

BRB No. 07-0194 BLA

E.D. )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 WESTMORELAND COAL COMPANY ) DATE ISSUED: 11/26/2007  
 )  
 Employer-Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Attorney Fee Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Attorney Fee Order (01-BLA-0594) of Administrative Law Judge Michael P. Lesniak on a 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).<sup>1</sup> Claimant filed his most recent claim on June 1, 2000. Director's Exhibit 1.

---

<sup>1</sup> The 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 20 C.F.R. Parts 718, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

The district director issued an Initial Determination awarding benefits on January 26, 2001. Director's Exhibit 30. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing, which, after several continuances, was scheduled for October 19, 2004.

Prior to the hearing, on October 15, 2004, claimant's counsel filed a motion to compel discovery, to which employer objected. At the October 19, 2004 hearing, employer's counsel admitted to having removed the narrative portion of a medical report and to having withheld it from claimant. Hearing Transcript 1 at 44. By Order dated October 22, 2004, the administrative law judge granted claimant's counsel's motion to compel discovery and scheduled an evidentiary hearing to be held on November 10, 2004.

Prior to the second hearing, on October 27, 2004, employer withdrew its controversion of all issues. Employer requested that the hearing be cancelled and that the claim be remanded to the district director for an order of payment. By letter dated November 1, 2004, claimant's counsel alleged that employer's counsel had violated the rules of discovery and requested that the hearing go forward on that issue. Over employer's objections,<sup>2</sup> the administrative law judge held further proceedings to

---

<sup>2</sup> Employer requested that the hearing be cancelled on the ground that, once employer withdrew its controversion of all issues, jurisdiction over the claim lay with the district director. By Order dated November 9, 2004, the administrative law judge denied employer's request, retained jurisdiction, and rescheduled the evidentiary hearing for December 16, 2004 for the purpose of investigating claimant's counsel's allegations. On November 19, 2004, employer again moved that the hearing be cancelled. The administrative law judge requested that claimant's counsel respond to employer's motion, and, after considering the parties' arguments, denied employer's request by Order dated December 6, 2004, and held the hearing as scheduled. At the hearing, claimant's counsel requested that the administrative law judge certify the facts of the case to the district court for consideration of sanctions. By Order dated March 21, 2005, the administrative law judge denied claimant's counsel's request, and remanded the case to the district director for the payment of benefits. On April 20, 2004, claimant's counsel requested reconsideration, and in a decision dated June 27, 2005, the administrative law judge again denied claimant's counsel's request to certify the facts, suggesting that the parties attempt to reconcile the matter informally. By letter dated August 18, 2005, claimant's counsel advised the administrative law judge that attempts to reconcile the matter were unsuccessful, and again asked that the facts of the case be certified to the district court. By Order dated October 21, 2005, the administrative law judge considered claimant's counsel's letter to be a second motion for reconsideration, granted claimant's counsel's request, and certified the facts to the United States District Court for the Southern District of West Virginia for appropriate action.

investigate the alleged discovery violations by employer's counsel and to determine whether to certify the facts to the United States District Court for the Southern District of West Virginia for consideration of sanctions, as claimant's counsel had requested. The administrative law judge ultimately granted claimant's counsel's request, by Order dated October 21, 2005.

In a memorandum opinion dated August 30, 2006, the district court dismissed the action, holding that, under the facts of this case, sanctions did not lie within its jurisdiction. *Daugherty v. Westmoreland Coal Co. (In re Jackson Kelly PLLC)*, No. 2:05-0853, slip op. at 4 (S.D. W.Va. Aug. 30, 2006). However, the district court referred the matter to the Office of Disciplinary Counsel of the West Virginia State Bar. *Id.* at 13.

On August 14, 2006, claimant's counsel submitted a fee petition to the administrative law judge for work performed between August 4, 2003 and October 25, 2005, requesting a fee of \$28,344.01 representing 104 hours of attorney services at the rate of \$250.00 per hour, plus an additional \$2,344.01 in expenses. After considering employer's objections and claimant's counsel's response thereto, the administrative law judge approved the hourly rate and all of the hours requested, but disallowed \$500.22 of the requested expenses. The administrative law judge also approved claimant's counsel's subsequent request for a supplemental fee of \$1,687.50, representing 6.75 hours at the rate of \$250.00 per hour for legal work performed from September 12, 2006 through October 13, 2006, in responding to employer's opposition to claimant's counsel's fee petition. Accordingly, the administrative law judge directed employer to pay claimant's counsel the amount of \$29,531.29 for legal services and expenses on behalf of claimant.

Employer appeals, challenging the administrative law judge's Attorney Fee Order on several grounds. Employer contends that the administrative law judge erred in finding the fee petition timely filed. Employer's Brief at 34. Employer's principal argument, however, is that the administrative law judge erred in approving fees for 39.75 hours of attorney services performed between October 27, 2004, when employer accepted liability, and October 25, 2005, because: (1) the administrative law judge no longer had jurisdiction over the claim after employer withdrew controversion; (2) claimant did not receive an economic benefit for services performed after October 27, 2004, and, therefore, these hours were not necessary to the successful prosecution of the claim; (3) the administrative law judge did not have the authority to issue monetary sanctions; and (4) the administrative law judge's investigation into the alleged discovery violations, after employer accepted liability, was arbitrary, capricious, and contrary to law. Employer's Brief at 17-20. Employer further asserts that the administrative law judge erred in approving the requested hourly rate of \$250.00, and failed to exercise his discretion in determining the number of compensable hours for services rendered on August 5, 2003, and August 24, August 30, and August 31, 2004, overruling employer's objections without adequate discussion. Claimant's counsel responds, urging affirmance of the

attorney fee award. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

The standard of review for the Board in analyzing petitioner's arguments on appeal of an attorney fee determination is whether the determination is arbitrary, capricious, or an abuse of discretion. *See Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998). The adjudicating officer must discuss and apply the regulatory criteria at 20 C.F.R. §725.366 in determining the fee award due, if any. *See Lenig v. Director, OWCP*, 9 BLR 1-147 (1986).

Initially, we reject employer's assertion that the administrative law judge erred in accepting claimant's counsel's fee petition as timely filed. The regulations permit the administrative law judge to set the time limits for the filing of a fee petition. *See* 20 C.F.R. §725.366(a). In addition, the Board has held that the loss of an attorney fee is a harsh result that should not be imposed except in the most extreme circumstances. *Paynter v. Director, OWCP*, 9 BLR 1-190 (1986). As the administrative law judge considered employer's contention that the fee petition was untimely, but explained why he found that claimant's counsel had provided ample justification for his delay, we hold that the administrative law judge did not abuse his discretion in accepting claimant's counsel's fee petition as timely. 20 C.F.R. §725.366(a); *see generally Bankes v. Director, OWCP*, 765 F.2d 81, 8 BLR 2-1 (6th Cir. 1985); *Bradley v. Director, OWCP*, 8 BLR 1-418 (1985); Attorney Fee Order at 4.

We also reject employer's contention that the administrative law judge lacked jurisdiction to hold any additional proceedings after October 27, 2004, when employer accepted liability for the payment of benefits. Employer specifically asserts that the regulation at 20 C.F.R. §725.462 requires that "[i]f a party withdraws his or her controversion of all issues, the administrative law judge shall remand the case to the district director for the issuance of an appropriate order." Employer's Brief at 17. Thus, employer contends, when employer withdrew controversion on October 27, 2004, jurisdiction over the claim immediately reverted to the district director as a matter of law, and the administrative law judge lacked jurisdiction to hold further proceedings in this claim. Employer's Brief at 17.

We reject employer's argument that 20 C.F.R. §725.462 immediately deprived the administrative law judge of jurisdiction when employer withdrew its controversion of the claim.

The regulations provide that:

If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, . . . or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, . . . the

administrative law judge responsible for the adjudication of the claim, shall certify the facts to the Federal district court having jurisdiction . . . .

20 C.F.R. §725.351(c) (2000); *see also* The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. §18.29(b).

In this case, during the October 19, 2004 hearing before the administrative law judge, prior to employer's withdrawal of controversion, employer's counsel admitted to having removed the narrative portion of a medical report and having withheld it from claimant. Pursuant to the authority conferred on him by the regulations at 20 C.F.R. §725.351 (2000) and 29 C.F.R. §18.29, the administrative law judge properly retained jurisdiction over this claim in order to fully ascertain, and, as appropriate, to certify, the facts to the Federal district court. We, therefore, also reject employer's argument that, pursuant to 20 C.F.R. §725.479, which requires that a motion for reconsideration be filed within thirty days of the filing of an administrative law judge's decision and order, the administrative law judge lacked the jurisdiction to either consider or grant claimant's counsel's request that the administrative law judge certify the facts of this case to the district court. The regulations at 20 C.F.R. §725.351 (2000) and 29 C.F.R. §18.29 grant the administrative law judge the authority to certify the facts on his own motion. Thus, the administrative law judge's consideration of claimant's counsel's untimely second request for reconsideration was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We find merit, however, in employer's contention that the administrative law judge erred in awarding claimant's counsel fees for 39.75 hours of services performed after employer's October 27, 2004 withdrawal of controversion, because those services were not necessary to the successful prosecution of the claim.

Counsel is entitled to fees for all necessary services rendered claimant at each level of the adjudicatory process, even if he was unsuccessful at a particular level, so long as he is ultimately successful in prosecuting the claim. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *see* 20 C.F.R. §§725.366, 725.367 (2000); *Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), *reaff'd on recon. en banc*, 13 BLR 1-56 (1989); *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105, 1-106 (1987). Successful prosecution of the claim requires success in establishing, or preserving, claimant's entitlement to compensation benefits. *See Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 248, 38 BRBS 37, 39(CRT) (4th Cir. 2004). Thus, the Board has held that the test of whether an attorney's services are "necessary" is "whether an attorney at the time he or she performs the work in question could reasonably regard the work as *necessary to establish entitlement.*" *Marcum v. Director, OWCP*, 2 BLR 1-894, 1-901 (1980)(emphasis added).

Therefore, while claimant's counsel is entitled to fees for services performed prior to employer's withdrawal of controversion, *see Markovich*, 11 BLR at 1-106, once employer accepted liability for the payment of benefits, claimant no longer had any economic interest in the outcome of the additional proceedings. Thus, as claimant's counsel's actions after employer accepted liability for payment did not confer any additional economic benefit to claimant, claimant's counsel has failed to meet his burden to establish that the 39 hours of services performed after October 28, 2004 were necessary to the successful prosecution of claimant's claim for entitlement.<sup>3</sup> *See Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993)(Order)(*en banc*)(holding that a successful prosecution of a claim exists when claimant receives an economic benefit); *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 the payment of benefits rather than entitlement to benefits); *Wade v. Director, OWCP*, 7 BLR 1-334 (1984) (holding that the petitioning attorney bears the burden of establishing that a particular service is necessary to establish entitlement). We, therefore, reverse the administrative law judge's award of fees for the 39 hours of itemized services performed by claimant's counsel on October 29, 2004 through October 25, 2005. As employer is not liable for fees after controversion is withdrawn, we decline to address, as moot, employer's additional arguments with respect to the 39 hours. *See Larioni*, 6 BLR at 1-1278.

We next address employer's contention that the administrative law judge's award of \$250.00 per hour for claimant's counsel's services in this case is excessive. Employer's Brief at 30. Employer specifically asserts that \$250.00 per hour exceeds the usual market rate charged by most attorneys in West Virginia or in federal black lung claims, and that the United States Court of Appeals for the Fourth Circuit has established that claimant's counsel's appropriate hourly rate for black lung claims is \$200.00. Employer's Brief at 30-31. Finally, employer contends that as claimant's counsel's own affidavit establishes that he did not raise his billing rates to \$250.00 until the fall of 2005, it was error for the administrative law judge to award an hourly rate of \$250.00 for any work completed prior to that time. Employer's Brief at 34-35.

Initially, we reject employer's challenge to the administrative law judge's award of \$250.00 per hour, as excessive. The administrative law judge found that claimant's counsel is one of the most experienced attorneys in the field of black lung litigation and concluded that the requested hourly rate of \$250.00 was "consistent with [claimant's

---

<sup>3</sup> We allow the .75 hours of services performed by claimant's counsel on October 28, 2004 to conclude activities specifically related to establishing claimant's entitlement to benefits before the administrative law judge. *See Brown v. Director, OWCP*, 3 BLR 1-95 (1979).

counsel's] years of experience, his skill, and the complexity of the case." Attorney Fee Order at 4; *see* 20 C.F.R. §725.366(b); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986).

However, we agree with employer, that attorney's fees should be awarded based upon the hourly rate in effect at the time the services were rendered. *Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65, 67 (1986). In an affidavit attached to his fee petition, claimant's counsel represented that he charged an hourly rate of \$225.00 from the fall of 2000 until the fall of 2005, when he raised his rates to \$250.00 per hour. Attorney Fee Petition Exhibit A, at 6-7. The administrative law judge, however, awarded claimant's counsel a fee based on the \$250.00 hourly rate for services that were performed when counsel's hourly rate was still \$225.00.<sup>4</sup> Therefore, we modify the administrative law judge's fee order to reflect the hourly rate that was in effect when particular services were rendered.

Consequently, with respect to claimant's counsel's hourly rate of \$250.00, we affirm the award for the 6.75 hours of itemized services performed by claimant's counsel, in defense of his fee, between September 12, 2005 and October 13, 2006, as his new rate was in effect during that period. However, as discussed above, for the itemized services performed from August 4, 2003 through October 28, 2004, we modify the administrative law judge's order to reflect an hourly rate of \$225.00. *See Hobbs*, 18 BRBS at 67.

Finally, we reject employer's assertion that the administrative law judge erred in approving the number of compensable hours claimed by claimant's counsel for services performed on August 5, 2003, and August 24, 30, and 31, 2004, without adequately addressing employer's objections on the grounds that the descriptions of work performed on these dates were too vague and that the time spent was excessive. Employer's Brief at 32-33. Contrary to employer's contention, the administrative law judge specifically stated that he had considered employer's objections to certain time entries, together with claimant's counsel's responses to employer's objections, and found that claimant's counsel's "explanation of the time spent on this case was sufficient." Attorney Fee Order at 1, 4. The administrative law judge then permissibly concluded that, taking into consideration that "[t]he record in this matter is more extensive than a typical claim and the issues were more complex[.]" he was "satisfied" that the hours spent on this claim were "justified." Attorney Fee Order at 4. Contrary to employer's arguments, the

---

<sup>4</sup> In responding to employer's objections to the fee petition, claimant's counsel indicated that he was entitled to receive attorney fees based on current rather than historic rates. Claimant's Response Brief at 33. The cases cited by claimant's counsel to support his position relate to compensation where there has been delay in payment. However, claimant's counsel neither specifically requested, nor was awarded, payment to compensate for delay.

administrative law judge properly considered the factors set forth in 20 C.F.R. §725.366(b), and we detect no abuse of discretion in his approval of counsel's fee for the itemized services performed on August 5, 2003, and August 24, 30, and 31, 2004, as reasonable. *See Jones*, 21 BLR at 1-108.

Accordingly, the administrative law judge's Attorney Fee Order, is reversed in part, affirmed in part and modified in part, consistent with this opinion, to reflect an award of \$18,156.29 representing 65 hours of legal services at an hourly rate of \$225.00, 6.75 hours of legal services at an hourly rate of \$250.00, and \$1,843.79 in expenses, to be paid directly to him by employer.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

JUDITH S. BOGGS  
Administrative Appeals Judge