U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0410 BLA
Case No. 2013-BLA-05843

RONALD MARTIN Claimant-Respondent v. NATIONAL MINES CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/30/2019 ORDER on MOTION for RECONSIDERATION and on PETITION for ATTORNEY'S FEES

Employer/carrier (employer) has filed a timely motion for reconsideration of the Board's decision in *Martin v. National Mines Corp.*, BRB No. 17-0410 BLA (July 30, 2018) (unpub.), affirming the award of benefits in this miner's claim. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. The Director, Office of Workers' Compensation Programs (the Director), responds, in part, in opposition to employer's motion. Employer has filed a reply brief. Claimant has not responded to employer's motion.

Employer argues for the first time on reconsideration that, pursuant to *Lucia v. SEC*, 585 U.S. ___, 138 S. Ct. 2044 (2018), the manner in which Department of Labor administrative law judges are appointed violates the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2. Employer thus requests that the Board vacate the

award of benefits and remand the case for a new hearing before a constitutionally appointed administrative law judge. The Director responds that employer forfeited this argument by failing to raise it in its opening brief.

We agree that the issue is forfeited. The Appointments Clause issue is "non-jurisdictional," and thus is subject to the doctrines of waiver and forfeiture. *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018); *Intercollegiate Broadcast Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009). Because employer first raised its Appointments Clause argument fifteen months after it filed its appeal, thirteen months after it filed its opening brief, and after the Board issued its decision on the merits, employer forfeited the issue. *See Lucia*, 138 S. Ct. at 2055 (one who makes "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case" is entitled to relief); *Wilkerson*, 910 F.3d at 256 (Appointments Clause challenge forfeited because it was not raised in opening brief); *Motton v. Huntington Ingalls Industries, Inc.*, 52 BRBS 69 (2018) (Appointments Clause issue forfeited when raised in motion to vacate filed after initial petition for review and brief); *Luckern v. Richard Brady & Associates*, 52 BRBS 65 (2018) (Appointments Clause issue raised in reply brief will not be addressed); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal).

We reject employer's contention that it has timely raised the Appointments Clause issue because *Lucia* was decided during the pendency of its appeal. Emp. Reply Brief at 5. The decision in *Lucia* rests on the Court's earlier decision in *Freytag v. Comm'r*, 501 U.S. 868 (1991). *Lucia*, 138 S. Ct. at 2053 ("*Freytag* says everything necessary to decide this case."); *see Wilkerson*, 910 F.3d at 257 ("No precedent prevented the company from bringing the constitutional claim before [the Supreme Court issued its decision in *Lucia*]."). Moreover, we reject employer's contention that its forfeiture should be excused pursuant to *Jones Bros.*, 898 F.3d 669. Unlike *Jones Bros.*, employer here did not preserve the constitutional issue by raising it before the Board in its Petition for Review and brief.[1] *See Turner Bros., Inc. v. Conley*, 757 F. App'x 697, 699-700 (10th Cir. 2018) (unpublished) (distinguishing *Jones Bros.* and declining to excuse forfeiture where the issue was first mentioned in a motion to the court after the briefing was complete); *see also Freytag*, 501 U.S. at 879 ("rare" case where discretion was exercised to address untimely Appointments Clause challenge); *In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008) (declining to excuse waived

[1] In *Jones Bros.*, the petitioner raised the Appointments Clause issue before the Federal Mine Safety and Health Review Commission, but did not "press" it. *Jones Bros.*, 898 F.2d at 677.

Appointments Clause challenge). If employer had timely presented the issue, the Board would have addressed it and could have provided a remedy. *Miller v. Pine Branch Coal Sales, Inc.*, __ BLR ___, BRB No. 18-0323 BLA (Oct. 22, 2018) (en banc) (vacating award by improperly appointed administrative law judge and remanding for reassignment); *see also Kiyuna v. Matson Terminals, Inc.*, __ BRBS __, No. 19-0103 (June 25, 2019) (affirming administrative law judge's finding that Appointments Clause issue raised on reconsideration was forfeited and not excused as claimant engaged in "sandbagging.").

Employer next contends the Board erred in affirming the administrative law judge's reliance on Dr. Baker's opinion to find that claimant has legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that it is a substantially contributing cause of his totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). We reject employer's contentions. The Board fully addressed these issues, *see Martin*, slip op. at 4-5, 7-8, and employer has not established a basis for reconsideration of the Board's decision. Therefore, we deny employer's motion for reconsideration. 20 C.F.R. §802.409.

Claimant's counsel has filed a complete, itemized statement requesting an attorney's fee for services performed before the Board in this appeal, pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a fee of $1,662.50 for 1.75 hours of legal services by Joseph E. Wolfe at an hourly rate of $350.00; 3.50 hours of legal services by Brad A. Austin at an hourly rate of $200.00; and 3.50 hours of services by legal assistants at an hourly rate of $100.00. Employer opposes the fee petition, arguing that claimant's counsel failed to support the hourly rates requested with market-based evidence. Employer further challenges the number of hours requested by claimant's counsel.

In support of his fee petition, claimant's counsel has provided a list of sixty-eight black lung cases in which the Office of Administrative Law Judges, the Board, or the United States Courts of Appeals awarded attorney fees to his firm. Evidence of fees received in the past may be an appropriate consideration in establishing a market rate. *See B & G Mining, Inc. v. Director, OWCP [Bentley*], 522 F.3d 657, 664 (6th Cir. 2008); *see also E. Associated Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010). Based on the documentation submitted in this case, we award claimant's counsel the requested hourly rates of $350, $200, and $100. 20 C.F.R. §802.203(d)(4).

Employer challenges counsel's use of quarter-hour billing as an unreasonable method of calculating the amount of time necessary to perform the identified tasks. We reject this contention, as claimant's counsel reasonably billed in quarter-hour increments, which is the minimum billing increment set forth in the applicable regulation, 20 C.F.R. §802.203(d)(3). *See Gosnell*, 724 F.3d at 576; *Bentley*, 522 F.3d at 666.

Employer also objects to the 1.75 hours charged by Mr. Wolfe as unreasonable, averring these charges were for reviewing routine documents and "should be disallowed as unnecessary, duplicative and excessive." Emp. Opp. to Fee Petition at 8. We agree that the .25 of an hour expended by Mr. Wolfe on August 16, 2017, for submitting claimant's response brief to the Board, was clerical in nature. We therefore disallow the .25 hour requested for this service. *See Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986); *McKee v. Director, OWCP*, 6 BLR 1-233 (1983). However, the remaining 1.5 hours claimed are not excessive, duplicative, or unreasonable for reviewing the notice of appeal, the Board's acknowledgement letter, other preliminary pleadings, and a response brief. *See Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). We also reject employer's contention that the 3.50 hours billed by Mr. Austin for reviewing employer's petition for review and brief and preparing claimant's response brief are excessive. *Id.*; 20 C.F.R. §802.203(e).

In all other respects, we find the fee requested to be reasonable and commensurate with the necessary services performed in defending claimant's award of benefits. 20 C.F.R. §802.203(e). Therefore, we award claimant's counsel a fee of $1,575.00, representing 1.50 hours of attorney services by Mr. Wolfe at an hourly rate of $350.00, 3.50 hours of attorney services at an hourly rate of $200.00 by Mr. Austin, and 3.50 hours of legal assistant services at an hourly rate of $100.00.

Accordingly, we deny employer's motion for reconsideration. 20 C.F.R. §802.409. We award claimant's counsel an attorney's fee of $1,575.00 to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge[2]

[2] Administrative Appeals Judge Jonathan Rolfe is substituted on this panel due to the retirement of Chief Administrative Appeals Judge Betty Jean Hall. 20 C.F.R. §802.407(a).