



BRB No. 18-0492 BLA

ROSE JUNE STILTNER)
(Surviving Spouse of ALFRED L.)
STILTNER))

Claimant-Respondent)

v.)

HARMAN MINING CORPORATION)

and)

OLD REPUBLIC INSURANCE COMPANY)

Employer/Carrier-)
Petitioners)

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

Party-in-Interest)

DATE ISSUED: 09/17/2019

DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney's Fees on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Attorney's Fees on Remand (2007-BLA-05384) of Administrative Law Judge Joseph E. Kane rendered in connection with a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time.

The administrative law judge initially awarded claimant's counsel a total fee of \$22,366.25. Upon review of employer's appeal, the Board affirmed the hourly rates awarded,¹ but held that the administrative law judge erred in determining the number of hours for which claimant's counsel was entitled to fees. *Stiltner v. Harman Mining Corp.*, BRB No. 16-0098 BLA, slip op. at 3-4 (Nov. 10, 2016)(unpub.). The Board remanded the case for the administrative law judge to address employer's objections to counsel's individual billing entries and set forth the reasoning for his findings on the appropriate number of hours. *Id.* at 4-5.

On remand, the administrative law judge addressed employer's objections that some of the time sought by counsel and the legal assistants was for clerical work, and that several of counsels' charges were duplicative and excessive. He agreed that four hours of the legal assistants' time was spent on clerical work and disallowed those hours. He rejected employer's remaining objections to the legal assistants' time and all its objections to counsels' charges, found the fees requested to be reasonable, and awarded a total fee of \$21,976.25. Decision and Order on Remand at 5; 20 C.F.R. §725.366(a).

On appeal, employer contends the administrative law judge lacked the authority to decide this case because he was not properly appointed consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2.² Alternatively, employer

¹ The Board affirmed hourly rates of \$300.00 for Joseph E. Wolfe, \$250.00 for Bobby J. Belcher, \$200.00 for Andrew Delph, \$175.00 for Ryan C. Gilligan, and \$100.00 and \$60.00 for counsel's full-time and part-time legal assistants. *Stiltner v. Harman Mining Corp.*, BRB No. 16-0098 BLA, slip op. at 3-4 & n.4 (Nov. 10, 2016)(unpub.).

² Article II, Section 2, Clause 2, sets forth the appointing powers:

challenges the award of attorney fees. Claimant’s counsel responds in support of the fee award. The Director, Office of Workers’ Compensation Programs (the Director), has filed a limited response asserting that employer waived its Appointments Clause challenge by failing to raise it in its previous appeal to the Board.

Appointments Clause

We agree with the Director that employer forfeited its Appointments Clause argument by failing to raise it when the case was previously before the Board. *See Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (requiring “a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party’s] case”); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) (“Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.”) (citation omitted); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its opening brief); Director’s Brief at 3-4.

The exception for considering a forfeited argument due to extraordinary circumstances recognized in *Jones Brothers v. Sec’y of Labor*, 898 F.3d 669 (6th Cir. 2018) is inapplicable because, unlike the Federal Mine Safety and Health Review Commission at issue in that case, the Board has the long-recognized authority to address properly-raised questions of substantive law. *Island Creek Coal Co. v. Bryan*, F.3d , Nos. 18-3680, 18-3909, 18-4022, 2019 WL 4282871, at *9-10 (6th Cir. Sept. 11, 2019); *see Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (holding that because the Board performs the identical appellate function previously performed by the district courts, Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts); *Duck v. Fluid Crane & Constr. Co.*, 36 BRBS 120, 121 n.4 (2002) (the Board “possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction”). Therefore, we reject employer’s argument that this case should

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

Fee Award

The amount of attorney fees awarded by an administrative law judge 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 applicable law.³ See *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

The administrative law judge scrutinized counsel's fee petition in light of employer's objections that the hours requested were excessive and included clerical work. Decision and Order at 3-4, *citing and discussing* Motion to Strike at 5-8 & nn.3, 4. He found sixteen billing entries totaling four hours for the legal assistants involved no more than taking phone messages and disallowed that time as clerical work. *Id.* He found, however, that the remaining legal assistant entries were not purely clerical in nature but involved compensable tasks, and found all the attorneys' billing entries were for necessary legal work and not duplicative. *Id.* Additionally, he rejected employer's argument that counsel had not justified the use of multiple attorneys, and found counsels' practice of billing in quarter-hour increments reasonable. *Id.* at 4.

Employer argues that although the administrative law judge properly disallowed sixteen phone call entries as clerical work, he abused his discretion by failing to explain why twenty-three other phone call entries "involved more than taking a phone message." Employer's Brief at 12-13. Employer also contends he erred in allowing billing in quarter-hour increments. *Id.* at 13-14.

Employer's contentions lack merit. The administrative law judge conducted a thorough review and reached a conclusion supported by the record, that the total number of hours claimed, with the exception of the disallowed entries, was reasonable. See *E. Associated Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 577-78 (4th Cir. 2013); *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 666 (6th Cir. 2008); *Abbott*, 13 BLR at 1-16. He explained that the other phone call entries went beyond just taking or leaving a message and involved communicating with claimant, opposing counsel, or witnesses, and "requesting documents like the [miner's] death certificate that are needed

³ The miner's last coal mine employment was in Virginia. *Stiltner*, BRB No. 16-0098 BLA, slip op. at 2 n.3, *citing Stiltner v. Harman Mining Corp.*, BRB No. 10-0702 BLA, slip op. at 3 n.3 (Sept. 30, 2011)(unpub.). Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *Id.*, *citing Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

for the prosecution of the” claim. Decision and Order at 3. Further, the administrative law judge permissibly determined that quarter-hour billing is acceptable, as long as the total amount of time claimed is reasonable. *See Gosnell*, 724 F.3d at 577-78; *Bentley*, 552 F.3d at 666-67; *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); 20 C.F.R. §802.203(d)(3).

As employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused his discretion, we affirm his findings approving 43.75 hours of legal services performed by Joseph E. Wolfe, 1.5 hours of legal services performed by Bobby J. Belcher, 12.25 hours of legal services performed by Andrew Delph, 15.75 hours of legal services performed by Ryan C. Gilligan, and 32.25 and .75 hours of legal services performed by counsel’s full-time and part-time legal assistants. We therefore affirm his decision to award a fee totaling \$21,976.25.

Accordingly, the administrative law judge’s Decision and Order Awarding Attorney’s Fees on Remand is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge