

BRB No. 96-0379 BLA

JOHN R. FRISCO)
)
 Claimant-Petitioner)
)
 v.)
)
 CONSOLIDATION COAL COMPANY)
)
 Employer-Respondent)
)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED) DATE ISSUED: 10/29/99
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Supplemental Decision and Order on Reconsideration of James Guill, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant's counsel appeals the Supplemental Decision and Order on Reconsideration (80-BLA-9829) of Administrative Law Judge James Guill denying counsel's request for a supplemental fee award 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). On reconsideration, the administrative law judge found that counsel's fee award could not now be reconsidered because the August 27, 1985 fee award issued by Administrative Law Judge Arthur C. White became final thirty days after his decision awarding a fee was rendered. Supplemental Decision and Order on Reconsideration at 3. The administrative law judge also found Judge White's fee award to be proper and reasonable and that counsel is not

entitled to a supplemental fee due to delay. Supplemental Decision and Order on Reconsideration at 5-6. Accordingly, the administrative law judge denied counsel's request for reconsideration.

On appeal, claimant's counsel contends that the administrative law judge erred in refusing to reconsider counsel's fee award pursuant to 20 C.F.R. §725.366, citing *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999). Claimant's Counsel's Brief at 4-7. Claimant's counsel also asserts that the administrative law judge erred in determining that because delay in payment occurs regularly in black lung cases, this factor is already incorporated into the reasonable hourly rate. Claimant's Counsel's Brief at 6-7. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

On September 15, 1982 Judge White awarded benefits and attorney's fees in this case.¹ Subsequently, employer appealed the award of benefits and claimant cross-appealed, challenging Judge White's findings regarding the date from which benefits commence and the award of attorney's fees. On appeal, the Board affirmed the administrative law judge's finding of Section 727.203(a)(1) invocation. *See Frisco v. Consolidation Coal Co.*, BRB No. 82-1820 BLA/A (May 20, 1985)(unpub.). The Board also vacated the administrative law judge's findings pursuant to Section 727.203(b)(2), (b)(3), and (b)(4) and regarding attorney's fees. *See Frisco, supra*. On remand, counsel's fee award was finally adjudicated by Judge White on August 27, 1985. After successive appeals and remands regarding claimant's entitlement to benefits, claimant's award of benefits became final when the Board affirmed Judge White's finding of entitlement on April 28, 1993, and no further appeal was taken. Thereafter, on May 7, 1993, claimant's counsel sent a letter to the Office of

¹Claimant's counsel requested a fee in the amount of \$5,168.15. This amount represents 48.5 hours of attorney work at \$100.00 per hour, 1 hour of paralegal work at \$20.00 per hour, and \$298.15 in expenses. Judge White reduced the number of compensable attorney hours from 48.5 to 30, approved the paralegal time and expenses, and ordered a total fee award of \$3,318.15.

Administrative Law Judges requesting reconsideration of his attorney fee award. Employer subsequently submitted a letter stating that the Office of Administrative Law Judges has no jurisdiction to reconsider the fee award.

The administrative law judge determined that he could not consider counsel's request for reconsideration of the fee award because counsel did not appeal within thirty days Judge White's August 27, 1985 decision awarding fees. Supplemental Decision and Order on Reconsideration at 3. Additionally, the administrative law judge found that Judge White properly assessed the attorney fee against employer in his August 27, 1985 decision, even though the decision on the merits of the case "had not become 'final' and was not enforceable until sixty days after the Board issued its Decision and Order on April 28, 1993." *Id.*

Claimant's counsel asserts that the administrative law judge erred in finding that counsel's request for reconsideration of his fee award pursuant to Section 725.366(d) should have been filed within thirty days of Judge White's August 27, 1985 decision. Claimant's Counsel's Brief at 5. Rather, counsel asserts that "it was entirely proper for him to seek reconsideration of his fee award on May 7, 1993, which was within ten days of the Board's final decision [regarding entitlement],"² citing *Kerns, supra*. Claimant's Counsel's Brief at 6.

In *Kerns*, which was issued subsequent to the administrative law judge's Supplemental Decision and Order on Reconsideration, the United States Court of Appeals for the Fourth Circuit stated that "[a]n attorney may request a reconsideration of his fee award, and the regulations do not provide for a time limit within which this request must be filed." *See Kerns, supra*. The Fourth Circuit court noted that counsel, in that case, complied with the administrative law judge's requirement by filing his fee petition within thirty days and that because of the various decisions in this case, counsel was unable to request reconsideration of his fee award before a final decision was rendered on the merits. *Id.* Therefore, the court held that counsel's only recourse for reconsideration of his attorney fee was to file a request for supplemental fees with the administrative law judge after the award

²As counsel asserts, it is unclear why the administrative law judge states that counsel's request for reconsideration was filed over two years after the Board's Decision and Order, Supplemental Decision and Order on Reconsideration at 3, when counsel filed his request within days, rather than years, of the Board's April 28, 1993 decision.

of benefits became final in 1990, after the Fourth Circuit court affirmed the award of benefits, which was initially made in 1984. *Id.*

Accordingly, in light of *Kerns*, we vacate the administrative law judge's finding that he could not reconsider counsel's fee award because counsel did not timely appeal Judge White's August 27, 1985 fee award. Rather, in accordance with *Kerns*, it was proper for counsel to request reconsideration of his fee award after the Board's affirmance of the award of benefits became final in 1993. We also note that employer's assertion, that a long delay in the appellate review of a fee petition denies due process to employer, is without merit inasmuch as employer would be afforded a reasonable time to respond to counsel's request for a supplemental fee at the time such a request was made.

Additionally, counsel contends that the administrative law judge erred in rejecting his assertion that his original fee should be enhanced because of the ten-year delay from the fee award to the actual payment of the fee. Claimant's Counsel's Brief at 6-7. The administrative law judge stated that the "reasonable hourly rate" in black lung cases already accounts for "factors such as risk of loss and delay of payment." Supplemental Decision and Order on Reconsideration at 4. Thus, absent "special circumstances" the administrative law judge found that the attorney's fee awarded at the earlier time will already have accounted for the expected delay when a final decision is issued and the award becomes enforceable. *Id.* Thus, the administrative law judge found that, in essence, counsel was requesting "a type of 'interest' due to the delay." Supplemental Decision and Order on Reconsideration at 5. Accordingly, the administrative law judge rejected counsel's request for a supplemental fee and found Judge White's original fee award to be "proper and reasonable." Supplemental Decision and Order on Reconsideration at 6.

We hold that counsel's contentions have merit inasmuch as the Fourth Circuit court in *Kerns* also held that current law requires an administrative law judge to consider enhancement for delay. Therefore, we vacate the administrative law judge's findings regarding this issue and remand this case for the administrative law judge to reconsider whether or not to enhance counsel's fee because of the almost ten-year delay between the fee award and payment.³ *See Kerns, supra; cf. Shaffer v. Director, OWCP*, 21 BLR 1-97 (1998)(enhancement of hourly rate for delay not appropriate where Trust Fund is liable because of government's immunity from award of interest).

³Employer asserts that the delay in this case fails to cause the award of attorney fees to be unreasonable. Employer's Brief at 6. Employer contends that because the award of attorney fees became final in 1993 and counsel was paid in 1993, there was no delay in this case. However, the delay in payment is considered to be the time the initial fee petition was filed in 1982 until the date of payment in 1993. *See Kerns, supra*. Therefore, counsel is essentially correct in stating that there was a ten-year delay between the fee award and payment.

Accordingly, the administrative law judge's Supplemental Decision and Order on Reconsideration is vacated and this case is remanded for further findings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge