

BRB No. 07-0268 BLA

R.S. )  
 )  
 Claimant-Respondent )  
 )  
 v. ) DATE ISSUED: 11/30/2007  
 )  
 MOUNTAIN CLAY, INCORPORATED )  
 )  
 Employer-Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Granting Attorney Fees and Order Denying Request for Reconsideration of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

S. Parker Boggs (Buttermore & Boggs), Harlan, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Attorney Fees and Order Denying Request for Reconsideration (99-BLA-0749) of Administrative Law Judge Linda S. Chapman rendered 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). In a Decision and Order on Remand issued on January 6, 2003, the administrative law judge awarded benefits to claimant. Pursuant to employer's appeal, the Board affirmed the administrative law judge's award of benefits. [R.S.] v. *Mountain Clay, Inc.*, BRB No. 03-0338 BLA (Feb. 26, 2004)(Smith, J., concurring and dissenting)(unpub.). The Board denied employer's motion for reconsideration. [R.S.] v.

*Mountain Clay, Inc.*, BRB No. 03-0338 BLA (Aug. 31, 2004)(Smith, J., concurring and dissenting)(unpub.). Thereafter, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, affirmed the award of benefits. *Mountain Clay, Inc. v. [R.S.]*, No. 04-4297 (6th Cir. Feb. 23, 2006)(unpub.).

Four months after the Sixth Circuit court's decision, claimant's counsel filed a fee petition with the administrative law judge requesting a fee of \$7,650, representing thirty-four hours of services at \$225 per hour. Employer objected to the fee petition as untimely filed, and objected to the requested hourly rate and the number of hours. After considering employer's objections, the administrative law judge initially denied employer's request to deny the fee petition as untimely filed. Decision and Order Granting Attorney Fees at 1-2. Additionally, the administrative law judge reduced the rate to \$203 per hour. Decision and Order Granting Attorney Fees at 2-4. The administrative law judge also disallowed two hours of time. Decision and Order Granting Attorney Fees at 4-5. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$6,496, representing thirty-two hours of services at the hourly rate of \$203. Upon her review of employer's motion for reconsideration, and claimant's response thereto, the administrative law judge found no reason to amend her order awarding an attorney's fee. Order Denying Request for Reconsideration at 1.

On appeal, employer contends that the administrative law judge erred in finding that the fee petition was timely filed. Employer further asserts that the administrative law judge erred in determining that \$203 was a reasonable hourly rate, and in granting compensation for thirty-two hours. Claimant responds, urging affirmance of the fee award. The Director, Office of Workers' Compensation Programs, has not filed a response to employer's appeal. Employer has filed a reply brief reiterating its contentions.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

Employer first argues that the administrative law judge erred in finding that claimant's counsel's fee request was timely filed. We disagree. As noted previously, claimant's counsel filed his fee request four months after the Sixth Circuit court affirmed the Board's most recent decision. The administrative law judge rejected employer's argument that the fee petition should have been filed years earlier, after the administrative law judge's first decision awarding benefits. The administrative law judge reasoned that claimant's counsel was entitled to a fee only upon the successful prosecution of the

claim, and that the denial of a fee is a harsh penalty. Decision and Order Granting Attorney Fees at 1-2. Section 725.366(a) allows the administrative law judge to set a deadline for filing a fee petition. *See* 20 C.F.R. §725.366(a). Although the administrative law judge previously had set deadlines for claimant's counsel to file his fee petition, *see* 1999 Decision and Order at 22; 2003 Decision and Order at 6, the administrative law judge noted that employer appealed those decisions and the claim was not successfully prosecuted until the Sixth Circuit court affirmed the award on February 23, 2006. Upon consideration of employer's arguments, we affirm the administrative law judge's finding that claimant's attorney did not unreasonably delay filing his fee petition, as the finding was reasonable, was neither arbitrary nor capricious, and was within the administrative law judge's discretion. *See Bankes v. Director, OWCP*, 765 F.2d 81, 82, 8 BLR 2-1, 2-3 (6th Cir. 1985), *aff'g*, 7 BLR 1-102 (1984); 20 C.F.R. §725.366(a).

Employer next argues that the administrative law judge erred in awarding an hourly rate of \$203. In awarding claimant's counsel an hourly rate of \$203, the administrative law judge inappropriately referenced the risk of loss. Risk of loss cannot be factored into the determination of the hourly rate. *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992); *see also Broyles v. Director, OWCP*, 974 F.2d 508, 510, 17 BLR 2-1, 2-3 (4th Cir. 1992). However, in awarding the hourly rate of \$203, the administrative law judge also appropriately applied the regulatory criteria, taking into account her observation that claimant's attorney is a competent attorney, and her determination that the case involved complicated issues. *See* 20 C.F.R. §725.366(b). Based on the administrative law judge's proper analysis of the regulatory criteria, and in the absence of any contrary information regarding claimant's counsel's market rate from employer, we affirm the administrative law judge's finding that an hourly rate of \$203 was reasonable.<sup>1</sup> *See* 20 C.F.R. §725.366(b); *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 894-895, 22 BLR 2-514, 2-535 (7th Cir. 2002); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672, 22 BLR 2-483, 2-493 (7th Cir. 2002).

---

<sup>1</sup> The administrative law judge did not abuse her discretion in finding that the declaration of Ms. Christine Terrill, submitted by employer, attesting to the hourly rate that Old Republic Insurance Company pays attorneys with over ten years of experience to defend black lung claims, was not persuasive evidence of claimant's counsel's market rate, in light of the factors listed at 20 C.F.R. §725.366(b). Decision and Order at 3-4; Declaration of Christine Terrill (attached to employer's objections to the fee request). Moreover, claimant's counsel, as well as Messrs. Fred Busroe, John Carter, Ronald Cox, Sidney Douglass, and Mark Ford, all of whom practice in Harlan, Kentucky, represented to the administrative law judge that \$225 is a reasonable hourly rate for black lung litigation. Affidavit to Claimant's Counsel's Fee Request; Claimant's Response to Employer's Motion for Reconsideration, Exhibits 4-8. On appeal, claimant does not challenge the administrative law judge's decision to approve a rate of \$203 per hour.

Lastly, employer argues that the administrative law judge erred by approving thirty-two of the requested thirty-four hours of services. We disagree. Employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused her discretion, in finding that the “total amount of reasonable hours expended by Mr. Boggs is 32.00 hours, . . . .” See 20 C.F.R. §725.366; *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217, 1-218 (1986); *Brown v. Director, OWCP*, 3 BLR 1-95, 1-98 (1979); Decision and Order Granting Attorney Fees at 4-5. Additionally, the administrative law judge did not err in finding that counsel’s practice of billing in quarter-hour increments was reasonable. See *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993). Consequently, we affirm the administrative law judge’s finding that thirty-two hours of services were reasonable.<sup>2</sup> Therefore, we affirm the administrative law judge’s award of a total fee of \$6,496, representing thirty-two hours of services at the hourly rate of \$203.

Accordingly, the administrative law judge’s Decision and Order Granting Attorney Fees and Order Denying Request for Reconsideration are affirmed.

SO ORDERED.

---

<sup>2</sup> Contrary to employer’s arguments, time spent drafting letters to claimant on October 4, 1999 and June 4, 2001 was properly found to be compensable, as it was time spent explaining the administrative law judge’s decisions to claimant. See *Brown v. Director, OWCP*, 3 BLR 1-95, 1-98 (1979); Claimant’s Response to Employer’s Motion for Reconsideration (unpaginated – explanations for the October 4, 1999 and June 4, 2001 entries involving letters to claimant). Moreover, we reject employer’s argument that time claimed on August 19, 1999, for a letter to Dr. Baker, was merely work on drafting a cover letter and thus was noncompensable clerical work, where the record reflects that claimant’s counsel prepared a five-page letter to Dr. Baker, reciting all of the medical evidence. See Claimant’s Response to Employer’s Motion for Reconsideration (unpaginated – explanation for the August 19, 1999 entry).

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge