BRB No. 99-0824 BLA

MYRTLE FOSTER (Widow of JACK N. FOSTER) Claimant-Respondent v. DRUMMOND COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fees and the Decision on Motion for Reconsideration of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fees and the Decision on Motion for Reconsideration (98-BLA-0269) of Administrative Law Judge Gerald M. Tierney rendered 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).

Subsequent to the issuance of the administrative law judge's Decision and Order awarding benefits, claimant's counsel submitted a fee petition to the administrative law judge, requesting $5,701.30 for 38 hours of services at $150 per hour, and $1.30 in expenses. Thereafter, employer filed objections and claimant responded to employer's objections. In a Supplemental Decision and Order Granting Attorney Fees issued on January 27, 1999, the administrative law judge rejected employer's objections and approved the full amount of the fee requested. Accordingly, the administrative law judge awarded claimant's counsel a fee of $5,701.30, representing 38 hours of services at $150 per hour, plus $1.30 in expenses. Employer then filed a motion for reconsideration, to which claimant responded. In a Decision on Motion for Reconsideration issued on April 9, 1999, the administrative law judge denied employer's request for reconsideration.

On appeal, employer challenges the number of hours and the total fee approved by the administrative law judge. Claimant responds, urging affirmance of the administrative law judge's fee award, to which employer replies in opposition.

The award of an attorney's fees pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a) is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Employer contends that the administrative law judge abused his discretion in rejecting employer's objections to counsel's fee petition, and argues that the administrative law judge did not adequately address the issues of whether the number of hours claimed for services rendered was excessive and whether the total fee approved by the administrative law judge was reasonable. We disagree. The regulations provide that fees approved shall be "reasonably commensurate with the necessary work done." 20 C.F.R. §725.366(b). The test of whether or not work is necessary is whether an attorney at the time he performs the work in question could reasonably regard the work as necessary to establish entitlement. *Marcum, supra*. *Marcum* requires a two-tier analysis: the adjudication official must first determine whether the service was necessary to the proper conduct of the case, and, if so, whether the time expended performing the service was excessive or unreasonable. *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984). In the present case, in objecting to claimant's fee petition, employer merely offered a general challenge to the amount requested for services rendered and specifically asserted that the 18.5 hours claimed by counsel for preparing claimant's post-hearing brief, including 12.5

hours in one day, appeared excessive in light of the skill and experience of claimant's attorney. In his Supplemental Decision and Order Granting Attorney Fees, the administrative law judge noted employer's specific challenge to the time spent, and counsel's response that he submitted a nineteen-page post-hearing brief on behalf of claimant and believed it was necessary to devote as much time as he could to the research, writing and editing of the brief. The administrative law judge articulated the appropriate standard and, noting that time spent preparing a brief is compensable and that reasonable latititude and discretion must be allowed to an experienced attorney in the practice of his profession, and that "[r]easonable attorneys might choose different quantitative or qualitative courses or choices of emphasis in rendering professional services in particular cases," the administrative law judge acted within his discretion in finding that all of the hours requested by counsel for preparing the brief were necessary and not excessive. Supplemental Decision and Order at 1-2; *see* 20 C.F.R. §725.366; *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986); *Lanning, supra.* The administrative law judge then concluded, after consideration of the nature of the issues involved, the degree of skill with which claimant was represented, the amount of time and work involved, and other relevant factors, that the amount of $5,701.30 constituted a reasonable fee which was approved. Supplemental Decision and Order at 2; *see* 20 C.F.R. §725.366(b).

In requesting reconsideration, employer argued that the 18.5 hours expended by counsel in preparing claimant's post-hearing brief were excessive in view of the fact that the statement of facts and list of uncontested issues therein were adopted from the district director's Memorandum of Conference, and counsel had written similar briefs, containing the same case citations and using the same format, in four other cases in which he submitted large fee requests for his services. With its motion for reconsideration, employer attached thirteen exhibits in support of its opposition to the number of hours counsel expended on his post-hearing brief and the overall amount of the fee approved. These exhibits included the district director's award of attorney fees in this case for services rendered before the district director; a fee request to the administrative law judge in an unrelated case from another attorney who regularly handles Black Lung cases in the Birmingham area; four other briefs filed with the administrative law judge by claimant's attorney in other Black Lung cases, three of which were submitted prior to the filing of the post-hearing brief in the instant case; and counsel's fee applications in those four cases. The administrative law judge acknowledged this evidence but, for the reasons stated in his Supplemental Decision and Order, was not persuaded to alter his original determination that the work performed by counsel in preparing the post-hearing brief in this case was necessary and not excessive, and that the total fee requested was reasonable, thus employer's request for reconsideration was denied. We can discern no abuse of the administrative law judge's discretion in this regard. Contrary

to employer's arguments, the mere submission of a fee application of another attorney in an unrelated case is in and of itself insufficient to establish that the fee awarded to claimant's attorney herein was substantially higher than the fees customarily paid to claimants' attorneys in the Birmingham area[1] or that the number of hours expended in the preparation of his closing brief were excessive. *See generally Lanning, supra; Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Additionally, we reject employer's argument that the administrative law judge must base his fee award in this case upon the decision rendered by the district director, as fees for legal services must be approved at each level of the proceedings by the tribunal before which work was performed. 33 U.S.C. §928(c); 20 C.F.R. §725.366; *see generally Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994). Lastly, despite the similarities in claimant's counsel's various closing briefs, the administrative law judge could reasonably rely on counsel's representation that the 18.5 hours expended in preparing the post-hearing brief in the present case were not excessive but necessary to tailor the brief to the specific facts of this case, and the administrative law judge acted within his discretion in concluding, after consideration of the factors at 20 C.F.R. §725.366(b), that the requested fee was reasonable. Since employer has failed to demonstrate an abuse of discretion, we affirm the administrative law judge's approval of an attorney fee in the amount of $5,701.30 assessed against employer.

[1]We note that employer did not challenge the hourly rate sought by claimant's counsel.

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney Fees and his Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge