

U.S. Department of Labor

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



BRB Nos. 22-0048 BLA
and 22-0049 BLA

TERESA ALLEN (o/b/o and Widow of
RICKY ALLEN))

Claimant-Respondent)

v.)

CONSOL OF KENTUCKY,
INCORPORATED)

Employer-Petitioner)

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

Party-in-Interest)

DATE ISSUED: 02/16/2023

DECISION and ORDER

Appeals of the Attorney Fee Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Attorney Fee Order (2019-BLA-06095 and 2019-BLA 06096) rendered on a miner's claim and a survivor's claim¹ filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

On June 30, 2021, the ALJ issued a Decision and Order Granting Request for Modification and Awarding Benefits in Miner's and Survivor's Claims. In a separate Attorney Fee Order dated September 30, 2021, which is the subject of these appeals,² the ALJ stated Employer did not file any objections to Claimant's counsel's fee petition and determined the fee was reasonable. He therefore approved an award of \$13,553.30 (\$7,437.50 in fees for legal services and \$6,115.80 in expenses) payable to counsel for work performed and expenses incurred obtaining an award of benefits for Claimant.

On appeal, Employer argues the ALJ failed to address its objections to the fee petition and requests the Board vacate the ALJ's Attorney Fee Order and remand the case to the ALJ for consideration of its objections. Claimant's counsel agrees with Employer that the case should be remanded to the ALJ to consider Employer's objections. The Director, Office of Workers' Compensation Programs, has declined to file a response.

The Board's scope of review is defined by statute. We must affirm the ALJ's Order if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

The amount of an attorney's fee award is discretionary and will be upheld on appeal unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or

¹ The Miner filed his claim on June 15, 2016. Miner's Claim Director's Exhibit 2. He subsequently died on June 18, 2017. Claimant is the surviving widow of the Miner and is pursuing the miner's claim on his behalf and her own survivor's claim, filed on May 10, 2018. Survivor's Claim Director's Exhibits 3, 7.

² Employer appealed the ALJ's single fee order concerning both the miner's and the survivor's claims. The Benefits Review Board assigned two appeal numbers and consolidated them for a decision. *Allen v. Consol of Kentucky Inc.*, BRB Nos. 22-00048 BLA and 22-0049 BLA (Dec. 10, 2021) (Order) (unpub.).

³ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

not in accordance with applicable law. *See E. Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 568-69 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289 (4th Cir. 2010); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

In his June 20, 2021 Decision and Order awarding benefits, the ALJ gave Claimant's counsel thirty days to file a fee petition. Decision and Order at 24. Claimant's counsel filed his petition on July 29, 2021.⁴ Employer asserts that on August 20, 2021, it filed objections to the fee petition via email with the Office of Administrative Law Judges (OALJ),⁵ and on October 7, 2021, a legal assistant at the OALJ confirmed Employer's objections had been received and were forwarded to the ALJ.⁶ Employer's Brief at 2. Because the ALJ misstated Employer raised no objections to the fee petition, and in view of the parties' agreement that remand is appropriate, the Board vacates the ALJ's Attorney Fee Order. On remand, if the ALJ determines Employer's objections to the fee petition were timely filed, or if he finds Employer established good cause for filing its objections out of time, he must consider them and determine the appropriate attorney fee in accordance with the Administrative Procedure Act,⁷ 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see* 29 C.F.R. §18.32(b).

⁴ The total fee requested represents: \$2,537.50 for 7.25 hours of legal services performed by Attorney Joseph E. Wolfe at an hourly rate of \$350.00; \$2,650.00 for 13.25 hours of legal services performed by Attorney Brad A. Austin at an hourly rate of \$200.00; \$75.00 for 0.5 hour of legal services performed by Attorney Shane Hobbs at an hourly rate of \$150.00; and \$2,175.00 for 21.75 hours of legal assistant services performed at an hourly rate of \$100.00; as well as expenses of \$6,115.80. ALJ Fee Request at 1, 11-12.

⁵ The ALJ encouraged the parties to file their pleadings using the eFile/eServe System, available at <https://efile.dol.gov/>, or by e-mail to OALJ-Cincinnati@DOL.gov. June 30, 2021 Decision and Order at 24. Claimant's counsel states that he received Employer's objections on August 20, 2021. *See* Claimant's December 31, 2021 Response to Employer's Petition for Review at 2.

⁶ Employer objected to the hourly rates of Attorneys Wolfe, Austin, and Hobbs, and the legal assistants; it also challenged several of the services and times charged. Employer's Objections at 2-3.

⁷ The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented" 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, we vacate the ALJ's Attorney Fee Order, and remand the case to him for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge