

P & K COAL CO., LTD.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 95-296

Decided April 16, 1996

Appeal from a decision of Administrative Law Judge Ramon M. Child dismissing a petition for award of attorney's fees. DV-93-12-REAJA and DV-93-13-REAJA.

Appeal dismissed.

~~Part of the Surface Mining Control and Reclamation Act of~~

An appeal from an order finding that an applicant for attorney's fees claiming entitlement thereto based upon bad faith by OSM had waived any right to the award claimed is properly dismissed when the applicant fails to allege or show that the decision appealed from is in error.

APPEARANCES: Stephen W. Smith, Esq., Henryetta, Oklahoma, for appellant; John S. Retrum, Esq., Office of the Regional Solicitor, Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

P & K Coal Company, Ltd. (P&K), has appealed from a February 15, 1995, decision by Administrative Law Judge Ramon M. Child dismissing an application for attorney's fees filed under provision of 43 CFR 4.1294.

The application, filed January 13, 1995, sought an award of attorney's fees and costs, alleging that P&K had prevailed against the Office of Surface Mining Reclamation and Enforcement (OSM) when, on June 6, 1994, Judge Child issued a final order vacating Cessation Order (CO) 93-030-081-002 and CO 93-030-081-003. The application recites that:

The subject imminent harm COs were filed by OSMRE in bad faith and for the sole purpose of harassing and embarrassing Applicant and the Oklahoma Department of Mines (ODM). OSMRE was engaged

in a systematic effort to establish that ODM was not properly enforcing surface mining reclamation laws and that the primacy of the State of Oklahoma should be rescinded. As a result, OSMRE filed the subject COs knowing that the State of Oklahoma was addressing the problem for the sole reason of harassing and embarrassing Applicant and ODM. The charges were without merit and OSMRE knew they were without merit.

Concerning the timing of this filing, the application explained that "[a]pplicant requests to be allowed to present this Application at this time because it is only now able to document the extent of OSMRE's bad faith." Attached to the application are five pages of billing for attorney's fees, showing time spent on behalf of P&K beginning on August 16, 1993, in a "[c]onference with client" and ending on June 16, 1994, with a "[r]eview of Administrative Law Judge decision and authority - Conference with Client."

Finding that P&K's delay in applying for attorney's fees amounted to a waiver of any right it may have had to such fees (see 43 CFR 4.1291), Judge Child dismissed the application. He further found that:

The evidence presented at the hearing did not support a finding of bad faith. If applicant could make a showing of bad faith, it was charged with bringing such an allegation within 45 days of the receipt of the Decision wherein it had prevailed on the issue presented. That it took longer to "*** document the extent ***" does not excuse the delay in filing the petition. [Emphasis in original.]

(Decision at 2). A notice of appeal from P&K was filed with the Hearings Division on March 10, 1995, and was received by the Board of Land Appeals with the case file transmitted by the Hearings Division on March 27, 1995. This notice included a certification that it was being transmitted to the Board of Land Appeals on March 8, 1995.

When no brief in support of the notice of appeal was filed by May 15, 1995, OSM moved that this appeal be dismissed, arguing that under 43 CFR 4.1273(a), a brief from P&K was due not later than April 13, 1995.

It was not until May 19, 1995 (following filing of the motion to dismiss by OSM), that P&K filed a belated request to file a brief. Thereafter, on May 25, 1995, P&K filed a request for hearing to permit P&K to gather evidence concerning alleged misconduct by an OSM inspector. Although entitled "brief," this filing points to no error in Judge Child's decision dismissing the fee application, but instead suggests that the manner in which the OSM inspector conducted a related surface mining investigation will support the allegation of agency misconduct made against OSM as the basis for the application for award of attorney's fees.

[1] P&K's failure to transmit a brief within the time allowed by 43 CFR 4.1273(a) subjected this appeal to summary dismissal. See 43 CFR 4.1273(b); Adkins v. OSM, 128 IBLA 1, 2 (1993). Further, it is a principle of practice before this Board that an appellant challenging a decision must show error in the decision if he is to prevail; one who does not state a reason for appeal that is supported by argument or evidence showing error cannot succeed. See Estil Estep, 130 IBLA 291, 293 (1994), and cases cited therein. In requesting a hearing to develop evidence outside the record of the proceedings made by Judge Child, P&K has tacitly admitted that, as Judge Child found, nothing in the record before Judge Child would support a finding that OSM had acted in bad faith. More to the point, P&K has not shown any error in Judge Child's finding that the delay in making an application for award, under the circumstances of this case, amounted to a waiver of any right to claim attorney's fees and costs, especially in view of the provision of 43 CFR 4.1291 putting all persons on notice that failure "to make a timely filing of the petition may constitute a waiver of the right to such an award." See Rith Energy, Inc. v. OSM, 108 IBLA 114 (1989).

While P&K took an appeal to this Board from Judge Child's ruling, it has not prosecuted that appeal in timely fashion. As OSM contends, P&K failed to make a timely filing of a brief. Even if the belated submission filed by P&K on May 25 were considered to be a brief within the meaning of 43 CFR 4.1273, it does not allege error in the decision here under review or state any ground for reversing that decision. On the record before us, P&K has failed to state any grounds upon which relief from the decision appealed from can be granted. It is therefore apparent that the motion by OSM to dismiss this appeal because P&K has failed to provide any reason why it should continue is well taken and must be granted.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed.

Franklin D. Amess
Administrative Judge

I concur:

James L. Burski
Administrative Judge

