

BRB No. 11-0663 BLA

ROY W. FINNEY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ITMANN COAL COMPANY)	DATE ISSUED: 07/19/2012
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Proposed Order Supplemental Award Fee for Legal Services of Michelle Harmon, Claims Examiner, Office of the District Director, Office of Workers' Compensation Programs, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel appeals the Proposed Order Supplemental Award Fee for Legal Services of Claims Examiner Michelle Harmon (the district director), on a petition for fees for legal services performed in securing an award of benefits on a miner's claim, filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The relevant procedural history is as follows. Claimant was awarded federal black lung benefits by Administrative Law Judge William S. Colwell on November 24, 2008, and the award was affirmed by the Board. *R.W.F. [Finney] v. Itmann Coal Co.*, BRB No. 06-0421 BLA (Oct. 21, 2009)(unpub.).

Employer did not appeal the Board's decision.¹ Claimant's counsel submitted an itemized fee petition, requesting attorney fees in the amount of \$1,073.62, representing 4.0 hours of legal services performed at the hourly rate of \$250.00, in addition to costs incurred in the amount of \$73.62, while the case was pending before the district director. In the Proposed Order Supplemental Award Fee for Legal Services, dated June 17, 2011, the district director reduced the hourly rate to \$200.00 and approved 3.75 of the requested hours, disallowing .25 of an hour charged by claimant's counsel on November 4, 2009. The district director also denied all costs claimed. Consequently, the district director awarded a total fee of \$750.00.

On appeal, claimant's counsel contends that the district director erred in disallowing the .25 of an hour charged on November 4, 2009, and in disallowing \$73.62 in costs.² Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

All fee petitions must be filed with, and approved by, the adjudicating officer or tribunal before whom the services were performed. 20 C.F.R. §725.366(a); *see Helmick v. Director, OWCP*, 9 BLR 1-161 (1986); *Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). The amount of an attorney's fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

The district director disallowed .25 of an hour charged on November 4, 2009, finding that the work was performed while the case was pending before the Board. Claimant's counsel maintains, however, that this work was actually performed before the district director. Claimant asserts that while employer had sixty days following the Board's October 21, 2009 decision to file an appeal with the United States Court of Appeals for the Fourth Circuit, because employer did not do so, the Board's decision because "final as of the issuance date" and jurisdiction of the claim "reverted back to the [d]istrict [d]irector's office after October 21, 2009." Brief on Behalf of Claimant at 5.

The regulation at 20 C.F.R. §802.406 provides:

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mining employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 1, 4.

² Claimant's counsel does not challenge the district director's reduction of his hourly rate and therefore, we affirm the district director's award of an hourly rate of \$200.00. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

A decision rendered by the Board pursuant to this subpart *shall become final 60 days after the issuance of such decision* unless a written petition for review praying that the order be modified or set aside, pursuant to section 21(c) of the LHWCA is filed in the appropriate U.S. court of appeals prior to the expiration of the 60-day period herein described, or unless a timely request for reconsideration by the Board has been filed as provided in §802.407. . . .

Id. (emphasis added). In this case, since employer did not appeal or request reconsideration of the Board's October 21, 2009 Decision and Order, it became final sixty days after issuance, or on December 21, 2009. Thus, contrary to claimant's contention, the legal services by claimant's counsel on November 4, 2009 were performed while the case was pending with the Board.

However, the Board has held that, in order to determine "the jurisdictional cutoff date" for an attorney fee award, "the issue is not whether the work was performed before or after a certain date." *Matthews v. Director, OWCP*, 9 BLR 1-184, 1-186-87 (1986). Rather, the proper inquiry is whether the work performed was "reasonably integral" to the proceedings before the tribunal in which the fee petition was filed. *Id.*

In his fee petition, claimant's counsel charged .25 of an hour on November 4, 2009, for "Receipt of correspondence concerning benefits due and review of same." January 11, 2011 Fee Petition at 2. This entry suggests that counsel reviewed correspondence initiated by the district director with respect to payment of benefits to claimant. Because we are unable to determine if the district director considered whether the services performed by counsel on November 4, 2009 were "reasonably integral" to proceedings before the district director, we must vacate the district director's disallowance of .25 of an hour on November 4, 2009. On remand, if the district director determines that work by claimant's counsel on November 4, 2009 was performed as a result of correspondence initiated by the district director, then counsel is entitled to a reasonable fee for such work and the district director may issue that award.

Claimant's counsel also correctly asserts that the district director provided no explanation for disallowing costs associated with the claim in the amount of \$73.62.³ Because we are unable to discern the basis for the district director's ruling, the Proposed Order Supplemental Award Fee for Legal Services can not be affirmed. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir.

³ Claimant reported on the fee petition, under "Miscellaneous Expenses" that \$60.00 was paid to Dr. Miller for an x-ray interpretation performed on September 5, 2003, and \$13.62 was paid to Raleigh General Hospital, on November 10, 2003, for receipt of medical records. January 11, 2011 Fee Petition.

1999); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We, therefore, vacate the district director's disallowance of costs in the amount of \$73.62 and remand the case for specific findings on this issue. On remand, the district director must set forth the rationale underlying his findings, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the district director's Proposed Order Supplemental Award Fee for Legal Services is affirmed in part and vacated in part, and the case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge