BRB No. 97-0350 BLA

DARLENE BROWN (Widow of SIDNEY L. BROWN)	)	
Claimant-Respondent	)	
v.	)	
CEDAR COAL COMPANY	)	DATE ISSUED:
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order on Reconsideration of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman and Crane, L.C.), Charleston, West Virginia, for claimant.

David L. Yaussy (Robinson & McElwee), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor of Labor; 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, BROWN and McGRANERY, Administrative Appeals Judges.

BROWN, Administrative Appeals Judge:

Employer appeals the Order on Reconsideration (96-BLA-0253) of Administrative Law Judge Frederick D. Neusner issued with respect to 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*. Claimant filed a claim on March 3, 1995. The district director issued an initial finding of entitlement on August 28, 1995. Director's Exhibit 17. At employer's request, this matter was forwarded to the Office of Administrative Law Judges

for a formal hearing. The case was assigned to Administrative Law Judge Frederick D. Neusner. On July 19, 1996, claimant filed a motion for production requesting the following documents: 1) All evidence employer had obtained, including medical reports, positive x-ray readings not submitted, and the deceased miner's personnel file; 2) a statement listing all expenses incurred by employer from all medical sources; and 3) copies of all legal bills sent to employer by its counsel. At the formal hearing held on August 9, 1996, the administrative law judge ordered compliance with claimant's motion for production over employer's objection.[1] On August 14, 1996, employer filed a written objection to claimant's discovery request. On August 21, 1996, employer also filed a motion for reconsideration. At the request of the administrative law judge, employer next filed a memorandum of law supplementing its objections to the discovery request. Claimant then filed a motion to compel on August 21, 1996, and a supporting memorandum on September 3, 1996.

This appeal arises from the administrative law judge's Order on Reconsideration dated October 25, 1996. The Order directed employer to: 1) provide the miner's complete personnel file to the claimant's counsel; 2) provide claimant's counsel with a list of all funds that employer has expended in collecting medical evidence; and 3) deliver to claimant's counsel copies of all of employer's legal bills. The delivery of these items was required on or before November 15, 1996. A deadline for submission of post-hearing briefs was set for November 26, 1996.

On November 13, 1996, employer filed a notice of appeal, along with a motion for stay and supporting memorandum. The Board, while acknowledging the interlocutory nature of the appeal, accepted the appeal, and granted employer's motion for stay on December 5, 1996. Employer appeals, arguing that the administrative law judge erred in compelling discovery of the items discussed *supra*. Claimant and the Director, Office of Workers' Compensation Programs, respond, arguing for affirmance of the administrative

[1] The administrative law judge specifically noted employer's admission that it had neither filed a protective order, nor responded to claimant's motion for production. Hearing Transcript at 18-21. In his Order on Reconsideration, the administrative law judge found, however, that employer's objections to claimant's motion for production, as they were raised at the hearing, fell within the thirty day response rule under 29 C.F.R. §§18.18 and 18.19. Thus, the administrative law judge considered employer's objections to constitute a timely motion for protection under 29 C.F.R. §18.15.

law judge's procedural rulings. The Board, on its own motion, ordered that Oral Argument be held in this case and scheduled the argument for July 16, 1997 in Charleston, West Virginia. *Brown v. Cedar Coal Co.*, BRB No. 97-0350 BLA (June 10, 1997) (unpub. Order).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law, they are binding upon this Board and must be affirmed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because the administrative law judge has broad discretion in the conduct of the hearing, the Board will affirm his rulings on procedural matters unless they are shown on appeal to be arbitrary, capricious or an abuse of discretion. *See generally, Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges at 29 C.F.R. §18.14 govern the scope of discovery. Section 18.14(a) provides that "Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." 29 C.F.R. §18.14(a). Section 18.14(b) states that "It is not ground for objection that information sought will not be admissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 29 C.F.R. §18.14(b). Additionally, under Section 18.14(c), "A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's' representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by some other means." 29 C.F.R. §18.14(c).

On appeal, employer challenges the administrative law judge's production order requiring the miner's employment records be sent to Charleston, West Virginia, since employer had volunteered to make the file available to claimant in Lancaster, Ohio, consistent with 29 C.F.R. §18.19(c). Employer further challenges the administrative law judge's production order requiring employer to provide claimant with a list of expenses incurred by employer in developing its medical evidence. Initially, we note that the record contains a letter dated November 22, 1993, wherein employer provided claimant with a list of its medical expenses. At the time of the oral argument, employer likewise had already given the miner's employment file to claimant's counsel. Insofar as employer has complied with the administrative law judge's production order, the first two issues raised on appeal are moot. Thus, any opinion issued by the Board on those issues would be advisory in nature, and contrary to the rule in federal courts against issuing advisory opinions. U.S. Const. art. III, § 2. *See Hayburn's Case*, 2 Dall. 409, 1 L.Ed. 436 (1792); *see also Andrews v. Petroleum Helicopters, Inc.*, 15 BRBS 166 (1982). Consequently, we decline to address

employer's arguments in this regard. We, therefore, hold that the issue of the validity of the administrative law judge's order of production of the miner's employment records and employer's medical expenses is not properly before us.

Employer further argues that the administrative law judge erred by ordering the production of its legal bills. According to employer, discovery of its legal bills is precluded by the work product doctrine and the attorney-client privilege. We note that attorney "work product," which is protected against discovery, includes only material prepared by an attorney for trial or in anticipation of litigation. *See Hickman v. Taylor*, 329 U.S. 495 (1947). In the instant case, because the administrative law judge reasonably determined that employer's legal bills were not prepared for the purpose of litigating the merits of entitlement, we affirm the administrative law judge's finding that employer's legal bills are not protected from discovery by the work product doctrine. *Id.*; Order on Reconsideration at 8.

Additionally, contrary to employer's contention, the administrative law judge properly found that the attorney-client privilege does not preclude discovery of employer's bills. The attorney-client privilege protects disclosure of confidential communications made for the purpose of obtaining a lawyer's professional advice and assistance. *See* 8 Wigmore, *Evidence* §§ 2292, 2311 (McNaughten rev. 1961). In discussing application of the attorney-client privilege in this case, the administrative law judge observed that "the cost of the services of employer's counsel does not on its face affect the candor of communication between this client and his lawyer." Order on Reconsideration at 6. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has specifically held that the attorney-client privilege normally does not extend to the payment of attorney fees and expenses. *See In re Grand Jury Proceedings*, 42 F.3d 876 (4th Cir. 1994); *United States v. Ricks*, 776 F.2d 455 (4th Cir. 1985). We, therefore, affirm the administrative law judge's ruling that employer's legal bills are not shielded from discovery by either the work product doctrine or the attorney-client privilege.[2]

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[2] The attorney-client privilege need not foreclose inquiry into the general nature of a lawyer's activities on behalf of a client, the conditions of the lawyer's employment or any of the other external trappings of the relationship. *See Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert denied*, 371 U.S. 95, 83 S.Ct. 505(1963); *Cohen v. Uniroyal, Inc.,* 80 F.R.D. 480 (E.D. Pa. 1978).

We agree with employer, however, that the administrative law judge's order directing production of its legal bills is premature. The administrative law judge found employer's legal bills to be relevant to an award of attorney fees and ordered their production prior to an award of benefits. Order on Reconsideration at 9. That order constituted an abuse of discretion because employer's legal bills have no relevance to the issue cited by the administrative law judge until such time as an award of benefits has been entered, an attorney fee request submitted, and objections to the fee request offered. Accordingly, we vacate the administrative law judge's production order with respect to employer's legal bills.[3] On remand, we instruct the administrative law judge to refrain from ordering production of employer's legal bills until such time as he has considered the merits of entitlement. If he issues a decision awarding benefits, and thereafter employer objects to the attorney fees requested by claimant, the administrative law judge should then consider claimant's counsel's request for production of employer's legal bills, and employer's objections thereto, before making a determination that employer's legal bills are relevant to the questions to be decided. If the administrative law judge reasonably determines the requested bills are relevant to the contested issues, he may order their production at that time.

Accordingly, the administrative law judge's Order on Reconsideration is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

I concur:

[3] We reject employer's contention that by ordering the production of employer's legal bills prior to a decision on the merits of entitlement, the administrative law judge has shown that he is biased. The Board will reject allegations of bias on the part of the administrative law judge in the absence of a clear showing of prejudice. *See Zamora v. C.F.I. Steel Corp.*, 7 BLR 1-568 (1984); *Sanders v. Consolidation Coal Co.*, 1 BLR 1-193 (1977); Employer's Brief at 7, n 6.

REGINA C. McGRANERY
Administrative Appeals Judge

HALL, Chief Administrative Appeals Judge, concurring and dissenting:

I write separately only because I believe that the administrative law judge did not abuse his discretion when he ordered employer to provide claimant's counsel copies of all legal bills sent to it or its representative in connection with this claim.

It is well-established that relevancy is to be broadly construed for discovery purposes. The administrative law judge correctly found that the fees charged by employer's attorney are not shielded by either the attorney-client privilege or the work product doctrine. Further, trial judges have broad discretion in discovery matters and their rulings should not be overruled absent a clearly erroneous application of law or lack of substantial evidence. In the instant case, the administrative law judge articulated at least one plausible reason why the requested bills could become relevant to the case, namely appropriate rates and allowable hours for attorney fees in the event that claimant ultimately prevails and is entitled to be paid fees and costs. If claimant is challenged as to either reasonable attorney fee rates or hours, the rates and hours claimed by opposing counsel could become relevant.

I specifically disagree with my colleagues' view that the administrative law judge abused his discretion by prematurely ordering employer to provide the information regarding legal fees. Controlling the pace and scope of discovery is a matter of case management. I believe it was within the administrative law judge's discretion to determine that the goal of judicial economy permitted, or even required, him to address all discovery issues, including the request for copies of legal bills, as expeditiously as possible. Thus, he was not required to bifurcate issues relating to attorney fees which might or might not become relevant issues before the case was concluded.

In all other respects, I concur with the decision of the majority.

BETTY JEAN HALL, Chief
Administrative Appeals Judge