

BRB No. 91-2179 BLA

DELBERT BRANHAM)
)
 Claimant-Respondent)
)
 v.) DATE ISSUED:
)
 EASTERN ASSOCIATED COAL)
 CORPORATION)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's
Fees of Theodor P. Von Brand, Administrative Law Judge, United States
Department of Labor.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Kathleen M. Bole (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH,
Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's
Fees (83-BLA-2987) of Administrative Law Judge Theodor P. Von Brand on a claim

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). The administrative law judge awarded claimant's counsel a fee of \$2,048.40 for \$1,600 in

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

legal services and \$448.40 in costs. On appeal, employer argues that the administrative law judge erred in awarding claimant's counsel \$448.40 in costs. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. Neither claimant nor his counsel participated in this appeal.

The award of attorney fees 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 law. See *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Employer argues that the administrative law judge erred in requiring him to reimburse claimant \$400.00 for obtaining Dr. Ahmed's deposition¹ and \$48.40 for mileage costs incurred by claimant's counsel for attending two medical depositions. See Employer's Brief at 1-6. Employer, citing *West Virginia University Hospitals, Inc. v. Casey*, [Casey], 111 S.Ct. 1138 (1991), contends that the plain language of the attorney fee provision found at 33 U.S.C. §928(d), as incorporated into the Act by 30 U.S.C. §932(a), provides for the shifting of these expert expenses only for "necessary witnesses attending the hearing at the instance of claimant." See Employer's Brief at 2-5. Employer argues that since Dr. Ahmed did not attend the hearing, the administrative law judge erred in finding employer liable for these costs. See *Casey, supra*; Employer's Brief at 2-5. Employer's reliance on *Casey*, however, is misplaced. Section 28(d) provides:

In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such an employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing at the instance of claimant. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the hearing officer, the Board, or the court, as the case may be. The amounts awarded against an employer or carrier as attorney fees, costs, fees, and mileage for witnesses shall not in any respect affect or diminish the compensation payable under this chapter.

¹ Upon the request of claimant's counsel, Dr. Ahmed attended a deposition on February 11, 1985 to provide his medical opinion relevant to claimant's application for benefits. See Claimant's Exhibit 2.

33 U.S.C. §928(d). In cases arising under the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988), the Board has previously interpreted this statutory language and held that an expert need not testify at the administrative hearing in order for claimant's counsel to be reimbursed for the costs of obtaining a physician's opinion. See *Hardrick v. Campbell Industries, Inc.*, 12 BRBS 265, 270 (1980); see also *Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 195 (1984); *Cahill v. International Terminal Operating Company, Inc.*, 14 BRBS 483, 489 (1981); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 541 (1979). Furthermore, 33 U.S.C. §925, as incorporated into the Act by 30 U.S.C. §932(a), specifically states that, "[w]itness summoned in a proceeding before a deputy commissioner or whose depositions are taken shall receive the same fees and mileage as witnesses in courts of the United States." Additionally, the Director is correct in asserting that 33 U.S.C. §924, as incorporated into the Act by 30 U.S.C. §932(a), specifically provides for the substitution of hearing testimony with deposition testimony. See Director's Brief at 3. Moreover, as noted by the Court in *Casey*, the Act is one of numerous federal statutes that specifically provide for the transfer of fees for expert witnesses. See *Casey* at 1142, n.4; see also 20 C.F.R. §725.459(c).² We therefore affirm the administrative law judge's finding requiring employer to reimburse claimant \$400.00 for obtaining Dr. Ahmed's deposition.

In addition, we hold that the administrative law judge properly found employer liable for \$48.40 in mileage costs claimant's counsel incurred when attending two depositions since the administrative law judge permissibly found these travelling expenses necessary in establishing claimant's case. See *Bradley v. Director, OWCP*, 4 BLR 1-241, 1-245 (1981); 20 C.F.R. §725.366(c). Consequently, since all of employer's arguments are without merit, we affirm the administrative law judge's

² 20 C.F.R. §725.459(c) provides:

If a claimant is determined entitled to benefits, there may be assessed as costs against a responsible operator, if any, fees and mileage for necessary witnesses attending the hearing at the request of claimant. Both the necessity of the witnesses and the reasonableness of the fees of any expert witness shall be approved by the administrative law judge. The amounts awarded against a responsible operator as attorney fees, or costs, fees and mileage for witnesses, shall not in any respect affect or diminish benefits payable under the Act.

20 C.F.R. §725.459(c).

finding that employer is liable to claimant's counsel for \$448.40 in costs and affirm the administrative law judge's attorney fee award.

Accordingly, we affirm the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge