BRB No. 07-0763 BLA

J.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TWIN PINES, INCORPORATED	)	DATE ISSUED: 06/27/2008
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Modification of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for carrier.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Carrier appeals the Decision and Order on Remand – Denial of Modification (03-BLA-0185) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) on a claim[1] 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).[2] This case has been before the Board on two prior occasions.[3] Pursuant to the last appeal filed by employer, the Board held that Administrative Law Judge Daniel J. Roketenetz erred in refusing to consider carrier's modification request on the responsible carrier issue, and erred in stating that he would only "consider this a case on remand from the Board."[4] Consequently, the Board vacated Judge Roketenetz's decision, and remanded the case for him to address the issues raised in carrier's modification request under the applicable modification standard. The Board noted that on remand it may be necessary to reopen the record to resolve carrier's modification request. Further, the Board rejected the argument by the Director, Office of Workers' Compensation Programs (the Director), that on remand carrier must prove that it did not waive the responsible carrier issue. Rather, the Board held that the sole issue for Judge Roketenetz to resolve on remand was whether the evidence showed that carrier was on the risk for employer as of April 1995. The Board therefore instructed Judge Roketenetz that if he found that carrier was not on the risk for employer as of April 1995, then he should hold the Black Lung Disability Trust Fund (Trust Fund) liable for the payment of benefits owed to claimant. [*J.S.*] *v. Twin Pines, Inc.*, BRB No. 06-0121 BLA (Oct. 26, 2006)(unpub.).

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[1] Claimant filed a claim in June 1993, which was withdrawn on July 20, 1993. Director's Exhibit 34. Claimant filed this claim on October 13, 1998. Director's Exhibit 1.

[2] The record indicates that claimant was last employed in the coal mine industry in Kentucky. Director's Exhibits 2, 4, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The full procedural history of this case is set forth in the following Board decisions: [*J.S.*] *v. Altec Energy, Inc.*, BRB No. 01-0453 BLA (Feb. 12, 2002)(unpub.); [*J.S.*] *v. Altec Energy, Inc*., BRB No. 01-0453 BLA (Aug. 2, 2002)(unpub. Decision and Order on Recon.); [*J.S.*] *v. Twin Pines, Inc.*, BRB No. 06-0121 BLA (Oct. 26, 2006) (unpub.).

[4] The Board previously affirmed Administrative Law Judge Daniel J. Roketenetz's finding that claimant was entitled to benefits and his determination that the date for the commencement of benefits was April 1995. [*J.S.*] *v. Altec Energy, Inc.*, BRB No. 01-0453 BLA (Feb. 12, 2002) (unpub.).

On remand, the administrative law judge[5] found that carrier failed to timely raise the responsible carrier issue.[6] The administrative law judge therefore found that no mistake in fact occurred in naming employer as the responsible operator and carrier as the responsible carrier. Consequently, the administrative law judge denied carrier's request for modification. Alternatively, the administrative law judge concluded that "[s]hould the Board find [that] I abused my discretion and that the affidavit should have been considered, as fact finder, I would hold the [Trust Fund] liable under the logic articulated under *Gilbert v. Williamson Coal Co*., 7 BLR 1-289 (1984)." May 23, 2007 Decision and Order on Remand – Denial of Modification at 5 n.18.

On appeal, carrier contends that the administrative law judge erred in finding that it waived its right to contest the designation of the responsible carrier. Claimant has not participated in this appeal. The Director responds, urging the Board to reconsider its prior determinations regarding whether carrier waived the responsible carrier issue.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

RESPONSIBLE CARRIER

Initially, we will address carrier's contention that the administrative law judge erred in finding that carrier waived its right to contest the designation of the responsible carrier.[7] Carrier argues that because it did not become aware that April 5, 1995 was the

[5] Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), noted that the case was reassigned to him because Judge Roketenetz no longer worked for the Office of Administrative Law Judges. May 23, 2007 Decision and Order on Remand – Denial of Modification at 2.

[6] The administrative law judge stated that employer and carrier should have raised the responsible carrier issue at the first hearing, based on a review of the evidence. May 23, 2007 Decision and Order on Remand – Denial of Modification at 5 n.16.

[7] Citing *Caudill Construction Co. v. Abner*, 878 F.2d 179, 12 BLR 2-335 (6th Cir. 1989), carrier also asserts that a waiver of the responsible carrier issue should be excused because the United States Court of Appeals for the Sixth Circuit has held that the Director was permitted to give notice of a claim to a new carrier after the issuance of an award of benefits. Contrary to carrier's assertion, the Sixth Circuit has subsequently held that the Director cannot correct the designation of the party liable for the payment of

relevant date for determining the proper responsible carrier until the Board issued its first Decision and Order in this case, it raised the responsible carrier issue at the earliest practicable time. Carrier also argues that the administrative law judge exceeded the Board's mandate on remand.

The Director asserts that the administrative law judge was correct in considering whether employer and carrier had waived the responsible carrier issue, and in finding that they had done so. The Director also asserts that if the Board does not affirm the administrative law judge's waiver determination, then the Board should remand the case for consideration of the merits of carrier's modification request. Lastly, the Director asserts that the Board should not affirm the administrative law judge's alternative finding that liability for the payment of benefits should be transferred to the Trust Fund.

Regarding Judge Roketenetz's findings that employer was the responsible operator and carrier was the responsible carrier, the administrative law judge found that the evidence did not establish a mistake in a determination of fact at 20 C.F.R. §725.310. The administrative law judge essentially determined that carrier waived the responsible carrier issue, on the ground that carrier had adequate knowledge to raise that issue with the Board after Judge Roketenetz found that the onset date was April 1995. The administrative law judge specifically stated:

> When [Judge Roketenetz] issued his ruling that the onset date was April of 1995, both the [e]mployer and [c]arrier were on notice of their potential liability. As such, based on the facts of the case, [carrier] could have raised the issue that [it was] not responsible with the Board and failed to do so. Furthermore, as [employer and carrier] were wise enough to argue the position that the onset date was 1993 – they could have also argued that even if it [sic] complicated pneumoconiosis was not established until April 1995, [carrier] could still not be held liable. Thus, I find the [c]arrier failed to timely raise the issue of responsible carrier and deny the request for modification.

May 23, 2007 Decision and Order on Remand – Denial of Benefits at 5 (footnotes omitted).

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benefits in a case after a hearing was held and entitlement to benefits was fully adjudicated. *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 22 BLR 2-349 (6th Cir. 2002). In the instant case, an administrative law judge has held a hearing and claimant's entitlement to benefits has been fully adjudicated. Thus, we reject carrier's assertion that a new carrier could be held liable for the payment of benefits in this case.

As the Act prohibits holding an employer liable for the payment of benefits to a miner when the employer had no responsibility for the miner's presumed total disability, it follows by logical extension that the Act prohibits holding a carrier liable for the payment of benefits to a miner when the carrier was on the risk for the employer after the date that the miner was found to be entitled to benefits. 30 U.S.C. §932(c).

In this case, the record indicates that carrier did not insure employer in April 1995. Director's Exhibit 24. No party points to any evidence that questioned the credibility of the record in this regard. Although carrier was sent a Notice of Claim because it insured employer, the notice did not specify the time period that employer was insured by carrier. Director's Exhibit 25. Carrier could not have anticipated that the Director would try to hold it liable for a time period before it actually insured employer. Thus, contrary to the administrative law judge's finding, there was no reason why carrier should have believed that an onset finding before the date that it insured employer would have been of concern to it. By contrast, the Director should have known that claimant may have had complicated pneumoconiosis prior to the date that carrier insured employer, and that the Trust Fund would be held liable for the payment of benefits in this case if he failed to notify the appropriate carrier. As a carrier has a constitutional and statutory right to notice of black lung proceedings, *Warner Coal Co. v. Director, OWCP* [*Warman*], 804 F.2d 346 (6th Cir. 1986), the Director has an obligation to provide that notice. *Tazco Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 13 BLR 2-313 (4th Cir. 1990). The Director, however, did not notify the carrier that insured employer in April 1995. Thus, upon further reflection, we hold that carrier was not on the risk for employer in April 1995. Consequently, we reverse the administrative law judge's finding that carrier was the responsible carrier in this case. Furthermore, we hold that the Trust Fund is liable for the payment of benefits owed to claimant.

ATTORNEY'S FEE

Next, we address carrier's contentions with regard to the request for attorney's fees by claimant's counsel for work performed before the Board. Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed in the above captioned case pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a fee of $2,375.00 for 9.50 hours of legal services rendered before the Board from February 14, 2002 to June 8, 2007 at an hourly rate of $250.00. Carrier has filed a response to the fee petition with the Board. Claimant's counsel replies, urging the Board to grant his request for attorney's fees.

We find the hourly rate requested by claimant's counsel exceeds the "reasonable and customary" rate for work performed before the Board. 20 C.F.R. §802.203(d)(4); *see also B & G Mining, Inc. v. Director, OWCP*, 522 F.3d 657 (6th Cir. 2008). Therefore, we reduce the hourly rate to $225.00 for claimant's counsel.

Carrier argues that claimant's counsel is not entitled to recover an attorney's fee because it was not served with the request for attorney's fee. We disagree. Claimant's counsel filed his fee application on July 11, 2007. Carrier did not initially receive service of the fee application along with the other parties to the case. However, carrier subsequently filed an objection to the fee application on August 10, 2007. Thus, because carrier has received effective service of claimant's counsel's fee application, we reject carrier's assertion that because claimant's counsel's fee request was not initially served on carrier, the Board should not consider the fee request. 20 C.F.R. §802.203(c), (g).

Carrier also argues that claimant's counsel is not entitled to recover an attorney's fee because the award of benefits is not yet final. We disagree. An attorney's fee award may be approved pending a final award of benefits, but that fee award is neither enforceable nor payable until the award of benefits becomes final and that award reflects a successful prosecution of the claim. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Wells v. International Great Lakes Shipping Co*., 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982); *Spinner v. Safeway Stores, Inc*., 18 BRBS 155 (1986). Thus, we reject carrier's assertion that because the award of benefits is not yet final, claimant's counsel is not entitled to recover an attorney's fee.

Carrier further argues that claimant's counsel is not entitled to recover an attorney's fee because the ultimate liability for the payment of benefits has not been determined. We disagree. An award of attorney's fees for the successful prosecution of a claim may be collected from either the responsible operator/carrier or the Trust Fund. 20 C.F.R. §725.367.

Carrier finally argues that claimant's counsel is requesting compensation for legal services that were not necessary to establish entitlement to benefits. Specifically, carrier asserts that claimant's counsel requested a fee for legal services that were performed after the claim was in payment status. An attorney's fee may be approved for services that are necessary to establish entitlement to benefits. 20 C.F.R. §725.366(b). In this case, claimant's entitlement to benefits had been established. The only issue before the Board was the responsible carrier issue. Consequently, the services performed by claimant's counsel before the Board related to the liability for the payment of benefits. *Harriger v. B & G Construction Co*., 8 BLR 1-378 (1985)(holding that counsel was not entitled to attorney's fees where the sole issue on appeal was the source of payment of benefits rather than entitlement to benefits). Nonetheless, we hold that while no party challenged claimant's entitlement to benefits, claimant's counsel is entitled to a fee for the time he spent reviewing the decisions of the Board and the appeal filed by carrier. 20 C.F.R. §802.203(e). Therefore, claimant's counsel is entitled to a fee for 1.75 hours of legal services performed in this appeal on February 14, 2002, August 4, 2002, October 5, 2005, October 19, 2005, November 23, 2005, June 26, 2006, and October 28, 2006 at the hourly rate of $225.00.

All of the remaining time requested by claimant's counsel is disallowed as unnecessary to the issue on appeal. *Harriger*, 8 BLR at 1-379.

We, therefore, award a fee of $493.75 for 1.75 hours of legal services at an hourly rate of $225.00, to be paid directly to claimant's counsel by the Trust Fund, in addition to any benefits payable to claimant. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Modification is reversed, and claimant's counsel is awarded a fee of $493.75.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the majority's decision to vacate the administrative law judge's decision, and to hold the Black Lung Disability Trust Fund (Trust Fund) liable for the payment of benefits. In addition, I would reject the argument by the Director, Office of Workers' Compensation Programs (the Director), that if the Board does not affirm the administrative law judge's waiver determination, the case must be remanded for the administrative law judge to determine the credibility of the affidavit regarding the starting date of coverage. The administrative law judge specifically stated that if the Board determines he exceeded his authority in considering the waiver issue, and that his obligation was to consider the credibility of the affidavit, "as fact finder, [he] would hold the Trust [Fund] liable…." May 23, 2007 Decision and Order on Remand – Denial of Modification at 5 n.18. He thereby implicitly credited the affidavit. Moreover, the Director has proffered no reason to doubt its credibility. Hence, remand would unnecessarily delay the resolution of this case.

In all other respects I concur in the majority's decision.

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REGINA C. McGRANERY
Administrative Appeals Judge