

BRB No. 99-1043 BLA

WALTER A. SANDINE (Deceased))
)
 and)
)
 MARY A. SANDINE (deceased widow)
 of WALTER A. SANDINE))
) DATE ISSUED:
 Claimants-Petitioners)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Amended Supplemental Award Fees for Legal Services (on behalf of the deceased miner) and the Amended Supplemental Award Fees for Legal Services (on behalf of the deceased widow) of Kevin G. Peterson, District Director, United States Department of Labor.

Antoinette Boyle, Billings, Montana, for claimants.

Jennifer U. Toth (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant's counsel¹ appeals the Amended Supplemental Award Fees for

Legal Services (on behalf of the deceased miner) and the Amended Supplemental Award Fees for Legal Services (on behalf of the deceased widow) of District Director Kevin G. Peterson awarding attorney's fees for legal services performed in securing the miner and the widow awards of benefits on claims 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). On April 17, 1989, claimant's counsel filed a fee petition with District Director John C. Martin requesting a total fee of \$8,725.00 for legal services performed in connection with the miner's claim and the widow's claim.² In a Supplemental Award Fees for Legal Services dated August 11, 1998, District Director Martin awarded claimant's counsel a total fee of \$4,102.50 for legal services performed in connection with the miner's claim to be paid by the miner's estate. In a separate Supplemental Award Fees for Legal Services issued on the same date, District Director Martin awarded claimant's counsel a total fee of \$900.00 for legal services performed in connection with the widow's claim to be paid by the widow's estate.

Claimant's counsel filed a request for reconsideration. In an Amended Supplemental Award Fees for Legal Services dated June 17, 1999, District Director Kevin G. Peterson (the district director) awarded claimant's counsel a total fee of \$6,100.00 for 61.00 hours of legal services performed in connection with the miner's claim at an hourly rate of \$100.00 to be paid by the miner's estate. In a separate Amended Supplemental Award Fees for Legal Services issued on the same date, the district director awarded claimant's counsel a total fee of \$1,350.00 for 13.50 hours of legal services performed in connection with the widow's claim at an hourly rate of \$100.00 to be paid by the widow's estate. On appeal, claimant's counsel contends that the district director erred in disallowing 8.00 hours of legal services performed in connection with the miner's claim and in disallowing 5.25 hours of legal services performed in connection with the widow's claim. Claimant's counsel also argues that the Black Lung Disability Trust Fund (Trust Fund) should have been held liable for the payment of attorney's fees in the instant case. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, urging the Board to remand the case to the district director to reconsider whether claimant's counsel is entitled to some of the rejected fees. The Director also contends that the district director's "blanket denial" of Trust Fund liability must be vacated. In a reply brief, claimant's counsel reiterates her previous 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. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Counsel for claimant is entitled to attorney's fees only if there is a successful prosecution of the claim and the work performed was necessary. See 33 U.S.C. §928(a), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §725.367; *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987). Because counsel succeeded in securing benefits, claimant's counsel successfully prosecuted the instant claims. See *Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993)(*en banc*); *Sosbee v. Director, OWCP*, 17 BLR 1-136 (1993) (*en banc*) (Brown, J., concurring). Claimant's counsel, having successfully prosecuted the claims, is entitled to a fee which is reasonably commensurate with the necessary work done in establishing entitlement to benefits. See 20 C.F.R. §725.366.

Claimant's counsel contends that the district director erroneously disallowed 8.00 hours of legal services performed in connection with the miner's claim.³ Claimant's counsel argues that the district director erred in disallowing a total of 2.25 hours that claimant's counsel spent communicating with Senator Max Baucus regarding the location of a lost file. We disagree. The Board has held that an attorney's communications with a legislator as to the status, progress or resolution of a constituent's claim is neither part of the adjudication process, nor necessary to establish entitlement to benefits. See *Morgan v. Director, OWCP*, 4 BLR 1-103 (1981). Consequently, an attorney cannot receive a fee award based on time spent seeking or obtaining a legislator's assistance or intervention in processing a claim. *Id.* We, therefore, affirm the district director's disallowance of 2.25 hours that claimant's counsel spent communicating with Senator Baucus.

Claimant's counsel also challenges the district director's disallowance of a total of 1.50 hours that claimant's counsel spent on August 8, 1983 requesting a revision of the miner's award of benefits and the district director's disallowance of an additional total of 2.50 hours on September 6, 1983 and September 21, 1983 that claimant's counsel spent contesting the date of the miner's entitlement to benefits. Claimant's counsel notes that she was ultimately successful in obtaining approximately \$15,000.00 in additional benefits by contesting the erroneous entitlement date. The district director disallowed these 4.00 hours of services because they were not necessary to establish entitlement.

The district director's analysis is insufficient. The test for determining whether claimant's counsel's work was necessary in this case is whether claimant's counsel, at the time she performed the work in question, could have reasonably regarded the work as necessary to establish entitlement to benefits. See generally *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Once a service has been found to be compensable, the adjudicating officer must decide whether the amount of time expended by the attorney in performance of the service is excessive or

unreasonable. *Id.* Because the district director has not adequately addressed whether claimant's counsel, at the time she performed the work in question, could have reasonably regarded the work as necessary to establish entitlement to benefits, we remand the case to the district director to reconsider whether claimant's counsel is entitled to compensation for these services.

Claimant's counsel also challenges the district director's disallowance of a total of 1.75 hours of legal services performed on September 10, 1985. Claimant's counsel sought compensation for her work on that date seeking correction of errors contained in a memorandum from a district director. Claimant's counsel notes that the amount of benefits was incorrectly stated, as were the dates and parties. Claimant's Brief at 3. The district director disallowed these hours, noting that they were "not necessary to establish [the miner's] entitlement to benefits." Amended Supplemental Award (Miner's Claim) at 2. Again, because the district director has not adequately addressed whether claimant's counsel, at the time she performed the work in question, could have reasonably regarded the work as necessary to establish entitlement to benefits, *see Lanning, supra*, we remand the case to the district director to reconsider whether claimant's counsel is entitled to compensation for these services.

Claimant's counsel further contends that the district director erroneously disallowed a total of 5.00 hours of legal services performed in connection with the widow's claim. Claimant's counsel argues that the district director erred in disallowing a total of 4.00 hours that claimant's counsel spent attempting to obtain the release of an underpayment of benefits in the amount of \$5,000.00. The district director disallowed compensation for this work because he found that these "activities had no bearing on whether [the widow] was, by law, entitled to benefits." Amended Supplemental Award (Widow's Claim) at 1. Because the district director has not adequately addressed whether claimant's counsel, at the time she performed the work in question, could have reasonably regarded the work as necessary to establish entitlement to benefits, *see Lanning, supra*, we remand the case to the district director to reconsider whether claimant's counsel is entitled to compensation for these services.

Claimant's counsel also challenges the district director's disallowance of a total of 1.00 hour of legal services performed on October 12, 1983, October 6, 1987, October 9, 1987 and November 13, 1987. The district director disallowed the time spent on these dates because he found that the charges were for "purely administrative, non-legal activities" and had "no bearing on [a] legal determination of [the widow's] entitlement to benefits." Amended Supplemental Award (Widow's Claim) at 2.

Claimant's counsel sought compensation for 0.25 hour that she spent on October 12, 1983 speaking with one of the widow's relatives regarding the fact that the widow was entering a nursing home and explaining her health benefits. We affirm the district director's disallowance of this time as it was clearly not necessary to establish the widow's entitlement to benefits.

We also affirm the district director's disallowance of 0.75 hours that claimant's counsel spent receiving notice of the widow's death and obtaining a copy of the widow's death certificate. Because the widow's eligibility for benefits had already been established, claimant's counsel's actions are not compensable.

Claimant's counsel finally contends that the district director erred in not designating the Trust Fund as liable for the payment of claimant's counsel's attorney fees. In cases involving Part B transfer claims denied by the Social Security Administration (SSA) and subsequently reviewed by the Department of Labor (DOL) at the claimant's election (and in which there is no post-1969 coal mine employment), the Trust Fund is liable for those attorney's fees incurred after the DOL receives the referral and the Director either specifically refuses to pay benefits or fails to respond within 30 days. See *Belcher v. Director, OWCP*, 3 BLR 1-250 (1981); *Yokley v. Director, OWCP*, 3 BLR 1-230 (1981).

In the instant case, the miner filed a Part B claim for benefits with the SSA on May 4, 1970. Director's Exhibit 1. In a decision dated December 29, 1975, an administrative law judge from the SSA denied benefits. Director's Exhibit 31. After the miner elected DOL review of his denied Part B claim in April of 1978, the SSA again denied benefits on February 5, 1979.⁴ *Id.* The DOL awarded benefits on August 5, 1983.⁵ Director's Exhibit 26. The miner performed no post-1969 coal mine employment.

On remand, the district director is instructed to address whether the Trust Fund should be held liable for the payment of claimant's counsel's attorney fees in the instant case.

Accordingly, the district director's Amended Supplemental Award Fees for Legal Services (on behalf of the deceased miner) and his Amended Supplemental Award Fees for Legal Services (on behalf of the deceased widow) are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge