

BRB No. 09-0759 BLA

RANDAL WILLIAMS (deceased))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WILLIAMS BROTHERS COAL)	DATE ISSUED: 07/20/2010
COMPANY)	
)	
and)	
)	
KENTUCKY COAL PRODUCERS SELF-)	
INSURANCE FUND)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Attorney Fee Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier appeals the Attorney Fee Order (2005-BLA-05239) of Administrative Law Judge Janice K. Bullard rendered on a 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).¹ On February 26, 2009, the administrative law judge issued a Decision and Order Awarding Benefits on Remand pursuant to 20 C.F.R. Part 718.² The administrative law judge also issued an Attorney Fee Order on June 26, 2009 granting claimant's counsel the amount of \$3,575.00 in attorney fees, reflecting 13.0 hours of legal work performed at the hourly rate of \$275.00, while this case was pending before the Office of Administrative Law Judges on remand.³

On appeal, employer requests that the Board reverse the administrative law judge's fee award, arguing that it was based on an invalid fee petition because claimant's counsel did not provide an adequately detailed description of the dates and types of services provided. Claimant responds, urging affirmance of the administrative law judge's attorney fee award. The Director, Office of Workers' Compensation Programs, has declined to respond to this appeal, unless specifically requested to do so by the Board.⁴

The award of an attorney fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion.

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not affect employer's appeal of the administrative law judge's attorney fee award.

² On March 18, 2009, employer appealed to the Board the administrative law judge's February 26, 2009 Decision and Order Awarding Benefits on Remand. In a Decision and Order issued on April 22, 2010, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration. *Williams v. Williams Brothers Coal Co.*, BRB No. 09-0471 BLA (Apr. 22, 2010) (unpub.). Employer's May 21, 2010 motion for reconsideration of the Board's decision is currently pending. On July 28, 2009, the Board received employer's notice of appeal with regard to the administrative law judge's award of attorney fees, which appeal was docketed as BRB No. 09-0759 BLA, and is disposed of herein.

³ In an Attorney Fee Order issued on May 7, 2007, the administrative law judge awarded claimant's counsel a total of \$4,106.25 in fees and expenses for work performed previously before the administrative law judge. Attorney Fee Order at 1.

⁴ We affirm, as unchallenged on appeal, the administrative law judge's allowance of \$275.00 as a reasonable hourly rate for the legal services provided. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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). An attorney's fee may be approved pending a final award of benefits, but that fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. See 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

In determining the amount of attorney fees to be awarded under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008).

Employer challenges the administrative law judge's attorney fee award, arguing that the administrative law judge abused her discretion in awarding the requested fee because it was based on an invalid fee petition. Specifically, employer contends that claimant's counsel failed to provide an adequate description of the daily activities performed on September 29 and 30, 2008, because claimant's counsel "lumped dates and services for drafting, editing and submitting a brief on remand." Employer's Brief at 4. Employer contends that, as a matter of law, counsel failed to provide a sufficient description of the daily activities performed pursuant to the requirements of Section 725.366 and Board case law. *Id.* Consequently, employer contends that, because claimant's counsel failed to submit a valid fee petition, the administrative law judge should have invalidated the fee petition and no fee should have been awarded. Employer, therefore, requests that the Board reverse the administrative law judge's attorney fee award.

In awarding claimant's counsel a total fee of \$3,575.00, the administrative law judge specifically considered employer's objections to the itemized entries, *i.e.*, that claimant's counsel did not provide adequate detail for each date and type of service but, nonetheless, she found that the requested fee is reasonable and is commensurate with the necessary work performed. Attorney Fee Order at 1-2. The administrative law judge specifically rejected employer's objection to the entry dated September 29 and 30, 2008 for drafting, editing and submitted the brief on remand. Attorney Fee Order at 2. While acknowledging that the entry in question did not constitute a proper daily reporting of each specific activity, the administrative law judge, nonetheless, found that the 12.0 hours requested was for the preparation and submission of claimant's brief on remand, which

entailed a 35 page brief submitted on September 30, 2008 and received in the Office of Administrative Law Judges on October 3, 2008.⁵ *Id.* The administrative law judge thus denied employer's objections, and found that the fee requested by claimant's counsel was reasonable and commensurate with the necessary work performed.

Employer's assertions of error in this appeal are insufficient to meet its burden of proving that the administrative law judge acted in a manner that was arbitrary, capricious, or an abuse of discretion. *Jones*, 21 BLR at 1-108. Section 725.366 states that the fee application "shall be supported by a complete statement of the extent and character of the necessary work done, and shall indicate the professional status of the person performing such work, and the customary billing rate for each person." 20 C.F.R. §725.366(a). Herein, the administrative law judge reasonably exercised her discretion in finding that, while this disputed entry did not constitute a specific daily reporting of each individual activity, the 12.0 hours of legal services, reflects the work performed on a single item, *i.e.*, the drafting, editing and submission of claimant's 35 page brief on remand. Consequently, it was not inherently unreasonable for the administrative law judge to find that the challenged entry was sufficient to permit her to determine that necessary work was performed and, therefore, that the fee requested was reasonable and commensurate with the necessary work performed. 20 C.F.R. §725.366; *Ball v. Director, OWCP*, 7 BLR 1-617, 1-619 (1984); *Bash v. Director, OWCP*, 7 BLR 1-419, 1-422 (1983); *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). We, therefore, affirm the administrative law judge's determination approving 13.0 hours of legal services, at an hourly rate of \$275.00 as reasonable and necessary work performed. *See* 20 C.F.R. §725.366; *Abbott*, 13 BLR at 1-16; *Lanning*, 7 BLR at 1-316. Thus, we affirm the administrative law judge's attorney fee award in the amount of \$3,575.00. However, as previously noted, a fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *Goodloe*, 19 BLR at 1-100 n.9; *Coleman*, 18 BLR at 1-17.

⁵ Employer states that his record does not reflect the receipt of claimant's brief on remand and, therefore, states that "it is impossible to determine...whether a rounded amount of 12.0 hours would constitute a reasonable amount of time for the services alleged." Employer's Brief at 4 n.1.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge