# *Chapter 27*

## Representative's Fees and Representation Issues

## I. Entitlement to fees

Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act at 30 U.S.C. § 932, provides for the award of an attorney's fee to claimant's counsel or lay representative for the successful prosecution of a claim. The statutory fee provisions are constitutional and do not deprive the employer of due process of law. *United States Department of Labor v. Triplett*, 110 S.Ct. 1428 (1990).

Regulations governing the award of fees in black lung cases are found at 20 C.F.R. §§ 725.362-725.367 (2000) and (2008), and the disposition of a fee petition should be styled as a "*Supplemental Decision and Order*." The award of a representative's fees is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 B.L.R. 1-15 (1989).

### A. Notice of appearance

A claimant may be represented by counsel or by a lay person. 20 C.F.R. § 725.363 (2008). Any representative, whether attorney or otherwise, must file a notice of appearance or be otherwise authorized to appear before the Department of Labor on behalf of a particular claimant. 20 C.F.R. § 725.362 (2008).

Under the amended regulations, a representative may file a declaration that s/he is authorized to represent a party. Subsection 725.362(a) provides, in part, as follows:

> An attorney qualified in accordance with § 725.363(a) shall file a written declaration that he or she is authorized to represent a party, or declare his or her representation on the record at a formal hearing. Any other person (see § 725.363(b)) shall file a written declaration that he or she is authorized to represent a party, or declare his or her representation on the record at a formal hearing.

20 C.F.R. § 725.362(a)(2008).

## B. Privacy Act

In *Doe v. Chao*, 435 F.3d 492 (4th Cir. 2006), a case stemming from a federal black lung claimant's pursuit of damages under the Privacy Act for the "wrongful disclosure of his Social Security number" by this Office, the court affirmed the district judge's finding that "Doe is entitled to costs and reasonable attorney fees even though he suffered no actual damages," and remanded the case for recalculation of attorney fees. The court rejected the government's argument that "because Doe sought money damages from the United States, and was awarded none, the only reasonable attorney fee is no fee at all." However, citing to *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), the court held that, in determining the reasonableness of a fee, the "most critical factor" is the "degree of success obtained." The court reasoned:

> Doe failed to recover any monetary award, despite the fact that damages were the primary goal of his suit. Because his underlying litigation was largely unsuccessful, it is unlikely that Doe may recover significant attorney fees.

Notably, the court concluded that it would not "disturb the district court's calculation of Buck Doe's litigation costs" as 5 U.S.C. § 552a(g)(4)(B) permits an award of "the actual costs of his action unrestrained by any reasonableness inquiry."

In *Doe v. Chao*, 2006 WL 2038442 (W.D. Va. July 19, 2006), the district court awarded $15,000.00 to Buck Doe in attorney's fees under the Privacy Act of 1974 and the Equal Access to Justice Act against the Department of Labor "for its practice of listing social security numbers on black lung multi-captioned hearing notices."

## C. Successful prosecution of the claim

### 1. Generally

If a claimant is successful in prosecuting a claim, the party opposing entitlement is liable for the claimant's attorney's fees. Thus, fees will be awarded only if the claimant is successful and awarded benefits or if the amount of overpayment is reduced or waived. *Bryant v. Lambert Coal Co.*, 9 B.L.R. 1-166 (1986) (benefits awarded); *Sosbee v. Director, OWCP*, 17 B.L.R. 1-136 (1993)(*en banc*) (amount of recovery of overpayment reduced); *Reynolds v. Director, OWCP*, 6 B.L.R. 1-914 (1984) (fees awarded where overpayment waived).

### 2. Representation at any time relevant

Fees are awarded to a representative in the successful prosecution of a claim, even if s/he did not represent the claimant at the time benefits were awarded. In *Murphy v. Director, OWCP*, 21 B.L.R. 1-116 (1999), the administrative law judge erred in failing to award a fee to an attorney who originally represented the claimant, but who did not represent him at the time he prevailed. The Board reiterated that a representative is entitled to fees, even if he was unsuccessful at a particular level of adjudication, so long as Claimant ultimately prevails. Thus, while the miner's original claim was denied by the administrative law judge while counsel was representing him, the Board determined that counsel's work during that time period was necessary and relevant to the claimant's award of benefits on modification. Finally, the Board reiterated that "any award of attorney fees does not become enforceable and payable until such time as an award of benefits becomes final and reflects successful prosecution of the claim."

Similarly, "counsel is entitled to fees for all services rendered to claimant at each level of the adjudication process, even if unsuccessful at a particular level, so long as counsel is ultimately successful in prosecuting a claim." *Clark v. Director, OWCP*, 9 B.L.R. 1-211 (1986). *See also Brodhead v. Director, OWCP*, 17 B.L.R. 1-138 (1993) (fees awarded for entitlement to benefits on modification).[1]

## D. Claimant's interest; adversarial proceeding

The following principles relate to a claimant's interest in the issues of the claim and whether the proceeding for which fees are awarded was *adversarial* in nature.

[1] It is noteworthy that in a decision from the District of Columbia Circuit Court of Appeals, *George Hyman Construction Co v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992), the court adopted the United States Supreme Court's ruling in *Hensley v. Eckerhart*, 461 U.S. 424 (1981), to hold that the fact-finder must determine whether the successful and unsuccessful claims are related and, if not, then the award of attorney's fees must be confined to the successful claims. Underlying this conclusion is the rationale that the party opposing entitlement should not be liable for time spent on groundless claims merely because they were included in a suit involving successful claims. Finally, the percentage of time spent by counsel on the successful claims must be ascertained to determine the amount of the fee award.

### 1. Prior to applicability of 20 C.F.R. Part 725 (2008), precontroversion fees not awarded

The "successful prosecution" of a claim necessarily requires that the posture of the parties be adversarial. The regulation at 20 C.F.R. § 725.367 (2000) states, in relevant part:

> If an operator declines to pay any benefits on or before the 30th day after receiving written notice of its liability for a claim on the ground that there is no liability for benefits within the provisions of the Act, and the person seeking benefits shall thereafter have utilized the services of an attorney in the successful prosecution of the claim, there shall be awarded, in addition to an award of benefits, in an order, a reasonable attorney's fee against the operator or carrier in an amount approved by the [district director], administrative law judge, Board, or court as the case may be, which shall be paid promptly and directly by the operator or carrier to the claimant's attorney in a lump sum after the order becomes final.

20 C.F.R. § 725.367 (2000).

#### a. Benefits Review Board

In *Jackson v. Jewell Ridge Coal Corp.*, 21 B.L.R. 1-27 (1997)(en banc), the Board upheld the district director's finding that the employer, as opposed to the claimant, was liable for attorney fees "for services performed in the period between an initial denial of benefits by the Department of Labor and the responsible operator's receipt of notice of the claim and controversion of entitlement." The Board stated that "[t]he imposition of liability for attorney fees (upon Claimants) for pre-controversion representation of claimants is inconsistent with the 1972 Amendments providing clear congressional preference that the attorney fee not diminish the recovery of a claimant." The Board further noted that "enhancement for delay" is permissible because "[w]hat would be a reasonable fee if paid promptly is something less than a reasonable fee after a long delay." *See also Carter v. Peabody Coal Co.*, BRB Nos. 93-0651 BLA and 93-0651 BLA-S (July 19, 1994) (unpub.) (Employer's agreement with the district director's finding of non-entitlement resulted in *adversarial* proceeding).

Similarly, Employer was liable for fees when it controverted the claim and then withdrew controversion and accepted liability. *Markovich v. Bethlehem Mines Corp.*, 11 B.L.R. 1-105 (1988). *See also Davis v. Ingalls Shipbuilding, Inc.*, BRB Nos. 90-072 and 90-672A (Jan. 27,

1992)(unpublished)(the employer's acceptance of liability after the case was referred to the administrative law judge is a "successful prosecution" of a claim). *But see Lucas v. Director, OWCP*, BRB No. 92-1618 BLA (May 26, 1994)(unpub.) (award of fees to be paid by claimant, not the Trust Fund, where the Director did not object to the repayment schedule negotiated by claimant's counsel and, therefore, the proceeding was non-adversarial in nature).

Finally, in *Childers v. Drummond Co.*, 22 B.L.R. 1-146 (2002)(en banc) (Judges McGranery and Hall, dissenting), the miner's and survivor's claims were filed prior to January 19, 2001 and, as a result, the Board held that the amended provisions at 20 C.F.R. § 725.367(a) (2008) were inapplicable and denied an award of pre-controversion attorney's fees. In so holding, the Board noted that "imposition of pre-controversion attorney fees on employers may be made only where the district director has initially denied benefits, as an adversarial relationship arises at that point . . .." The Board further stated that, in a case where the district director initially awards benefits, a claimant cannot receive pre-controversion attorney's fees. The Board reasoned that "no adversarial relationship arises unless and until employer controverts the award and, therefore, claimant has no reason to seek professional assistance in pursuing the claim." Moreover, the Board determined that an employer's controversion of a miner's claim is "separate and distinct" from its controversion in a survivor's claim and the controversions "do not merge." Claimants are liable for fees incurred prior to the employer's receipt of the formal notice of claim, notice of its potential liability, and subsequent refusal to pay compensation . . .."

### b. Third Circuit

*Bethenergy Mines, Inc. v. Director, OWCP [Markovich]*, 854 F.2d 632 (3rd Cir. 1988).

### c. Sixth Circuit

In *Director, OWCP v. Bivens*, 757 F.2d 781 (6th Cir. 1985), the court barred recovery of attorney's fees where the district director awarded fees and this finding was not contested by the Director who proceeded to pay benefits. Rather, the claimant was held liable for such fees. The rationale underlying this interpretation of 20 C.F.R. § 725.367(a) is that notice of actual liability, not merely potential liability, must be provided to the Director or employer, "who is then placed in an adversarial position vis-a-vis claimant." *Id.* at 787. *See also Director, OWCP v. Poyner*, 810 F.2d 99 (6th Cir. 1987).

### 2. After applicability of 20 C.F.R. Part 725 (2008), precontroversion fees awarded

The regulations have been amended to permit an award of pre-controversion fees to an attorney. However, the Board holds that these regulations are inapplicable to claims filed prior to January 19, 2001. *See Childers, supra*. Section 725.367(a) provides, in part, the following:

> An attorney who represents a claimant in the successful prosecution of a claim for benefits may be entitled to collect a reasonable attorney's fee from the responsible operator that is ultimately found liable for the payment of benefits, or, in the case in which there is no operator who is liable for the payment of benefits, from the fund. Generally, the operator or fund liable for the payment of benefits shall be liable for the payment of the claimant's attorney's fees where the operator or fund, as appropriate, took action, or acquiesced in action, that created an adversarial relationship between itself and the claimant. The fees payable under this section shall include reasonable fees for necessary services performed prior to the creation of the adversarial relationship.

20 C.F.R. § 725.367(a) (2008).

The regulation also contains examples of cases where fees are properly awarded, including success in (1) a medical treatment dispute claim, (2) obtaining an increase in the monthly benefit payments, or (3) "resisting the request for a decrease in the amount of benefits payable." 20 C.F.R. § 725.367(a)(1) to (5) (2008).

## E. Overpayment cases

In *Sosbee v. Director, OWCP,* 17 B.L.R. 1-136 (1993)(*en banc*), the Board held that attorney's fees may be awarded where the claimant's counsel "succeeded in reducing the overpayment amount and defeating the Director's appeal before the Board. . . ." *See also Reynolds v. Director, OWCP*, 6 B.L.R. 1-914 (1984) (fees awarded where overpayment waived). *But see Lucas v. Director, OWCP*, BRB No. 92-1618 BLA (May 26, 1994)(unpub.) (award of fees to be paid by claimant, not the Trust Fund, where the Director did not object to the repayment schedule negotiated by claimant's counsel and, therefore, the proceeding was non-adversarial in nature). *See also* 20 C.F.R § 725.367 (2008).

### F. Medical treatment disputes

The regulation also contains examples of cases where fees are properly awarded, including success in (1) a medical treatment dispute claim, (2) obtaining an increase in the monthly benefit payments, or (3) "resisting the request for a decrease in the amount of benefits payable." 20 C.F.R. § 725.367(a)(1) to (5) (2008).

### G. Preparation of the fee application; litigation of the fee award

Claimant's counsel or representative is entitled to fees for time spent *litigating the fee award*. The Board reasoned that the claimant has an interest in the fee issue and derives a benefit from such services if found not liable for these payments. *Bardovinus v. Director, OWCP*, BRB No. 88-1445 BLA (July 30, 1991)(unpub.). However, note that 20 C.F.R. § 725.366(b) (2008) provides that "[n]o fee approved shall include payment for time spent in preparation of a fee application."

### H. No separation of issues

A representative may be awarded fees only where the claimant has an interest in the outcome of the litigation. The Board has held, however, that it will not separate issues in which claimant did and did not have an interest in the outcome in determining the total fee to be awarded. *Yates v. Harman Mining Co.*, 12 B.L.R. 1-175 (1989), *aff'd on recon.*, 13 B.L.R. 1-56 (1989)(*en banc*).

## II. Fee Petitions

### A. Generally

Pursuant to 20 C.F.R. § 725.366(a) (2008), to receive an award for fees, an application must be filed with the appropriate adjudicator and served on the claimant and all other parties within the time limits allowed by the adjudicator.

### B. Limiting time to file fee petition

The regulations do not contain time limitations for the filing of a fee petition. Therefore, the administrative law judge has the authority to limit the time for acceptance of fee petitions. However, 20 C.F.R. § 725.366(a) (2008) does not provide a penalty for failure to file a fee petition within the established time limits. *See e.g., Brock v. Pierce County* 476 U.S. 253 (1986); *Twin Pines Coal Co. v. U.S. Department of Labor*, 854 F.2d 1212 (10th Cir.

1988). In addition, the Board has held that the "loss of an attorney's fee is a harsh result and should not be imposed on counsel as a penalty except in the most extreme circumstances." *Paynter v. Director, OWCP*, 9 B.L.R. 1-190, 1-191 (1986).

#### 1. Examples of reasonableness of time limitations

##### a. Fifteen days reasonable

The Board has held that 15 days is "not an unreasonable" amount of time to require the submission of a fee petition. *Bradley v. Director, OWCP,* 8 B.L.R. 1-418 (1985).

##### b. Late petition still considered

It was an "abuse of discretion" to deny all fees because a petition was received 30 days past the time allowed for filing. The penalty was too harsh and there was no evidence that the failure to file on time was an intentional omission. *Paynter v. Director, OWCP*, 9 B.L.R. 1-190 (1986).

Likewise, in *Mullins v. Director, OWCP*, BRB No. 92-2332 BLA (Sept. 29, 1995)(unpub.), the Board found that the administrative law judge's denial based on untimeliness was arbitrary. Petitioner was granted extensions for the filing of his fee petition, but maintained that the law firm with which he was associated had failed to forward his application. The administrative law judge found no basis to set aside the time limits. However, the Board noted that the Director did not object to the late filing or contend that she suffered any prejudice thereby. Because there was no prejudice, the Board determined that the administrative law judge's denial of the entire fee petition was arbitrary. *Id.* at 3. In another fee petition in the same case, the Board held that the application was not untimely where the applicant was not provided proper notice by the administrative law judge of the deadline for filing the fee petition. *Id.* at 4.

### C. Fees awarded separately at each administrative level

Subsection 725.366(a) states that a representative seeking a fee for services performed on behalf of a claimant shall make application to the district director, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed. 20 C.F.R. § 725.366(a) (2008). Said differently, if the work was performed before the district director, claimant's counsel must submit a fee petition to the district director, and if the work was done before the administrative law judge, counsel must submit a petition to the administrative law judge. An administrative law judge cannot award a fee for services rendered before the district director or

the Benefits Review Board. *Ilkewicz v. Director, OWCP*, 4 B.L.R. 1-400 (1982). For example, preparing a notice of appeal to the Board must be disallowed. *Id. See also* 20 C.F.R. § 725.367(b) (2008).

#### 1. Determining whether services performed before this Office

The administrative law judge must determine whether the services performed were necessary to adjudication of the claim before this Office. Certain dates help to determine whether services were performed before this Office, *e.g.*, the date of request for a hearing, the date of referral to the Office of Administrative Law Judges by the district director, the date on which the case was docketed in this Office, and the like.

The issue is not whether the work was performed on or before a certain date; rather, it is whether the work performed was relevant to the proceedings before the administrative law judge. *Matthews v. Director, OWCP*, 9 B.L.R. 1-184 (1986). The Board has held that, where services performed prior to referral to the administrative law judge were reasonably integral to preparation for the hearing, the administrative law judge may award fees for the entire period of representation. *Vigil v. Director, OWCP*, 8 B.L.R. 1-99 (1985). Thus, if this is not clear from the fee petition, an order should be issued requesting specificity as to the work performed and its relation to the hearing process at this level.

#### 2. Sample boilerplate

> An administrative law judge is only authorized to award fees for services rendered while the case was pending before the Office of Administrative Law Judges. In *Matthews v. Director, OWCP*, 9 B.L.R. 1-184, 1-186 (1986), the Benefits Review Board held that in determining the jurisdictional cutoff date between the District Director and the Office of Administrative Law Judges, neither the date the hearing was requested nor the date the case was transferred is dispositive. Rather, the appropriate inquiry is whether the work done was "reasonably integral to preparation for the hearing." *See Vigil v. Director, OWCP*, 8 B.L.R. 1-99 (1985).

### D. Contents of the fee petition

Under 20 C.F.R. § 725.366(a) (2008), the application must be supported by a complete statement of the extent and character of the necessary work done and shall include the professional status (attorney, paralegal, law clerk, lay representative) of the person performing the work, and the customary billing rate for each such person. The application shall also include a list of reasonable unreimbursed expenses and a description of any fee requested for

services rendered before any other state or federal agency in connection with the matter. Thus, if this information is not clear from the face of the fee petition, an order should be issued requesting specificity as to any vague or incomplete entry.

### E. Contingency fees or other fee arrangements prohibited

Because attorney's fees are paid by the party opposing entitlement, contingency fees and other fee agreements are invalid. Section 725.365 states that no fee charged for services rendered to a claimant shall be valid unless approved under this subpart (*i.e.* by the appropriate adjudicative officer or tribunal). These regulatory provisions also state that no contract or prior agreement for a fee shall be valid. 20 C.F.R. § 725.365 (2008); *Goodloe v. Peabody Coal Co.*, 19 B.L.R. 1-91 (1995). In this vein, the Board has held that contingent and stipulated fee agreements are invalid. *Wells v. Director, OWCP*, 9 B.L.R. 1-63 (1986).

It is noteworthy that, in *Eifler v. Peabody Coal Co.*, 13 F.3d 236 (7th Cir. 1993), the Seventh Circuit held that any settlement of attorney's fees requires administrative or judicial approval. Moreover, even though attorney's fees may not be awarded before a final compensation award is entered, a *settlement* of attorney's fees may be approved before such a final award.

## III. Amount of the fee award

### A. Factors to be considered

Pursuant to 20 C.F.R. § 725.366(b) (2008), any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of the proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fees requested.

"The amount of the attorney's fees award is discretionary and will only be set aside if shown . . . to be arbitrary, capricious, an abuse of discretion or not in accordance with the law." *Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980). The administrative law judge must provide sufficient explanation for a reduction in the fee requested.

As an example, in *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001), the Seventh Circuit disapproved of the judge's award of $200.00 per hour for attorney's fees, which would exceed what the attorney would charge his paying clients. The court noted that the judge did not address the

employer's argument that "the rate chargeable against the mine operator must be market-based, . . . without a premium for the contingent nature of the compensation." Rather, the court noted that the hourly rate of $200 was merely "a number plucked from a hat." *But see* the discussion later in this Chapter on enhancement of a fee based on the extended length of litigation.

**Sample boilerplate:**

> Accordingly, a fee in the amount of $_____, representing _____ hours of service rendered at an hourly rate of $_____, is found to be reasonably commensurate with the work done before the Office of Administrative Law Judges and necessary and reasonable for the successful prosecution of this claim.

### B. Enhancement of the fee for delay, proper for employer but not Director, OWCP

In *Shaffer v. Director, OWCP*, 21 B.L.R. 1-97 (1998) (*en banc on recon.*), the Board agreed with the Director's position that, "while an employer may be required to pay an enhanced attorney's fee due to delay, such an enhancement is not appropriate where the Trust Fund is liable for the fee because the Act does not specifically waive the government's sovereign immunity from an award of interest. The Board likened enhancement of an attorney's fee for delay to imposing interest upon the Trust Fund which is not permitted under the Act or implementing regulations.

In *Frisco v. Consolidation Coal Co.*, 22 B.L.R. 1-321 (2003), the Board upheld application of the amended regulatory provisions at 20 C.F.R. § 725.608 (2003), which allow imposition of interest on a fee award to compensate counsel for delay in payment. The Board held that the regulation was valid and could be applied to fee awards issued prior to January 19, 2001. The Board further held that interest began to accrue from the date the fee was originally awarded (even though the 1982 initial fee award was vacated in *Frisco*).

### C. "Necessary work" defined

The Board has held that the test of necessary work is "whether an attorney *at the time he or she performs the work in question* could reasonably regard the work as necessary to establish entitlement." *Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980)(emphasis in original). The petitioning attorney bears the burden of establishing that a particular service is necessary to establish entitlement. *Wade v. Director, OWCP*, 7 B.L.R. 1-334 (1984). The fee petition must be reasonably specific to allow such a finding.

**Sample boilerplate:**

I have reviewed Petitioner's application for a representative's fee in accordance with the applicable regulations. I find that the services rendered by Petitioner, including _____, _____, and _____, were [were not] necessary in pursuit of benefits for Claimant. Additionally, I find that the time spent by Petitioner is not [is] excessive.

### 1. Two-prong test for establishing "necessary work"

The Board, in *Lanning v. Director, OWCP*, 7 B.L.R. 1-314 (1984), set forth a two-step process for determining the necessity of services rendered, "First, [the administrative law judge] must decide whether the service is necessary to the proper conduct of the case and therefore compensable. . . . Second, once a service has been found to be compensable, the adjudicating officer must decide whether the amount of time expended by the attorney in performance of said service is excessive or unreasonable."

### 2. Examples

The following constitutes common examples involving whether the "necessary work" standard is satisfied:

#### a. Research time

The Board has held that "an attorney must be allowed an appropriate amount of time for research." *Bradley v. Director, OWCP*, 4 B.L.R. 1-241 (1981). However, general research time must be allocated to all clients and "should not be charged against the account of any single client." *Snyder v. Director, OWCP,* 9 B.L.R. 1-187 (1986).

#### a. Contacting a congressional representative

Time spent seeking or obtaining a congressperson's assistance or intervention in the processing of a claim "is not part of the adjudication process, nor is it necessary to establish entitlement to benefits"; therefore, it cannot be included in a fee award. *Krahenbuhl v. Director, OWCP*, 3 B.L.R. 1-673 (1981).

#### c. Preparing and litigating fee petition

Time spent *preparing* the fee petition is not compensable. 20 C.F.R. § 725.366(b) (2008). However, the Fourth Circuit, in *Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001), the court held that it was proper to

award fees for time spent *litigating* an attorney's fee award. *See also Bardovinus v. Director, OWCP*, BRB No. 88-1445 BLA (July 30, 1991)(unpub.).

## D. Expenses and costs

Under 20 C.F.R. § 725.366(c) (2008), reasonable and unreimbursed expenses may be awarded. Again, the fee petition must be detailed enough to demonstrate relevance and connection to the claim.

### 1. Advising the claimant

Time spent advising a claimant as to the status of his claim is compensable. *Lanning v. Director, OWCP*, 7 B.L.R. 1-314 (1984). Time spent explaining the decision to the claimant is also compensable. *Brown v. Director, OWCP*, 3 B.L.R. 1-95 (1979).

### 2. Clerical costs

In *B&G Mining, Inc. v. Director, OWCP [Bentley]*, ___ F.3d ___, Case No. 06-0304 BLA (6th Cir. Apr. 16, 2008), the court upheld the administrative law judge's reduction of time spent "receiving and filing correspondence," as this constituted clerical work. Reviewing correspondence, on the other hand, "can constitute legal work" and may be billed according to the court.

#### a. Not allowed

Traditional clerical duties are not properly compensable and must be included as part of overhead in setting the hourly rate. These unreimbursable expenses include local telephone calls, photocopying, postage, and typing. *Pritt v. Director, OWCP*, 9 B.L.R. 1-159 (1986); *Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980).

Time preparing correspondence is compensable. *But see Picinich v. Lockheed Shipbuilding*, 23 B.R.B.S. 128 (1989), a case involving several parties, complex issues, and a number of appeals, wherein the Board held that it is within the adjudicator's discretion to determine whether, based upon the evidence in a particular claim, photocopying costs or other miscellaneous expenses are reasonable and necessary or are part of overhead. The Board further stated that it would affirm any such findings unless they are demonstrated as arbitrary, capricious, or an abuse of discretion.

#### b. Allowed

In *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894 (7th Cir. 2003), the court upheld the judge's allowance of postage and photocopying costs (as opposed to finding that the costs were part of overhead) because Claimant asserted that the costs "were necessary to successfully prosecute (the) case as the physicians needed a complete copy of the record to provide a

written report on Hawker's behalf."

**Sample boilerplate:**

> Twenty C.F.R. § 725.366(c) (2008) provides that "[i]n awarding a fee, the appropriate adjudication officer shall consider, and shall add to the fee, the amount of reasonable and unreimbursed expenses incurred in establishing the claimant's case." Petitioner seeks $_____ for expenses, which includes $_____ for postage. The Benefits Review Board has held that traditional clerical expenses, such as local telephone calls, photocopying, and postage, should not be billed separately. These expenses should be considered part of the office overhead expenses when an attorney sets the hourly rate and cannot be included in an award of a representative's fee. *See Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980); *Pritt v. Director, OWCP*, 9 B.L.R. 1-159 (1986). Accordingly, the $_____ in costs requested for postage expenses is disallowed.

### 3. Co-counsel

The petitioner has the burden of establishing the necessity of associating with co-counsel. *Esselstein v. Director, OWCP,* 676 F.2d 228 (6th Cir. 1982); *Coutz v. Director, OWCP* , 7 B.L.R. 1-449 (1984); *Simmons v. Director, OWCP*, 7 B.L.R. 1-175 (1984).

### 4. Obtaining medical evidence

Expenses incurred in obtaining x-ray readings are compensable. However, a representative cannot be reimbursed for expenses incurred in obtaining medical or other evidence, which was previously submitted to the district director in connection with the claim. 20 C.F.R. § 725.366(c) (2008).

### 5. Travel expenses

Travel time is compensable, but the pertinent details of the trip must be included in the petition. *Bradley v. Director, OWCP*, 4 B.L.R. 1-241 (1981). Expenses charged must be determined in accordance with 20 C.F.R. § 725.459(a) (2008), as required by 20 C.F.R. § 725.366(c) (2008). *See also Cavote v. Director, OWCP*, 2 B.L.R. 1-1052 (1980).

In *Branham v. Eastern Associated Coal Corp.*, 19 B.L.R. 1-1 (1994), the Board held that it was proper to require that the employer reimburse claimant's counsel $48.40 in mileage costs to attend to medical depositions.

In so holding, the Board reasoned that such costs were "expenses necessary in establishing claimant's case."

In *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102 (1998) (*en banc*), the Board held that it was within the administrative law judge's discretion to find "that all of the hours requested by counsel for reviewing the file, traveling, organizing exhibits and preparing briefs were necessary and reasonable."

### 6. Witness fees

#### a. Generally

The regulations at 20 C.F.R. § 725.459(a) (2008) provide, in part, that a "witness testifying at a hearing before an administrative law judge, or whose deposition is taken, shall receive the same fees and mileage as witnesses in the courts of the United States." The federal court provisions for witness fees and costs are found at 28 U.S.C. § 1821 (1996) which provides, in part, as follows:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
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> . . .
>
> (2)(b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> (c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.
>
> (2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal government shall be paid to each witness who travels by

privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d)(1) A subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

The statute also contains provisions regarding fees and costs for incarcerated witnesses (who generally cannot receive fees or allowances) and paroled aliens (who are ineligible to receive fees and allowances).

### b. Expert witness fees

In *Branham v. Eastern Associated Coal Corp.*, 19 B.L.R. 1-1 (1994), the Board held that it was proper to require the employer to reimburse claimant $400.00 for obtaining a physician's deposition. The Board reasoned that "an expert need not testify at the administrative hearing in order for claimant to be reimbursed for the costs of obtaining a physician's opinion."

In *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894 (7th Cir. 2003), the court held that it was proper to require Employer to pay the fees of the successful Claimant's medical experts, regardless of whether they attended the hearing, were deposed, or merely submitted reports for consideration.

### c. After applicability of 20 C.F.R. Part 725 (2008)

The witness fees continue to be based upon the fees and mileage received by witnesses before the courts of the United States. 20 C.F.R. § 725.459(a) (2008).

### 7. LEXIS research

The court, in *Corsair Asset Management Inc. v. Moskovitz*, Case No. 1:89-CV-2116-JOF, 1992 U.S. Dist. LEXIS 6679, at 12 (N.D. Ga. Mar. 17, 1992), disallowed LEXIS online research charges stating that they are traditionally covered in office overhead expenses. The court compared incurring such expenses to using the law firm library.

## E. The hourly rate and hours requested

### 1. Generally

Counsel or representative for the successful claimant must set forth the hourly rate requested in his or her fee petition. To determine whether such a rate is appropriate, several factors must be considered, including the location of the representative or counsel, his or her years of experience, the level of expertise, and the complexity of the case. Additional factors which may be considered are the risk of loss, delay in payment, and the amount of the award of benefits. *Helton v. Director, OWCP*, 6 B.L.R. 1-176 (1983).

In *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102 (1998) (*en banc*), the Board held that it was proper for the administrative law judge to award fees at counsel's "customary hourly rate of $200 for black lung cases." In so holding, the Board rejected Employer's argument that "an hourly rate of $175 would be appropriate and more consistent with the rate obtained by the general legal community in the area of law" as Employer's argument was deemed "insufficient to meet (its) burden of proving the rate awarded was excessive or that the administrative law judge abused his discretion in this regard."

### 2. *Survey of Law Firm Economics*

Some administrative law judges will take judicial notice of Altman & Weil's *Survey of Law Firm Economics*, which lists the average hourly rates for attorneys by area of practice, years of experience, and geographical location. *Schneider v. Director, OWCP*, 2 B.L.R. 1-918, 1-926 (1980). However, by unpublished decision in *Mullins v. Betty B. Coal Co.*, BRB No. 95-1149 (Mar. 14, 1996) (unpub.), the Board held that "while the administrative law judge may take judicial notice of attorneys' customary hourly rates, a copy of the

1988 *Altman & Weil Survey of Law Firm Economics* is not in the record" and, therefore, on remand the judge was "instructed . . . to explain the basis for utilizing the northeast standard in setting the hourly rate for legal services rendered in Virginia."

### 3. Other sources

Another source of hourly rate statistics is the local bar association for attorneys practicing black lung in a particular area. *Budinski v. Director, OWCP*, 6 B.L.R. 1-541 (1983). The administrative law judge may also consider *Martindale-Hubbel* excerpts and other types of documentation submitted in support of a fee petition, such as affidavits from other practicing attorneys attesting to their hourly rates.

**Sample boilerplate:**

> In determining whether the hourly rate requested by Petitioner is reasonable, I note that Petitioner has _____ years of experience in black lung litigation. Additionally, I take judicial notice of the 20XX *Survey of Law Firm Economics*, published by Altman & Weil, Inc., a copy of which is attached, reports an average hourly billing rate for attorneys with ___ to ___ years of experience practicing law in the _____ region to be $_____ to $_____. *See Schneider v. Director, OWCP*, 2 B.L.R. 1-918, 1-926 (1980).

### 4. Amount of benefits awarded

Because the amount of benefits is set by law, "counsel bears the burden of demonstrating how the quality of representation affected the *amount* of benefits received if he or she wishes this factor to be considered." *Allen v. Director, OWCP*, 7 B.L.R. 1-330 (1984) (emphasis in original).

## IV. Augmentation or enhancement based on unique circumstances

Generally, fees are awarded based on hourly rates in effect at the time of representation. However, some cases have offered unique circumstances, which warrant exceptions to this rule.

## A. Extended length of litigation

### 1. Benefits Review Board

#### a. Generally

In *Cox v. Brady Hamilton Stevedore Co.*, 25 B.R.B.S. 203 (1991), the Board permitted fees in excess of the hourly rate in effect at the time the services were rendered based upon a finding of unique circumstances, including the extended length of litigation.

#### b. Enhancement against Trust Fund not permitted

However, in *Bennett v. Director, OWCP*, 17 B.L.R. 1-72 (1992), the Board denied counsel's request for an augmented fee due to delay in a case involving the Trust Fund. Counsel's first petition for fees was awarded by the administrative law judge immediately subsequent to the decision awarding benefits. The case was then appealed and a final compensation order was not entered for several years. Counsel then filed a second fee petition seeking to enhance the initial fee award on grounds of unusual delay in the processing of the claim. The Board held that because (1) counsel's petition for fees was granted and fees awarded by the administrative law judge in May of 1988, at which time no request for enhancement based upon delay was made and, (2) the fee award became final within thirty days because no appeal or motion for reconsideration was filed, the adjudicator was collaterally estopped from awarding an enhancement of the fee and stated as follows:

> Claimant's counsel contends that the administrative law judge erred in failing to award a supplemental fee to compensate for counsel's delay in receiving payment.
>
> . . .
>
> The filing of a supplemental fee petition seeking an additional $500.00 to account for delay in payment is tantamount to a collateral attack on a final order. The administrative law judge properly denied the motion for supplemental fees.
>
> . . .
>
> Furthermore, as the Director suggests, the supplemental fee petition is, in essence, a request for interest to be paid by the Black Lung Disability Trust Fund.

*Id.* at 1-73. The Board held that an award of interest against the Fund is not permitted by the Act or implementing regulations. *See also Goodloe v.*

*Peabody Coal* Co., 19 B.L.R. 1-91 (1995); *Hobbs v. Stan Flowers Co.*, 18 B.R.B.S. 65 (1986), *aff'd*, 820 F.2d 1528 (9th Cir. 1987).

### 2. Fourth Circuit

In *Kerns v. Consolidation Coal Co.*, 176 F.3d 802 (4th Cir. 1999), the court held that it was proper to award an enhanced fee to compensate counsel for the six year delay between the time his fee was initially awarded and the date on which he received payment of the fee. Specifically, the administrative law judge awarded a fee to Claimant's counsel on June 20, 1984 at the hourly rate of $80. Through a myriad of appeals and remands, the award of benefits was ultimately affirmed by the court and Employer sent counsel a check dated July 20, 1990 as payment for services rendered pursuant to the administrative law judge's 1984 fee order.

The court held that, contrary to Employer's assertion, it had jurisdiction to consider the fee enhancement request, which was submitted years after the 1984 fee award, as the original fee award did not become final until the compensation order became final. It noted that "[a]lthough the law at the time (counsel) filed his fee request did not require that the ALJ consider enhancement for delay, current law does." In support of this statement, the court cited to the Board's holding in *Nelson v. Stevedoring Servs. of America*, 29 B.R.B.S. 90 (1995) wherein the Board held that an administrative law judge is permitted to award a higher hourly rate to account for the delay in receipt of payment of the fee awarded. Thus, the case was remanded for the administrative law judge to consider counsel's request for enhancement of the fee award based upon delay in payment. *See also Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001) (fees for delay in payment and for litigating fee petition proper).

## B. Contingent nature of black lung claims

In *Goodloe v. Peabody Coal Co.*, 19 B.L.R. 1-91 (1995), the Board held that a fee cannot be enhanced to accommodate its contingent nature. However, enhancement for unusually lengthy delay may be an appropriate factor to consider in determining the hourly rate as noted in *Missouri v. Jenkins*, 109 S. Ct. 2463 (1989).

In *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001), the Seventh Circuit disapproved of the administrative law judge's award of $200.00 per hour for attorney's fees in the case (exceeding what the attorney would charge his paying clients. The court noted that the judge did not address Employer's argument that "the rate chargeable against the mine operator must be market-based, . . . without a premium for the contingent nature of the compensation." Rather, the court noted that the hourly rate of $200 was merely "a number plucked from a hat."

## C. Risk of loss and delay in payment

### 1. A background

Risk of loss and delay in payment are distinct factors. In awarding fees, risk of loss is generally deemed an inappropriate factor to consider, whereas enhancement of a fee to account for the delay in payment may be properly considered.

In *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 107 S. Ct. 3078 (1987), the Supreme Court considered an award of attorney's fees for successful prosecution of a claim under the Clean Air Act. The Court noted that "delay and the risk of nonpayment are often mentioned in the same breath" but that "adjusting for the former is a distinct issue that is not involved in this case." The Court further stated that "[w]e do not suggest, however, that adjustments for delay are inconsistent with the typical fee-shifting statute." Turning to an enhancement for risk of loss, the Court held that such an enhancement under fee-shifting statutes should be utilized only under exceptional circumstances. It reasoned as follows:

> [P]ayment for the time and effort involved--the lodestar--is presumed to be the reasonable fee authorized by the statute, the enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by the evidence in the record and specific findings by the courts.

Id. at 3088.

### 2. The case law

Enhancement for risk of loss in black lung claims is inappropriate. *See Gibson v. Director, OWCP*, 9 B.L.R. 1-149 (1986); *Helton v. Director, OWCP*, 6 B.L.R. 1-176 (1983) (risk of loss is a constant factor in black lung litigation and is, therefore, deemed incorporated into the hourly rate).

In recent cases, the Fourth Circuit has declined the use of contingency multiplier to account for the risk of loss in black lung claims. In *Broyles v. Director, OWCP*, 974 F.2d 508 (4th Cir. 1992), the court addressed the issue of risk of loss and held the following:

> A multiplier is not necessary to encourage attorneys to handle black lung litigation. These cases are argued before our court almost every term. While some of these claims are unsuccessful, the claimants win a sufficient number to encourage lawyers to

handle this type of litigation through the administrative proceedings and into the federal court.

*Id.* at 510. *See also Simkins v. Director, OWCP*, 53 F.3d 329 (4th Cir. 1995)(table); *Stollings v. Director, OWCP*, 43 F.3d 1468 (4th Cir. 1994)(table).

### D. Billing method

Disputes may arise regarding the billing method utilized by the representative—whether s/he uses the quarter hour billing method, or some other division such as an eighth or tenth of an hour. The Board's regulations at 20 C.F.R. § 802.203(d)(3) (2008) provide for billing in one-quarter hour increments.

In *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 B.R.B.S. 883 (1982), the Board held that a quarter of an hour minimum charge billing method is reasonable. On the other hand, in *Bullock v. Ingalls Shipbuilding, Inc.*, 29 B.R.B.S. 131 (1995)(en banc), a case arising under the jurisdiction of the Fifth Circuit and applying unpublished precedent of that court, the Board held that counsel's use of "a minimum quarter hour billing method was improper." In so concluding, the Board found that "the Fifth Circuit held that, generally, attorneys may not charge more than one-eighth hour for review of a one page letter and one-quarter hour for preparation of a one-page letter."

In *B&G Mining, Inc. v. Director, OWCP [Bentley]*, ___ F.3d ___, Case No. 06-0304 BLA (6th Cir. Apr. 16, 2008), the court upheld use of the "quarter hour" billing method and noted that the regulatory provisions at 20 C.F.R. § 802.203(d)(3) require that fees be submitted in such increments. The court stated that "[w]hile attorneys who record their time in quarter-hour increments might overbill their clients, attorneys who bill in tenth-hour increments might also overbill—the risk exists under both methods." The court concluded that "[a]s long as the total number of billable hours is reasonable in relation to the work performed, the award should be affirmed."

### E. Interest on the fee awarded

#### 1. Prior to applicability of 20 C.F.R. Part 725 (2008)

An award requiring the payment of interest by the Fund on an attorney's fee award is not authorized under the Act and is, therefore, not payable. *Griffin v. Director, OWCP*, 17 B.L.R. 1-75 (1993); *Bennett v. Director, OWCP*, 17 B.L.R. 1-72 (1992).

In *Hawker v. Zeigler Coal Co.*, BRB Nos. 99-0434 BLA and 04-0398 BLA (June 14, 2005) (unpub.), Employer challenged an award of interest on

attorney's fees under 20 C.F.R. § 725.608(c) stating that the Department "lacks the authority to increase an award of attorney fees by assessing interest through a regulation." Employer noted that the claims at issue were filed before the effective date of the amended regulations and "the previous regulations did not provide for mandatory interest payable from the date of the award of attorney fees. Citing to *Frisco v. Consolidation Coal Co.*, 22 B.L.R. 1-321 (2003), the Board held that "no new burden was imposed upon employer by application of Section 725.608, as attorney's fees paid by responsible operators were subject to enhancement for delay before the regulation's effective date of January 19, 2001."

#### 2. After applicability of 20 C.F.R. Part 725 (2008)

In *Frisco v. Consolidation Coal Co.*, 22 B.L.R. 1-321 (2003), the Board upheld application of the amended regulatory provisions at 20 C.F.R. § 725.608 (2008), which allow imposition of interest on a fee award to compensate counsel for delay in payment. The Board held that the regulation was valid and could be applied to fee awards issued prior to January 19, 2001. The Board further held that interest began to accrue from the date the fee was originally awarded (even though the initial 1982 fee award was vacated in *Frisco*).

### F. Reasonableness of the requested rate

It is the responsibility of the representative or attorney to establish the reasonableness of the hourly rate based on the quality of the representation, his or her qualifications, the complexity of the legal issues involved, and the level of the proceedings. *Pritt v. Director, OWCP*, 9 B.L.R. 1-159 (1986). The Board has consistently held that $50.00 per hour is manifestly inadequate. *Gibson v. Director, OWCP*, 9 B.L.R. 1-149 (1986). However, each case must be reviewed on its own merits and, under some circumstances, attorney's fees in black lung claims may exceed $200.00 per hour. Some examples are as follows:

#### 1. Benefits Review Board

In *J.V. v. Edd Potter Co.*, BRB No. 07-0292 BLA (Jan. 25, 2008) (unpub.), the Board upheld the administrative law judge's award of $250.00 per hour for counsel's services in the successful prosecution of a claim for benefits. The Board rejected Employer's proclaimed "uncontradicted evidence" that the "market rate for black lung attorneys in the geographic region of claimant's practice areas is no more than $140.00 per hour." Rather, the Board held that the "administrative law judge properly determined that Section 725.366(b) is controlling." In applying the factors set forth in the regulation, the administrative law judge noted that he had observed claimant's counsel's

"handling of this case" and found that "that quality of representation was very good." Further, the Board upheld the administrative law judge's approval of 47.25 hours of legal services, including the judge's determination "that time counsel spent conferring with his client and explaining decisions issued in this case was reasonable and compensable." *See Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980).

In *O.R.H. v. Blue Star Coal Corp.*, BRB No. 07-0124 BLA (Oct. 30, 2007) (unpub.), the Board affirmed the administrative law judge's attorney fee award to Claimant's counsel, Mr. Wolfe, at an hourly rate of $300.00. The administrative law judge noted that Claimant's counsel was "highly experienced" in the area of federal black lung and that his office was "one of the few in the area that accepted these types of cases." In affirming the attorney fee award, the Board cited to *Whitaker v. Director, OWCP,* 9 B.L.R. 1-216 (1986) and held that fee decisions in other cases wherein the administrative law judge awarded a lower hourly rate to Claimant's counsel were not binding in this case.

By unpublished decision in *McNew v. Sahara Coal Co.*, BRB No. 92-2520 BLA (Feb. 22, 1995)(unpub.), the Board held that the administrative law judge properly awarded fees at hourly rates of $175.00 and $200.00 based upon the quality of the representation and complexity of the legal issues involved, as well as the "unusual delay from the time the case was accepted until the payment of the fee." In this vein, the Board noted that the record did not reveal that the administrative law judge "improperly enhanced the requested hourly rates by incorporating a contingency multiplier," citing *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992).

In *Braenovich v. Cannelton Industries, Inc.*, 22 B.L.R.1-236 (2003), the Board upheld an hourly rate of $200, where the administrative law judge properly considered the factors at 20 C.F.R. § 725.366(b), including the "high quality" of counsel's representation, her professional credentials and experience, and the complex issues involving complicated pneumoconiosis presented in the case. In the case, Claimant was represented by the Director of the Washington and Lee University School of Law Legal Practice Clinic who, in turn, was assisted by law school students.

### 2. Fourth Circuit

In *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the court upheld the administrative law judge's award of $225.00 per hour to Claimant's counsel for successful prosecution of a black lung claim. Employer argued that counsel normally charged $175.00 for most civil litigation matters. The court concluded that the judge properly considered the factors set forth at 20 C.F.R. § 725.366(b) (2008) in approving of a higher hourly rate.

### 3. Sixth Circuit

In *B&G Mining, Inc. v. Director, OWCP [Bentley]*, ___ F.3d ___, Case No. 06-0304 BLA (6th Cir. Apr. 16, 2008), the court affirmed an awards of attorney's fees by the district director, administrative law judge, and Benefits Review Board in the amount of $16,618.75 for 69.25 hours of work. The approved hourly rates were $200.00 per hour by the district director, $250.00 per hour by the administrative law judge, and $225.00 per hour by the Benefits Review Board. In approving the awards, the court upheld the adjudicators' use of the "lodestar" method in calculating fees, *i.e.* a reasonable hourly rate times the number of hours reasonably expended in successful prosecution of the claim.

In assessing the propriety of the hourly rates requested, the Sixth Circuit noted that "courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." The court further stated that "[t]he appropriate rate, therefore, is not necessarily the exact value sought by a particular firm, but is rather the market rate in the venue sufficient to encourage competent representation." Finally, the court stated that "[a]n adjustment can then be made to the lodestar rate of the attorney's efforts resulted in 'exceptional success.'"

In upholding the approved hourly rates, the court reasoned that fee determinations in other claims, while not binding, may provide guidance:

> As a general proposition, rates awarded in other cases do not set the prevailing market rate—only the market can do that. Rates from prior cases can, however, provide some inferential evidence of what a market rate is, just as state-bar surveys of rates provide evidence of a market rate, but themselves do not set the rate. (citations omitted).

The court stressed that "'the market' for legal counsel is not a commodity market with a single price, but rather a service market with various price points based on education, experience, speciality, complexity, etc." The court declined to find that the adjudicators abused their discretion in awarded different hourly rates at different levels of prosecution of the claim.

Employer submitted evidence that attorneys performing work for insurance companies in black lung claims typically earn $125.00 per hour such that Claimant's counsel should not be entitled to a higher hourly rate. The court disagreed and stated:

> [T]he rates received by (insurance) attorneys are undoubtedly

> affected by several factors, including volume of work and prompt payment. Attorneys who represent claimants, on the other hand, likely do not benefit from the same high volume of work. Moreover, as evidenced by the briefs and letters submitted by claimant's attorney asking for expedited payment, attorneys who represent claimants often face a significant delay in getting paid. A delay in payment can justify a higher hourly rate.

*Id.*

#### 4. Seventh Circuit

In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002), the court approved of an attorney's fee for Claimant's counsel based on an hourly rate of $200.00. In support of its holding, the court noted that counsel filed affidavits by various black lung attorneys nationwide who stated that $200 per hour was reasonable in light of counsel's expertise, a letter from the vice president of the local bar association stating that the fee was reasonable in the area, and the fact that counsel was awarded that hourly rate in 22 out of 27 fee applications she filed with various administrative law judges and the Benefits Review Board.

### G. Request for reconsideration

Pursuant to 20 C.F.R. § 725.366(d) (2008), any party may request reconsideration of a fee award, and if appropriate, a modified fee award (or Supplemental Decision and Order on Reconsideration) may be issued. 20 C.F.R. § 725.366(e) (2008). Twenty C.F.R. § 725.366(e) requires that requests for reconsideration be in writing and that they contain "supporting statements and information pertinent to any increase or decrease requested."

## V. Liability for payment

### A. Attorney and lay representative

#### 1. Generally

The party opposing entitlement is generally liable to the claimant's counsel for payment of the fee award where claimant was successful.

#### 2. Lay representatives

Because the Act only provides for the award of attorney fees, the Black Lung Disability Trust Fund is not responsible for the payment of fees to lay representatives. *Madrak v. Director, OWCP*, 7 B.L.R. 1-559 (1984). In *Harrison v. Liberty Mutual Insurance Co.*, 3 B.L.R. 1-596, 1-597 (1981), the

Board held the following with regard to fees awarded to lay representatives:

> [T]here is no authority in either the Act or the implementing regulations for [a lay representative's fee] to be assessed against an employer, the Black Lung Disability Trust Fund or as a lien against claimant's benefits. Sections 28(a) and 28(b) of the Act, which authorize the award of a fee against the employer or the Trust Fund, apply only to the award of attorney's fees. Section 28(c), which allows the fee to be made a lien on claimant's benefits, similarly applies only to attorney's fees.

In a case involving a lay representative, fees must be paid by the claimant, although, as previously noted, no lien may be placed upon a claimant's benefits no ensure such payment of fees. 20 C.F.R. § 725.365 (2000) and (2008).

Moreover, in *Kuhn v. Kenley Mining Co.*, Case No. 01-2255 (4th Cir. Apr. 4, 2002) (unpub.), the Fourth Circuit cited to 33 U.S.C. § 928(a) and 20 C.F.R. § 725.367(a) to hold that "the statute does not permit the fees of a lay representative to be shifted to an employer."

### B. Fees in Part C claims, miner had no post-1969 coal mine employment

Employers are not responsible for attorney's fees and benefits in Part C claims where the miner had no post-1969 coal mine employment. The Black Lung Disability Trust Fund is liable for the payment of compensation in these claims as well as for payment of attorney's fees. In addition, the 1981 Amendments of the Black Lung Act provided for the transfer of liability in claims that were finally denied prior to March 1, 1978, but where and benefits were later awarded upon review pursuant to Section 435 of the Reform Act. 30 U.S.C. § 932(c); 20 C.F.R. § 725.496 (2008). Thus, the Trust Fund is liable for all attorney's fees and costs in claims covered by the 1981 transfer Amendments, and which the employer has not yet paid. 20 C.F.R. § 725.367(b) (2008); *Marple v. Jones & Laughlin Steel Corp.*, 7 B.L.R. 1-580 (1984).

The 1981 Amendments and 20 C.F.R. § 725.367(b) and (c) (2008) prohibit the Trust Fund from reimbursing an operator or carrier for any attorney's fees or costs that it paid on cases subject to the transfer provisions. Thus, fees paid by an operator or carrier pursuant to a final order awarding benefits prior to January 1, 1982 may not be reimbursed. *But see Burress v. Windsor Power House Coal Co.*, 7 B.L.R. 1-517 (1984).

## VI. Enforcement of supplemental decision and order

The Board has held that an administrative law judge may render an attorney's fee determination when a decision is issued to further the goal of administrative efficiency. *See Bruce v. Atlantic Marine, Inc.*, 12 B.R.B.S. 65, 68 (1980), *aff'd*, 661 F.2d 898 (5th Cir. 1981).[2] However, when a final decision in a case is still pending, the attorney's fee award is neither enforceable nor payable until such time as an award of benefits to the claimant becomes final and the award reflects a successful prosecution of the claim. 33 U.S.C. § 928; 20 C.F.R. § 725.367(a) (2000) and (2008).

In *Adkins v. Kentland Elkhorn Coal Corp.*, 109 F.3d 307 (6th Cir. 1997), the court dismissed counsel's fee petition without prejudice to state that "attorney fees may be recovered only if there has been a final decision awarding the claimant an economic benefit as a result of his black lung claim." The court concluded that counsel's request for fees was premature as no award of benefits had become final.

It is also noteworthy that, in *Eifler v. Peabody Coal Co.*, 13 F.3d 236 (7th Cir. 1993), the Seventh Circuit held that any settlement of attorney's fees requires administrative or judicial approval and, even though attorney's fees may not be awarded before a final compensation award is entered, a *settlement* of attorney's fees may be approved before such a final award.

## VII. Solicitor as counsel to claimant pursuant to 20 C.F.R. § 725.422

The regulations at 20 C.F.R. § 725.422 provide that the "Secretary or his or her designee may, upon request, provide a claimant with legal assistance in processing a claim under the Act." Section 725.422 further states the following:

> Such assistance may be made available to a claimant in the discretion of the Secretary of Labor . . . at any time prior to or during the time in which the claim is being adjudicated and shall be furnished without charge to the claimant. Representation of a claimant in adjudicatory proceedings shall not be provided by the Department of Labor unless it is determined by the Solicitor of Labor that such representation is in the best interests of the black lung benefits program. In no event shall representation be provided to a claimant in a claim with respect to which the

[2] The Fifth Circuit affirmed the Board's decision, but the Board's holding that an attorney fee order may be issued before a final compensation order is entered was neither raised nor decided by the circuit court.

> claimant's interests are adverse to those of the Secretary of Labor or the fund.

By unpublished decision in *Adams v. Eastern Associated Coal Corp.*, BRB No. 93-305 BLA (Jan. 28, 1994) (unpub.), the Board held that an administrative law judge is without authority to order that the Solicitor provide legal assistance to a claimant under 20 C.F.R. § 725.422 (2000) of the regulations. Rather, the Board determined that the "regulations clearly endow the Solicitor with sole discretion to determine whether to provide legal assistance to claimants." The Board further noted that "the comments accompanying the publication of the most recent revision of Section 725.422 state that 'the decision to commit resources to a claimant's case was always within the discretion of the Solicitor.'" 43 Fed. Reg. 36, 796-97 (1978). The provisions at § 725.422 remain unchanged in the amended regulations. 20 C.F.R. § 725.422 (2008).

## VIII. Right to counsel

The regulations at 20 C.F.R. § 725.362(b) (2000) and (2008) provide the following in regard to a claimant's right to counsel:

> Any party may waive his or her right to be represented in the adjudication of a claim. If an adjudication officer determines, after an appropriate inquiry has been made, that a claimant who has been informed of his or her right to representation does not wish to obtain the services of a representative, such adjudication officer shall proceed to consider the claim in accordance with this part, unless it is apparent that the claimant is, for any reason, unable to continue without the help of a representative. However, it shall not be necessary for an adjudication officer to inquire as to the ability of a claimant to proceed without representation in any adjudication taking place without a hearing. The failure of a claimant to obtain representation in an adjudication taking place without a hearing shall be considered a waiver of the claimant's right to representation. However, at any time during the processing or adjudication of a claim, any claimant may revoke such waiver and obtain a representative.

In *Shapell v. Director, OWCP*, 7 B.L.R. 1-304 (1984), the Board interpreted these provisions to require that "the administrative law judge has the responsibility to inform a *pro se* claimant of his right to be represented by a representative of his/her choice, at no cost to him/her, and inquire whether claimant desires to proceed without such representation." In so holding, the Board concluded that a judge conducts a full and fair hearing involving a *pro se* claimant where s/he: (1) advises the claimant of the contested issues; (2) asks the claimant whether s/he objects of the admission of the Director's

exhibits; and (3) inquires "extensively" of the claimant's coal mine employment and medical problems.

In *Petrosky v. Donex Mining, Inc.*, BRB No. 94-652 BLA (Dec. 22, 1994)(unpub.), the Board held that the claimant properly waived his right to legal representation under the Act. Under the facts of the case, the claimant appeared *pro se* before the administrative law judge, who failed to notify him that an attorney could not charge him a fee. The administrative law judge, however, did notify the claimant that he had a right to an attorney, offered to continue the proceeding until the claimant could obtain representation, gave the claimant the opportunity to testify fully, and allowed the claimant to object to the submission of any evidence.

However, by unpublished decision in *Talbert v. Meadow River Coal Co.*, BRB No. 93-1525 BLA (Dec. 29, 1994) (unpub.), the Board directed that a *de novo* hearing be held on remand as, in addition to failing to advise a *pro se* claimant of the advantages of obtaining representation, the administrative law judge further failed to inform the claimant that he is entitled to representation by counsel of his choice.

While a claimant must be informed of his or her right to counsel, the same is not required for an employer. In *Mitchell v. Daniels Co.*, 22 B.L.R. 1-73 (2000), the Board held that there is no regulatory requirement that responsible operators be informed of the right to counsel and that policy concerns underlying the requirement that *pro se* claimants receive such notification do not apply to presumably more sophisticated coal company officials.

## IX. Qualifications of representative

### A. Generally

Under the pre-amended regulations, any representative, attorney or otherwise, must file a notice of appearance or be otherwise authorized to appear before the Department of Labor on behalf of a particular claimant. The amended regulations, however, provide that a qualified attorney need not file a notice of appearance, but may submit a written declaration (or oral declaration at the formal hearing) that s/he is authorized to represent the party. 20 C.F.R. § 725.362(a) (2008).

A representative must be qualified under 20 C.F.R. § 725.363. 20 C.F.R. § 725.362(a) (2000) and (2008). If an attorney, the representative must be in good standing; admitted to practice before a court of a state, territory, district, or insular possession, or before the Supreme Court of the United States or other federal court; and is not, pursuant to any provision of law, prohibited from acting as a representative. 20 C.F.R. § 725.362(a) (2000) and (2008).

For a representative who is not an attorney, s/he may be appointed as a representative so long as that person is not, pursuant to any provision of law, prohibited from acting as a representative. 20 C.F.R. § 725.363 (2000) and (2008). To be awarded an attorney's fee, an individual must either be an attorney in good standing or be an attorney approved by the adjudication officer.

### B. Licensed to practice in one state, may represent claimant in another state

In *R.R. v. Marine Terminals Corporation East*, BRB No. 07-0920 (Sept. 17, 2007) (unpub.), a case arising under the Longshore and Harbor Workers' Compensation Act, the Board affirmed the administrative law judge's finding that an attorney who is licensed to practice law in one jurisdiction (Virginia) may represent the claimant in another jurisdiction (North Carolina) pursuant to 29 C.F.R. § 18.34(g)(1).

### C. Criminal conviction

In *United States v. Davis*, 490 F.3d 541 (6th Cir. 2007), the court upheld the criminal convictions of Carolyn Sue and Otis Davis for aiding and abetting in Medicare fraud and obstructing a criminal investigation. The court noted that the charges "stemmed from the Davis's orchestration of and participation in a scheme to supply oxygen to coal miners suffering from black lung disease." The court noted that Ms. Davis "was instrumental in the founding of the Kentucky Black Lung Association . . ., an organization designed to help miners obtain black lung benefits, as well as other goods and services they might need in order to live with the disease."

## X. Costs for pursuit of frivolous claim

In *Crum v. Wolf Creek Collieries*, 18 B.L.R. 1-81 (1994), the Board adopted the Ninth Circuit's holding in *Metropolitan Stevedoring Co. v. Brickner*, 11 F.3d 887 (9th Cir. 1993), that under Section 926 of the Longshore and Harbor Workers' Compensation Act, as incorporated into the Black Lung Benefits Act, "only a federal court can assess a party's costs as a sanction against a claimant who institutes or continues, without reasonable ground, workers' compensation proceedings under LHWCA." Thus, the Board, the administrative law judge, and the district director are without authority to impose Section 926 costs.