



BRB No. 23-0419 BLA

ROGER L. LESTER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
VACO RESOURCES, INCORPORATED)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS’)	DATE ISSUED: 08/12/2024
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS’)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Granting Fees and Costs of Dierdra M. Howard, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy 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: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

Employer and its Carrier (Employer) appeal the Order Granting Fees and Costs (2016-BLA-05939) (Order Granting Fees) of Administrative Law Judge (ALJ) Dierdra M. Howard rendered on an attorney fee petition filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Claimant filed his first claim on July 24, 2006. The law firm of Wolfe, Williams, and Reynolds (Wolfe) represented him. Director's Exhibit 12. ALJ Linda S. Chapman denied Claimant's claim in a Decision and Order Denying Benefits dated June 2, 2009. Director's Exhibit 68. ALJ Christine L. Kirby denied Claimant's request for modification on February 19, 2013. Claimant took no further action on that claim.

On May 12, 2014, Claimant filed a subsequent claim. Director's Exhibit 3. In the early stages of this claim, Claimant was represented, as he had been in his previous claim, by Wolfe. Director's Exhibit 24. The district director awarded benefits on June 28, 2016, and Employer requested a formal hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibits 57, 58. The case was assigned to ALJ Morris D. Davis, who denied benefits in a Decision and Order dated August 29, 2019.

Claimant appealed ALJ Davis's decision denying benefits to the Benefits Review Board. However, Wolfe did not represent him on appeal. *See* Corr. from Roger L. Lester, Sept. 17, 2019 (appointing Stone Mountain Health Services as representative); Corr. from Wolfe to OWCP, Sept. 11, 2019 (withdrawing from representation).

On appeal, the Board affirmed in part and vacated in part ALJ Davis's decision and remanded the case for further consideration. *Lester v. Vaco Res., Inc.*, BRB Nos. 19-0556 BLA and 19-0556 BLA-A (Nov. 5, 2020) (unpub.). After originally assigning the case to ALJ Heather C. Leslie, the OALJ later reassigned the case to ALJ Dierdra M. Howard (the ALJ), who adjudicated the claim on remand and awarded benefits in a Decision and Order dated May 11, 2023. The ALJ's initial Decision and Order erroneously awarded benefits back to July 2006, reflecting the filing date of Claimant's first claim. Decision and Order at 43. In consideration of Employer's unopposed Motion for Reconsideration of Onset Date, the ALJ issued an Errata Order correcting the onset date for the payment of benefits to May 2014, the date of the filing of the current claim.

After receiving the ALJ's initial award of benefits on remand (but before the ALJ issued the errata order correcting the date of entitlement), Wolfe filed an itemized statement

requesting an attorney's fee for services performed before the OALJ from October 14, 2007 to June 5, 2009; December 13, 2010 to March 7, 2013; and July 29, 2016 to September 10, 2019. Counsel requested a total fee of \$24,281.25, representing legal services performed by: Joseph E. Wolfe at an hourly rate of \$300.00; Ryan C. Gilligan at an hourly rate of \$225.00; W. Andrew Delph at an hourly rate of \$200.00; Brad A. Austin at an hourly rate of \$150.00; Micah Blankenship at an hourly rate of \$150.00; Rachel Wolfe at an hourly rate of \$150.00; legal assistants at an hourly rate of \$100.00; and expenses of \$3,644.79. Employer objected to the fees arguing, *inter alia*, that all fees and costs associated with Claimant's 2006 claim should be disallowed.

In her Order Granting Fees and Costs, the ALJ awarded a total fee of \$20,054.79, representing 36.20 hours of attorney services by Mr. Wolfe at an hourly rate of \$300.00; 11.50 hours of attorney services by Mr. Delph at an hourly rate of \$200.00; 0.25 hour of attorney services by Mr. Belcher at an hourly rate of \$200.00; 6.00 hours of attorney services by Mr. Austin at an hourly rate of \$150.00; 1.00 hour of attorney services by Ms. Wolfe at an hourly rate of \$150.00; 21.50 hours of legal assistant services at an hourly rate of \$100.00; and \$3,644.79 in expenses.

On appeal, Employer challenges the ALJ's awarding fees for legal services performed and costs incurred in Claimant's 2006 denied claim. Wolfe has not filed a response brief. The Director, Office of Workers' Compensation Programs, filed a response agreeing with Employer. Director's Letter Brief at 4-5.

When an attorney prevails on behalf of a claimant under the Act, the employer or its insurer that is liable for benefits shall also pay a "reasonable attorney's fee" to the claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928. The amount of an attorney fee award by an ALJ is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.¹ See *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

We agree with Employer's argument that the award of attorney fees and expenses associated with Claimant's 2006 prior denied claim is contrary to law. Employer's Brief at 5-10 (citing *Broughton v. Director, OWCP*, 13 BLR 1-35 (1989)). In order to receive compensation for legal services performed on a claimant's behalf, counsel must

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as Claimant performed his coal mine employment in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); [April 24, 2012] Hearing Transcript at 23.

successfully prosecute the claim. 30 U.S.C. §928(a), as incorporated 30 U.S.C. §932(a); *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 (1987). In *Broughton*, the Board held that an attorney fee request must be rejected for work performed with respect to a prior claim which was denied, even though the claimant was later successful in his pursuit of benefits on a subsequent claim. 13 BLR at 1-36.

In the present claim, the ALJ correctly observed, “where benefits are ultimately awarded on modification, counsel is entitled to fees for all work performed before the OALJ on the underlying claim.” Order Granting Fees and Costs at 4. However, she incorrectly found the question of whether counsel is entitled to a fee for work performed in prior, denied claims when benefits are “ultimately awarded on a subsequent claim remains an open question.” *Id.* She then awarded fees for billing entries associated with the unsuccessful prosecution of Claimant’s denied 2006 claim. *Id.* at 4-5. She also found all claimed expenses, including those associated with Claimant’s 2006 claim, reasonable and reimbursable. *Id.* at 7-8.

Because fees and costs are awardable to a claimant’s attorney only for work performed in connection with a successful prosecution of a claim, not work performed in connection with a previously denied claim, the ALJ improperly awarded fees relating to Claimant’s prior claim which was denied in 2013. Therefore, we vacate that aspect of the award and remand this case for the ALJ to determine and award the appropriate fees and costs associated only with Claimant’s successful 2014 claim.²

² Employer does not challenge the ALJ’s hourly rate findings or its liability for fees pertaining to Claimant’s successful subsequent claim filed on May 12, 2014. We therefore affirm those findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Order Granting Fees and Costs at 5-6. However, we remind the ALJ she may award fees for only those attorneys and legal assistants who performed services in connection with Claimant’s successful 2014 claim.

Accordingly, the Order Granting Fees and Costs is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge