

BRB No. 00-0770 BLA

CHARLES KUHN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KENLEY MINING COMPANY)	
)	
and)	
)	
WEST VIRGINIA COAL-WORKERS=)	DATE ISSUED: _____
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)		
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Granting Modification of John C. Holmes, Administrative Law Judge.

John Cline, New River Health Center, Scarbro, West Virginia, for claimant.

Robert Weinberger (State of West Virginia Employment Programs Litigation Unit), Charleston, West Virginia, for carrier.

Edward Waldman (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Modification of Administrative Law Judge John C. Holmes (00-BLA-0066) holding claimant liable for the payment of his lay representative's fee awarded in connection with an approved 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).¹ Judge Holmes (the administrative law judge) held that, pursuant to the Board's decision in *Harrison v. Liberty Mutual Insurance Co.*, 3 BLR 1-596 (1981), there is no authority under the Act for assessing the fee of a claimant's lay representative against an employer. The administrative law judge thus held that employer was not required to pay the fee of claimant's lay representative and granted carrier's motion to modify the prior order of Administrative Law Judge Lawrence P. Donnelly² holding employer liable for payment of the fee. The administrative law judge indicated that the amount of the fee award may be considered a lien against Claimant's award. @ Order Granting Modification at 1.

On appeal, claimant contends that modification under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, as incorporated into the Act by Section 422(a), 30 U.S.C. § 932(a), does not apply to awards of attorney's fees or to questions of law and thus, Judge Donnelly's fee award was not subject to modification and the administrative law judge erred in granting modification of the award. Claimant also argues that the Act does not permit the lien which the administrative law judge placed on claimant's benefits.³ Citing *Madrak v. Director, OWCP*, 7 BLR 1-559 (1984) and *Harrison*, carrier argues that employer cannot be held liable for the payment of a lay representative's fee under the Act. Carrier acknowledges the procedural defects in its pursuit of a reversal of Judge Donnelly's decision, but urges the Board to decide the case on its merits and to affirm the administrative law judge's decision holding claimant liable for

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²The administrative law judge indicated that the case had been reassigned to him as Judge Donnelly was no longer with the Office of Administrative Law Judges.

³Claimant has submitted a supplemental memorandum with several attachments containing documents which are not part of the record. The Board's review of a case is limited to record as developed by the administrative law judge. *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985). Accordingly, the Board cannot consider these documents.

payment of the fee. The Director, Office of Workers= Compensation Programs (the Director), contends that Judge Donnelly=s fee award was not subject to modification, and urges the Board to vacate the administrative law judge=s Order Granting Modification and to reinstate Judge Donnelly=s decision. The Director also argues that if, in the alternative, the administrative law judge=s imposition of liability on claimant is upheld, the Board should vacate the administrative law judge=s imposition of a lien on claimant=s benefits as a lien for the payment of a lay representative=s fee may not be imposed, *see* 20 C.F.R. ' 725.365; *Harrison, supra*.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass=n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which claimant, carrier and the Director have responded. Carrier and the Director assert that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant asserts that the revised regulation at 20 C.F.R. ' 725.310 Amore clearly states that modification would not provide a remedy in this case even if the employer did prevail. Therefore, the challenged regulations could affect the outcome of this case.@ Claimant=s Response to the Board=s Order dated March 2, 2001. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. We note that the amendments to the regulation at 20 C.F.R. ' 725.310(2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. ' 725.2, 65 Fed. Reg. 80,057. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board=s scope of review is defined by statute. If the administrative law judge=s findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. ' 921(b)(3), as incorporated by 30 U.S.C. ' 932(a); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Subsequent to the issuance of an award of benefits to the claimant, the claimant=s lay representative, John Cline, submitted an application for a fee. Director=s Exhibit 42. Mr. Cline sought a total fee of \$1,150.82, constituting 13.6 hours of work at \$80 per hour, plus \$62.82 in expenses. In his Supplemental Decision and Order Granting Attorney Fees dated August 24, 1998, Judge Donnelly awarded the fee as requested by Mr. Cline and held that

employer was liable for payment of the fee. Director=s Exhibit 47. Judge Donnelly noted Mr. Cline=s status as claimant=s lay representative. *Id.* at 1. On November 25, 1998, carrier apparently moved for correction of Judge Donnelly=s Order or, alternatively, for a remand of the case to the district director for modification proceedings,⁴ which motion Judge Donnelly denied by Order dated January 8, 1999, Director=s Exhibit 48. Judge Donnelly was not persuaded by carrier=s argument that there is no authority in the Act for a lay representative=s fee to be assessed against an employer. *Id.* Carrier thereafter sought modification before the district director of Judge Donnelly=s August 24, 1998 and January 8, 1999 Orders. Director=s Exhibit 50. The district director forwarded the case to the Office of Administrative Law Judges without making any initial finding. Director=s Exhibits 51, 52. On March 22, 2000, the administrative law judge issued his Order Granting Modification, which is the subject of the instant appeal.⁵

Claimant and the Director contend that Judge Donnelly=s fee award was not subject to modification and therefore, the administrative law judge erred in granting carrier=s request for modification of the fee award to correct Judge Donnelly=s error in imposing liability on employer for payment of claimant=s lay representative=s fee. Claimant and the Director also argue that the only means for employer to have effectively contested its liability for payment of the fee was to have timely requested reconsideration or appealed from Judge Donnelly=s decision, and it did neither.

The contentions of claimant and the Director have merit. The Board has held that an attorney=s fee is not subject to modification. *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997); *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993); *Fortier v. Bath Iron Works Corp.*, 15 BRBS 261 (1981). Although these cases arose under the Longshore and Harbor Workers= Compensation Act, 33 U.S.C. ' ' 901-950, Sections 22 and 28, governing modification and attorney=s fees respectively, are incorporated into the Act by Section 422(a). 33 U.S.C. ' ' 922, 928, as incorporated by 30 U.S.C. ' 932(a). Under the Act, an attorney=s fee is awarded Ain addition to the award of benefits.@ 20 C.F.R. ' 725.367(a)(2000).⁶ ABenefits@ are defined by 20 C.F.R. ' 725.101(a)(18) as

⁴Carrier=s motion is not of record and is described by Judge Donnelly in his Order.

⁵The administrative law judge issued his Order on the record. Carrier had waived its right to a hearing, Letter of K. Keian Weld dated March 3, 2000, and claimant had indicated that resolution of the case did not require a hearing. Letter of John Cline dated January 9, 2000.

⁶The amendments to the regulation at 20 C.F.R. ' 725.367(2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. ' 725.2,

All money or other benefits paid or payable under section 415 or part C of title IV of the Act on account of disability or death due to pneumoconiosis.⁷ Section 725.310(2000) permits the factfinder to terminate, continue, reinstate, increase, or decrease benefit payments or award benefits.⁸ Thus, an attorney's fee does not fall within the meaning of Abenefits@ and is not subject to modification under Section 725.310(2000).

Further, the fact that this case involves a lay representative's fee and not an attorney's fee does not compel a different result. The critical facts remain that Judge Donnelly treated this case as if it involved an attorney's fee rather than a lay representative's fee, by imposing liability on employer for payment of the fee, and that, in either case, Judge Donnelly's fee award does not constitute a Abenefit@ and is not subject to modification under 20 C.F.R. ' 725.310(2000). As claimant and the Director correctly argue, employer was obligated to either move for reconsideration or to appeal from Judge Donnelly's fee award in order to address any error therein. Employer did neither.

Based on the foregoing, we hold that the administrative law judge erroneously granted carrier's request for modification of Judge Donnelly's fee award. We, therefore, vacate the administrative law judge's Order Granting Modification.⁸

Accordingly, the administrative law judge's Order Granting Modification is vacated.

65 Fed. Reg. 80,057. Further, the regulation at 20 C.F.R. ' 725.367 concerns attorney's fees as opposed to lay representative's fees. We note, however, that comments to the revised regulation at 20 C.F.R. ' 725.367 provide:

The Department rejected comments suggesting that lay representatives should be entitled to collect fees from responsible coal mine operators or the fund.

65 Fed. Reg. 79979.

⁷The regulation at 20 C.F.R. ' 725.101(a)(18)(2000) has been amended. The revised regulation applies to all claims. *See* 20 C.F.R. ' 725.2, 65 Fed. Reg. 80,057. The revised regulation at Section 725.101(a)(18) defines the term Abenefits@ to additionally include the cost of the complete pulmonary exam authorized by the Act, 30 U.S.C. ' 923(b); 20 C.F.R. ' 725.406(2000).

⁸Claimant further contends that the administrative law judge erred in imposing a lien on claimant's benefits in the amount of the fee award, and that Judge Donnelly properly exercised his authority in imposing liability on employer for payment of claimant's lay representative's fee. Claimant also submits that, along with a decline in the approval rate of claims filed under the Act, there has been a decline in the number of attorneys willing to represent claimants who seek benefits under the Act, and thus, that lay advocates and law students are the only remaining sources of legal assistance. Claimant's arguments, and submission, are rendered moot by our decision to vacate the administrative law judge's Order Granting Modification.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge