



BRB No. 23-0162 BLA

DALLAS S. DENNISTON )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 MOUNTAIN COALS CORPORATION )  
 )  
 and )  
 )  
 AMERICAN ZURICH INSURANCE )  
 COMPANY )  
 )  
 Employer/Carrier-Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest )

**NOT-PUBLISHED**

DATE ISSUED: 09/12/2024

DECISION and ORDER

Appeal of the Proposed Order Supplemental Award Fee for Legal Services of Sarah N. Booten, Claims Examiner, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

Scott A. White (White & Risse, LLC), Arnold, Missouri, for Employer and its Carrier.

David Casserly (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: GRESH, Chief Administrative Law Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Claims Examiner Sarah N. Booten's (the district director's) Proposed Order Supplemental Award Fee for Legal Services (Fee Award) 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 claim for benefits on February 23, 2021, and retained counsel to represent him. Director's Exhibit 2. Thereafter, the district director issued a Proposed Decision and Order Awarding Benefits. Director's Exhibit 85. On October 24, 2022, Claimant's counsel (Counsel) filed a fee petition for work performed before the district director. Counsel requested a total fee of \$10,485.00 for 34.95 hours of services rendered between June 2, 2021, and September 12, 2022, at an hourly rate of \$300.00.<sup>1</sup>

On October 26, 2022, Employer submitted a letter to Office of Workers' Compensation Programs claims examiner Keria Kimbrough requesting until December 12, 2022, to file an objection to Counsel's fee petition given its outstanding requests for production and requests for admission that it had served on Counsel, which it contended were relevant to the fee petition. Employer's Initial Request. The next day, Counsel replied in a letter to Employer that he did not intend to respond to Employer's discovery requests unless ordered to do so. October 27, 2022 Correspondence. After receipt of Counsel's correspondence, Employer filed an amended motion with claims examiner Kimbrough to respond to Counsel's fee petition by November 14, 2022. Employer's Amended Request. In the motion, it also asked if the district director would "kindly advise" if the Department of Labor was going to order Counsel to respond to its discovery requests. *Id.* The district director did not respond to Employer's requests but issued the Fee Award on December 6, 2022, awarding the \$10,485.00 fee Counsel requested.

On appeal, Employer challenges the Fee Award, asserting the district director violated its due process rights in not allowing it to respond to Claimant's counsel's fee

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<sup>1</sup> In support of his requested hourly rate, Counsel provided a list of eight cases in which he was awarded \$300.00 in 2018 and 2019. Fee Petition. He also provided multiple affidavits from other counsel regarding the market rate. *Id.*

petition prior to issuing the award. It also submits multiple objections to the fee petition, arguing Counsel's requested hourly rate is unsupported and certain time entries are excessive. Counsel filed a response brief in support of the Fee Award. The Director, Office of Workers' Compensation Programs (the Director) responded, arguing the district director did not deprive Employer of due process. Employer replied to both Counsel and the Director, reiterating its contentions.<sup>2</sup>

Employer argues the district director denied it due process by failing to respond to its motion seeking additional time to file an objection to Counsel's fee petition.<sup>3</sup> Employer's Brief at 2. The Director counters that Employer's due process argument fails because the district director did not take any action that impaired any right protected by the due process clause. Director's Response at 2. We agree with the Director's position.

To sustain its allegation of a due process violation, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *see also Energy W. Mining v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (The due process clause "is concerned with procedural outrages, not procedural glitches.").

The regulations set no deadline for attorney fee petitions filed with the district director, nor is there a deadline or process by which to file objections to such a fee petition. *See* 20 C.F.R. §725.366(a) (providing only that the application for fees "shall be filed and served . . . within the time limits allowed by the district director . . ."). After Counsel's refusal to respond to its discovery requests, Employer amended its extension request to respond to Counsel's fee petition, asking the district director to shorten the initial time it requested to respond to November 14, 2022. While the district director did not provide an explicit response to Employer's requests, she did not issue the Fee Award until December 6, 2022, more than three weeks after the amended deadline Employer requested.

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<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

<sup>3</sup> Employer generally states that Counsel's "non-compliance" with its discovery requests and the district director's failure to "allow proper discovery" inhibited its ability to ascertain the reasonableness of Counsel's hourly rate. Employer's Reply to Director at 2. However, at no point did Employer move to compel Counsel's response to its discovery requests. 20 C.F.R. §725.360.

Thus, there was time within which Employer could have filed its objections to the district director, within the timeline it requested, prior to the issuance of the Fee Award, but there is no indication it ever attempted to do so. Moreover, after the Fee Award was issued, Employer could have requested reconsideration and filed objections to the fee petition with the district director, but again it did not do so. 20 C.F.R. §725.366(d). Instead, it chose not to raise its objections until this appeal. Based on the foregoing, we decline to find the district director's lack of an explicit response to Employer's requests violated its due process rights.<sup>4</sup>

Regarding Employer's remaining arguments objecting to Counsel's hourly rate and certain time entries, Employer's Brief at 2-8, Employer did not raise these objections at any point before the district director. Therefore, they are not properly before us as we cannot address them in the first instance. *See Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989) (if a party does not raise objections to a fee petition below, the party cannot subsequently contest the award on appeal); *see also Ball v. Director, OWCP*, 7 BLR 1-617, 1-619 (1984) (when seeking to submit additional information to the district director regarding a fee award, the proper course of action is to seek reconsideration rather than requesting an "immediate appeal to the Board").

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<sup>4</sup> In so finding, we by no means condone the district director's failure to respond to Employer's counsel's requests.

Accordingly, we affirm the Proposed Order Supplemental Award Fee for Legal Services.<sup>5</sup>

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge

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<sup>5</sup> As this case is currently pending before the Office of Administrative Law Judges, OALJ No. 2023-BLA-05313, this fee award is neither payable nor enforceable until an award of benefits to Claimant becomes final and that award reflects a successful prosecution of the claim. 33 U.S.C. §928; *see Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663 (7th Cir. 1982); *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986); *aff'd mem sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987).