U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0254 BLA

CLEATIS CLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	
	)	DATE ISSUED: 04/28/2020
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Attorney Fee Order of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Scott A. White (White & Risse, LLP), Arnold, Missouri, for employer.

Sarah M. Hurley (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: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Attorney Fee Order (17-BLA-05894) of Administrative Law Judge Drew A. Swank granting an attorney's fee in connection with a claim[1] filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Claimant's counsel requested a total fee of $8,525.00, for 15.75 hours of legal services at an hourly rate of $350.00 (Joseph E. Wolfe), 4.0 hours of legal services at an hourly rate of $300.00 (Andrew Delph), 3.5 hours of legal services at an hourly rate of $200.00 (Brad A. Austin), 2.25 hours of legal services at an hourly rate of $150.00 (Victoria Herman), and 7.75 hours of legal assistant services at an hourly rate of $100.00. Claimant's counsel also requested $3,645.64 in expenses.

The administrative law judge reduced Mr. Wolfe's requested hourly rate to $300.00, Mr. Delph's requested hourly rate to $200.00, and Mr. Austin's hourly rate to $150.00. He also disallowed 1.25 hours of legal services performed by Mr. Austin and 1.75 hours of services performed by the legal assistants. The administrative law judge also disallowed $277.13 in expenses. He therefore awarded claimant's counsel a total fee of $6,800.00, and $3,368.51 in expenses.

On appeal, employer argues the administrative law judge lacked the authority to preside over the case because he had not been appointed consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. It also challenges his authority to hear and decide this case in light of the removal provisions governing administrative law judges. Employer also contends that the administrative law judge's attorney's fee award is excessive. Claimant responds in support of the attorney fee award. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the Board should reject employer's argument that the administrative law judge lacked the authority to adjudicate the attorney fee petition. Employer has filed separate reply briefs, reiterating its previous contentions.

[1] In a Decision and Order dated June 28, 2018, Administrative Law Judge Richard A. Morgan awarded benefits. Upon review of employer's appeal, the Board affirmed the award of benefits, but vacated Judge Morgan's finding that employer was the responsible operator. *Cline v. Mingo Logan Coal Co.*, BRB No. 18-0543 BLA (Dec. 4, 2019) (unpub.). The Board remanded the case for the limited purpose of reconsidering this issue. *Id.* Due to Judge Morgan's retirement, Administrative Law Judge Drew A. Swank considered the attorney fee petition.

Appointments Clause Challenge

Employer urges the Board to vacate the attorney fee award[2] and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[3] Employer's Brief at 3-14. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[4] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment.[5] *Id.* at 7. We reject employer's argument, as the Secretary's ratification was a valid exercise of his authority and brought the administrative law judge's appointment into compliance with the Appointments Clause.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification "can remedy a defect"

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[2] The Board previously rejected employer's challenge to Judge Morgan's authority to hear the merits of the claim. *Cline*, BRB No. 18-0543 BLA, slip op. at 3-7.

[3] *Lucia* involved an Appointments Clause challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[4] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Swank.

[5] On July 20, 2018, the Department of Labor (DOL) expressly conceded that the Supreme Court's holding in *Lucia* applies to the DOL's administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress has authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Thus, at the time of the ratification of the administrative law judge's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

Under the presumption of regularity, it is presumed the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Swank and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Swank. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Swank "as an Administrative Law Judge." *Id.* Having put forth no contrary evidence, employer has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Based on the foregoing, we hold that the Secretary's action constituted a valid ratification of the appointment of the administrative law judge.[6] *See Edmond v. United*

[6] We also reject employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, "confirms" its Appointments Clause argument because incumbent administrative law judges remain in the competitive service pending promulgation of implementing regulations. Employer's Brief at 7-8. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the

States, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was proper).

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges, asserting that they "violate the separation of powers [doctrine]." Employer's Brief at 5-6. We decline to address this issue, as it is inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

Before the Board will consider the merits of an appeal, the Board's procedural rules impose threshold requirements for alleging specific error. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. Further, to merely "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider the merits of an argument that the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

Employer refers to the removal provisions for administrative law judges contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, and notes the United States Supreme Court's holding that the two-level removal protection applicable to the Public Company Accounting Oversight Board was unconstitutional. Director's Brief at 6; Employer's Brief at 9-13, *citing Free Enter. Fund v. Public Co. Accounting Oversight Bd.*,

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government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999).

561 U.S. 477 (2010). Employer has not explained how such a holding undermines the administrative law judge's authority to hear and decide this case.[7] Employer "cannot simply point to *Free Enterprise Fund* and declare its work done." Director's Brief at 6. Thus we decline to address this issue. *Cox*, 791 F.2d at 446-47; *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; 20 C.F.R. §802.211(b).

Attorney's Fee Award

The amount of an 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.[8] *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

In determining the amount of an attorney's fee to award under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case, and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *See E. Assoc. Coal*

[7] Employer cites the Supreme Court's decision in *Free Enterprise* and Justice Breyer's separate opinion in *Lucia*. Employer's Brief at 8-10. It notes that in *Free Enterprise*, the Supreme Court invalidated a statute that provided the Public Company Accounting Oversight Board with two levels of "for cause" removal protection and thus interfered with the President's duty to ensure the faithful execution of the law. *Id.* Employer does not set forth how *Free Enterprise* applies to the administrative law judge in this case. As the Director notes, the Supreme Court expressly stated that its holding did not address administrative law judges. *Free Enter. Fund*, 561 U.S. at 507 n.10; Director's Brief at 6. Further, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. Justice Breyer commented in his concurrence in *Lucia* that administrative law judges are provided two levels of protection, "just what *Free Enterprise Fund* interpreted the Constitution to forbid in the case of Board members." *Lucia*, 138 S.Ct. at 2060 (Breyer, J., concurring). However, as the Director accurately notes, "even if Justice Breyer's remarks could somehow be interpreted as suggesting Section 7521 was constitutionally infirm, he did not speak for the Court in *Lucia*." Director's Brief at 6-7.

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Cline*, BRB No. 18-0543 BLA, slip op. at 2 n2.

Corp. v. Director, OWCP [*Gosnell*], 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010). An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). In order to identify the prevailing market rate, the fee applicant must produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *see Gosnell*, 724 F.3d at 571. Further, the regulation states:

> [a]ny fee approved under . . . this section 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 fee requested.

20 C.F.R. §725.366(b).

Employer contends that claimant's counsel failed to establish that the prevailing market rate for Mr. Wolfe's legal services was $350.00 an hour.[9] Employer's Brief at 14-16. Although the administrative law judge reduced Mr. Wolfe's requested hourly rate from $350.00 to $300.00, employer argues that Mr. Wolfe is entitled to a rate of "no more than $265 an hour." *Id.* at 15. We disagree.

In support of his requested hourly rate, Mr. Wolfe listed numerous fee awards from 2006 to 2017, wherein other administrative law judges granted him hourly rates ranging from $300.00 to $425.00. The administrative law judge found that "the vast majority of the cases [Mr. Wolfe] cites as supporting his hourly rate, which are specific to black lung work and in the same general community, awarded him the rate of $300.00." Attorney Fee Order at 3. The administrative law judge therefore awarded Mr. Wolfe an hourly rate of $300.00, finding the rate to be "commensurate with the quality of his representation, his qualifications and the complexity of the legal issues." *Id* at 3-4. The United States Court of Appeals for the Fourth Circuit has recognized that evidence of fees received in the past is an appropriate factor to take into account when establishing a market rate. *See Cox*, 602 F.3d at 290. The administrative law judge also relied upon Mr. Wolfe's "many years of

[9] Because employer does not challenge the administrative law judge's award of $200.00 per hour for Mr. Delph; $150.00 per hour for Mr. Austin and Ms. Herman, and $100.00 per hour for the legal assistants, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

experience." Attorney Fee Order at 3. This is a relevant factor that an administrative law judge may consider in determining a reasonable hourly rate for claimant's counsel. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228 (4th Cir. 2009). Because the administrative law judge acted within his discretion in analyzing the relevant criteria and explaining the factors he considered, we affirm his approval of an hourly rate of $300.00 for Mr. Wolfe's legal services. 20 C.F.R. §725.366(b); *see Gosnell*, 724 F.3d at 572; *Abbott*, 13 BLR at 1-16.

Employer also argues that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for legal services. Employer's Brief at 16-18. Specifically, employer contends that counsel's practice of billing in quarter-hour increments was unreasonable. We disagree. The Fourth Circuit has held that attorneys may bill in quarter-hour increments in black lung cases. *Gosnell*, 724 F.3d at 576. Consequently, we hold that the total number of hours awarded by the administrative law judge was reasonable and supported by the record. We therefore affirm the administrative law judge's fee award of $6,800.00 and 3,368.51 in expenses.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge