

BRB No. 04-0796 BLA

LAVERNE H. DESHAZO)
(Widow of WILLIAM DESHAZO))
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED: 03/24/2005
CONSOLIDATION COAL COMPANY)
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

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

John Cline (Lay Representative), Piney View, West Virginia, for claimant.

Dorothea J. Clark (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Representative's Fee Order (2003-BLA-5626) of Administrative Law Judge Michael P. Lesniak awarding claimant's lay representative fees for services rendered in connection with 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). After successfully establishing claimant's entitlement, claimant's lay representative submitted a fee petition requesting a fee award of \$2,904.70, representing 24.1 hours of services at an hourly rate of \$120.00 and \$12.70 for expenses. Claimant also submitted a Motion to hold Employer liable for the fees. The administrative law judge determined that employer was not liable for the fee in this case and denied claimant's request for sanctions requiring employer to assume liability for the fee award. Representative's Fee Order at 1-3. The administrative law judge further concluded that the hourly rate of \$120.00 was excessive and reduced the rate to \$100.00. Representative's Fee Order at 3. Accordingly, the lay representative was awarded a fee of \$2,422.70 for all services rendered and expenses in this case. Representative's Fee Order at 4.

On appeal, claimant contends that the administrative law judge erred in failing to apply 20 C.F.R. §725.483 to hold employer liable for the fee award. Employer responds, asserting that the administrative law judge's determinations were rational and should be upheld. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that the administrative law judge properly declined to hold employer liable for the fee award.¹

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 the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In cases in which the issue is whether the administrative law judge properly adjudicated a fee request, the administrative law judge's fee award will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). In the present case, claimant argues that the administrative law judge should have shifted liability for the lay representative's fees to employer due to employer's unreasonable decision to contest the survivor's claim after benefits had been awarded in the miner's claim based upon invocation of the irrebuttable

¹ The administrative law judge's reduction in the hourly rate and award of \$2,422.70 in fees and expenses are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304. We disagree.

In his Decision and Order, the administrative law judge determined correctly that neither the Act nor the regulations authorize imposing a lay representative's fee upon an employer. Representative's Fee Order at 1-2; *Harrison v. Liberty Mutual Insurance Co.*, 3 BLR 1-596, 1-597 (1981). The administrative law judge also rationally found, contrary to claimant's argument, that Section 725.483 does not give him the power to shift liability for the fee award to employer as a sanction for contesting the survivor's claim. Section 725.483 provides that:

If a United States court having jurisdiction of proceedings regarding any claim or final decision and order, determines that the proceedings have been instituted or continued before such court without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

20 C.F.R. §725.483. The courts have determined, however, that the district director, the administrative law judge and the Benefits Review Board are not "United States court[s]" under the terms of Section 725.458. *See Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995); *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT)(9th Cir. 1993). The Board adopted this holding in *Crum v. Wolf Creek Collieries*, 18 BLR 1-80 (1994), a case involving an employer's request that sanctions be imposed upon a claimant seeking benefits under the Act. *See also Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997). The administrative law judge properly found, therefore, that he could not use Section 725.483 to shift liability for payment of the lay representative's fee from claimant to employer. Thus, the administrative law judge acted rationally in denying claimant's Motion to Hold Employer Liable and in awarding the lay representative's fee to be paid by claimant.

Accordingly, the administrative law judge's Representative's Fee Order awarding fees to claimant's lay representative is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge