

U.S. Department of Labor

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



BRB No. 15-0406 BLA

OLIVER BOLLING, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
JARISA, INCORPORATED)	DATE ISSUED: 07/18/2016
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of Reconsideration and Proposed Order - Supplemental Award - Fee for Legal Services of Senior Claims Examiner Phillip K. Little, United States Department of Labor.

Joseph Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Felicia A. Snyder (Snyder Law Office, PLLC) Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the district director's award of attorney fees for services performed before the district director with respect to a claim filed on March 14, 2005,

pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The relevant procedural history of this case is as follows: On March 14, 2005, claimant filed a subsequent claim for benefits. The district director rendered an initial finding of entitlement on November 28, 2005, and employer requested that the case be transferred to the Office of Administrative Law Judges (OALJ) for a hearing. The district director transmitted the claim to the OALJ on March 1, 2006. After conducting the hearing, Administrative Law Judge Alan L. Bergstrom issued a Decision and Order denying benefits on October 31, 2007. Claimant filed a request for modification on January 7, 2008.

On January 3, 2011, Administrative Law Judge Teresa C. Timlin granted claimant's request for modification and awarded benefits. Her Decision and Order was served on employer and, separately, on William E. Brown II, who was identified as having made an appearance for employer, at 167 West Main Street, Suite 100, Lexington, Kentucky. Claimant's counsel filed an attorney fee petition for work performed before the OALJ, which Judge Timlin granted in an order dated March 4, 2011. The service sheet shows that the order was mailed to employer and to Mr. Brown, at 167 West Main Street, Suite 100, Lexington, Kentucky.

Over four years later, claimant's counsel filed a fee petition dated April 17, 2015, for work performed before the district director. Counsel requested a total of \$3,600.00 for 14.25 hours of services rendered between December 2004 and March 2006. Counsel certified that a copy was served on Mr. Brown, at 167 West Main Street, Suite 100, Lexington, Kentucky. In an order issued on May 21, 2015, the district director reduced the hourly rate for counsel's legal assistant to \$75.00, disallowed 1.25 hours of services, and awarded a fee of \$3,318.75 for 13 hours of services. The service sheet indicates that copies of the district director's order were sent to employer and to Mr. Brown, at 269 West Main Street, Suite 100, Lexington, Kentucky.

By letter dated June 11, 2015, Felicia Snyder, of Snyder Law Office PLLC, filed a notice of appearance on behalf of employer and submitted employer's Objection to Proposed Order and Supplemental Award Fee for Legal Services and Request for Reconsideration by the District Director. Ms. Snyder contended that "Employers Risk never received a copy of the Motion for approval of [the] legal fees accrued in 2005" and, therefore, could not "compare the original attorney fee award with the supplemental request for attorney fees," to assess whether the fee award was proper. Employer's Objection and Request for Reconsideration at 1. She also argued that claimant's counsel's fee petition was untimely filed because he did not seek reconsideration of, or appeal from, Judge Timlin's Order Granting Attorney Fees dated March 4, 2011. *Id.*

In a June 19, 2015 letter, the district director rejected employer's arguments, finding that claimant's counsel's April 17, 2015 cover letter establishes that "Attorney [Joseph] Wolfe provided a copy of [the] fee petition . . . to Attorney William E. Brown II, who is the responsible operator's attorney of record." The district director also rejected employer's assertion that the May 21, 2015 Proposed Order should be reversed because claimant's counsel failed to request reconsideration of Judge Timlin's March 4, 2011 Order Granting Attorney Fees. Accordingly, the district director declined to revise the Proposed Order awarding fees for legal services performed before the district director.

On appeal, employer again alleges that the "supplemental" fee application submitted to the district director was untimely because claimant failed to seek reconsideration of, or appeal from, Judge Timlin's March 4, 2011 Order Granting Attorney Fees. Employer's Brief at 3. Employer also argues that it did not receive the April 17, 2015 attorney fee petition because claimant's counsel did not send it "to the attorney's correct address at the time of the [m]otion." *Id.* at 3-4. Claimant's counsel has responded in support of the fee award. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

The district director's award of attorney fees will be upheld by the Board unless the challenging party establishes that the district director's decision is arbitrary, capricious, or an abuse of discretion. *See Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989). We hold that employer has not satisfied its burden to demonstrate that counsel's April 17, 2015 attorney fee petition was untimely. Employer appears to suggest that claimant's counsel was foreclosed from pursuing additional attorney fees by allowing Judge Timlin's March 4, 2011 Order Granting Attorney Fees to become final.

The district director correctly determined, however, that Judge Timlin's award of fees pertained to services performed before the OALJ, and that claimant's counsel was required to file a separate fee petition for services performed before the district director. 20 C.F.R. §725.366(a); *see Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-140 (1993); Letter dated June 19, 2015, at 1 (unpaginated). Furthermore, under 20 C.F.R. §725.366(a), a fee petition must be filed "within the time limits allowed" by the deciding authority. Unlike the time period established for filing fee petitions with the Benefits Review Board, the regulations do not specify a time limit on the filing of attorney fee petitions for work performed before the district director or the OALJ. *See* 20 C.F.R. §802.203(c). We therefore affirm the district director's finding that counsel's April 17, 2015 attorney fee petition was timely as within his discretion.

We are persuaded, however, that remand is required to ensure that employer has an opportunity to review the attorney fee petition based on the unique factual circumstances of this case. As indicated in our summary of the procedural history, counsel served a copy of the April 17, 2015 petition on William E. Brown II, at 167 West Main Street, Suite 100, Lexington, Kentucky. This is the same attorney of record, and address, upon which employer was served over four years earlier, in 2011, when Judge Timlin issued her Decision and Order awarding benefits and Order Granting Attorney Fees. Nevertheless, when the district director served the Proposed Order awarding attorney fees on Mr. Brown in the present matter, the district director used a different address – 269 West Main Street, rather than 167 West Main Street. This discrepancy in service addresses used by the district director and claimant’s counsel lends support to employer’s assertion that the fee petition “was not sent to the attorney’s correct address.” Employer’s Brief at 3. Subsequently, Ms. Snyder entered her appearance establishing that she is now employer’s attorney of record.

Given the more than four year delay in claimant’s counsel’s filing of a fee petition for services performed between 2004 and 2006, and the discrepancy as to the correct address for employer’s attorney of record at the time the petition was filed, we vacate the district director’s finding that claimant’s counsel served the petition on employer. We therefore remand this case to the district director for resolution of this issue by having claimant’s counsel serve copies of his April 17, 2015 attorney fee petition on employer and employer’s present counsel of record.¹ 20 C.F.R. §§725.364, 725.366(a). We further instruct the district director to provide employer an opportunity to raise objections to the adequacy of the petition, the hourly rates requested by counsel, and the amount of time spent performing services before the district director. 20 C.F.R. §725.366(d), (e). If employer does not raise any objections, the district director can reinstate the award of attorney fees as set forth in his Proposed Order dated May 21, 2015. Any challenges made by employer to the fee petition must be resolved by the district director in accordance with 20 C.F.R. §725.366(a)-(c), and within a reasonable exercise of his discretion. *See Jones*, 21 BLR at 1-108; *Abbott*, 13 BLR at 1-16.

¹ Pursuant to 20 C.F.R. §725.364, service on a party’s attorney is considered equivalent to the service on the party required at 20 C.F.R. §725.366(a). As indicated, *supra*, it is unclear whether claimant’s counsel served employer’s attorney of record at the time of the mailing of the April 17, 2015 attorney fee petition.

Accordingly, we affirm in part, and vacate in part, the district director's Proposed Order – Supplemental Award – Fee for Legal Services, and his June 19, 2015 letter denying employer's request for reconsideration. This case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge