

BRB No. 95-2083 BLA

FRANCES SHAFFER	)		
(Widow of EVERETTE SHAFFER)	)		
	)		
Claimant-Respondent	)		
	)		
v.	)		
	)		
DIRECTOR, OFFICE OF WORKERS'	)	DATE	ISSUED:
COMPENSATION PROGRAMS, UNITED	)		
STATES DEPARTMENT OF LABOR	)		
	)	DECISION and ORDER	
	)	on RECONSIDERATION	
Petitioner	)	<i>EN BANC</i>	

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane), Charleston, West Virginia, for claimant.

Rita A. Roppolo (Judith E. Kramer, Deputy Solicitor; 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: HALL, Chief Administrative Appeals Judge, SMITH, BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

By Motion for Reconsideration, the Director, Office of Workers' Compensation Programs (the Director), requests review of the Board's Decision and Order in the above-captioned case in which the Board modified the Supplemental Decision and Order Awarding Attorney Fees (93-BLA-1661) of Administrative Law Judge Daniel L. Leland 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). In his Supplemental Decision and Order, issued on May 17, 1995, the administrative law judge found that the standard hourly rate of \$250.00 charged by claimant's counsel was not enhanced by a contingency multiplier, was consistent with rates charged for black lung work in the area, and was consistent with the lodestar method. Accordingly, counsel was awarded \$4,916.49, which reflected 19.2 hours of work at the hourly rate of \$250.00, plus expenses. The Director appealed, contending that counsel's fee was based on an enhanced hourly rate which incorporated a contingency multiplier for risk of loss. Claimant responded, urging affirmance. On appeal, the Board adjusted counsel's attorney fee to exclude a contingency multiplier, but increased the hourly fee from \$125.00 to \$150.00 to account for delay in payment for legal services in this case. Thus, claimant's counsel was awarded an attorney's fee of \$2,996.49 for 19.2 hours of legal services at an hourly rate of \$150.00, plus \$116.49 in miscellaneous expenses. By Motion for Reconsideration, the Director contends that the Board erred in enhancing the attorney's fee due to delay. Subsequent to our receipt of the Director's Motion for Reconsideration, oral argument in this case was held on June 19, 1998, to address the specific issue of whether enhancement of an attorney's fee, because of delay in processing a case, is appropriate where the Black Lung Disability Trust Fund (Trust Fund) is liable for the fee. Claimant's counsel was represented at oral argument and urged that the Board affirm its previous Decision and Order awarding his fee based on an hourly rate of \$150.00.

After consideration of the Director's contentions, we grant the Director's Motion for Reconsideration. The Director argues that while an employer may be required to pay an enhanced attorney's fee due to delay, such an enhancement is not appropriate where the Trust Fund is liable for the fee because the Act does not specifically waive the government's sovereign immunity from an award of interest. We agree. In *Library of Congress v. Shaw*, 478 U.S. 310 (1986), the United States Supreme Court addressed the appropriateness of increasing the lodestar amount to compensate an attorney for delay in payment for legal services where the federal government was responsible for the payment of fees. The Court held that Title VII of the Civil Rights Act of 1964 did not expressly waive the federal government's traditional immunity from interest. See Civil Rights Act of 1964, §§701 *et seq.*, 706(k), as amended, 42 U.S.C.A. §§2000e *et seq.*, 2000e-5(k).<sup>1</sup> The Court further stated that it did not find a waiver of immunity from interest in the statutory requirement of

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<sup>1</sup> Subsequent to the Court's decision in *Shaw*, Congress passed the Civil Rights Act of 1991. In response to *Shaw*, Congress amended the portion of Title VII applying to federal employees to provide that "the same interest to compensate for delay in payment shall be available as in cases involving non public parties." 42 U.S.C. §2000e-16d.

awarding “reasonable” attorney’s fees as there was no basis for interpreting the term “reasonable” as being the “embodiment of a specific congressional choice to include interest as a component of attorney’s fees....” *Shaw*, 478 U.S. at 320.

Most importantly, relevant to the issue before this Board, the Court rejected the argument that the no-interest rule does not prohibit the award of compensation for delay and stated that

the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution: “[T]he character or nature of ‘interest’ cannot be changed by calling it ‘damages,’ ‘loss,’ ‘earned increment,’ ‘just compensation,’ ‘discount,’ ‘offset,’ or ‘penalty,’ or any other term, because it is still interest and the no-interest rule applies to it.” *United States v. Mescalero Apache Tribe*, 207 Ct.Cl. 369, 389, 518 F.2d 1309, 1322 (1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976).

*Id.* at 321. The Court further stated that “[i]nterest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money.” *Id.* at 322.

In keeping with this reasoning, we have previously denied a claimant’s counsel’s motion for an award of interest on attorney’s fees because neither the statutes nor regulations authorized the Trust Fund to pay interest, thereby waiving the federal government’s sovereign immunity from the payment of interest. *See Griffin v. Director, OWCP*, 17 BLR 1-75 (1993). The only time that the Trust Fund is authorized to pay interest under the Act is on its debt to the United States Treasury. 26 U.S.C. §9501(c)(2). Furthermore, the Secretary of Labor’s regulations provide that the Trust Fund “shall not be liable for the payment of interest under any circumstances, other than the payment of interest on advances from the United States Treasury as provided by section 9501© of the Internal Revenue Code of 1954.” 20 C.F.R. §725.608(d).

In *Griffin*, claimant’s counsel submitted a Motion for Award of Interest subsequent to a three year delay in receipt of fees. In the instant case, claimant’s counsel makes no such request, but instead, incorporates the delay factor in establishing his hourly fee. We are bound by the Supreme Court’s holding in *Shaw*, however, that interest and compensation for delay are “functionally equivalent”, and to label a request for interest by naming it compensation for delay cannot circumvent the prohibition of interest payments by the federal government in the absence of express Congressional authority to waive sovereign immunity and grant the payment of interest. *See Shaw, supra*. We further note that the Supreme Court has never overruled its holding in *Shaw*. *See Missouri v. Jenkins*, 491 U.S. 274 (1989). In *Jenkins*, the Supreme Court held that the Eleventh Amendment did not prohibit enhancement

of a fee award under the Civil Rights Attorney's Fees Awards Act against a state to compensate for delay in payment. In distinguishing *Jenkins* from *Shaw*, the Court stated:

Our opinion in *Shaw* does, to be sure, contain some language that, if read in isolation, might suggest a different result in this case. Most significantly, we equated compensation for delay with prejudgment interest, and observed that '[p]rejudgment interest...is considered as damages, not a component of "costs.".... Indeed, the term 'costs' has never been understood to include any interest component.' *Library of Congress v. Shaw*, 478 U.S. 310, 321, 106 S.Ct. 2957, 2965, 92 L.Ed.2d 250 (1986). These observations, however, cannot be divorced from the context of the special "no-interest rule" that was at issue in *Shaw*. That rule, which is applicable to the immunity of the United States and is therefore not at issue here, provides an "added gloss of strictness," *id.* at 318, 106 S.Ct. at 2963, only where the United States' liability for interest is at issue. Our inclusion of compensation for delay within the definition of prejudgment interest in *Shaw* must be understood in light of this broad proscription of interest awards against the United States. *Shaw* thus does not represent a general-purpose definition of compensation for delay that governs here.

*Jenkins*, 491 U.S. at 281 n.3. Thus, as the Trust Fund is liable for attorney's fees in this case, and the Trust Fund is an instrumentality of the United States government, we must revise our previous Decision and Order awarding counsel's fee to exclude an enhancement for delay in payment.

Accordingly, we grant the Director's Motion for Reconsideration and modify the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees to award claimant's counsel a fee of \$2,516.49, reflecting 19.2 hours of legal services at the hourly rate of \$125.00 plus \$116.49 in expenses.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge

**Deskbook Section: Part XI.A.7.c. - Enhancement**

Enhancement of an attorney's fee because of delay in processing the case is not appropriate where the Trust Fund is liable for the fee because the Act does not waive the government's sovereign immunity from an award of interest.