

U.S. Department of Labor

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



BRB No. 18-0455 BLA

JAMES D. BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MYSTIC ENERGY, INCORPORATED	)	
	)	DATE ISSUED: 07/16/2019
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Award of Attorney's Fee and Costs of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brad A. Austin and Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Karin L. Weingart and Kelly G. Pawlowski (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Award of Attorney's Fee and Costs (2016-BLA-05059) of Administrative Law Judge Daniel F. Solomon, rendered

in a successful miner's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Claimant's counsel submitted an itemized fee petition requesting \$13,525.00 for legal services performed before the administrative law judge from October 19, 2015 to December 29, 2017,<sup>1</sup> and costs in the amount of \$3,363.96. After considering the information presented in the petition and the objections raised by employer and the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge disallowed 4.00 hours of time as clerical, reduced the requested hourly rates for Attorney Joseph E. Wolfe and the legal assistants, and disallowed UPS shipping costs. He determined the remainder of the requested fees and costs were reasonable. Accordingly, he awarded \$9,450.00 in legal services and \$3,261.96 in costs, for a total attorney fee of \$12,711.96.

On appeal, employer contends that the administrative law judge erred by not disallowing all legal fees charged after August 1, 2017. Employer further contends that the administrative law judge erred in failing to reduce the number of hours allowed for services related to claimant's counsel's attendance at the telephonic hearing. Claimant's counsel responds, urging affirmance of the fee award. The Director has declined to file a response brief in this appeal.<sup>2</sup>

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, or an abuse of discretion.<sup>3</sup> *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).

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<sup>1</sup> The fee of \$13,525.00 represents 25.5 hours by Attorney Joseph E. Wolfe, at an hourly rate of \$425.00, 4.5 hours by Attorney Brad A. Austin, at an hourly rate of \$200.00, 1.25 hours by Attorney Rachel Wolfe, at an hourly rate of \$150.00, and 16 hours of work performed by legal assistants, at an hourly rate of \$100.00.

<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge's award of costs in the amount of \$3,261.96. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 7-111 (1983).

<sup>3</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Hearing Transcript at 9, 11.

Employer asserts claimant's counsel caused an unnecessary delay in this case by failing to timely provide an x-ray for employer's physician to re-read in accordance with 20 C.F.R. §718.102(f).<sup>4</sup> The administrative law judge considered employer's argument but rationally found no evidence indicating claimant's counsel "knowingly withheld evidence contrary to the Act" or negligently failed to comply with 20 C.F.R. §718.102(f).<sup>5</sup> Supplemental Decision and Order at 7; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We affirm the administrative law judge's finding because it is not arbitrary, capricious, or an abuse of discretion. *See E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 578 (4th Cir. 2013); *Abbott*, 13 BLR at 1-16.

Employer next argues the administrative law judge failed to address its assertion that three hours charged by Attorney Wolfe for preparing for, and participating in, the telephonic hearing on September 5, 2017 was unreasonable. Employer's Brief at 11. Contrary to employer's contention, the administrative law judge's decision adequately reflects his consideration of employer's objections to the fee petition. *See Wojtowicz*, 12 BLR at 1-165. We see no error his overall conclusion that the time expended by the attorneys and legal assistants was "reasonable in relation to the work performed and necessary to establish entitlement." Supplemental Decision and Order at 8; *see* 20 C.F.R. §725.366; *Gosnell*, 724 F.3d at 578; *Jones*, 21 BLR at 1-108. We therefore affirm the administrative law judge's finding that claimant's counsel is entitled to \$9,450.00 for legal services and \$3,261.96 in costs, for a total attorney fee of \$12,711.96.

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<sup>4</sup> Section 718.102(f) requires that the original x-ray film or digital x-ray image upon which an x-ray report is based be provided to the Office of Workers' Compensation Programs. 20 C.F.R. §718.102(f).

<sup>5</sup> On July 14, 2017, claimant submitted Claimant's Exhibit 4, Dr. DePonte's reading of the July 6, 2017 x-ray as positive for complicated pneumoconiosis. Employer requested the film from the Department of Labor (DOL) in order to obtain a reading by Dr. Adcock. Employer alleges that because claimant's counsel did not timely provide the DOL with the x-ray or its location, as required by 20 C.F.R. §718.102(f), it was unable to have the x-ray read until December 18, 2007. Employer's Brief at 8. Based on Dr. Adcock's positive reading of the film for complicated pneumoconiosis, employer accepted liability for benefits on December 21, 2017. *Id.* at 9. Employer maintains that it would have conceded liability five months sooner if claimant had timely submitted the x-ray to the DOL. *Id.*

Accordingly, the administrative law judge's Supplemental Decision and Order Award of Attorney's Fee and Costs is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge