

BRB No. 05-0880 BLA

LIGE M. SCARBERRY)	
)	
Claimant-Petitioner)	
)	
v.)	
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DIRECTOR, OFFICE OF WORKERS’ COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	DATE ISSUED: 07/11/2006
)	
Respondent)	DECISION and ORDER

Appeal of the Supplemental Decision and Order on Second Reconsideration Request – Denial of Additional Attorney Fees of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant’s counsel (counsel) appeals the Supplemental Decision and Order on Second Reconsideration Request – Denial of Additional Attorney Fees (2003-BLA-5468) of Administrative Law Judge Richard T. Stansell-Gamm 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 had previously awarded attorney fees in a total amount of \$7950 for counsel’s representation of claimant from 1995 through 2004 at the rate of \$200 per hour, but denied the remaining portion of counsel’s fee application for services provided from 1988 through 1994 on the ground that counsel failed to establish his customary hourly rate for representation prior to 1995 that did not include an enhancement for litigation delay. Upon counsel’s second

reconsideration request and a review of additional documentation and arguments, the administrative law judge again denied the remaining portion of counsel's fee application.

On appeal, counsel asserts that he provided sufficient documentation to establish that \$200 was his customary hourly rate between 1988 and 1994, and argues that he should have been awarded at least a reduced fee for his representation of claimant during that period. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of additional fees, to which counsel replies in support of his position.

The award of an attorney's fee 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) and implemented by 20 C.F.R. §725.367(a), is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Counsel initially contends that the administrative law judge erred in finding that counsel failed to meet his burden of providing adequate documentation of his customary hourly rate for services rendered prior to 1995. We disagree. In denying attorney fees for counsel's representation of claimant between 1988 and 1994, the administrative law judge acknowledged that counsel had demonstrated through multiple attorney fee awards that counsel's usual billing rate "as far back as 1988" was \$200 per hour for representation in cases involving private employers; however, the administrative law judge had previously found that this rate reflected an enhancement for delay in payment, which is prohibited in cases where the Black Lung Disability Trust Fund (Trust Fund) is liable for payment. Supplemental Decision and Order on Second Reconsideration at 4; see *Shaffer v. Director, OWCP*, 21 BLR 1-97 (1998)(*en banc on recon.*). As counsel repeatedly failed to provide documentation of his customary hourly rate in effect at the time the services were rendered which did not include an enhancement for litigation delay or a substitute for interest, the administrative law judge acted within his discretion in denying counsel an attorney fee for the disputed period of representation. *Id.*; see also *Griffin v. Director, OWCP*, 17 BLR 1-75 (1993); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995).

Alternatively, counsel maintains that the administrative law judge's denial of the requested fee is an unduly harsh result, and asserts that Altman & Weil's *Survey of Law Firm Economics* conducted for the years 1989 through 1994 should be used as a guideline to compute a reduced fee. As this evidence was attached to counsel's appellate brief, but was not submitted to the administrative law judge for consideration despite multiple directives to provide appropriate documentation of counsel's customary hourly

rate for representation in cases brought against the Trust Fund, we affirm the administrative law judge's denial of additional fees. *See* 20 C.F.R. §802.301(b).

Accordingly, the administrative law judge's Supplemental Decision and Order on Second Reconsideration Request – Denial of Additional Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge