

BRB No. 01-0209 BLA

VERNA FRISCO)
(Survivor of JOHN R. FRISCO))

Claimant-Respondent)

v.)

CONSOLIDATION COAL COMPANY)

Employer-Petitioner)

DATE ISSUED:

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)

Party-in-Interest)

DECISION AND ORDER

Appeal of the Decision and Order on Remand Awarding Attorney Fees of
Thomas Burke, Administrative Law Judge, United States Department of
Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Fairmont, West
Virginia, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West
Virginia for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Attorney Fees
(80-BLA-9829) of Administrative Law Judge Thomas Burke with regard to an award of
benefits 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).¹ The relevant procedural history of this case is as follows: On September 15, 1982, Administrative Law Judge Arthur C. White issued a Decision and Order awarding benefits and granting claimant's counsel attorney fees in the amount of \$3,318.15 for thirty hours of services billed at \$100 per hour, paralegal services, and miscellaneous expenses. On appeal to the Board, employer challenged the award of benefits and claimant cross-appealed, asserting that the administrative law judge's findings with respect to the date of onset of total disability due to pneumoconiosis and the attorney fee petition were erroneous. The Board vacated, *inter alia*, the administrative law judge's findings with regard to claimant's counsel's attorney fee petition and instructed the administrative law judge to set forth the rationale underlying his disallowance of eighteen and one-half hours of attorney services. *Frisco v. Consolidation Coal Co.*, BRB Nos. 82-1820 BLA and 82-1820 BLA-A (May 20, 1985)(unpub.).

In a Decision and Order dated August 27, 1985, Judge White awarded benefits and again issued an order requiring employer to remit \$3,318.15 to claimant's counsel in

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). As a result, the Board issued an order dated August 10, 2001, in which it rescinded its request for supplemental briefing. *Frisco v. Consolidation Coal Co.*, BRB No. 01-0209 BLA (Aug. 10, 2001)(unpub. Order).

²Claimant's counsel requested a fee in the amount of \$5,168.15. This amount represented 48.5 hours of attorney services billed at \$100.00 per hour, one hour of paralegal work billed at \$20.00 per hour, and \$298.15 in expenses. Judge White reduced the number of compensable hours of attorney services to 30 and approved the paralegal time and the expenses.

payment for attorney fees. Employer appealed the award of benefits, but claimant did not file a cross-appeal regarding the award of attorney fees. After subsequent Decisions and Orders on remand and appeals to the Board, the award of benefits became final when the Board affirmed Judge White's finding of entitlement in a Decision and Order issued on April 28, 1993. *Frisco v. Consolidation Coal Co.*, BRB No. 96-0379 BLA (Apr. 28, 1993)(unpub.). Claimant's counsel subsequently requested reconsideration of the attorney fee award that was issued in 1985. Employer responded that the Office of Administrative Law Judges did not have jurisdiction to reconsider counsel's attorney fee request. The case was assigned to Administrative Law Judge James Guill due to Judge White's unavailability. Judge Guill determined that inasmuch as counsel did not request reconsideration with thirty days of Judge White's August 27, 1985 Decision and Order, he waived his right to contest the fee award. Judge Guill also found that Judge White's determination with respect to the fee petition did not contain any errors.

Claimant's counsel appealed to the Board which, in a Decision and Order dated October 29, 1999, vacated Judge Guill's findings and remanded the case for consideration of whether counsel was entitled to an enhancement of the fees due to the delay between the date of the initial petition for attorney fees and the date on which payment actually occurred. *Frisco v. Consolidation Coal Co.*, BRB No. 96-0379 BLA (Oct. 29, 1999)(unpub.). The Board relied upon the holding of the United States Court of Appeals for the Fourth Circuit in *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999), that an administrative law judge must consider an attorney's petition for enhancement of a fee award for delay. On remand, the case was reassigned to Administrative Law Judge Thomas Burke (the administrative law judge) without objection from the parties. The administrative law judge determined, based upon data reported in the 1993 edition of *Survey of Law Firm Economics* identifying the average hourly rate charged by attorneys in the Northeast region of the country with sixteen to twenty years experience, that the hourly rate should be adjusted upward to \$181.00 and, therefore, that employer owed claimant's counsel an additional \$2,430.00.

Employer argues in the present appeal that the administrative law judge erred in basing his finding regarding the delay enhancement upon evidence that was not admitted into the record and which the parties did not have an opportunity to rebut. Employer also contends that the administrative law judge should have rejected counsel's request for reconsideration inasmuch as counsel did not specify the remedy which he sought. Furthermore, employer maintains that the administrative law judge failed to determine whether there was actually a delay in the payment of the attorney fee award in light of employer's prompt remittance of the 1985 award within months of the Board's October

³This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

1993 Decision and Order. Finally, employer asserts that counsel's request for "delay enhancement" constitutes an improper request for interest on the fee award and that employer should not be held responsible for the lengthy adjudication of the claim for benefits. Claimant has responded and urges affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has not filed a brief on the merits of the present 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially argues that the administrative law judge erred in relying upon the 1993 *Survey of Law Firm Economics* to determine the method and amount by which counsel's fee would be enhanced, as the administrative law judge did not notify the parties that he would base his findings upon this text. This contention has merit. An administrative law judge may take judicial notice of a fact if substantial prejudice to the parties will not result and the parties are given an adequate opportunity to rebut the fact of which the administrative law judge has taken notice. 5 U.S.C. §556(e); 29 C.F.R. §18.45; 20 C.F.R. §725.464; Fed. R. Evid. 201; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990), *aff'd*, 961 F.2d 1524, 16 BLR 2-68 (10th Cir. 1992); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1990); *Simpson v. Director, OWCP*, 9 BLR 1-99 (1986). In the present case, the administrative law judge did not inform employer of his intent to use this source in resolving the issue before him nor did he give employer an opportunity to comment upon the relevance and accuracy of the hourly rates set forth in the context of this particular case. *Id.*

Moreover, as employer notes, the hourly rate identified by the administrative law judge as appropriate is not the type of fact of which an administrative law judge can typically take judicial notice, as it is subject to dispute. The average hourly rate for the Northeast region of the country is at least arguably inaccurate as applied to cases involving black lung claims and may not reflect the factors identified in 20 C.F.R. §725.366(b) (2001), which provides in relevant part that "any fee approved...shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of the fee requested." 20 C.F.R. §725.366(b) (2001). We must vacate, therefore, the administrative law judge's decision to raise counsel's hourly rate to \$181.00 in order to enhance counsel's fee award and remand this case to the administrative law judge for reconsideration. On remand, the administrative law judge must notify the parties if he intends to refer to a source outside the record to determine the

method and amount of enhancement and must give the parties the opportunity to respond. *Id.*

The remainder of employer's allegations of error are without merit. Contrary to employer's contention, counsel's motion for reconsideration adequately stated a ground upon which the administrative law judge could rationally alter the prior fee award. *See Kerns, supra.* In addition, employer's assertion that no delay occurred inasmuch as it paid counsel the fee designated in Judge White's 1985 Decision and Order shortly after the award of benefits became final is inapposite, inasmuch as the Fourth Circuit indicated in *Kerns* that it is appropriate to treat as a delay in payment the period between the initial fee petition and the date on which the award of benefits becomes final. Employer's allegation that enhancing an attorney fee award is tantamount to requiring payment of interest is also without merit, inasmuch as the court held in *Kerns* that under the Act and the regulations, an attorney's fee may be enhanced to reflect a delay in payment. Finally, employer's argument that enhancement for delay violates its right to due process is rejected based upon the Fourth Circuit's holding in *Kerns*. Moreover, employer has failed to identify precisely how it has been "penalized" by the administrative law judge's determination, in light of the fact that employer did not have to remit the attorney fees at issue for nearly ten years after the initial award was made.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Attorney Fees is affirmed in part, vacated in part, and remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge