U.S. Department of Labor

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

BRB No. 20-0138 BLA

RICKY L. NEWSOME	)	
	)	
Claimant	)	
	)	
v.	)	DATE ISSUED: 02/25/2021
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Proposed Order Supplemental Award Fee for Legal Services and December 27, 2019 Letter Denying Reconsideration of C. Susan Mullins, Claims Examiner, United States Department of Labor.

Evan B. Smith (AppalReD Legal Aid), Prestonsburg, Kentucky, for Claimant.

Stefan Babich (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, BUZZARD and ROLFE, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Claimant's counsel (Counsel) appeals Claims Examiner C. Susan Mullins' Proposed Order Supplemental Award Fee for Legal Services (Supplemental Award) and December 27, 2019 Letter Denying Reconsideration rendered on an attorney fee petition

filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Claimant filed his claim for benefits on October 31, 2018, and retained counsel to represent him. On March 11, 2019, without issuing a Schedule for the Submission of Additional Evidence (SSAE), Claims Examiner C. Susan Mullins (the district director) awarded benefits commencing November 2018, to be paid by the Black Lung Disability Trust Fund (Trust Fund). By letter dated March 19, 2019, Counsel requested that the district director revise the entitlement date from November 2018 to October 2018. Counsel stated contrary to the district director's determination that the claim was filed on November 6, 2018, it was mailed to the Office of Workers' Compensation and postmarked October 31, 2018, and therefore, is considered filed as of the date of its postmark. *See* 20 C.F.R. §725.303(b).[1] The district director agreed with Counsel and, on March 28, 2019, sent Claimant a letter stating he was also entitled to benefits for the month of October 2018, and indicating a check for this additional month of benefits was forthcoming.

Counsel subsequently filed a complete itemized fee petition, requesting a fee for legal services performed before the district director. He indicated that his employment changed during the course of his representation of Claimant, and consequently fees should be separated based on his employer at the time the services were rendered: he was employed by Appalachian Citizens' Law Center prior to 2019, and is currently employed by AppalReD Legal Aid. He requested a fee in the amount of $947.50 for legal services performed between March 6, 2017 and November 26, 2018 while he worked at the Appalachian Citizens' Law Center, representing 2.9 hours of attorney services at an hourly rate of $275.00, and 1.5 hours of paralegal services at an hourly rate of $100.00. In addition, he requested $907.50 for legal services performed at his current law firm, AppalReD Legal Aid, representing 3.3 hours of attorney services at an hourly rate of $275.00.

The district director issued her Supplemental Award on October 24, 2019, reducing the requested hourly rate for paralegal services from $100.00 to $75.00. Supplemental Award at 1. She also disallowed 2.80 hours of legal services performed prior to October

[1] This regulation provides:

> A claim submitted by mail shall be considered filed as of the date of delivery unless a loss or impairment of benefit rights would result, in which case a claim shall be considered filed as of the date of its postmark.

20 C.F.R. §725.303(b).

25, 2018 as they were rendered in pursuit of Claimant's prior claim. *Id*. at 2. The district director therefore awarded a fee of $102.50 due to Appalachian Citizens' Center for 0.10 hour of attorney services at a rate of $275.00 and 1.0 hour of paralegal services at an hourly rate of $75.00. *Id.* In addition, she awarded a fee of $907.50 due to AppalReD Legal Aid for 3.30 hours of attorney services at a rate of $275.00. *Id.* The district director concluded because no SSAE was issued, and she initially awarded benefits in her Proposed Decision and Order, Claimant was responsible for the payment of the fees awarded.

Counsel requested reconsideration of the attorney fee award, arguing that the fee should be paid by the Trust Fund rather than Claimant. On December 27, 2019, the district director denied Counsel's request because no adversarial relationship existed between Claimant and the Trust Fund as required by 20 C.F.R. §725.367(a), the regulation that imposes liability for attorney fees on the Trust Fund.

On appeal, Counsel challenges the district director's determination that Claimant, not the Trust Fund, is responsible for the payment of the attorney's fees. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the district director's determination that the Trust Fund is not responsible for paying the attorney fee award.

When an attorney prevails on behalf of a claimant against the position of an employer, the Act provides that the employer or its insurer shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928. The amount of an attorney fee award 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.[2] *See Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989) (citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980)); *see also Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).[3]

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[3] The Longshore and Harbor Workers' Compensation Act provisions incorporated in the Black Lung Act provide for payment of an attorney fee when an employer contests entitlement to benefits, except as otherwise provided by regulations of the Secretary. They also provide for payment of an attorney fee as a lien against compensation due when claimant is obligated to pay the fee. *See* 33 USC §928(a)-(c).

The implementing regulation at 20 C.F.R. §725.367 sets forth with more particularity the circumstances under which an attorney's fee shall be payable by a responsible operator or the Trust Fund, and states, in relevant 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).

Relying on *Duncan v. Director,* OWCP, 24 BLR 1-154 (2010), Counsel argues the Trust Fund can be held responsible for the payment of attorney fees in cases where, such as here, the Director does not contest the claim. Claimant's Opening Brief in Support of Petition for Review (Claimant's Brief) at 7; Claimant's Reply Brief at 2. Counsel asserts the district director's erroneous entitlement date was, in effect, a denial of the claim for the month of October 2018. He therefore contends, because the amount of benefits to which Claimant is entitled was in dispute, an adversarial relationship between Claimant and the Trust Fund existed, and as such, the Trust Fund is liable for the attorney fees. Claimant's Brief at 5-8.

The Director disagrees with Counsel, asserting that "shifting liability for attorney's fees requires that an adversarial relationship exist between Claimant and the Trust Fund" and in this case, "no such relationship existed." Director's Brief at 4. The Director maintains the Trust Fund never contested Claimant's entitlement to benefits or the requested change in Claimant's entitlement date, which resulted in an increase in his benefits, thus, liability for the attorney fees should not shift to the Trust Fund. *Id*. We agree with the Director.

In denying Counsel's request to impose liability for the attorney fees on the Trust Fund, the district director also properly recognized that the regulatory provision for an attorney fee against the Fund when an SSAE is issued did not apply because she awarded

benefits without issuing a SSAE.[4] *See* 20 C.F.R. §725.367(a)(2) (in cases with no responsible operator and the district director issues a SSAE, Trust Fund shall be liable for attorney fees). Moreover, Counsel's argument that Claimant's request for a change in the entitlement date created an adversarial relationship ignores the plain language set forth in 20 C.F.R. §725.367(a)(4), which governs cases, such as this, where a claimant or beneficiary seeks an increase in benefits.[5] Section 725.367(a)(4) permits the award of an attorney fee payable by the responsible operator or Trust Fund where a "beneficiary seeks an increase in the amount of benefits payable, and the responsible operator or fund *contests the claimant's right to that increase*." 20 C.F.R. §725.367(a)(4) (emphasis added). Here, upon her receipt of counsel's letter indicating the error in Claimant's entitlement date, the district director agreed and, without opposition, immediately changed the date from November 2018 to October 2018, stating a check for this additional month of benefits was forthcoming. Because Counsel failed to demonstrate any evidence of an adversarial relationship between Claimant and the Trust Fund, a requisite element for the Trust Fund to be liable for attorney fees, we reject his argument.

In addition, Counsel's reliance on *Duncan* to compel the conclusion that the Trust Fund must pay the attorney fees is misplaced. In *Duncan*, the Board held that, where 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). In this case, however, there was no adversarial relationship between Claimant and the Trust Fund at any time in the processing of his claim or in his request for an increase in benefits.[6]

[4] Counsel does not contest that the district director did not issue a SSAE, and we therefore affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711.

[5] While Counsel appears to recognize the regulation set forth in 20 C.F.R. §725.367(a)(4) applies to this case, rather than citing the entire provision, he cites *only* the statement that the responsible operator or the Trust Fund shall be liable for attorney fees when either entity contests an increase in benefits. Claimant's Brief at 6 n.3, citing 20 C.F.R. §725.367(a)(4). In this case, it is undisputed that the Trust Fund did not contest Claimant's request for an increase in benefits.

[6] Counsel's reliance on *Jackson v. Jewell Ridge Coal Corp.*, 21 BLR 1-27 (1997) (en banc), *aff'd sub nom. Harris v. Clinchfield Coal Co.*, 149 F.3d 307 (4th Cir. 1998) and *Howard v. Director, OWCP*, BRB No. 05-0836 BLA (April 26, 2006) (unpub.) is also unavailing. In *Jackson*, the majority of the Board held the employer was responsible for

There also is no merit to Counsel's argument that the district director conflated the issues of whether the requested fees were reasonable and necessary with her designation of who is the party responsible for the payment of the fees. Claimant's Brief at 7-8. Counsel argues "the entitlement-date issue in this case required a synthesis of the general entitlement-date provision at 20 C.F.R. §725.503(b) with the provision regarding filing dates at [20 C.F.R.] §725.303(b)," which "is the sort of expertise that claimants retain attorneys for." Claimant's Brief at 7-8. When addressing Counsel's reconsideration request, the district director stated she changed Claimant's entitlement date from November 2018 to October 2018 and a lump sum payment of $1,320.00 would be issued to Claimant to cover the monthly rate. She further noted claimants who do not have the assistance of an attorney have successfully obtained changes in their entitlement dates by merely contacting their office[7] and, therefore, she denied his request to order the Trust Fund to pay the attorney fees.[8] *See* December 27, 2019 Letter Denying Reconsideration. However, because Counsel has not shown, nor do the facts of this case demonstrate, that

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all attorney fees, including those performed prior to employer's controversion based on the United States Supreme Court's holdings concerning what constitutes a "reasonable" fee in other federal fee-shifting statutes. *Jackson*, 21 BLR at 1-34-35. As the current fact situation differs from *Jackson* and there are regulations specifically addressing the instant case, we reject Counsel's reliance on this case. *See* 20 C.F.R. §725.367(a)(2), (4). *Howard* is an unpublished case, therefore not precedential, and is, like *Jackson*, in any event not relevant because of the factual differences and the specific applicable regulatory provision. Finally, we note that an adversarial relationship is not created merely by Claimant's allegation of error and there is no adversarial relationship between the adjudicator and a party where correction of an adjudicatory error is requested.

[7] As the Director acknowledges, "by suggesting that a pro se claimant could have received the additional benefits merely by asking, the district director also seemingly conflated the two issues [the necessity of an attorney's work with the creation of an adversarial relationship] when denying Claimant's motion for reconsideration of the fee order." Director's Brief at 6 n.6. However, as the district director's refusal to shift the payment of fees was ultimately based on the lack of an adversarial relationship, any error in making this statement is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); December 27, 2019 Letter Denying Reconsideration.

[8] The director director's fee award reflects that she found Counsel's requested hours for obtaining a change in Claimant's entitlement date were reasonable and necessary, and as such, those hours are included as compensable legal services of the attorney fee award. Counsel does not contest this determination.

an adversarial relationship between Claimant and the Trust Fund existed, we affirm the district director's attorney fee award.[9]

[9] Our dissenting colleague argues that "[e]very time a claimant is denied a benefit to which he is lawfully entitled, and the claimant employs the assistance of counsel to secure [it], he is entitled to an employer-paid or Trust Fund-paid attorney fee." Dissent at 13. While that might be an admirable policy, it is not the one set forth in the regulations. Instead, to shift fees, the Secretary's regulation universally requires an action or acquiescence that creates an "adversarial relationship," and the specific provision covering an increase in benefits like this further requires the district director to "contest" that increase. 20 C.F.R. §§725.367, (a)(4).

Neither occurred here. Claimant mailed his application for benefits on October 31; the district director received it on November 6 and did not dispute it. Claimant did not assert entitlement to benefits beginning in October in his application, and at Claimant's first suggestion of an error in the onset date, the district director immediately acknowledged a mistake and promptly paid the difference. The district director never disputed, denied or contested Claimant's right to an earlier onset date. While the prudence of ordering a fee payable by Claimant may be questionable under these circumstances (an issue not before us), we agree with the Director no justification exists to require payment by the Fund that does not read unambiguous and dispositive terms out of the regulation, which we are not empowered to do. *See, e.g., O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965) (Board's review is limited to ensure a decision is rational, supported by substantial evidence, and in accordance with applicable law); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (deference to an agency's interpretation of its own regulation not needed where, as here, the regulation is not "genuinely ambiguous.").

Accordingly, the district director's Proposed Order Supplemental Award Fee for Legal Services and December 27, 2019 Letter Denying Reconsideration are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the district director's holding that Claimant, not the Trust Fund, is liable for his attorney's fees. Because Claimant's counsel assisted him in securing an award of benefits, including a payment of $1,320 denied by the district director, he is entitled to a Trust Fund-paid fee.

The following facts are undisputed. With the assistance of his attorney, Claimant successfully proved his entitlement to black lung benefits. Director's Exhibit 25. Those benefits should have commenced in the month he filed his claim, which is determined by the date it was postmarked (October 31, 2018), not the date it was received by the Department of Labor (November 6, 2018). *See* 20 C.F.R. §§725.303(b), 503(b); Director's Exhibit 1. The district director committed a legal error when she issued her Proposed Decision and Order awarding benefits commencing in November 2018, resulting in a denial of $1,320 owed to Claimant and his three dependents. Director's Exhibits 25, 26. This denial was remedied only after Claimant's counsel intervened on his behalf by requesting that the district director reconsider her determination. Claimant's March 19, 2019 Request for Revision. As a result of counsel's work, the district director issued a new order requiring the Trust Fund to issue a check to Claimant for the month of October 2018. District Director's March 28, 2019 Letter Regarding Underpayment. The district director subsequently denied Claimant's request that the Trust Fund pay his attorney fees because a Schedule for the Submission of Additional Evidence (SSAE) had not been issued in the

claim, the Trust Fund did not "contest" his entitlement to benefits for the month of October, and he could have achieved the same result without an attorney. *See* Supplemental Award at 2; December 27, 2019 Letter Denying Reconsideration.

The Black Lung Benefits Act incorporates provisions of the Longshore and Harbor Workers' Compensation Act holding employers liable for successful claimants' attorney fees.[10] 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). When there is no coal mine operator that can be held liable, however, the Black Lung Disability Trust Fund "assumes all of the obligations of an operator, including liability for the claimant's attorney's fees[.]" 62 Fed. Reg. 3,338 (January 22, 1997); *see Director, OWCP v. Simmons*, 706 F.2d 481 (4th Cir. 1983); *Director, OWCP v. Black Diamond Coal Mining Co.*, 598 F.2d 945 (5th Cir. 1979); *Director, OWCP v. South East Coal Co.*, 598 F.2d 1046 (6th Cir. 1979); *Republic Steel Corp. v. U.S. Dept. of Labor*, 590 F.2d 77 (3d Cir. 1978). In holding the Trust Fund liable for attorney fees, courts have held that Congress "intended . . . that claimants should not be deprived of part of their benefits." *Simmons*, 706 F.2d at 485, *quoting Republic Steel*, 590 F.2d at 81. Thus, the "overriding purpose" of requiring the Trust Fund to pay attorney fees is "preserving a claimant's award." *Id*.

By regulation, the Trust Fund is liable for a successful claimant's attorney fees if it "took action, or acquiesced in action, that created an adversarial relationship between itself and the claimant." 20 C.F.R. §725.367(a). This liability extends to fees incurred "prior to the creation of the adversarial relationship." *Id*. While the regulation identifies four specific instances in which the Trust Fund "shall be liable for an attorney's fee," this list is explicitly "non-exclusive." 62 Fed. Reg. 3,338 (January 22, 1997); 20 C.F.R. §725.367(a)(2)-(5) (attorney fee awards "not limited" to the examples provided in the regulations).

In arguing the Trust Fund is not liable for Claimant's attorney fees, the Director relies upon the alleged inapplicability of two of the non-exclusive regulatory examples. He asserts that attorney fees are not warranted under subparagraph (a)(2) because the district director did not issue an SSAE prior to denying Claimant benefits for the month of October

[10] Under the Longshore Act, an employer is liable for attorney fees if it "declines to pay" compensation within thirty days of receiving written notice of the claim and the employee thereafter employs an attorney in its successful prosecution. 33 U.S.C. §928(a). Due to the "significant differences in the procedure for adjudicating claims" under the Black Lung Benefits Act versus the Longshore Act, the Department of Labor has enacted regulations clarifying the circumstances under which employers and the Trust Fund are liable for attorney fees in black lung cases. 62 Fed. Reg. 3,338 (January 22, 1997); *see* 20 C.F.R. §725.367.

2018.[11] 20 C.F.R. §725.367(a)(2). He further alleges attorney fees cannot be awarded under subparagraph (a)(4) because, while Claimant was successful in securing "an increase in the amount of benefits payable," the Trust Fund did not "contest[] the claimant's right to that increase." 20 C.F.R. §725.367(a)(4). In arguing Claimant does not meet these specific requirements, the Director admonishes that the regulation "should be construed so that effect is given to all its provisions." Director's Brief at 4, *quoting Rubin v. Republic of Iran*, 138 S. Ct. 816, 824 (2018). The Director, however, fails to heed his own advice.

First, the Director has not persuasively explained why the two provisions on which he relies necessarily preclude an award of Trust Fund-paid fees. While subparagraph (a)(2) addresses circumstances in which the district director issues an SSAE, the Director does not address why the mere issuance of an order containing preliminary findings and allowing the parties to submit additional evidence creates an "adversarial relationship" triggering fee liability, but an actual decision by the district director denying a benefit does not.[12] *See* Claimant's Reply at 2-3. Additionally, the Director's suggestion that *any* successful challenge to the denial of a benefit constitutes "an increase in the amount of benefits payable" – and thus must be "contested" under subparagraph (a)(4) – is unexplained in light of the broader context in which the regulation arises. *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014), *quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) ("[R]easonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'"). As Claimant alleges, for example, related regulations addressing "Increases and Reductions of Benefits" largely describe circumstances in which a miner's "amount of monthly benefits" should be modified due to offsetting payments from state workers' compensation programs, excess earnings, or the gain or loss of a dependent. *See* 20 C.F.R. §§725.533 - 725.539; Claimant's Reply at 4-5.

[11] A Schedule for the Submission of Additional Evidence (SSAE) contains the district director's "preliminary analysis of the medical evidence," her designation of the responsible operator, and notice to the parties of their right to submit additional evidence. 20 C.F.R. §725.402(a).

[12] That the regulations impose fee liability on the Trust Fund based on the district director's decision to issue an SSAE also undermines the majority's conclusion that an adjudicator's action – in this case denying a benefit – cannot create an adversarial relationship between the parties. *See* supra at 5. As explained, *infra*, that the regulations also impose fee liability based on the Trust Fund's "acquiescence" to another's action further undermines the majority's conclusion. 20 C.F.R. 725.367(a). In Trust Fund cases, where no employer can be held liable for benefits, the adjudicator is in the most obvious position to take adverse action to which the Trust Fund could acquiesce.

The Director does not address why, for purposes of fee liability under subparagraph (a)(4), successfully challenging an outright denial of a benefit should be equated with a separate action to modify the amount of the miner's ongoing monthly benefit payment.

Second, even assuming the Director's arguments with respect to the specific requirements of subparagraphs (a)(2) and (a)(4) have merit, the regulation explicitly provides that Claimant's entitlement to attorney fees is "not limited" to the provisions on which the Director relies. 20 C.F.R. §725.367(a). The relevant inquiry is not simply whether the district director issued an SSAE or the Trust Fund proactively objected to Claimant's request for reconsideration of the district director's decision (although those actions clearly trigger fee liability). By its plain language, the regulation requires payment of attorney fees in any case in which the Trust Fund "took action" – or even "acquiesced in action" – that "created an adversarial relationship between itself and the claimant." 20 C.F.R. §725.367(a).

The Director is silent on the broader circumstances, including those at-issue in this case, that may give rise to an adversarial relationship between the Trust Fund and a claimant. When it proposed the regulation, however, the Department explained that the "event triggering liability" is the "denial of the claimant's right to compensation . . . which creates the adversarial relationship requiring employment of an attorney." 62 Fed. Reg. 3,338 (January 22, 1997). Here, Claimant's entitlement to benefits was denied when the district director issued her Proposed Decision and Order setting the benefits commencement date as November 2018, not October 2018 as required by the regulations. This constitutes a "denial of the Claimant's right to compensation," creating an adversarial relationship between the parties sufficient to trigger fee liability under the regulation. *Id*.

The Director cannot simply hide behind his silence on the district director's error in denying benefits for the month of October, or his silence on Claimant's request for reconsideration of that decision. The Director is a party-in-interest at all stages in black lung proceedings, not just as administrator of the Trust Fund but, more broadly, in his role "to ensure the proper enforcement and lawful administration" of the Act. *Slone v. Wolf Creek Collieries, Inc.*, 10 BLR 1-66, 1-69 (1987); 20 C.F.R. §725.360(a)(5). His silence of the district director's clear legal error constitutes, at a minimum, an "acquiescence," i.e., a "passive acceptance" of the district director's denial of benefits, which also triggers fee liability under the regulation. *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/acquiescence (last visited Feb. 19, 2021); *see United States v. Johnson*, 529 U.S. 53, 57 (2000) (in a statutory or regulatory provision, words are presumed to have their ordinary, common sense meanings); *see also* 20 C.F.R. §725.412(b) (an employer that fails to proactively accept the claimant's entitlement to benefits after issuance of an SSAE is "deemed to have contested the claimant's entitlement"); *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103 (9th Cir. 2003) (remaining

silent on a claimant's entitlement to benefits constitutes "declin[ing] to pay" for purposes of shifting fee liability under the Longshore Act).

Nor is the Trust Fund shielded from fee liability due to the fact that the district director eventually corrected her mistake. Director's Brief at 5. This argument ignores that the district director is the adjudication officer who denied the benefit, requiring Claimant's counsel's intervention to correct the legal error and secure an order awarding the benefit and instructing the Trust Fund to send the payment. *See* 20 C.F.R. §§725.350, 725.351(a)(1) (district director is an "adjudication officer" with authority to "adjudicate" and "make determinations" on claims). In fact, Claimant's only options for correcting the error were to request that the district director reconsider her decision or proceed with a hearing before an administrative law judge. 20 C.F.R. §725.419(a), (b) (district director order becomes final if no request for revision or a hearing is made within thirty days; a revised order constitutes a new decision re-triggering the thirty-day appeal window). That Claimant's counsel chose the former avenue to quickly resolve the matter before the district director reveals effective lawyering, not a basis for the Trust Fund to avoid fee liability.

Moreover, this error is not merely a "clerical" mistake as the Director alleges. Director's Brief at 6. Decisions regarding the commencement date for benefits involve appealable, oft litigated issues with significant financial implications for the parties. In this claim, the district director's misidentification of the commencement date by just one month resulted in a loss of $1,320 for Claimant – an amount not many people, let alone an individual who is totally disabled from working, could casually forego. Additionally, such determinations require a fact-specific inquiry into the date the Claimant first became totally disabled due to pneumoconiosis. If that date can be determined, benefits are payable beginning in that month. 20 C.F.R. §725.503(b). If that date cannot be ascertained, benefits are payable with "the month during which the claim was filed." *Id*. Even then the inquiry is not complete because the adjudicator must determine when the claim was filed. In most cases, the date of filing is the date the application for benefits was delivered to the Department. 20 C.F.R. §725.303(b). If, however, setting the date of filing as the date of delivery would result in a "loss or impairment of benefit rights" – as in this case – the application is considered to have been filed as of the date it was postmarked. *Id*.

Relatedly, the district director's assessment that an attorney was not necessary is unpersuasive given that she committed the legal error she now suggests a *pro se* claimant could have identified on his own. *See* December 27, 2019 Letter Denying Reconsideration. To the extent claimants in other cases may have "obtained the same result" without an attorney is irrelevant to the Trust Fund's liability and whether this attorney performed "necessary work" in furtherance of Claimant's award. *See* 20 C.F.R. §725.366(b). This in no way is a criticism of the mere fact that an error was made. If, however, the district director is frequently making errors requiring claimants to "contact[] [her] office and

inquir[e] about the entitlement date determination," the solution is to take more care in making those decisions, not criticize a claimant who employs an attorney to achieve the lawful result. December 27, 2019 Letter Denying Reconsideration.

Finally, the Director objects that it is unreasonable to award a claimant attorney fees "every time he or she [successfully] 'seeks an increase in the amount of benefits payable.'" Director's Brief at 5, *quoting* 20 C.F.R. §725.367(a)(4). Consistent with the actual facts of this case, I would frame it differently. Every time a claimant is denied a benefit to which he is lawfully entitled, and the claimant employs the assistance of counsel to secure the benefit, he is entitled to an employer-paid or Trust Fund-paid attorney fee. To hold otherwise unfairly diminishes Claimant's award by the amount he must expend on fees, in contravention of the spirit of the Act and the plain language of the regulation. *Simmons*, 706 F.2d at 485.

I, therefore, dissent.

GREG J. BUZZARD
Administrative Appeals Judge