U.S. Department of Labor

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

BRB Nos. 21-0431 BLA
and 21-0517 BLA

CLEATIS CLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	
	)	DATE ISSUED: 11/21/2022
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits on Remand and 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, LLC), Arnold, Missouri, for Employer.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), 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.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2017-BLA-05894) and Attorney Fee Order (2017-BLA-05894) rendered on a subsequent claim filed on February 8, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case is before the Benefits Review Board for the second time.[2]

Initially, ALJ Richard A. Morgan awarded benefits, crediting Claimant with 24.83 years of coal mine employment and finding he established complicated pneumoconiosis arising out of coal mine employment, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018). ALJ Morgan also determined Employer is the responsible operator liable for the payment of benefits. Upon Employer's appeal, the Board affirmed the award of benefits but vacated ALJ Morgan's finding that Employer is the responsible operator and remanded the case for further consideration of that issue.[3] *Cline v. Mingo Logan Coal Co.*, BRB No. 18-0543 BLA (Dec. 4, 2019) (unpub.). Due to ALJ Morgan's unavailability, the case was reassigned to ALJ Swank (the ALJ), who also concluded Employer is the responsible operator.[4] Additionally, the ALJ awarded attorney fees in the amount of $412.50 for services performed before him from March 16, 2020, through April 27, 2021.

[1] We have consolidated for purposes of decision only Employer's appeals of the awards of benefits and attorney's fees. *Cline v. Mingo Logan Coal Co.*, BRB Nos. 21-0431 BLA and 21-0517 BLA (Feb. 28, 2022) (Order) (unpub.).

[2] We incorporate by reference the relevant procedural history set forth in our prior decision in this case. *Cline v. Mingo Logan Coal Co.*, BRB No. 18-0543 BLA (Dec. 4, 2019) (unpub.).

[3] Before ALJ Morgan, Employer requested it be dismissed as the responsible operator, arguing that Brody Coal Company was a successor operator of two other companies and, when Claimant's employment with them was added together, Brody Coal Company had most recently employed Claimant for a cumulative year. Employer's assertions stemmed from Claimant's hearing testimony regarding the ownership of these companies. ALJ Morgan did not rule on Employer's motion to dismiss or address Employer's argument. June 28, 2018 Decision and Order at 5-6.

[4] Although the Board remanded the case for the limited purpose of determining the responsible operator, the ALJ reconsidered Claimant's entitlement on remand and found, consistent with ALJ Morgan's determination, that Claimant invoked the irrebuttable presumption of total disability due to complicated pneumoconiosis. Decision and Order on Remand at 3. We affirm, as unchallenged on appeal, the ALJ's determination that

On appeal, Employer argues the ALJ lacked authority to hear and decide these cases because he was not appointed in a manner consistent with the Appointments Clause of the Constitution.[5] It also argues the removal provisions applicable to ALJs render his appointment unconstitutional. Additionally, Employer contends the ALJ erred in determining that it is the responsible operator for this claim. Further, Employer objects to the ALJ's award of an attorney's fee. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging the Board to reject Employer's contentions. However, the Director did not address Employer's challenge to the amount of the attorney's fee awarded. Employer filed separate, consolidated reply briefs in response to Claimant's and the Director's response briefs, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Claimant has established his entitlement to benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

> [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.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment 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 n 2; Director's Exhibit 57 at 113.

Appointments Clause and Removal Provisions Challenges

Employer urges the Board to vacate the ALJ's Decision and Order Awarding Benefits on Remand and Attorney Fee Order, and remand this case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[7] Employer's Brief in BRB No. 21-0431 BLA at 4-10; Employer's Brief in BRB No. 21-0517 BLA at 2-9. Employer asserts neither the ALJ's appointment nor his removal protections comply with the United States Constitution. *Id*. In its April 28, 2020 decision affirming the ALJ's first award of attorney fees on remand,[8] the Board rejected Employer's challenges to the ALJ's appointment and authority to adjudicate this claim.[9] *Cline v. Mingo Logan Coal Co.*, BRB No 19-0254 BLA (Apr. 28, 2020) (unpub.). Because Employer has not shown the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

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[7] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to the Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] On July 31, 2018, Claimant's counsel submitted a fee petition requesting $11,920.64 in fees for work performed on the case before the Office of Administrative Law Judges (OALJ). Because of ALJ Morgan's retirement, ALJ Swank reviewed counsel's fee petition and, on January 31, 2019, issued an Attorney Fee Order awarding counsel $10,168.51 in fees and costs. Employer appealed this fee order to the Board. On appeal, the Board affirmed the ALJ's fee order and therein also rejected Employer's challenges to the ALJ's appointment. *Cline v. Mingo Logan Coal Co.*, BRB No 19-0254 BLA (Apr. 28, 2020) (unpub.).

[9] The Board held the Secretary of Labor properly ratified the prior appointments of all sitting DOL ALJs on December 21, 2017, including ALJ Swank, thereby bringing their appointments into compliance with the Appointments Clause. *Cline v. Mingo Logan Coal Co.*, BRB No. 19-0254 BLA, slip op. at 3-6 (Apr. 28, 2020) (unpub.). The Board declined to address Employer's challenge to the removal provisions as it was inadequately briefed. *Id*. at 5-6. 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.

Responsible Operator

Employer argues it is not the responsible operator because Claimant was last employed by Brody Coal Company (Brody Coal), and, although Claimant did not work for it for at least one year, it is the same company or a successor operator to two of Claimant's previous employers for whom Claimant worked for at least one year. Employer's Brief in BRB No. 21-0431 BLA at 11-15. The responsible operator is the potentially liable operator that most recently employed the miner.[10] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another potentially liable operator that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2); *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016).

A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). It is created when an operator ceases to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). Where an operator is considered a successor operator, any employment with a prior operator "is deemed to be employment with the successor." 20 C.F.R. §725.493(b)(1). Thus, if a successor relationship is established, a miner's tenure with a prior and successor operator may be aggregated to establish one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c).

Claimant worked for Golden Chance Mining, Incorporated from 1996 to 2000, CK Coal Corporation (CK Coal) from 2001 to 2002, Employer from 2002 to 2005, and Brody Coal from January to March 2013. Director's Exhibits 4; 7; 57 at 101-103. Although

[10] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

Employer concedes it employed Claimant for one year, it argues Claimant's testimony that Mr. Anthony Paul Cline was the President of all three companies is sufficient to establish that these entities were either the same company or that Brody was a successor operator.[11] Employer's Brief in BRB No. 21-0431 BLA at 11-15; July 10, 2017 Motion to Dismiss; Director's Exhibit 57 at 101-103; Hearing Transcript at 37-41, 61-62. Thus, Employer asserts Claimant's employment with all three companies must be combined to conclude that Brody Coal is liable because it employed Claimant for more than one cumulative year of coal mine employment. *Id*.

On remand, in accordance with the Board's directive, the ALJ considered Claimant's testimony and Employer's assertions regarding Brody Coal. He permissibly found Claimant's testimony does not establish there was a transfer of assets from Golden Chance and CK Coal to Brody Coal, or that Golden Chance or CK Coal ceased to exist and became Brody Coal. 20 C.F.R. §§725.492(a), (b)(1)-(3), 725.493(b)(1); Decision and Order on Remand at 7. Nor did Employer introduce any evidence to establish that Brody Coal satisfies the regulatory definition of a successor operator or otherwise meet its burden to prove that Brody Coal more recently employed Claimant for one year. *See* 20 C.F.R. §725.495(c)(2).

We also reject Employer's assertion that the district director did not conduct a proper investigation of the responsible operator issue. Employer's Brief in BRB No. 21-0431 BLA at 15. Employer asserts that the district director did not consider or include into the record two motions it filed contesting its designation as the responsible operator, did not consider its submission of Claimant's deposition testimony, and failed to respond to its request for a current itemized statement of earnings from the Social Security Administration (SSA). *Id*. at 12, 15. Contrary to Employer's contention, the two motions to dismiss, dated July 20, 2016 and July 27, 2016, were included in the record at Director's Exhibits 40 and 53. Employer's motions, along with Claimant's July 8, 2016 deposition and its request for an updated SSA earnings statement, were submitted to the district

[11] Alternatively, Employer argues Claimant's uncontroverted testimony that he worked for Brody Mining from January to March 2013 establishes that he worked for this company for at least one year under *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401 (6th Cir. 2019) (one year of coal mine employment is established if the miner worked for 125 days, "regardless of how long the miner actually was employed by the mining company in any one calendar year, or partial periods totaling one year"). Employer's Brief in BRB No. 21-0431 BLA at 12-14. However, even assuming Claimant worked from January 1, 2013 to March 31, 2013, this period encompasses less than 125 calendar days and even fewer working days. Therefore we need not reach the merits of Employer's assertion, as even under the Sixth Circuit's holding in *Shepherd* a miner must establish at least 125 working days to be credited with one year of employment.

director *after* both the May 12, 2016 deadline for submission of liability evidence and the July 15, 2016 Schedule for Submission of Additional Evidence (SSAE) (wherein Employer was identified as the responsible operator). The district director therefore permissibly declined to address them, though he included them into the record transmitted to the OALJ. 20 C.F.R. § 725.408(b)(1) (setting a 90-day deadline from notification as a potentially liable operator to submit liability evidence); 20 C.F.R. §725.415(b) (enumerating the district director's options after reviewing the evidence submitted in response to the SSAE, including the option of issuing a Proposed Decision and Order); Director's Exhibit 33.

In conclusion, the ALJ properly found that Employer employed Claimant for a period of at least one cumulative year and is financially capable of assuming liability for benefits. 20 C.F.R. §§725.493(a)(1), 725.495(c)(2); Decision and Order on Remand at 6-8; Director's Exhibits 4; 7; 57 at 101-03; Hearing Transcript at 37. We therefore affirm the ALJ's finding that Employer is the responsible operator.

ALJ's Attorney's Fee Award

Claimant's counsel (Counsel) submitted an itemized fee petition requesting a fee for legal services performed before the ALJ between March 16, 2020, and April 27, 2021. Counsel requested attorney's fees in the amount of $475.00, representing: $87.50 for 0.25 hour of legal services performed by Attorney Joseph E. Wolfe at an hourly rate of $350.00; $200.00 for 1.00 hour of legal services performed by Attorney Brad A. Austin, Jr., at an hourly rate of $200.00; $37.50 for 0.25 hour of legal services performed by Attorney Rachel Wolfe at an hourly rate of $150.00; and $150.00 for 1.50 hours of work performed by legal assistants at an hourly rate of $100.00. After considering the fee petition, the regulatory criteria at 20 C.F.R. §725.366, and Employer's objections, which were only to the hourly rates of Attorneys Joseph Wolfe and Brad Austin, the ALJ reduced the requested hourly rates for Attorney Wolfe from $350.00 to $300.00 and for Attorney Austin from $200.00 to $150.00. In all other respects, the ALJ awarded the fee as requested. The ALJ therefore awarded $412.50 in attorney's fees.

The amount of an attorney's fee award is discretionary and will be upheld on appeal unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289 (4th Cir. 2010); *Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998) (en banc).

Under fee-shifting statutes, the United States Supreme Court has held that courts 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. *See Pennsylvania 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 Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 572 (4th Cir. 2013); *Cox*, 602 F.3d at 276.

An attorney's reasonable hourly rate is "calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). "[T]he rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record" comprises the market rate. *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); *see also B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 663 (6th Cir. 2008). The fee applicant has the burden to 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 Attorney Joseph Wolfe failed to establish his requested hourly rate of $350.00 is in line with the prevailing market rate of similarly experienced black lung counsel in Charleston, West Virginia, where the hearing took place, who work for fee-paying clients, and that the ALJ should have further reduced his rate to $275.00 per hour.[12] Employer's Brief in BRB No. 21-0517 BLA at 9-13; Employer's Consolidated Reply Brief to Claimant in BRB No. 21-0517 BLA at 10-14. I

Contrary to Employer's contention, the ALJ considered the relevant factors, including Attorney Wolfe's credentials and the quality of his representation. The ALJ explained that a rate of $300.00 an hour was appropriate given that Attorney Wolfe has been awarded this rate "in temporally proximate black lung cases," and thus it is "market-based." *Id*. Employer fails to explain why the ALJ's award of a $300.00 hourly rate to Attorney Wolfe is arbitrary, capricious, or an abuse of discretion. *See Cox*, 602 F.3d at

[12] Employer also asserts a more appropriate hourly rate for Mr. Austin is $150.00, not the $200.00 requested. Employer's Brief in BRB No. 21-0517 BLA at 12; Employer's Consolidated Reply Brief to Claimant at 13. However, Employer's argument is moot as the ALJ reduced Attorney Austin's hourly rate to $150.00.

289; *Jones*, 21 BLR at 1-108. We therefore affirm it, as well as the ALJ's overall fee award in the amount of $412.50.[13] *See Skrack*, 6 BLR at 1-711.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Remand and the Attorney Fee Order.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[13] The Board previously affirmed the ALJ's award of an hourly rate of $300.00 to Mr. Wolfe in this same claim for the work he performed before ALJ Morgan. *Cline*, BRB No. 19-0254 BLA, slip op. at 2 n.1, 7-8.