

BRB No. 90-1974 BLA

CASSIE RAY)
(Widow of DEWARD RAY))

)
Claimant-Petitioner)

)
v.)

)
) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Respondent) DECISION and ORDER

Appeal of the Attorney Fee Reconsideration of Margaret R. Peterson, Deputy Commissioner, United States Department of Labor.

W. Hobart Robinson, Abingdon, Virginia, for claimant.
C. William Mangum (Marshall J. Breger, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: DOLDER and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant's attorney, W. Hobart Robinson, appeals the deputy commissioner's Attorney Fee Reconsideration of January 10, 1990 finding that the Black Lung Disability Trust fund is not liable for an attorney's fee for a claim arising under the provisions of Title IV of the Federal Coal Mine Health and Safety Act, as amended, 30 U.S.C. §901 et seq. (the Act). On April 12, 1978, claimant, the miner's widow, filed a claim for benefits which was initially

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(Supp. V 1987).

approved by the deputy commissioner. Employer initially controverted the deputy commissioner's award of benefits, but later withdrew its controversion and agreed to pay benefits. On October 27, 1981, the deputy commissioner issued a final award of benefits. Claimant's attorney submitted a fee petition to the deputy commissioner on September 14, 1981. Before the deputy commissioner could address the fee petition, employer requested a review of the claim on February 24, 1982, to determine whether liability for benefits payments transferred to the Black Lung Disability Trust Fund. The deputy commissioner found that the claim was not subject to transfer and employer requested a hearing before the Office of Administrative Law Judges. Claimant died on March 4, 1984. On April 27, 1988, Administrative Law Judge G. Marvin Bober issued a Decision and Order finding that liability for benefits payments did not transfer to the Trust Fund. On May 9, 1988, claimant's attorney re-submitted his fee petition and on August 8, 1988, the deputy commissioner issued a fee award finding employer liable for \$365.25 in attorney's fees and claimant's estate liable for \$1037.50. Employer paid claimant's attorney \$365.25. On August 16, 1988, claimant's attorney requested reconsideration of the fee award asserting that liability for payment of his fees should be transferred to the Trust Fund as claimant's estate had closed during the period between the submission of his fee petition and the issuance of the deputy commissioner's fee award. On January 10, 1990, the deputy commissioner issued the Attorney Fee Reconsideration finding that the Trust Fund was not liable for any attorney's fees and that claimant's estate is liable for the \$1037.50 fee. On appeal, counsel contends that the delay in processing the fee petition was not caused by any fault of his own and that the fee should be paid by the Trust Fund, as claimant's estate has closed. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the deputy commissioner's Attorney Fee Reconsideration.

An award of attorney's fees is discretionary and will be upheld unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. Marcum v. Director, OWCP, 2 BLR 1-894 (1980).

Initially, it should be noted that claimant's attorney has not cited any legal authority, statute, or regulation in support of his contention that the Trust Fund is liable for the payment of his attorney's fees due to the closing of claimant's estate. The Board has held that the Trust Fund may be held liable for attorney's fees only in those cases where the Director has declined to pay benefits. See Graham v. Director, OWCP, 10 BLR 1-30 (1987). In this case, the Director never denied the claim or declined to pay benefits on the claim. As a result, the deputy commissioner properly determined that the Trust Fund is not liable for the payment of claimant's attorney's fees.

Accordingly, the deputy commissioner's Attorney Fee Reconsideration is affirmed.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge