

BRB No. 09-0662 BLA

SUE NELL DAVIS )  
(Widow of MARVIN DAVIS) )  
 )  
Claimant-Respondent )  
 ) DATE ISSUED: 05/07/2010  
v. )  
 )  
MIDWEST COAL COMPANY )  
 )  
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 Fees of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Scott A. White (White & Risse, L.L.P.), Arnold, Missouri, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order-Award of Attorney's Fees (06-BLA-5839) of Administrative Law Judge Daniel F. Solomon rendered with respect to a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l))(the Act).<sup>1</sup> Claimant filed her

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<sup>1</sup> The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not affect employer's appeal of the administrative law judge's fee award. Claimant's claim for benefits is not before the Board. Consequently, claimant's motion for an extension of time to file a supplemental brief concerning the impact on her

claim on May 16, 2005, Director's Exhibit 2, and was awarded benefits by the administrative law judge on July 22, 2008. Upon review of employer's appeal, the Board vacated the award of benefits, and remanded the case to the administrative law judge for further consideration. *S.N.D. [Davis] v. Midwest Coal Co.*, BRB No. 08-0791 BLA (Aug. 28, 2009)(unpub.). The case is currently pending before the administrative law judge.

In his July 22, 2008 decision awarding benefits, the administrative law judge gave claimant's counsel<sup>2</sup> thirty days to file his fee petition. Claimant's counsel moved for an extension on January 5, 2009, and filed his fee petition on January 20, 2009. He asked the administrative law judge to consider the fee petition even though it was filed late, arguing that the delay was excusable in light of counsel's heavy caseload, and that no harm would result to employer from considering the petition. Claimant's counsel requested \$4,920, representing 32.8 hours of services at \$150 per hour.

Employer objected that the fee petition was untimely. Employer also objected to the requested hourly rate of \$150, and asserted that it should be reduced to \$125 per hour. Employer submitted the declaration of Ms. Christine Terrill, the supervisor of Occupational Disease claims at Old Republic Insurance Company, stating that Old Republic currently pays attorneys with over ten years of experience \$125 per hour "to litigate federal black lung claims for [employer] in Carbondale, Illinois." Exhibit A to Employer's Objection. Employer also objected that certain time entries were for services that were not performed before the administrative law judge, and that other time entries were excessive.

Claimant's counsel responded to employer's objection. With regard to his requested hourly rate, claimant's counsel responded that \$150 is his usual hourly rate, and is the rate he previously has been awarded by administrative law judges for black lung work. Claimant's Counsel's Response at 2. With respect to the hours objected to by employer, claimant's counsel agreed that the services not performed before the administrative law judge should be disallowed, as should certain travel time to and from the hearing.

Initially, the administrative law judge found that, although the fee petition was late, no harm resulted to employer from considering it. Further, the administrative law judge found that "[p]etitioner is credible that his billing rate is \$150 per hour and that is the equivalent rate for someone of like experience in Western Kentucky." Supplemental

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claim of the recent amendments, as well as employer's motion to remand this case to the district director to determine their impact, are moot.

<sup>2</sup> Claimant's counsel is Mr. Brent Yonts of Greenville, Kentucky.

Decision and Order at 2. The administrative law judge discounted the affidavit submitted by employer, because he found that the \$125 hourly rate discussed by Ms. Terrill was not representative of claimant's counsel's "geographical area," or of "the hourly rates of most counsel." *Id.* The administrative law judge disallowed 2.05 hours for services that were not performed before him, and 1.5 hours for travel time to and from the hearing. The administrative law judge found that the remaining time entries were reasonable. Therefore, the administrative law judge awarded claimant's counsel a fee of \$4,387.50, representing 29.25 hours of services at \$150 per hour.

On appeal, employer asserts that the administrative law judge erred in considering the fee petition, as it was untimely. Employer also challenges the awarded hourly rate of \$150, as well as the number of hours awarded. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 902, BLR (7th Cir. 2003);<sup>3</sup> *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*). An attorney's fee may be approved pending a final award of benefits, but that fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

Employer first argues that the administrative law judge lacked jurisdiction to consider counsel's fee petition because it was untimely. We disagree.

The applicable regulation requires only that a fee petition be filed "within the time limits allowed by the . . . administrative law judge . . ." 20 C.F.R. §725.366(a). In this case, the administrative law judge provided a period of thirty days from the administrative law judge's initial award of benefits for claimant's counsel to file his fee petition. Claimant's counsel filed his fee petition after the specified time. However, the applicable regulation does not provide a penalty for a late-filed fee petition. Thus, the question of whether to consider a fee petition that is filed late is left to the administrative law judge's discretion.

Further, contrary to employer's contention, the fact that employer's appeal of the administrative law judge's award of benefits was pending before the Board when

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<sup>3</sup> The law of the United States Court of Appeals for the Seventh Circuit is applicable, as the miner was last employed in the coal mining industry in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

claimant's counsel filed his fee petition does not establish that the administrative law judge lacked jurisdiction to render a fee award. Rather, any fee awarded by the administrative law judge would not be enforceable until the claim was successfully prosecuted. *See Goodloe*, 19 BLR at 1-100 n.9. We therefore reject employer's contention that the administrative law judge lacked jurisdiction to consider the fee petition.

Employer next argues that the administrative law judge erred in awarding claimant's counsel an hourly rate of \$150 because claimant's counsel did not establish that \$150 is his market rate. Taking into account counsel's fee petition, counsel's response to employer's objections, counsel's thirty years of experience, and prior fee awards by this administrative law judge to claimant's counsel, the administrative law judge specifically determined that \$150 "is [counsel's] hourly rate and is the going rate in his geographical area," Western Kentucky. Supplemental Decision and Order at 2. The administrative law judge did not abuse his discretion in considering claimant's counsel's representation that \$150 is his usual hourly rate, or in considering his prior fee awards to claimant's counsel, in determining the hourly rate. *See Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 894-95, 22 BLR 2-514, 2-535 (7th Cir. 2002); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672, 22 BLR 2-483, 2-493 (7th Cir. 2002); *accord Westmoreland Coal Co. v. Cox*, F.3d , 2010 WL 1409418 (4th Cir. 2010); *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663-64, 24 BLR 2-106, 2-126 (6th Cir. 2008); *Bowman v. Bowman Coal Co.*, BLR , BRB No. 07-0320 BLA (Apr. 15, 2010), slip op. at 5 n.8; *Maggard v. Int'l Coal Group, Knott County, LLC*, BLR , BRB No. 09-0271 BLA (Apr. 15, 2010), slip op. at 9 n.5.

Further, the administrative law judge permissibly discounted the affidavit of Ms. Terrill, stating that \$125 per hour is the appropriate hourly rate, as unrepresentative of claimant's geographical area. *See Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126. Thus, we affirm the administrative law judge's award of an hourly rate of \$150. *See Chubb*, 312 F.3d at 894-95, 22 BLR at 2-535; *Goodloe*, 299 F.3d at 672, 22 BLR at 2-493.

Lastly, employer contends that the administrative law judge erred in awarding fees for services that were charged in quarter-hour billing increments. We decline to address this issue because it was not raised before the administrative law judge.<sup>4</sup> *See Braenovich v. Cannelton Indus.*, 22 BLR 1-236, 1-251 (2003). As employer raises no other

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<sup>4</sup> We note, however, that the United States Court of Appeals for the Sixth Circuit has approved of quarter-hour billing increments. *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 666, 24 BLR 2-106, 2-127 (6th Cir. 2008); *see* 20 C.F.R. §802.203(d)(3).

arguments with respect to the number of hours awarded, the administrative law judge's award of 29.25 hours is affirmed.

Therefore, we affirm the fee award. As noted, a fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *Goodloe*, 19 BLR at 1-100 n.9.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge