

BRB No. 99-0254 BLA

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| VERLIN W. ROBERTS              | ) |                    |
|                                | ) |                    |
| Claimant                       | ) |                    |
|                                | ) |                    |
| v.                             | ) |                    |
|                                | ) |                    |
| MASON COAL COMPANY             | ) | DATE ISSUED:       |
|                                | ) |                    |
| 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 Decision and Order As To Attorney Fee of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Robert R. Kaplan, Jr. (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplemental Decision and Order As To Attorney Fee (84-BLA-5449) of Administrative Law Judge Frederick D. Neusner awarding attorney fees 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). Originally, in a Decision and Order issued on July 15, 1987, the administrative law judge awarded benefits. Employer appealed and the Board vacated the award of benefits and remanded the case for reconsideration, *see Roberts v. Mason Coal Co.*, BRB No. 87-2228 BLA (Nov. 20, 1989)

(unpub.). On remand, the administrative law judge again awarded benefits in a Decision and Order issued on September 10, 1991. Subsequently, by letter dated November 5, 1991, claimant's counsel filed a request [1991 Fee Request] with the administrative law judge for attorney fees in the amount of \$7,890.00 for services performed from May 23, 1984, to July 17, 1987, and from November 28, 1989, to October 3, 1991, before the administrative law judge. In a Supplemental Decision and Order Approving Attorney Fee issued on June 5, 1992, the administrative law judge reduced the amount of attorney fees requested by claimant's counsel and awarded counsel \$2,355.00. Employer appealed the administrative law judge's 1991 award of benefits and claimant cross-appealed the administrative law judge's 1992 attorney's fee award. The Board vacated the award of benefits and remanded the case for reconsideration, but affirmed the administrative law judge's award of attorney fees in the amount of \$2,355.00, *see Roberts v. Mason Coal Co.*, BRB No. 92-0121 BLA-A (Dec. 16, 1993)(unpub.). No further action was taken regarding the Board's affirmance of the administrative law judge's award of attorney fees relating to claimant's counsel's 1991 fee request.

On remand, the administrative law judge again awarded benefits in a Decision and Order issued on April 8, 1994. Subsequently, on June 7, 1994, claimant's counsel filed a request [1994 Fee Request] with the administrative law judge for attorney fees in the amount of \$412.50 for services performed from January 13, 1994, through April 14, 1994, before the administrative law judge. In a Supplemental Decision and Order Denying Approval Of An Additional Attorney Fee issued on June 23, 1994, the administrative law judge denied claimant's counsel's request for attorney fees in the amount of \$412.50. Employer appealed the award of benefits, but no further action was taken regarding the administrative law judge's 1994 Supplemental Decision and Order denying claimant's counsel's 1994 fee request. The Board affirmed the award of benefits, *see Roberts v. Mason Coal Co.*, BRB No. 94-2427 BLA (June 29, 1995)(unpub.), and reaffirmed the award of benefits on reconsideration, *see Roberts v. Mason Coal Co.*, BRB No. 94-2427 BLA *on recon.* (Sep. 17, 1997)(unpub.).<sup>1</sup>

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<sup>1</sup> By letter dated August 28, 1995, claimant's counsel filed a request for attorney fees with the Board for services performed before the Board. Claimant's counsel noted that he

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had previously been awarded a fee in the amount of \$2,355.00 for services performed before the administrative law judge and had also submitted a fee petition with the administrative law judge for services performed before the administrative law judge in 1994. On November 21, 1997, employer filed a Motion to Hold in Abeyance claimant's counsel's fee request before the Board, indicating that it was in the process of filing interrogatories with claimant's counsel regarding a similar fee request that claimant's counsel had filed with the administrative law judge. The Board denied employer's motion.

Subsequently, on October 23, 1998, the administrative law judge issued his Supplemental Decision and Order As To Attorney Fee, at issue herein, in which he awarded claimant's counsel \$8,302.50, the total amount of claimant's counsel's 1991 and 1994 fee requests. On appeal, employer contends that as the administrative law judge had previously considered and issued final decisions on claimant's counsel's fee requests at issue herein, the administrative law judge lacked jurisdiction to again consider claimant's counsel's fee requests. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, have responded to this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The administrative law judge awarded claimant's counsel \$8,302.50, the total amount of his 1991 and 1994 fee requests. However, as employer contends, the administrative law judge had already issued final decisions on claimant's counsel's 1991 and 1994 fee requests for the same services at the hourly rate requested, and claimant's counsel had never requested that the fee requests be reconsidered.<sup>2</sup> In a Supplemental Decision and Order Approving Attorney Fee issued in June, 1992, the administrative law judge had reduced claimant's counsel's 1991 fee request of \$7,890 and awarded counsel \$2,355.00. On December 16, 1993, the Board affirmed this reduction and the administrative law judge's 1992 award of attorney fees in the amount of \$2,355.00, *see Roberts*, BRB No. 92-0121 BLA-A, and no further action was taken regarding the administrative law judge's 1992 award of attorney fees relating to claimant's counsel's 1991 fee request. Moreover, in a Supplemental Decision and Order Denying Approval Of An Additional Attorney Fee issued in June, 1994, the administrative law judge denied claimant's counsel's 1994 fee request for \$412.50 and no

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<sup>2</sup> Although employer contends that the administrative law judge reconsidered claimant's counsel's fee requests "for some unexplained reason," it is apparent that the administrative law judge was prompted to consider claimant's counsel's 1991 and 1994 fee requests in 1998 due to employer's 1997 filing of interrogatories and motions regarding claimant's counsel's 1991 and 1994 fee requests. The administrative law judge noted that in November, 1997, employer had filed interrogatories and motions regarding claimant's counsel's 1991 and 1994 fee requests for attorney fees in the amounts of \$7,890 and \$412.50, respectively, for a total of \$8,302.50. The administrative law judge erroneously noted that "a decision was overdue" on claimant's counsel's fee requests, 1998 Supplemental Decision and Order at 6, and awarded CL's counsel \$8,302.50.

further action was taken regarding the administrative law judge's 1994 denial of claimant's counsel's 1994 fee request. Thus, the Board's December, 1993 affirmance of the administrative law judge's 1992 fee award and the administrative law judge's 1994 fee denial became final as no request for reconsideration or appeal was taken within the prescribed thirty day period, *see* 20 C.F.R. §§725.479, 802.205; *Bennett v. Director, OWCP*, 17 BLR 1-72, 1-74 (1993). Consequently, as the Board's 1993 affirmance of the administrative law judge's 1992 fee award and the administrative law judge's 1994 fee denial are final, we vacate the administrative law judge's 1998 Supplemental Decision and Order As To Attorney Fee awarding attorney fees in the amount of \$8,302.50, *see generally* 20 C.F.R. §725.465(a)(3).

Accordingly, the administrative law judge's 1998 Supplemental Decision and Order As To Attorney Fee is vacated.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge