

BRB No. 09-0710 BLA

BONNIE C. FULLER)
(Widow of LARRY D. FULLER))
)
 Claimant-Respondent)
)
 v.)
)
 SOUTH HOLLOW COAL COMPANY) DATE ISSUED: 07/20/2010
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Supplemental Order Awarding Attorneys' Fees of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Order Awarding Attorneys' Fees (2004-BTD-00001) of Administrative Law Judge Pamela Lakes Wood relating to 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). This case involved an action brought against employer by the Director, Office of Workers' Compensation Programs (the Director), for reimbursement of the miner's medical benefits that had been paid by the Black Lung Disability Trust Fund (the Trust Fund). Following issuance of an Order of Dismissal based on the administrative law judge's approval of a settlement agreement between employer and the Director, claimant's¹ counsel, Joseph E. Wolfe, submitted a fee petition to the administrative law judge. Claimant's counsel requested a fee of \$11,625.00, representing 30.75 hours of legal services by Mr. Wolfe at an hourly rate of \$300.00; 1.0 hour of legal services by Bobby S. Belcher, Jr. at an hourly rate of \$250.00; 7.25 hours of legal services by W. Andrew Delph at an hourly rate of \$200.00; and 7.0 hours of services by legal assistants at an hourly rate of \$100.00 (collectively, claimant's counsel). Following consideration of employer's objections to the fee petition and its Motion to Dismiss Claimant's Motion for Approval of Attorney Fees, the administrative law judge determined that a fee was appropriate in this case; that the requested number of hours billed was neither unreasonable nor excessive; and that the requested hourly rate of \$100.00 for the legal assistants was appropriate. The administrative law judge found, however, that the total fee requested was excessive and, therefore, reduced the hourly rate for all work performed by the attorneys to \$200.00 per hour. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$8,500.00 for legal services performed while the case was before the Office of Administrative Law Judges.

On appeal, employer contends that the administrative law judge erred in determining that a shifted fee for legal services was permitted in this case. Alternatively, employer alleges that the administrative law judge failed to apply the appropriate legal standard in determining a reasonable hourly rate,² and abused her discretion in allowing

¹ Claimant is the widow of the miner, who died on June 24, 2000.

² Employer challenges the hourly rate awarded by the administrative law judge, contending that the approved hourly rate was based solely on the administrative law judge's perception of what counsel should be able to charge, and is not supported by the record. Employer's Brief at 12-13.

reimbursement for all of the time billed.³ Claimant's counsel responds in support of the fee award. The Director has filed a response, asserting that claimant's counsel has failed to show that legal services were "necessary" as contemplated by the regulations, as recoupment for the payment of medical bills was never sought from the miner's estate and could never have been sought from the miner's widow, as a matter of law. Employer, agreeing with the Director, has replied in support of its position.

The amount of an attorney's fee award by an administrative law judge 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 applicable law. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); *see also Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

Employer contends that the administrative law judge erred in determining that the statute and regulations permit a shifted fee for claimant's counsel in this case. Employer argues that because the dispute was solely between the Director and employer, claimant never had an interest in this litigation and, therefore, an adversarial relationship was never established between employer and claimant. Employer further contends that, even if the Director sought recovery of an overpayment, there was no legal basis to seek recovery from claimant personally. Employer's Brief at 5-11. We agree.

The administrative law judge determined that claimant remained a named party in this matter throughout the course of the proceedings, and that claimant had at least some interest in the outcome of the litigation. Citing to 20 C.F.R. §725.367, the administrative law judge noted that an adversarial relationship is created when claimant submits a bill for medical treatment and the party liable for the payment of benefits declines to pay the bill on the grounds that the treatment is unreasonable, or is for a condition that is not compensable. 20 C.F.R. §725.367(a)(3); Supplemental Order at 3-4. The administrative law judge reasoned that, because "employer was held to be the party liable for the payment of benefits, and it declined to pay the bill [to the Trust Fund] on the grounds that the treatment was for a condition that was not compensable," it is liable for claimant's attorneys' fees even though the Trust Fund temporarily assumed liability for the payment of the miner's medical benefits. Supplemental Order at 2, 4. Regarding the requested number of hours, the administrative law judge found that a majority of the work was undertaken in brief fifteen and thirty minute increments, and as the litigation had been going on for nearly four years, the accumulated time invested by claimant's counsel was

³ Employer contends that the administrative law judge abused her discretion by failing to consider whether specific hours were necessary to the result achieved. Employer's Brief at 11-12.

neither unreasonable nor excessive. Supplemental Order at 6. Regarding the hourly rates sought, the administrative law judge determined that the hourly rates charged by Mr. Wolfe, Mr. Belcher, Jr., and Mr. Delph were not unreasonable, but that the total sum sought to be recovered was unreasonable and not commensurate with the nature and complexity of the legal services provided, as the work was not “highly complex.” *See* 20 C.F.R. §725.366(b); Supplemental Order at 4-5. Determining that it was not necessary to involve an attorney with the extensive black lung knowledge possessed by Mr. Wolfe, the administrative law judge found that the work could have been undertaken by Mr. Delph or another less-experienced, but similarly competent, attorney. The administrative law judge, therefore, found that the appropriate hourly billing rate for all attorneys was \$200, the rate charged by Mr. Delph. Supplemental Order at 7.

We agree with employer that, on the facts of this case, the administrative law judge’s award of attorneys’ fees cannot be affirmed. This proceeding involved a request by the Director for employer to reimburse the Trust Fund for the payment of the miner’s medical bills, all of which had been previously paid by the Trust Fund. Because all of the miner’s bills for medical treatment were paid by the Trust Fund, they were not “declined,” as required under Section 725.367(a)(3) in order for liability for the payment of attorneys’ fees to attach. Furthermore, as employer has never sought recoupment of the payment of any medical bills from the miner’s estate and no overpayment was ever sought by the Trust Fund against the miner’s estate, no adversarial relationship between employer or the Director and claimant existed. *See* 20 C.F.R. §725.367(a)(3). Representation by claimant’s counsel, therefore, was not “necessary” to the proceeding, especially in light of the fact that recoupment would have been impossible against the miner’s widow.⁴ *See* 20 C.F.R. §§ 725.366(b); 725.540. Because a shifted fee is not appropriate in this case, we decline to address employer’s contentions regarding the substance of the fee award.

⁴ The pertinent regulation provides, in part, that if an overpaid beneficiary dies before adjustment is completed, recovery of the overpayment shall be effected through repayment by the estate of the deceased overpaid beneficiary. 20 C.F.R. §725.540(d).

Accordingly, the administrative law judge's Supplemental Order Awarding Attorneys' Fees is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of my colleagues to reverse the administrative law judge's award of attorneys' fees. In my opinion, the administrative law judge's findings should be affirmed in all respects.

I would affirm the administrative law judge's finding that an adversarial relationship existed between claimant and employer, beginning February 17, 2004, when claimant, as a named party to the proceeding, was requested by employer to sign a medical records release, and continuing when claimant was served with interrogatories from employer in 2005, which necessitated the retention of counsel. *See* 20 C.F.R. §725.367(a)(3). Furthermore, despite the administrative law judge's urging on several occasions, neither employer nor the Director would agree to voluntarily dismiss claimant from the case or stipulate that they would not seek subrogation or indemnification against claimant. Thus, the administrative law judge rationally concluded that the presence of claimant's counsel was required to ensure that claimant would not be exposed to liability.

In addition, I would affirm the administrative law judge's finding that the accumulated time of forty-six hours by claimant's counsel was neither unreasonable nor excessive, given that the majority of work was undertaken in brief fifteen and thirty minute increments for litigation that has been ongoing for nearly four years. In addition, I would affirm the administrative law judge's finding of \$200.00 as a reasonable hourly rate, as she permissibly determined, after careful and thoughtful analysis, that the level of work undertaken was not highly complex, and that employer's proffered evidence regarding fees applicable in a Social Security adjudication, was not relevant to fees awarded in a black lung proceeding. As employer failed to demonstrate that the

attorneys' fees awarded in this matter were arbitrary, capricious, or an abuse of discretion, I would affirm the administrative law judge's award of \$8,500.00. *See Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*); *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-315 (1984).

BETTY JEAN HALL
Administrative Appeals Judge