

L. D.)
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Claimant-Petitioner) BRB No. 06-0302 BLA
)
v.)
)
PUNCHEON BRANCH COAL COMPANY)
)
Employer) DATE ISSUED: 03/27/2007
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
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Respondent)
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L. D.)
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Claimant-Respondent) BRB Nos. 06-0303 BLA
) and 06-0303 BLA-S
v.)
)
PUNCHEON BRANCH COAL COMPANY)
)
Employer)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Petitioner) DECISION and ORDER

Appeals of the October 24, 2005 Order, the November 30, 2005 Order Denying Director's Motion for Reconsideration, and the January 18, 2006 Supplemental Attorney Fee Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor, and the Proposed Order

Supplemental Award Fee for Legal Services of Mary B. Tackett, Senior Claims Examiner, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the October 24, 2005 Order, the November 30, 2005 Order Denying Director's Motion for Reconsideration, and the January 18, 2006 Supplemental Attorney Fee Order (03-BLA-6657) of Administrative Law Judge Daniel J. Roketenetz holding the Black Lung Disability Trust Fund (Trust Fund) liable for the payment of the attorney's fees awarded. Claimant appeals the Proposed Order Supplemental Award Fee for Legal Services (Claim No. ****-***-9596) of Senior Claims Examiner Mary B. Tackett. The awards of attorney's fees herein are in connection with a living miner's 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). The relevant procedural history of this case is as follows.

Claimant filed his application for benefits on September 10, 2001.¹ Director's Exhibit 2. Following the initial processing of the claim by the district director, the claim was transferred to the Office of Administrative Law Judges and a formal hearing was held on November 10, 2004 before Administrative Law Judge Daniel J. Roketenetz (the administrative law judge). By Decision and Order dated February 24, 2005, the administrative law judge awarded benefits, finding Puncheon Branch Coal Company (employer) liable for the payment of all benefits beginning in September 2001, and for the payment of the fees and expenses of claimant's counsel to be established in a supplemental decision and order. Decision and Order at 13. The administrative law

¹ Claimant filed an initial claim for benefits on June 19, 1991, the withdrawal of which was subsequently granted on September 4, 2001. Director's Exhibit 1; 20 C.F.R. §725.306.

judge provided claimant's counsel thirty days in which to file his attorney fee petition for work performed while the case was before the Office of Administrative Law Judges. *Id.* No appeal was taken on the administrative law judge's award of benefits.

Pursuant to the instructions in the administrative law judge's Decision and Order, claimant's counsel filed an application for attorney's fees on March 23, 2005, requesting a total fee of \$8,437.50 for 33.75 hours of legal services rendered from February 8, 1993 to March 2, 2005 at a rate of \$250.00 per hour. No objections were received to this fee application. The administrative law judge issued an Attorney's Fees Order on May 17, 2005. The administrative law judge initially determined that there was a computational error in the attorney's fee application and determined that the fee petition should have requested fees for 34.25 hours of legal services and not the 33.75 hours requested. Attorney's Fees Order at 1-2. Noting that there were no objections to the attorney's fee application, the administrative law judge awarded claimant's counsel a total fee of \$8,562.50, representing 34.25 hours of legal services rendered at an hourly rate of \$250.00. Attorney's Fees Order at 2. The administrative law judge further ordered employer to pay these fees. *Id.*

By motion dated May 27, 2005, the Director sought reconsideration of the administrative law judge's Attorney's Fees Order, arguing that the awarded fee was excessive. The administrative law judge denied the Director's motion for reconsideration, finding that it constitutes an objection to claimant's counsel's fee petition and the time allotted for objecting to the fee petition had expired with no comment from the Director. June 7, 2005 Order Denying Director's Motion for Reconsideration (June 7, 2005 Order) at 2. Consequently, the administrative law judge found the Director's arguments to be untimely and denied the motion for reconsideration. *Id.* No appeal of this Order was taken by any party.

The record indicates that there were numerous communications between claimant's counsel and the district director's office concerning employer's failure to pay the attorney's fees awarded by the administrative law judge. Counsel submitted a Motion for Payment of Attorney's Fees to the administrative law judge on September 16, 2005. In this motion, counsel requested that the administrative law judge instruct the Trust Fund to pay counsel's fees, as awarded by the administrative law judge in his May 17, 2005 Order. On September 27, 2005, the administrative law judge issued an Order to Show Cause regarding counsel's request that liability of the awarded attorney's fees be transferred to the Trust Fund. In response, the Director objected to the payment of the attorney's fees, asserting that no duty exists for the Director to pay counsel's fees, as these fees were awarded against employer and no adversarial position exists between claimant and the Director.

By Order dated October 24, 2005, the administrative law judge found the Director liable for payment of the attorney's fees, stating that an adversarial relationship had been established and that the regulations provide that if an employer no longer possesses the assets to secure payment of benefits when the miner files a claim, liability transfers to the Trust Fund. October 2005 Order at 3. The administrative law judge, therefore, found that because the Trust Fund paid benefits to claimant, it was logical that counsel's awarded attorney's fees should also be paid by the Trust Fund. *Id.* The Director sought reconsideration, arguing that the administrative law judge's February 2005 Decision and Order and the May 2005 Attorney's Fees Order became final because these awards were not appealed by any of the parties and, therefore, the administrative law judge lacked jurisdiction to reopen these awards and issue a new fee award against the Director. On November 30, 2005, the administrative law judge issued an Order Denying Director's Motion for Reconsideration (Nov. 30, 2005 Order), holding that the Director has raised no compelling arguments to alter his prior finding that the Director is liable for payment of counsel's attorney's fees in this case. Nov. 30, 2005 Order at 2. The Director thereafter filed this appeal with the Board.

Subsequent to the administrative law judge's October 2005 Order, claimant's counsel submitted a supplemental fee petition for work performed in litigating his original attorney's fees award, seeking a total fee of \$3,062.50 for 12.25 hours of legal services at a rate of \$250.00 per hour. The Director filed an objection to counsel's fee petition. In a Supplemental Attorney Fee Order issued on January 18, 2006, the administrative law judge awarded a total fee of \$1,125.00, representing 4.25 hours of services rendered before the administrative law judge in litigating the prior fee award at a rate of \$250.00 per hour. The Director filed this appeal with the Board.

In addition, pursuant to counsel's March 23, 2005 application to the district director, the claims examiner awarded counsel a total fee of \$3,100.00, representing 15.50 hours of legal services at an hourly rate of \$200.00. Proposed Order Supplemental Award Fee for Legal Services (Supplemental Award Fee for Legal Services) at 2. Claimant appealed this Order to the Board.

On appeal, the Director contends that the administrative law judge erred in holding the Trust Fund liable for payment of attorney's fees, arguing that the administrative law judge did not have the authority to transfer the liability for payment of the fee award because claimant's Motion for Payment of Attorney's Fees was in essence an untimely motion for reconsideration of the administrative law judge's original Decision and Order – Award of Benefits and the May 17, 2005 Attorney's Fees Order. In addition, the Director contends that even if the administrative law judge had authority to transfer liability for payment of the fees awarded, the reasons given for transferring liability were impermissible. The Director, therefore, requests that the Board reverse the administrative law judge's findings. With regard to the administrative law judge's January 18, 2006

Supplemental Attorney Fee Order, the Director argues that the Trust Fund is not liable for payment of the awarded attorney's fees. The Director asserts that employer should be found liable for the supplemental attorney's fees because only one entity may be liable for benefits at any given time. In response, claimant urges the Board to reject the Director's arguments and affirm the administrative law judge's findings transferring liability for payment of the awarded fees to the Trust Fund. In addition, claimant's counsel states that interest should be paid in this case pursuant to 20 C.F.R. §725.602, due to the Director's delay in paying the attorney's fees as awarded. Employer has not responded in this appeal.

Claimant has appealed from the claims examiner's Proposed Order Supplemental Award Fee for Legal Services, contending that the claims examiner failed to provide an adequate basis for reducing the requested hourly rate and also in reducing the requested number of hours of legal services. Claimant also states that the Trust Fund should be held responsible for payment of these attorney's fees. In response, the Director urges affirmation of the award of attorney's fees for work performed before the district director. Employer has not responded in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director's Appeal

The Director contends that the administrative law judge lacked the authority to revise his original Decision and Order – Award of Benefits and the May 17, 2005 Attorney's Fees Order. Specifically, the Director contends that these decisions became final because none of the parties appealed the decisions or sought reconsideration of the administrative law judge's findings within the time limitations set forth in the regulations. Therefore, the Director argues that claimant's September 16, 2005 Motion for Payment of Attorney's Fees is an untimely motion for reconsideration of these decisions and, thus, the administrative law judge lacked the authority to act upon it. In addition, the Director contends that even if the administrative law judge had the authority to act upon claimant's motion, the administrative law judge provided an impermissible basis for holding the Trust Fund liable for payment of counsel's attorney's fees.

We hold that the administrative law judge in this case erred in addressing claimant's Motion for Payment of Attorney's Fees, as it constituted an untimely motion for reconsideration of the administrative law judge's February 2005 Decision and Order - Awarding Benefits and the May 17, 2005 Attorney's Fees Order. Claimant, in filing this

motion, was in effect requesting the administrative law judge to reconsider his original Order awarding counsel's attorney's fees by seeking transfer of liability from employer to the Trust Fund. However, the applicable regulation, set forth at Section 725.479(b), states:

Any party may, within 30 days after the filing of a decision and order under §725.478, request a reconsideration of such decision and order by the administrative law judge. The procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.

Section 725.479(b). The record indicates that claimant submitted the September 16, 2005 Motion for Payment of Attorney's Fees more than thirty days after the administrative law judge's May 17, 2005 Attorney's Fees Order and June 7, 2005 denial of the Director's motion for reconsideration.

Thus, because Section 725.479(b) provides for a thirty day time limit within which a party may seek reconsideration of the administrative law judge's Decision and Order, the administrative law judge erred in considering claimant's motion. 20 C.F.R. §725.479(b). The thirty day time limit applies with equal force to Decisions and Orders adjudicating attorney's fees as it does to Decisions and Orders adjudicating the merits of entitlement. *See Bennett v. Director, OWCP*, 17 BLR 1-72, 1-74 (1992)(holding that the administrative law judge did not err in rejecting counsel's separate request for enhancement of his fee award based upon delay in payment when counsel did not make this request in his initial fee petition and did not seek reconsideration of the administrative law judge's Decision and Order awarding attorney's fees within thirty days of its filing). Consequently, because the administrative law judge lacked the authority to consider claimant's untimely request for reconsideration of his award of attorney's fees, we reverse his finding that liability for these fees transferred to the Trust Fund, and reinstate his original finding that employer, as the party found to be the responsible operator in this case, is liable for payment of counsel's awarded fees.²

Moreover, we reverse the administrative law judge's January 18, 2006 Supplemental Attorney Fee Order awarding a total fee of \$1,125.00 payable by the Trust Fund. In awarding counsel's fees, the administrative law judge found that counsel was

² We note that claimant has not submitted, nor did the administrative law judge cite, any basis in fact or in law for the enlargement of the thirty day time period in this case.

entitled to fees for time spent litigating the original fee award, based on the rationale that claimant has an interest in the fee issue and derives a benefit from such services, citing *Bardovinus v. Director, OWCP*, BRB No. 88-1445 BLA (July 30, 1991)(unpublished). However, because we have reversed the administrative law judge's October 2005 Order on the grounds that counsel's September 16, 2005 Motion for Payment of Attorney's Fees was an untimely motion for reconsideration, the time that counsel spent in pursuing the fees is not compensable. Absent the validity of the request for reconsideration, the work was not necessary to defending or raising the fee award. See generally *Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 22 BLR 2-283 (4th Cir. 2001); *Jarrell v. Newport Shipbuilding and Dry Dock Co.*, 14 BRBS 882, 883 (1982). Consequently, we reverse the administrative law judge's award of supplemental attorney's fees in this case.

Claimant's Appeal

Claimant's counsel appeals the claims examiner's Proposed Order Supplemental Award Fee for Legal Services (Supplemental Award Fee for Legal Services) awarding fees for work done before the district director's office. Claimant's counsel generally contends that the district director, or in this case, the claims examiner, erred in reducing the requested rate from \$250.00 to \$200.00 per hour. Claimant's Brief at 2. In addition, counsel contends that the claims examiner did not give a reasonable rationale for reducing the number of hours of compensable legal services from 52.25 to 15.50. *Id.*

The standard of review for the Board in analyzing an appellant's arguments on appeal of an attorney fee determination is whether the determination is arbitrary, capricious, or an abuse of discretion. See *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). All fee petitions must be filed with, and approved by, the adjudicating officer or tribunal before whom the services were performed. 20 C.F.R. §§725.365, 725.366(a); see *Abbott*, 13 BLR 1-15; *Helmick v. Director, OWCP*, 9 BLR 1-161 (1986); *Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). The adjudicating officer must discuss and apply the regulatory criteria at 20 C.F.R. §725.366 in determining the fee award due, if any. See *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986).

Herein, the claims examiner stated that, she considered the complexity of the case, the qualifications of the representative, and the level at which the claim was decided, and she concluded that the work was performed in a routine case, which did not require any special expertise; hence, she reduced the hourly rate to \$200.00 from the requested \$250.00 per hour. Supplemental Award Fee for Legal Services at 1. With regard to the number of hours requested, the claims examiner found that the case was before the Office of Administrative Law Judges from September 12, 2003 through February 9, 2004, representing 1.5 hours of legal services and, therefore, these hours were not compensable by the district director. *Id.* at 2. In addition, she disallowed 32.5 hours for legal services

performed from June 20, 1990 through September 9, 2001, as services performed in a prior claim, which was withdrawn by claimant. *Id.* Consequently, the claims examiner awarded a total fee of \$3,100.00, representing 15.50 hours of legal services at an hourly rate of \$200.00.

In challenging the claims examiner's award of attorney's fees, claimant's counsel argues that the district director arbitrarily reduced the requested rate from \$250.00 to \$200.00 per hour. In so doing, counsel makes reference only to fee awards in other cases in which fees of \$225.00 to \$250.00 per hour were awarded for work performed either before the Board or the Office of Administrative Law Judges. Claimant's Brief at 2. These awards were based on the facts and circumstances of those particular cases and are not binding on the Board for purposes of this case. *See Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986). In the instant case, the claims examiner found that an hourly rate of \$200.00 was reasonable, given the complexity of the legal issues, the qualifications of the representative, the level of the claim at the time of the legal representation and the fees charged in the same geographical area. Supplemental Award Fee for Legal Services at 1; *see* 20 C.F.R. §725.366(b); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986). Counsel has not shown the district director's reduction of the hourly rate to be arbitrary, capricious or an abuse of discretion, *Whitaker*, 9 BLR at 1-217; *Abbott*, 13 BLR at 1-16, and as \$200.00 per hour is a reasonable hourly rate, we affirm the claims examiner's reduction of the hourly rate from \$250.00 to \$200.00.

With regard to the claims examiner's reduction of the number of hours of legal services, counsel does not specifically challenge the claims examiner's findings other than to generally aver that "the District Director did not give a reasonable rational[e] for reducing his 52.25 hours down to 15.50 hours." Claimant's Brief at 2. The Board's circumscribed scope of review requires that unless a party challenging the findings below identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Herein, claimant's counsel does not raise any specific errors with the claims examiner's reduction of the total number of hours of legal services or provide a specific rationale that the reduction was arbitrary and capricious. Consequently, because claimant's counsel does not allege any errors of law with specificity, we affirm the claims examiner's reduction in number of compensable hours for legal services as within a permissible exercise of her discretion and, thus, we affirm the total fee award of \$3,100.00 payable by employer directly to claimant's counsel.

Lastly, claimant's counsel has submitted a Motion for Attorney Fee for Time Spent Litigating Attorney Fee Order, which the Board accepted as counsel's attorney's fee petition. However, this motion does not comply with Section 802.203(c), which requires the fee application to be supported by a complete statement of the extent and character of the necessary work done, and of the professional status of the persons performing such work. 20 C.F.R. §802.203(c). Consequently, we are unable to entertain counsel's request at this time. 20 C.F.R. §802.203(a)-(c); *Bryant v. Lambert Coal Co.*, 9 BLR 1-166 (1986). Counsel may submit a revised fee application to the Board that is in compliance with Section 802.203(c) within thirty days of this decision.

Accordingly, the administrative law judge's October 24, 2005 Order and November 30, 2005 Order Denying Director's Motion for Reconsideration are reversed. In addition, the administrative law judge's January 18, 2006 Supplemental Attorney Fee Order is reversed. However, the claims examiner's Proposed Order Supplemental Award Fee for Legal Services is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge