

BRB No. 98-1233 BLA

DARLENE BROWN	)		
(Widow of SIDNEY BROWN)	)		
	)		
Claimant-Respondent	)		
	)		
v.	)		
	)		
CEDAR COAL COMPANY	)	DATE	ISSUED:
	)		
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 of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Rodger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

David L. Yaussy (Robinson & McElwee), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplemental Decision and Order (96-BLA-0253) of Administrative Law Judge Frederick D. Neusner awarding attorney's fees on a survivor's 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 awarded claimant's counsel a fee of \$6,750.00 for 25.9 hours of legal services at an hourly rate of \$250.00 and \$275.00 for expenses incurred in successfully litigating the case. On appeal, employer contends that the administrative law judge erred by awarding claimant's counsel an hourly rate of \$250.00 based on a contingency enhancement. Claimant's counsel responds, urging affirmance of the administrative law judge's award of attorney's fees. The Director, Office of Workers' Compensation Programs, contends that the administrative law judge erred in granting claimant's counsel an hourly rate of \$250.00 for legal services because the requested fee is both exorbitant for the work performed and impermissibly incorporates a risk of loss multiplier.

An award of attorney's fees is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. See *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Employer contends that the administrative law judge erred by awarding claimant's counsel an hourly rate of \$250.00 based on a contingency enhancement. Employer's contention has merit. On March 1, 1998, the administrative law judge awarded survivor's benefits to claimant.<sup>1</sup> Claimant's counsel subsequently filed a Motion for Attorney's Fee, a Memorandum in Support of Motion for Attorney's Fee (Memorandum) with supporting documents, and a fee petition.<sup>2</sup> In the

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<sup>1</sup>When a claimant wins a contested case, the Act provides that the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a).

<sup>2</sup>Claimant's counsel requested a fee of \$6,934.96 for 25.9 hours of legal services at an hourly rate of \$250.00 and \$459.96 in litigation expenses incurred while the case was before the administrative law judge. The administrative law judge stated that "[t]he Claimant's attorney seeks compensation of postage from September 15, 1995, to November 26, 1996, in the amount of \$38.28; photocopies from September 15, 1995, to November 26, 1996, in the amount of \$144; long distance phone calls from September 15, 1995, to November 26, 1996, in the amount of \$2.68; and medical reports from the Charleston Area Medical Center in the amount of \$75 on

Memorandum, claimant's counsel indicated that the standard hourly rate that he charges clients who hire him on non-contingency hourly cases is \$150.00 per hour. Further, claimant's counsel, citing *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992), stated that "[w]hile contingency can no longer enhance the lodestar rate, it can and should figure into establishing that rate." Memorandum in Support of Motion for Attorney's Fee at 2. Claimant's counsel also stated, "Clearly we do not ask for a multiplier of the lodestar, but do, as is permitted and encouraged by *Dague*, increase said lodestar to account for contingency."<sup>3</sup> *Id.*

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July 3, 1996, and in the amount of \$200.00 on July 19, 1996." Supplemental Decision and Order at 3. Although the administrative law judge disallowed counsel's request for expenses for postage, photocopies, and long distance telephone calls, the administrative law judge found that reimbursement for the expenditure of \$275.00 for medical reports was merited. In addition, the administrative law judge concluded that "the length of the time asserted was reasonable and necessary, and that the posture of the case demanded the effort counsel expended." *Id.* at 2.

<sup>3</sup>Claimant's counsel stated that "[w]hen **the contingent nature of the fee** is factored into my base fee, my hourly rate for handling federal black lung cases at the Administrative Law Judge level is \$300.00 an hour." Memorandum in Support of Motion for Attorney's Fee at 6 (emphasis added). Claimant's counsel further stated that "[a] fee of \$250.00 per hour, which I have requested here, is less than 2.0 times the standard \$150.00 hourly fee which is economically justified." *Id.*

In his decision, the administrative law judge stated that “counsel for the Claimant charges \$150 as his standard rate in non-contingency hourly cases, and that he customarily charges \$250 for contingent litigation.” Supplemental Decision and Order at 3. Further, the administrative law judge stated that an “[e]xamination of the arguments, the evidence offered, and the authorities cited by the parties leads me to find that \$250 is this lawyer’s usual hourly rate for contingency litigation, and that the lawyer’s contingency fee rate is consistent with both the nature and difficulty of this case and the hourly rates usually charged by this lawyer and other lawyers for their services under contingency fee retainer agreements for the prosecution of comparable litigation in the area where this case arose.” *Id.* The United States Supreme Court has held that fee-shifting statutes do not permit enhancement of a fee award beyond the lodestar amount to reflect the fact that a party’s attorneys were retained on a contingent-fee basis.<sup>4</sup> *Dague, supra*; see also *Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995).

In the instant case, claimant’s counsel’s requested hourly fee reflects an hourly rate adjusted to accommodate for the contingent nature of the fee. Hence, although claimant’s counsel did not increase the lodestar amount by a contingency multiplier, claimant’s counsel’s increase in his hourly rate from \$150.00 to \$250.00 based on the contingent nature of the fee achieved the same result. Since fee-shifting statutes do not permit an award of attorney’s fees to be enhanced on account of contingency, the hourly fee awarded by the administrative law judge to claimant’s counsel is reduced from \$250.00 to \$150.00, the hourly fee claimant’s counsel indicated that he usually charges in non-contingency hourly cases. Therefore, we modify the administrative law judge’s award of attorney’s fees to reflect a total fee of \$4,160.00 for 25.9 hours of legal services at an hourly rate of \$150.00 plus \$275.00 in litigation expenses.

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<sup>4</sup>In determining the amount of attorney’s fees to award under a fee-shifting statute, a fact-finder must determine the lodestar amount, which is the number of hours reasonably expended in preparing and litigating the case times a reasonable hourly rate. See *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546 (1986).

Accordingly, the administrative law judge's Supplemental Decision and Order awarding attorney's fees is modified.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge

