

BRB No. 04-0102 BLA

NANCY L. SNIDER)
(Widow of DONALD E. SNIDER))
)
Claimant-Petitioner)
)
v.)
)
ZEIGLER COAL COMPANY)
) DATE ISSUED: 07/28/2004
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Supplemental Award of Fees for Legal Services and Order Denying Reconsideration of Harry Skidmore, District Director, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

PER CURIAM:

Claimant's counsel appeals the Supplemental Award of Fees for Legal Services (Fee Award Order) and Order Denying Reconsideration of District Director Harry Skidmore awarding attorney's fees for legal services performed in securing claimant an award of benefits on a 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).¹

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Claimant's counsel filed a complete, itemized fee petition with the district director, requesting a total fee of \$470.00 for 2.35 hours of legal services at an hourly rate of \$200.00. Upon consideration of the fee petition, the district director found \$180.00 to be a reasonable hourly rate and, therefore, awarded claimant's counsel a total fee of \$423.00 for 2.35 hours of legal services at an hourly rate of \$180.00. Fee Award Order at 1. On reconsideration, the district director found the sum of \$423.00 for 2.35 hours of legal services at an hourly rate of \$180.00 "to be a reasonable fee." Order Denying Reconsideration at 2.

On appeal, claimant's counsel asserts that the district director's reduction in the requested hourly rate is "arbitrary, an abuse of discretion and not in accordance with law." Claimant's Counsel's Brief at 3-7. Employer has not responded to claimant's counsel's appeal of the district director's fee award. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.²

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, an abuse of discretion or not in accordance with law, *see Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Claimant's counsel first asserts that the district director erred in characterizing this case as routine and in finding that the case "did not involve special skills or unusual or novel issues and did not require extensive work." Claimant's Counsel's Brief at 3-5. In his Fee Award Order, the district director considered "[t]he complexity of the issues, the qualifications of the representative, and the level at which the claim was decided." Fee Award Order at 1. The district director stated that this was a "routine" case, which did not involve "special ability and effort," and that "most of the evidence was in [the] file." *Id.* After reviewing claimant's Motion for Reconsideration, the district director elaborated on his original decision. In doing so, the district director stated:

[t]he regulations provide that the level at which the services were performed is a consideration in approving a fee. Since proceedings at the Administrative Law Judge and Benefits Review Board level are formal in nature, the fees approved at those levels are generally higher than those approved by the District Director. If you have been approved a higher rate for work performed before a District Director in 1997, you may want to submit copies of the orders involved.

²We affirm the district director's determination that the number of hours counsel requested is reasonable as this finding 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).

Order Denying Reconsideration at 1. The district director further explained that in considering whether a case is “routine,” consideration is also given to whether the case presents issues “which would have required extensive research or a creative approach.” *Id.* The district director concluded that “[a]lthough the procedural history of this claim was quite lengthy, it does not appear that it involved any unusual or novel issue.” *Id.* We find no error in the district director’s characterization of this case as “routine.”

Counsel next asserts that the district director erred in citing to the decision of the United States Court of Appeals for the Sixth Circuit in *Esselstein v. Director, OWCP*, 676 F.2d 228, 4 BLR 2-71 (6th Cir. 1982), in determining whether counsel’s hourly rate was reasonable because this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. Claimant’s Counsel’s Brief at 5-6. Contrary to counsel’s assertion, the district director did not cite *Esselstein* as support for the hourly rate of \$180, but cited this case in support of the legal proposition that an “approved rate is comparable to that being charged by other highly qualified attorneys within the same geographical location” with black lung litigation experience. Fee Award Order at 1. Additionally, there is no indication from the district director’s decision or the record that the district director reduced counsel’s hourly rate based on a geographical location in the Sixth Circuit rather than the Seventh Circuit.

Based on the foregoing, we affirm the district director’s reduction of counsel’s requested hourly rate of \$200.00 to \$180.00 inasmuch as the district director thoroughly considered the factors contained at 20 C.F.R. §725.366(b), and, within his discretion, determined the reasonable hourly rate to be \$180.00.³ *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *Gillman v. Director, OWCP*, 9 BLR 1-7 (1986). Because claimant’s counsel has not demonstrated an abuse of discretion in the district director’s award of attorney’s fees, the award is affirmed.⁴ *See Jones*, 21 BLR at 1-108.

³Contrary to counsel’s assertion, it was rational for the district director to consider whether counsel’s requested hourly rate was reasonable for 1997 because that is the year in which the services were performed. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

⁴An attorney’s fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1993).

Accordingly, the district director's Supplemental Award of Fees for Legal Services and his Order Denying Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge