

BRB No. 11-0679 BLA

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| PATRICIA HUNZIE |) | |
| (Widow of HARRY S. HUNZIE) |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| KEMMERER COAL COMPANY |) | DATE ISSUED: 06/11/2012 |
| |) | |
| Employer-Petitioner |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Amended Supplemental Decision and Order Awarding a Representative's Fee of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Scott M. Busser (Moseley, Busser & Appleton, P.C.), Denver, Colorado, for employer.

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

PER CURIAM:

Employer appeals the Amended Supplemental Decision and Order Awarding a Representative's Fee (07-BLA-5178) of Administrative Law Judge William S. Colwell with respect to a survivor'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). In a Decision and Order issued on April 30, 2009, the administrative law judge awarded survivor's benefits to claimant. Pursuant to employer's appeal, the Board held that

claimant was automatically entitled to survivor's benefits under an intervening amendment to the Act. *Hunzie v. Kemmerer Coal Co.*, BRB No. 09-0624 BLA (May 20, 2010)(unpub.)(applying the automatic entitlement provision of amended 30 U.S.C. §932(l)). Employer did not appeal the Board's decision.

On May 4, 2011, claimant's counsel, Jonathan Wilderman, submitted a fee petition to the administrative law judge, requesting a fee of \$20,712.34, representing 99.3 hours of legal services at the rate of \$200.00 per hour, and \$852.34 in costs. Employer objected that the fee petition was untimely, because the administrative law judge's 2009 Decision and Order required claimant's counsel to file his fee petition within thirty days.

After considering counsel's fee petition, employer's objection, and the evidence presented, the administrative law judge awarded the requested fee and costs, in full. In rejecting employer's contention that the fee petition was untimely, the administrative law judge determined that employer's appeal of the 2009 Decision and Order mooted the thirty-day deadline the administrative law judge had set for filing a fee petition:

Consideration of the procedural history of this claim leads this tribunal to find that the fee petition is timely. Specifically, Employer's appeal of the April 30, 2009 decision of this tribunal rendered the 30 day deadline set forth in the decision moot. No fee award is enforceable until the award of benefits becomes final. 20 C.F.R. §725.367(a). Most recently, the Board affirmed the award of benefits on May 20, 2010, and the 60-day period to file an appeal to the circuit court ended on July 19, 2010. 33 U.S.C. §921(c). When Employer did not appeal the Board's decision, Mr. Wilderman was entitled to file to have his fee petition adjudicated. Without a valid deadline for submission of the petition in place at that time, this tribunal finds that the petition is timely.

Supplemental Decision and Order 2 (case citation omitted). Turning to the merits of the fee petition, the administrative law judge found that counsel's requested hourly rate was reasonable, and that the time and costs he requested were reasonable and necessary. *See* 20 C.F.R. §725.366(a)-(c). Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$20,712.34. Supplemental Decision and Order 2-4.

On appeal, employer contends that the administrative law judge erred in finding that the fee petition was timely filed. Claimant responds, urging affirmance of the administrative law judge's fee award. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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.

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). An 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 (1995).

Employer argues that the administrative law judge erred in finding that claimant's counsel's fee request was timely filed. We disagree. The regulations permit the administrative law judge to set the time limits for the filing of a fee petition. *See* 20 C.F.R. §725.366(a). In addition, the Board has held that the loss of an attorney fee is a harsh result that should not be imposed except in the most extreme circumstances. *Paynter v. Director, OWCP*, 9 BLR 1-190, 1-191 (1986). Here, the administrative law judge considered employer's contention that the fee petition was untimely, but reasonably explained why he found that the fee petition was timely filed, given the procedural history of the case following his 2009 Decision and Order awarding benefits. Because employer has demonstrated no abuse of discretion by the administrative law judge, we reject employer's argument that the administrative law judge erred in accepting claimant's counsel's fee petition as timely. 20 C.F.R. §725.366(a); *see Bankes v. Director, OWCP*, 765 F.2d 81, 8 BLR 2-1 (6th Cir. 1985); *Jones*, 21 BLR at 1-108; *Paynter*, 9 BLR at 1-191; Supplemental Decision and Order at 2. As this is the extent of employer's argument on appeal, we affirm the administrative law judge's finding that claimant's counsel is entitled to a total fee of \$20,712.34.

Accordingly, the administrative law judge's Amended Supplemental Decision and Order Awarding a Representative's Fee is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge