel requested a total of \$11,047.50 for 95.50 hours of services rendered between June 1999 and September 2013. Employer objected to the fee petition, asserting

¹ Claimant's counsel avers that in the course of representing claimant on the overpayment issue, she filed a "protective motion" with the district director asking for an enlargement of time to file her petition for attorney fees on the awarded claim. Claimant's Counsel's Brief in Support of Petition for Review at [4] (unpaginated). The case file before the Board does not contain a copy of the protective motion, and the parties have not identified the date of such a motion.

that it was not timely filed because the deadline for submission of the fee petition expired on March 14, 2013, thirty days after the February 12, 2013 letter by Claims Examiner Harold Bloomfield.²

Claimant's counsel responded, alleging that her fee petition was not timely filed due to a clerical error. She explained that she maintained separate files pertaining to the awarded claim and the overpayment case, and that, "the [district director's February 12, 2013] letter was erroneously filed in the overpayment file and all the files mistakenly closed, including the subsequent remand for payment of benefits." Claimant's Counsel's September 23, 2015 Letter. Counsel further explained that, "it was only after [claimant] had contacted my office regarding [c]laimant's costs which had not been reimbursed, that the file was located in storage and the fee petition expeditiously prepared (which I note covered a 16 year period of pursuing this claim)." *Id.* Additionally, counsel asserted that employer was not harmed by the untimely filing of her fee petition and that "the loss of an attorney fee is a harsh result that should not be imposed except in the most extreme circumstances." *Id.*, citing *Paynter v. Director, OWCP*, 9 BLR 1-190, 1-191 (1986).

On October 14, 2015, Claims Examiner Lorraine Poletini denied the fee petition as untimely filed. Claimant's counsel filed a request for reconsideration, which was denied by District Director Colleen Smalley on November 23, 2015. Thereafter, counsel filed her appeal with the Board, which was assigned BRB No. 16-0187 BLA.

Claimant's counsel next filed a supplemental fee petition dated April 28, 2016, requesting a total of \$685.00 for 6.25 hours of services performed before the district director between July 2002 and April 2008. In a May 23, 2016 letter, Claims Examiner Harold Bloomfield advised counsel that the supplemental fee petition was also denied as untimely filed. Counsel subsequently filed an appeal with the Board on June 3, 2016, which was assigned BRB No. 16-0523. As noted *supra*, the appeals were consolidated by the Board for consideration in this decision.

On appeal, claimant's counsel argues that the district director abused her discretion in denying both of her fee petitions as untimely filed. Employer responds in both appeals, and the Director, Office of Workers' Compensation Programs, responds in appeal assigned BRB No. 16-0187 BLA only, each arguing that the district director acted within her discretion in denying the fee petitions pursuant to 20 C.F.R. §725.366(a).

² Employer argued in the alternative that attorney's fees should only be approved for services performed after December 29, 2011, the date of the filing of the claimant's last request for modification.

The award or denial of attorney's fees by the district director 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. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Pritt v. Director, OWCP*, 9 BLR 1-159, 1-160 (1986); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894, 1-896 (1980). Neither the Act, nor the regulations, sets a time period during which fee petitions must be filed with the district director. See 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a) of the Act. The regulation at 20 C.F.R. §725.366 states that an application for attorney fees "shall be filed and served upon the claimant and all other parties *within the time limits allowed* by the district director." 20 C.F.R. 725.366 (emphasis added).

Claimant's counsel is correct that in *Paynter*, the Board recognized that the loss of a fee is a harsh result which should not be imposed except in extreme circumstances. *Paynter*, 9 BLR at 1-191. However, unlike the one-month delay presented in *Paynter*, claimant's counsel was delayed in filing her fee petition for approximately two and one-half years after the deadline set by the district director. Under the facts of this case, we conclude that the district director did not abuse her discretion in finding that counsel did not exercise due diligence in filing either of the fee petitions. See *Bankes v. Director, OWCP*, 765 F.2d 81, 82, 8 BLR 2-1, 2-3 (6th Cir. 1985) (district director did not abuse his discretion in refusing to consider a fee petition that was filed more than fourteen months after the thirty-day filing period allotted). Thus, we reject counsel's assertion to the contrary. See *Abbott*, 13 BLR at 1-16; *Jones*, 21 BLR at 1-108.

Accordingly, the denial of petition for attorney's fees of Claims Examiner Lorraine Poletini, the denial of motion for reconsideration of Colleen Smalley, District Director, and the denial of the supplemental petition for attorney's fees of Claims Examiner Harold Bloomfield are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge