

BRB No. 11-0270 BLA

JERRY LEE ROSE)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 11/30/2011
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Order Denying Claimant's Petition for an Award of Attorney's Fees of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Claimant's Petition for an Award of Attorney's Fees (2007-BLA-05985) of Administrative Law Judge Janice K. Bullard with respect to a miner's claim filed pursuant to 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 relevant procedural history of this case is as follows. Claimant filed his claim for benefits on October 19, 2006, and the district director awarded benefits. The putative responsible operator challenged its designation as the responsible operator, as well as claimant's eligibility for benefits, and the case was forwarded to the Office of Administrative Law Judges for a formal hearing. The case was assigned to Administrative Law Judge Robert D. Kaplan, and a hearing was

scheduled for June 10, 2008. During these proceedings, claimant was not represented by counsel.

On April 1, 2008, claimant retained Leonard Stayton to represent him at the upcoming hearing. On April 24, 2008, employer moved for summary judgment regarding its designation as the responsible operator. By letter dated May 12, 2008, the Director, Office of Workers' Compensation Programs (the Director), agreed with employer that it could not be held liable as the responsible operator, and requested that employer be dismissed and that the claim be remanded to the district director for an award of benefits to be paid by the Black Lung Disability Trust Fund (the Trust Fund). In a Decision and Order dated May 21, 2008, Judge Kaplan granted the Director's motion and remanded the case for the payment of benefits.

On November 1, 2010, claimant's counsel filed a fee petition, requesting a total fee of \$2,437.50 for 9.75 hours of legal services rendered from April 1, 2008, the date counsel was retained by claimant, through June 27, 2008, at the rate of \$250.00 per hour. Due to Judge Kaplan's retirement, the fee petition was assigned to Administrative Law Judge Janice K. Bullard (the administrative law judge).

On November 3, 2010, the administrative law judge ordered claimant's counsel to address why his fee petition, filed almost two and one-half years after the award of benefits, should not be denied as untimely. The administrative law judge further ordered counsel to fully document the necessity and reasonableness of the requested hourly rate, and the number of hours claimed, pursuant to 20 C.F.R. §725.366. Finally, the administrative law judge allowed the Director thirty days to submit any objections to claimant's fee petition. No objections were filed. Claimant's counsel responded to the administrative law judge's Order, by letter dated November 29, 2010.

In an Order dated December 9, 2010, the administrative law judge accepted claimant's counsel's fee petition as timely, but denied fees for all legal work performed while this case was pending before the Office of the Administrative Law Judges, on the ground that it was unnecessary to the successful prosecution of the claim. Order Denying Claimant's Petition at 2.

On appeal, claimant challenges the administrative law judge's denial of his attorney's fee petition. The Director responds, urging the Board to vacate the denial of an attorney's fee, and to remand this case for the administrative law judge to reconsider the fee petition in accordance with 20 C.F.R. §725.366.

The amount of an attorney's fee award pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a), 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 law. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Claimant's counsel contends, and the Director concurs, that the administrative law judge abused her discretion in denying counsel's fee petition. The parties argue that the administrative law judge incorrectly found that the Trust Fund was not liable for the payment of an attorney's fee on the ground that there had never been an adversarial relationship between claimant and the Director. We agree.

The regulation at 20 C.F.R. §725.367 sets forth the circumstances under which an attorney's fee shall be payable by a responsible operator or the Trust Fund, and states, in part, that:

An attorney who represents a claimant in the successful prosecution of a claim for benefits may be entitled to collect a reasonable attorney's fee from the responsible operator that is ultimately found liable for the payment of benefits, or, in a case in which there is no operator who is liable for the payment of benefits, from the fund. *Generally, the operator or fund liable for the payment of benefits shall be liable for the payment of the claimant's attorney's fees where the operator or fund, as appropriate, took action, or acquiesced in action, that created an adversarial relationship between itself and the claimant.*

20 C.F.R. §725.367(a)(emphasis added).

In denying counsel's petition, the administrative law judge determined, pursuant to Section 725.367, that "'successful prosecution' of a claim necessarily requires that the parties have an adversarial relationship." Order Denying Claimant's Petition at 2. The administrative law judge found that no adversarial relationship existed between claimant and the Director because the Director moved for a remand to award benefits. The administrative law judge determined that, because claimant's counsel failed to establish that any services he rendered in this matter led to the Director's decision to move for an award of benefits, counsel failed to establish that his work was necessary for the successful prosecution of claimant's case. Order Denying Claimant's Petition at 2. Thus, the administrative law judge concluded that claimant's counsel's services in this claim are not compensable. *Id.*

The Board has held that, where, as here, there has been an adjudicative proceeding because "someone" contested liability, the party ultimately held responsible for the payment of benefits is also responsible for the payment of an attorney's fee, regardless of whether the responsible operator or the Trust Fund created the adversarial relationship. *Duncan v. Director, OWCP*, 24 BLR 1-153, 1-156 (2010); Director's Brief at 3. The

Director, therefore, concedes that the Trust Fund is liable for the benefits awarded, as well as any reasonable attorney's fees, because it has assumed liability from the dismissed responsible operator. Director's Brief at 3.

In view of the foregoing, we vacate the administrative law judge's denial of an attorney's fee, and remand this case for the administrative law judge to reconsider counsel's fee petition in accordance with Section 725.366. *See Duncan*, 24 BLR at 1-156.

Accordingly, the administrative law judge's Order Denying Claimant's Petition for an Award of Attorney's Fees is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge