

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 23-0150 BLA

ANDREW URICK)

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED: 04/29/2024

DECISION and ORDER

Appeals of the Proposed Order Supplemental Award Fee for Legal Services and Reconsideration of the Proposed Order Supplemental Fee Award of Fee for Legal Services of David Balmforth, Acting District Director, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Amanda Torres (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Claimant's counsel (Counsel) appeals Acting District Director David Balmforth's (the district director's) November 15, 2022 Proposed Order Supplemental Award Fee for Legal Services (Supplemental Fee Award) and December 22, 2022 Reconsideration of the Proposed Order Supplemental Award Fee for Legal Services (Reconsideration Letter) (22YY2-2021181) issued in connection with the successful prosecution of a claim filed on June 29, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

On May 13, 2022, the district director issued a Proposed Decision and Order Awarding Benefits (PDO) and identifying the responsible operator. Thereafter, in correspondence dated June 27 and June 28, 2022, the claim's examiner dismissed the putative responsible operator and advised the parties that the Black Lung Disability Trust Fund (Trust Fund) accepted liability for Claimant's benefits.

On October 17, 2022, Counsel filed a fee petition for work performed before the district director. Counsel requested a total fee of \$2,450.00 representing 7.0 hours of services rendered between July 15, 2021 and July 14, 2022 at an hourly rate of \$350.00, and \$300.00 in costs. On November 15, 2022, the district director issued a Supplemental Fee Award, awarding Counsel \$1,650.00 for 5.50 hours of services at a reduced hourly rate of \$300.00 and no costs. On November 30, 2022, Counsel requested reconsideration of the Supplemental Fee Award, asking the district director to reconsider the approved hourly rate, the exclusion of certain time entries, and the exclusion of costs. On December 22, 2022, the district director issued a Reconsideration Letter, awarding an additional \$225.00 in fees for 0.75 hour of services rendered on July 15, 2021, July 22, 2021, and August 30, 2021, at the previously approved hourly rate of \$300, but continuing to deny reimbursement for the \$300.00 in costs. Thus, the district director ultimately awarded \$1,875.00 in attorney's fees.

On appeal, Counsel challenges the district director's denial of his request for reimbursement of \$300.00 in costs expended for computed tomography (CT) scan and x-ray interpretations by Dr. DePonte.¹ The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the district director's denial of reimbursement for the \$300.00 in costs.

¹ Counsel does not challenge the district director's award of \$1,875.00 in attorney's fees; therefore, we affirm it. *See Skrack v. Island Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The amount awarded for an attorney fee is discretionary and will be upheld on appeal unless the challenging party shows it to be arbitrary, capricious, or an abuse of discretion.² *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

Counsel argues the district director erred in denying his request for reimbursement of \$300.00 in costs expended for Dr. DePonte's CT scan and x-ray interpretations. Specifically, Counsel contends that, although a final award was issued before he received Dr. DePonte's interpretations on July 18, 2022, when payment was originally made to retain Dr. DePonte's services on March 9, 2022, Counsel reasonably regarded Dr. DePonte's interpretations as necessary to prove entitlement. Counsel's Brief at 5 (unpaginated). He indicated that at the time, a responsible operator was still a party and there was no guarantee there would be a favorable final award. *Id.* at 4-5. The Director argues that Counsel did not argue how the district director's denial of the \$300.00 in costs was arbitrary, capricious, or an abuse of discretion. Director's Response at 3. He contends Counsel's argument that he reasonably believed the costs were necessary is inconsistent with the timeline and facts of the case. *Id.* at 3-4. We agree with the Director's position.

Reasonable and unreimbursed expenses may be awarded under 20 C.F.R. §725.366(c). The test for whether an expense is compensable is "whether an attorney at the time he performs the work in question could reasonably regard the work as necessary to establish entitlement." *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984); *see also Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

As the district director noted, and Counsel concedes, Dr. DePonte's interpretations were not submitted into evidence. Supplemental Fee Award; Reconsideration Letter; Counsel's Brief at 5 (unpaginated). Counsel further acknowledges that the February 4, 2022 Schedule for the Submission of Additional Evidence (SSAE) set deadlines for the submission of evidence: April 5, 2022, for affirmative evidence and May 5, 2022, for rebuttal evidence, while further noting either party may request an extension for good cause. Counsel's Brief at 2-3 (unpaginated). Counsel forwarded correspondence to Dr. DePonte requesting interpretations on March 30, 2022, and May 11, 2022. *See* Fee Petition; Request for Reconsideration. All SSAE deadlines had passed by the time Counsel's second request was sent to Dr. DePonte; however, at no point did Counsel request additional time to submit Dr. DePonte's interpretations before the district director.

² The Benefits Review Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Claimant's CM-911(a); Proposed Decision and Order.

Director's Response at 4; Counsel's Brief at 2 (unpaginated). Counsel's failure to request an extension to submit the evidence, particularly when one of the requests to Dr. DePonte was not sent until after the SSAE deadlines had already passed, belies Counsel's contention that he reasonably believed the evidence was necessary to establish entitlement.

Moreover, Counsel explains that Dr. DePonte's reports were not received until July 19, 2022; however, this occurred several weeks after the putative responsible operator was dismissed and the Trust Fund accepted liability on June 28, 2022. Counsel's Brief at 3 (unpaginated). Thus, as the Director argues, Counsel has not explained how he could have reasonably believed that any additional evidence was required once the Trust Fund accepted liability. Director's Response at 4. Further, Counsel has not explained what steps, if any, he took to avoid or mitigate incurring these costs given these facts.

Based on the foregoing, we conclude Counsel has failed to demonstrate the district director abused his discretion in denying reimbursement for \$300.00 in costs for Dr. DePonte's interpretations. *See Jones*, 21 BLR at 1-108.³

Accordingly, the district director's Proposed Order Supplemental Award Fee for Legal Services and Reconsideration of the Proposed Order Supplemental Fee Award of Fee for Legal Services are affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

³ Although our dissenting colleague indicates that he would have found Claimant's expenses were reasonable, the Board's standard of review is whether the attorney fee award constituted an abuse of discretion, even if we, or our dissenting colleague, might reach a different conclusion after reviewing the evidence de novo.

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the denial of Claimant's expenses to secure Dr. DePonte's CT scan and x-ray interpretations. Under the Black Lung Benefits Act, claimants and their attorneys are entitled to reimbursement for "reasonable" expenses incurred "in establishing the claimant's case." 20 C.F.R. §725.366(c).

The majority holds Claimant's expense was not reasonable in large part because Dr. DePonte's interpretations were ultimately not submitted into evidence and thus did not contribute to his success. However, a claimant need not show, after the fact, that the expenses in question directly contributed to his ultimate success; the proper test is whether the claimant could, at the time the expense was incurred, reasonably regard it as necessary to establish entitlement. *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984); *see also Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Thus, under the law, the fact that Dr. DePonte's interpretations were ultimately not submitted into evidence is not dispositive to the reasonableness of Claimant's efforts to obtain that evidence.

Nor is it dispositive that one of Claimant's attempts to secure Dr. DePonte's interpretations was made after the deadline for submitting evidence to the district director. While certain deadlines govern the submission of evidence to the district director, 20 C.F.R. §725.410(b), the parties are entitled to continue gathering medical evidence well after that date for later submission to the ALJ. 20 C.F.R. §725.456(b)(2) (any documentary evidence not submitted to the district director may be received in evidence by the ALJ if it has been exchanged with the other parties at least 20 days before the hearing). Upon any party's disagreement with the district director's proposed decision, the ALJ, in turn, must conduct a de novo review of the record and issue a new decision on entitlement based on the evidence submitted to the district director *and* the additional evidence admitted by the ALJ. 20 C.F.R. §725.455(a), (b).

Clearly then, black lung litigation and evidentiary development is an ongoing process between the district director and ALJ stages, and the evidence at issue in this appeal – CT scan and x-ray readings – are, by definition, relevant to establishing Claimant's entitlement. 20 C.F.R. §§718.202(a) (types of evidence necessary to establish pneumoconiosis), 725.202 (establishing pneumoconiosis is required for an award). There is no basis for the Board to assume that a claimant's effort to collect that evidence must come to a standstill while waiting for the district director to issue a proposed decision and order, particularly in the face of an ongoing challenge to his entitlement.

The facts of this case prove the point. Claimant's counsel initially sought Dr. DePonte's services to interpret a CT scan on March 30, 2022 at a cost of \$200.00, prior to the deadline for submitting evidence to the district director. Fee Petition; Request for

Reconsideration. Then, on May 11, 2022, prior to the district director's proposed decision in this claim, Claimant's counsel sought Dr. DePonte's services to interpret an x-ray at a cost of \$100.00. Fee Petition; Request for Reconsideration. At both times, in fact at all times while the claim was before the district director, the named responsible operator (RO) was still actively contesting Claimant's entitlement to benefits, which explains why Claimant would have continued developing evidence in support of his case. The named RO's subsequent request for a formal hearing before the ALJ to challenge Claimant's entitlement, at which additional evidence would be admissible by both parties, simply reinforces the reasonableness of Claimant's ongoing efforts to develop evidence. Employer's Request for Hearing.

The Director's later agreement to dismiss the named RO and accept liability for Claimant's benefits may have ultimately eliminated the need for a hearing before the ALJ, but that development in no way undermines Claimant's decision earlier in the proceedings, i.e., at the time the expenses were incurred, to develop relevant, admissible evidence to support his case. *Lanning*, 7 BLR at 1-316. That decision was particularly prudent in the face of the named RO's ongoing challenge to his benefits and in reasonable anticipation of litigation before the ALJ.

As a final point, unlike the majority, I am not persuaded by the Director's statement that "Claimant fails to identify whether he attempted to mitigate the expense" during the two-week period between the Director accepting liability for the claim on June 28, 2022, and Dr. DePonte providing her radiographic interpretations on July 15, 2022. Director's Response at 4.

First, the Director's statement is made as an aside. The very next sentence begins, "Regardless...[,] and he does not provide any analysis of how a duty to mitigate expenses might apply generally, or in this case specifically. See *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018); 20 C.F.R. §802.211(b).

Second, the Director does not dispute that Claimant incurred the expense for Dr. DePonte's interpretations prior to the April 5, 2022 deadline for submitting evidence to the district director, when he gave his attorney a \$300.00 check for both the CT scan and x-ray interpretations on March 9, 2022. Director's Response at 3-4; Counsel's Brief at 2-3 (unpaginated). Nor does the Director dispute that Claimant's counsel, in turn, formally requested and paid for Dr. DePonte's CT scan and x-ray interpretations, respectively, on March 30, 2022 (prior to the evidentiary deadline) and May 11, 2022 (prior to the district director's decision, at a time when the named RO was still contesting eligibility). Fee Petition. The Director's suggestion that Claimant might have been able to recoup his otherwise reasonable expenditure, perhaps by requesting a refund from Dr. DePonte two

to four months after he retained her as an expert, is highly speculative and, as noted, is unsupported by any legal analysis.

Because Claimant's expenses were reasonable, I would reverse the denial.

GREG J. BUZZARD
Administrative Appeals Judge