

BRB No. 00-0649 BLA

MERKIE BROOKS)
(Widow of FRELIN BROOKS))
)
Claimant-Petitioner)
)
v.)
)
CLINCHFIELD COAL COMPANY) DATE ISSUED:
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Supplemental Award Fees for Legal Services and Reconsideration Request of Supplemental Award Fees for Legal Services of Stuart C. Glassman, District Director, United States Department of Labor.

Daniel Sachs (Law Offices of Daniel Sachs), Springfield, Virginia, for claimant.

Jeffrey S. Goldberg (Judith E. Kramer, Acting 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant's counsel¹ (counsel), appeals the Supplemental Award Fees for Legal

¹ Counsel is Daniel Sachs, who represented Frelin Brooks in pursuit of benefits on his miner's claim and his widow, Merkie Brooks, in pursuit of benefits on her survivor's claim.

Services (Supplemental Award) and the Reconsideration Request of Supplemental Award Fees for Legal Services of District Director Stuart C. Glassman on a fee petition 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).² Counsel requested an attorney's fee in the amount of \$2,887.50, representing 19.25 hours of legal services rendered before the district director at \$150.00 per hour. The district director awarded counsel \$1,732.50, which reflects 19.25 hours of legal services at \$90.00 per hour. Supplemental Award at 2. On November 24, 1999, counsel filed a Motion for Reconsideration with supporting evidence, requesting that the fee be increased. The district director denied counsel's motion for reconsideration and found that his previous attorney fee award remained unchanged.

On appeal, counsel contends that the district director erred by finding that the reasonable hourly rate for services was \$90.00 and by failing to consider whether to augment the fee due to the delay in payment for services rendered. Employer has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response letter, disagreeing with counsel's contention that the

Administrative Law Judge Stuart A. Levin awarded benefits in a Decision and Order dated August 2, 1999, and a Decision and Order Denying Claimant's Motion for Reconsideration dated September 29, 1999.

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

fee should be enhanced due to the delay in payment. Consequently, counsel has filed a reply letter, arguing that he has suffered a hardship due to the delay.³

³Inasmuch as the district director's award of 19.25 hours of legal services rendered is unchallenged on appeal, we affirm this finding. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see also Barr v. Director, OWCP*, 7 BLR 1-367, 1-369 (1984); *Robel v. Director, OWCP*, 7 BLR 1-358 (1984); Supplemental Award at 2.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which the Director and employer have responded.⁴ Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The award of attorney's fees pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a), is discretionary and will be sustained on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *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. Kaiser Steel Corp.*, 8 BLR 1-339, 1-343 (1985). *Marcum* requires a two-tier analysis: the adjudicating official before whom the service was performed must first determine whether the service was necessary to the proper conduct of the case and, if so, whether the time expended performing the service was excessive or unreasonable. See 20 C.F.R. §725.366(b); *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984).

Counsel argues that the district director's finding that a reasonable hourly rate of \$90.00 is unsupported by the evidence of record, arbitrary, and an abuse of discretion inasmuch as the Board and the administrative law judge awarded counsel fees at an hourly rate of \$150.00 in this case. Although the Board and the administrative law judge previously awarded counsel fees based on an hourly rate of \$150.00, *Brooks v. Clinchfield Coal Co.*,

⁴ The Director's brief, dated March 13, 2001, asserts that the outcome of this case will not be affected by application of the revised regulations. In a brief dated March 22, 2001, employer similarly avers that the applicable revised regulations will not affect the outcome of this appeal, but that employer is neither endorsing the revised regulations nor waiving any objections as to the validity and legality of the regulations.

BRB No. 98-0395 BLA (Apr. 27, 1999) and *Brooks v. Clinchfield Coal Co.*, No. 97-BLA-739 (Jan. 21, 1998), these determinations were based on counsel's fee petition for legal services rendered before the Board and the administrative law judge respectively, and consequently, are not binding on the district director. *See Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217 (1986). We, therefore, reject this argument.

Counsel argues further that, when determining the hourly rate, the district director erred by failing to consider the affidavit from Robert Cohen, an attorney who affirmed that his hourly rate is \$210.00 in pending black lung cases.⁵ With respect to fees charged by similarly qualified attorneys in the same geographical region, counsel asserts that operational costs in Northern Virginia, where his office is located, are greater than those in the coal fields of Virginia. With respect to the complexity of the legal issues and the level of the claim at the time of legal representation, counsel maintains that the claim had been denied twice prior to his involvement, which increased the burden he had to satisfy, and that the miner's claim was filed pursuant to the older, less often used 20 C.F.R. Part 727 (2000) regulations. Counsel's arguments have merit.

After citing the complexity of legal issues, the qualifications of the representative, the level of the claim at the time of legal representation, and fees being charged by highly qualified attorneys within the same geographical location, the district director summarily found that a rate of \$90.00 per hour was reasonable. Supplemental Award at 1. On reconsideration, the district director found that the attorney fee award remained unchanged. Reconsideration Request of the Supplemental Award at 1.

It is well established that the adjudicating official determines the appropriate fee award by considering the regulatory criteria set forth at Section 725.366(b). These factors include the quality of representation, qualifications of the representatives, complexity of the legal issues involved, level of proceedings to which the claim was raised, and the level of the claim at which counsel entered the proceedings. 20 C.F.R. §725.366(b); *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 13 BLR 2-364 (1990); *see Blankenship v. Schweiker*, 676 F.2d 116, 117-118 (4th Cir. 1982); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984). However, the adjudicating official must provide an explanation supporting his or her determination regarding the attorney fee. *Busbin v.*

⁵ Counsel stated that he filed affidavits from two attorneys, Robert Cohen and Michael Bevers. However, a review of the record reveals that only the affidavit of Mr. Cohen is contained therein. In a letter dated January 10, 2000, the district director informed counsel that he had failed to file Mr. Bevers's affidavit, that employer did not receive Mr. Cohen's affidavit from counsel, and requested that all relevant information be filed.

Director, OWCP, 3 BLR 1-374, 1-375-376 (1981). The United Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that it is “impossible” to review fee awards to determine their reasonableness unless the adjudicators set forth the findings that support their conclusions that a particular fee is reasonable. *Blankenship*, 676 F.2d at 118. Even more specifically, the Court held, “[w]hat is required is not an empty ritual but thoughtful consideration of the factors, evidenced by findings sufficient to enable us to review the award.” *Blankenship*, 676 F.2d at 118; *Perkins v. Harris*, 628 F.2d 1350 (4th Cir. 1980). Although the district director listed the regulatory criteria, he failed to discuss their application to the instant fee petition or to adequately explain why he reduced the requested hourly rate from \$150.00 to \$90.00. See *Blankenship, supra*; *Lenig v. Director, OWCP*, 9 BLR 1-147, 1-148 (1986). Inasmuch as the district director must apply the regulatory criteria in a reasoned manner, we vacate the district director’s finding that \$90.00 is a reasonable hourly rate and remand this case for further consideration.

Counsel additionally contends that he is entitled to an augmented fee because of a two-year delay in receiving a decision on his fee petition, and that the district director failed to address this contention. Specifically, counsel argues that he originally filed his attorney fee petition on or about November 12, 1997, and that the district director did not render his decision on attorney fees until November 9, 1999, because the original fee petition had been lost, a delay of two years. Learning that his fee petition had been lost, counsel refiled his fee petition on October 29, 1999, asking that his fee be enhanced due to the delay caused by the loss of the original fee petition. In response, the Director contends that even if the district director had immediately approved the original 1997 fee petition, counsel would not have been able to collect his fee because the administrative law judge’s award of benefits was not final until September 29, 1999, the date of the administrative law judge’s decision denying claimant’s motion for reconsideration.⁶ Thus, the Director contends that loss of the original fee petition delayed counsel’s receipt of attorney fees by no more than one month, not two years.

The Fourth Circuit court acknowledged recent Board precedent that a fee may be enhanced to compensate for delay in payment, *i.e.*, the passage of time between when the services were rendered and when the fee award becomes enforceable. *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 805, 21 BLR 2-631, 2-638 (4th Cir. 1999); *Nelson v. Stevedoring Servs. of America*, 29 BRBS 90 (1995)(overruling statements in prior decisions by Board holding that awarding higher rate to account for delay is abuse of administrative law judge’s discretion); see *Triplett, supra*. Counsel’s right to collect an attorney fee does

⁶ Actually, the Decision and Order on Reconsideration would not become final for at least 30 days after being filed in the office of the district director. See 20 C.F.R. §§725.479(c), 802.206; *Fairley v. Ingalls Shipbuilding Inc.*, 22 BRBS 184, 193 (1989)(*en banc*); *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248, 253 (1987).

not arise, however, until the opportunity to appeal from the attorney fee award has been exhausted. *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982).

The district director did not address the enhancement issue in either the Supplemental Fee Award or the Reconsideration Request of the Supplemental Award. Therefore, we must remand the case for him to do so. *See Kerns, supra; Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997). The fees at issue were for legal services performed from April 4, 1994 through November 7, 1997. The pertinent issue in determining whether enhancement of the fee is appropriate is not when the fee petition was filed and/or lost, as counsel and the Director argue, but whether the passage of time between when the services were rendered and when the fee became enforceable results in the fee charged providing inadequate compensation for the services rendered, *Kerns*, 176 F.3d at 805, 21 BLR at 2-638. Accordingly, we vacate the district director's determination that \$90.00 is a reasonable hourly rate, and we remand the case for the district director to determine an hourly rate in accordance with the regulatory criteria pursuant to Section 725.366(b) and to determine whether enhancement of the fee is appropriate in this case.

Accordingly, the Supplemental Award Fees for Legal Services and the Reconsideration Request of the Supplemental Award Fees for Legal Services of the district director are affirmed in part and vacated in part, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge