

JUDGES' BENCHBOOK OF THE BLACK LUNG BENEFITS ACT



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CHAPTER 27 Representative's Fees and Representation Issues

Chapter 27

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Chapter 27

Representative's Fees and Representation Issues

I. Entitlement to fees

[XI(A)(2)]

Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act, 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 have been held to be constitutional and do not deprive the employer of due process of law. *United States Department of Labor v. Triplett*, 110 S. Ct. 1428 (1990). The regulations governing the award of fees in black lung cases are found at 20 C.F.R. §§ 725.362-725.367, and a disposition of an attorney's fee petition should be styled as a “*Supplemental Decision and Order Awarding Representative's Fees and Costs*.” The award of attorney'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(b). 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.

Under the regulations as amended in December 2000, however, an attorney may file a declaration that s/he is authorized to represent a party. Section 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) (Dec. 20, 2000).

B. Successful prosecution of the claim

[XI(A)(4)]

1. Successful prosecution, 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). Moreover, fees are awarded to an attorney who represented the claimant, 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."

2. Partial success

The Board has held that "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).

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.

3. Claimant's interest; adversarial proceeding

The following principles relate to a claimant's interest in the issues of the claim as well as the requirement that the proceeding for which fees are awarded was adversarial in nature.

a. Prior to applicability of December 2000 regulations--precontroversion fees not awarded

The "successful prosecution" of a claim necessarily requires that the posture of the parties be adversarial. The following are examples of how "adversarial" proceeding is defined. The regulation at § 725.367 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.

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."

**b. After applicability of December 2000 regulations--
precontroversion fees awarded**

The regulations have been amended to permit an award of pre-controversion fees to an attorney. 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) (Dec. 20, 2000). The regulation also contains examples of cases where fees would properly be awarded, including medical treatment disputes, where the claimant is successful in obtaining an increase in the monthly benefit payments, and where the claimant is "successful in resisting the request for a decrease in the amount of benefits payable." 20 C.F.R. § 725.367(a)(1) to (5) (Dec. 20, 2000).

4. Fees permitted in overpayment cases

As previously noted, 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 nonadversarial in nature). See also 20 C.F.R § 725.367 (Dec. 20, 2000).

5. Litigation of the fee award

The Board has held that claimant's counsel or representative is entitled to fees for time spent litigating the fee award. In so holding, 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)(unpublished). However, note that 20 C.F.R. § 725.366(b) provides that "[n]o fee approved shall include payment for time spent in preparation of a fee application."

6. 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*).

7. Notice of actual liability required

In *Director, OWCP v. Bivens*, 757 F.2d 781 (6th Cir. 1985), the court barred recovery of attorney's fees from the employer 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 § 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). But see *Bethenergy Mines, Inc. v. Director, OWCP [Markovich]*, 854 F.2d 632 (3d Cir. 1988).

By unpublished decision, the Board, in *Carter v. Peabody Coal Co.*, BRB Nos. 93-0651 BLA and 93-0651 BLA-S (July 19, 1994), upheld Judge Rudolph Jansen's Supplemental Decision and Order granting attorney's fees wherein he concluded that the holdings in *Poyner* and *Bivens* were inapplicable because, unlike the claimants in *Poyner* and *Bivens*, Carter's claim was denied by the district director, and the employer "agreed with this finding of non-entitlement . . . placing it in an adversarial position vis-a-vis claimant." The Board concluded that, "as this case involves an adjudicative rather than administrative award and employer's acceptance of the district director's finding of non-entitlement placed it in an adversarial posture vis-a-vis claimant, the administrative law judge properly found that employer is liable for attorney's fees in this case."

8. Withdrawal of controversion

The Board has held that successful prosecution includes the favorable resolution of a claim and has held an employer 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 OALJ 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 nonadversarial in nature). *See also* 20 C.F.R. § 725.367 (Dec. 20, 2000) (adversarial proceeding not required under amended regulations).

II. Fee Petitions

A. Submission of the fee petition; timeliness

[XI(A)(3)]

Pursuant to § 725.366(a), to receive an award for attorney's fees, an application for an award must be filed and served upon the claimant and all other parties within the time limits allowed by the district director, administrative law judge, or appropriate appellate tribunal.

Limiting time for filing 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, § 725.366(a) does not provide a penalty for failure to file a fee petition within the established time limits. *See generally 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). Examples of the reasonableness of time limitations are as follows:

- ! The Board has held that 15 days is not an unreasonable amount of time for the submission of a fee petition. *Bradley v. Director, OWCP*, 8 B.L.R. 1-418 (1985).
- ! The Board concluded that denying all fees because a petition was received 30 days past the time allowed for filing constituted an abuse of discretion, as 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).
- ! 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 he 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 which he imposed.

However, the Board noted that, significantly, 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.

B. Fees awarded separately at each administrative level
[XI(A)(5)]

Section 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. 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) (Dec. 20, 2000).

1. Determining which services were performed before this Office

The administrative law judge must determine whether the services performed were properly before this Office or before the district director. Certain dates help to determine before which office services were performed, *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, etc. Nevertheless, 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 the preparation for the hearing, the administrative law judge can 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).

C. Contents of the fee petition

[XI(A)(6)]

Under 20 C.F.R. § 725.366(a), 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, *i.e.*, attorney, paralegal, law clerk, lay representative, or clerical, 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.

D. Contingency fees or other fee arrangements prohibited; settlements

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) and that no contract or prior agreement for a fee shall be valid. *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

[XI(A)(7)(b)]

A. Generally

1. Factors to be considered

Pursuant to § 725.366(b), 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. In this vein, it is noted that, in *Peabody Coal Co. v. McCandless*, ___ F.3d ___, Case Nos. 95-3291, 00-1449, and 00-2788 (7th Cir. June 29, 2001)¹, the Seventh Circuit disapproved of the ALJ's award of \$200.00 per hour for attorney's fees in the case which would

¹ It is noted that the Seventh Circuit does not mention the amended regulations in its decision.

exceed what the attorney would charge his paying clients. The court noted that the ALJ 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."

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 for the successful prosecution of this claim.

2. 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.

B. "Necessary work" defined
[XI(A)(7)(b)(2)]

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. Time spent preparing the fee petition is not compensable. 20 C.F.R. § 725.366(b). However, the Fourth Circuit, in *Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001), the court held that time spent pursuing a petition for attorney's fees. Finally, an administrative law judge may not round off time claimed to the nearest quarter of an hour. *Porter v. Director, OWCP*, 4 B.L.R. 1-392 (1982).

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 two 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).

b. Contacting a congressional representative

It has also been held that 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. Expenses and costs

Under 20 C.F.R. § 725.366(c), the proper adjudication officer is authorized to award the amount of reasonable and unreimbursed expenses. Again, the fee petition must be detailed enough to demonstrate the relevance and connection to the claim.

1. Advising the claimant

The 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). In addition, the 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

[XI(A)(7)(b)(3)(b)]

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.

Sample Boilerplate:

Twenty C.F.R. § 725.366(c) 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 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 this Office in connection with the claim. 20 C.F.R. § 725.366(c).

5. Travel expenses [XI(A)(7)(b)(3)(a)]

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), as required by 20 C.F.R. § 725.366(c). *See id.*; *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." The Board further 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."

6. Witness fees

a. Generally

The regulations at 20 C.F.R. § 725.459(a) provide, in part, that a "witness summoned to 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.

. . .

(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.

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."

b. After applicability of December 2000 regulations

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) (Dec. 20, 2000). However, § 725.459(b) provides, in part, as follows:

If such witness is required to attend the hearing, give a deposition or respond to interrogatories for cross-examination purposes, the proponent of the witness shall pay the witness' fee. If the claimant is the proponent of the witness whose cross-examination is sought, and demonstrates, within time limits established by the administrative law judge, that he would be deprived of ordinary and necessary living expenses if required to pay the witness fee and mileage necessary to produce the witness for cross-examination, the administrative law judge shall apportion the costs of such cross-examination among the parties to the case. The administrative law judge shall not apportion any costs against the fund in a case in which the district director has designated a responsible operator, except that the fund shall remain liable for any costs associated with the cross-examination of the physician who performed the complete pulmonary evaluation pursuant to § 725.406.

20 C.F.R. § 725.459(b) (Dec. 20, 2000). Further, subsection (d) provides that “[a] claimant shall be considered to be deprived of funds required for ordinary and necessary living expenses for purposes of paragraph (b) of this section where payment of the projected fee and mileage would meet the standards set forth at 20 C.F.R. § 404.508.” 20 C.F.R. § 725.459(d) (Dec. 20, 2000). The amended regulations encourage the administrative law judge to “authorize the least intrusive and expensive means of cross-examination . . .” 20 C.F.R. § 725.459(d) (Dec. 20, 2000).

D. The hourly rate and hours requested
[XI(A)(7)(b)(1)]

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)(*see infra*). Some administrative law judges will take judicial notice of Altman & Weil's *Survey of Law Firm Economics*, which lists the normal 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), 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.” 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 he has ____ years of experience in black lung litigation. Additionally, I take judicial notice of the 19XX *Survey of Law Firm Economics*, published by Altman & Weil, Inc., which 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).

1. Amount of benefits awarded

Because the amount of benefits are 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).

2. Augmentation or enhancement based upon unique circumstances [XI(A)(7)(c)]

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

a. Extended length of litigation

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.

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. Counsel's first petition for fees was awarded by the administrative law judge immediately subsequent to the decision awarded benefits. The case was then appealed and a final compensation order was not entered for several years for which reason counsel 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, however, 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 Board held that 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); *Dotson v. Peabody Coal Co.*, Case No. 91-BLA-988 (ALJ May 24, 1993)(ALJ Sheldon R. Lipson considered claim's 16 year history in awarding attorney's fees).

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, but that 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)², the Seventh Circuit disapproved of the ALJ's award of \$200.00 per hour for attorney's fees in the case which would exceed what the attorney would charge his paying clients. The court noted that the ALJ 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.”

c. Risk of loss and contingency multipliers

Risk of loss, delay of payment, and the amount of the award are factors to be considered in setting the hourly rate. *Velasquez v. Director, OWCP*, 844 F.2d 738 (10th Cir. 1988); *Thompson v. Potashnick Cont. Co.*, 812 F.2d 574 (9th Cir. 1987); *Helton v. Director, OWCP*, 6 B.L.R. 1-176 (1983). *But see Gibson v. Director, OWCP*, 9 B.L.R. 1-149 (1986) (risk of loss is a constant factor in black lung litigation and is, therefore, deemed incorporated into the hourly rate).

In *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 107 S. Ct. 3078 (1987), the Supreme Court held that multipliers or other enhancement of a reasonable lodestar fee to compensate for the risk of loss are impermissible under the usual fee shifting statutes. The Court discussed the use of multipliers and stated that the applicant must establish that the risk is inherent to a class of cases rather than to a particular case and that the fee is enhanced only to the extent necessary to attract competent counsel.

² It is noted that the Seventh Circuit does not mention the amended regulations in its decision.

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 did not “improperly enhance[] the requested hourly rates by incorporating a contingency multiplier.” In addition, in *Milburn Colliery Co. v. Woodson*, Case No. 89-3318, slip. op. (4th Cir. Dec. 21, 1990)(unpub.), the Fourth Circuit approved the use of a multiplier in black lung cases and held that a multiplier of 60% for a \$200.00 hourly rate was appropriate. The court discussed how the use of the contingency fee system in black lung cases renders such claims unappealing to attorneys because of the low success rate, the prohibition of settlements, and slow rate at which cases move through the system, and that in black lung cases, as opposed to non-statutory contingency fee systems, attorneys cannot offset the loss of many cases with a large award in one case.

3. Billing method

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. However, it is noteworthy that, 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.”

4. Interest

[XI(A)(10)]

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).

5. 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, fees of \$75.00 per hour have routinely been upheld. *Gillman v. Director, OWCP*, 9 B.L.R. 1-7 (1986).

However, each case must be reviewed on its own merits and, under some circumstances, attorney's fees in black lung claims have often been approved at \$100.00 to \$150.00 an hour. 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).

E. Request for reconsideration

Pursuant to 20 C.F.R. § 725.366(d), 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. 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.”

IV. Liability for payment

[XI(A)(9)]

A. Attorney and lay representative

As previously noted, the party opposing entitlement is generally liable to the claimant's counsel for payment of the fee award. However, 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 to ensure such payment of fees. 20 C.F.R. § 725.365.

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

[XI(A)(9)(c)]

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 cases in which the claim was finally denied prior to March 1, 1978 and benefits were later awarded upon review pursuant to § 435 of the Reform Act. 30 U.S.C. § 932(c); 20 C.F.R. § 725.496. Thus, the Trust Fund is liable for all attorney's fees and costs for which the employer would have been liable, but for the 1981 Amendments, and which the employer has not yet paid. 20 C.F.R. § 725.367(b); *Marple v. Jones & Laughlin Steel Corp.*, 7 B.L.R. 1-580 (1984). Because the employer would only be liable for attorney's fees if it controverts the notice of liability, the Trust Fund is only liable for

post-controversion attorney's fees in transfer cases. *Couch v. The Pittston Co.*, 7 B.L.R. 1-514 (1984).

The 1981 Amendments and 20 C.F.R. § 725.367(b)³ prohibit the Trust Fund from reimbursing an operator or carrier for any attorney's fees or costs which it has 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).

V. 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).⁴ 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). 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.

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

³ See 20 C.F.R. § 725.367(c) (Dec. 20, 2000).

⁴ 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.

In *Owens v. Clinchfield Coal Co.*, BRB Nos. 93-874 BLA and 93-875 BLA (Jan. 27, 1993) (unpublished), the Board dismissed a claimant's appeal regarding the Solicitor's denial of legal assistance directly from the district director's level. In support of the dismissal, the Board held that it lacked jurisdiction because the "denial is neither a final order nor a non-final order which meets the criteria that determines whether an issue is appealable to the Board." However, by unpublished decision in *Adams v. Eastern Associated Coal Corp.*, BRB No. 93-305 BLA (Jan. 28, 1994), the Board held that an administrative law judge is without authority to order that the Solicitor provide legal assistance to a claimant under § 725.422 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).

VII. Right to counsel

[IV(C)(3)]

The regulations at 20 C.F.R. § 725.362(b) 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, 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 choice, at no cost to him, 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 he or she: (1) advises the claimant of the contested issues; (2) asks the claimant whether he or she 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)(unpublished), 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), 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.

VIII. Qualifications of representative

[IV(C)(3)]

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. 20 C.F.R. § 725.362(a).⁵ A representative must be qualified under 20 C.F.R. § 725.363. 20 C.F.R. § 725.362(a). 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). For an 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(b). 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.

IX. 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 § 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 § 926 costs.

⁵ Under the amended regulations, 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) (Dec. 20, 2000).