

BRB No. 91-1078 BLA

LORRAINE HATTER )  
(Widow of JOHN HATTER) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
HATTER COAL COMPANY )  
 ) DATE ISSUED:  
Employer )  
 ) )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Respondent ) DECISION and ORDER

Appeal of the Amended Award of Benefits of Jack Lewis Geller, District Director, United States Department of Labor.

Lynne G. Bressi (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for claimant.

C. William Mangum (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: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel (counsel) appeals the Amended Award of Benefits (183-20-9938) of District Director Jack Lewis Geller awarding attorney's fees 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). Claimant, the miner's widow, was awarded survivor's benefits in a Decision and Order dated November 14, 1990. No party appealed from the decision. On February 20, 1991, the district director issued an Amended Award of Benefits approving an attorney fee in the sum of \$500.00 for 6.25 hours of service at an hourly rate of \$80.00

for services rendered from February 15, 1990 to May 1, 1990 to be paid by the Hatter Coal Company (employer). On appeal, counsel contends that the district director erred in refusing to order payment from the Black Lung Disability Trust Fund (Trust Fund) for the approved attorney's fees as employer refused to pay the survivor's benefits and attorney's fees. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the district director's Amended Award of Benefits.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. See *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

On appeal, counsel argues that the attorney's fees should be paid by the Trust Fund pursuant to 20 C.F.R. §702.145(f) as they are monetary benefits which employer has refused to pay.<sup>1</sup> As the Director states in his response brief, the Board has consistently interpreted the Act and the implementing regulations as imposing liability for attorney's fees upon employer after it receives actual or constructive notice of its potential liability for benefits and declines to pay or fails to respond within thirty days, whichever occurs first. See *Capelli v. Bethlehem Mines Corp.*, 11 BLR 1-129 (1988). The only situations where the Trust Fund is required or authorized to assume a responsible operator's liability for the payment of benefits and attorney's fees are in those cases subject to the transfer provisions of the Act, those cases where a miner's pneumoconiosis did not arise out of coal mine employment performed after December 31, 1969, and where the responsible operator proves financial inability to pay. See 20 C.F.R. §725.496(f); *Lawley v. U.S. Steel Corp.*, 11 BLR 1-14 (1985); *Matulevich v. Director, OWCP*, 9 BLR 1-152 (1986); *Borders v. A.G.P. Coal Co.*, 9 BLR 1-32 (1986). In the present case, none of the criteria necessary for the Trust Fund to assume employer's liability for the payment of benefits and attorney's fees are present. As a result, the district director's finding that employer is liable for the payment of counsel's fees is affirmed as it is supported by substantial evidence of record.

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<sup>1</sup>Counsel contends that the payment of claimant's attorney's fees is a monetary benefit to claimant. This contention is without merit, however, as neither the Act nor the regulations treat the payment of attorney's fees as a benefits as that term is used in the Act. See 30 U.S.C. §956; 20 C.F.R. §§701.101(c), 727.367(a), 725.530(b).

Accordingly, the district director's Amended Award of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge