

BRB No. 10-0679 BLA

CAROLYN J. DUKE)
(o/b/o and Widow of WILLIAM R. DUKE))
)
 Claimant-Respondent)
)
 v.)
)
 COWIN & COMPANY, INCORPORATED) DATE ISSUED: 01/27/2012
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Granting Attorney Fees of Adele H. Odegard,
Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP),
Birmingham, Alabama, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for
employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Granting Attorney Fees (2008-BLA-5872 and 2008-BLA-5873) of Administrative Law Judge Adele H. Odegard rendered on a miner's claim, consolidated with a survivor's claim, filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹

¹ Claimant is the widow of the miner, who was receiving federal black lung benefits at the time of his death on July 19, 2007. Claimant filed her claim for survivor's

Claimant's counsel² submitted a fee petition to the administrative law judge, requesting a total fee of \$4,830.64 for 15.25 hours³ of legal services at an hourly rate of \$225, 0.625 hour of services performed by a legal assistant at an hourly rate of \$75, and \$1,352.51 in expenses. Employer did not object to the hourly rates, number of hours, or the expenses requested, but argued instead that claimant's counsel was not entitled to attorney fees. After considering employer's objections, the administrative law judge found that the requested fees and expenses were reasonable, and determined that claimant prevailed in defending against employer's request for modification of the award of benefits in the miner's claim, and in successfully prosecuting the survivor's claim. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$4,830.64 for legal services performed and expenses incurred while the case was before the Office of Administrative Law Judges.

On appeal, employer challenges the administrative law judge's award of attorney fees to claimant's counsel. Claimant's counsel has responded in support of the fee award. Employer replies in support of its position.

benefits on August 3, 2007. Director's Exhibit 2. During the pendency of the administrative processing of claimant's survivor's claim, employer submitted a request for modification of the award of benefits in the miner's claim, arguing a mistake in a determination of fact with regard to the finding of legal pneumoconiosis. The survivor's claim and employer's request for modification of the miner's claim were consolidated for hearing before the administrative law judge, and claimant's counsel rendered services to claimant on both claims. The administrative law judge found that reopening the miner's claim would not render justice under the Act, and denied employer's request for modification. The administrative law judge initially denied benefits in the survivor's claim, but subsequently determined, following claimant's motion for reconsideration, that claimant was derivatively entitled to survivor's benefits under amended Section 422(*l*) of the Act. 30 U.S.C. §932(*l*), amended by Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §932(*l*)).

² The fee petition was filed by Mr. Patrick Nakamura, who is no longer a partner with the firm of Quinn, Connor, Weaver, Davies & Rouco, LLP. The administrative law judge ordered that fees be paid to the law firm. Order Granting Attorney Fees at 4.

³ While claimant's motion for reconsideration of the denial of her survivor's claim was pending before the administrative law judge, counsel filed his application for attorney fees with the administrative law judge, requesting fees for the work performed defending the miner's claim. The fee petition requests compensation for half of the time spent preparing for the consolidated hearing. Petition for Attorney Fees at 2; Claimant's Response at 2 n. 2; Order Granting Attorney Fees at 2.

The amount of attorney fees awarded by an administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.⁴ *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); *see also Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

On appeal, employer maintains that claimant's counsel is not entitled to attorney fees because the administrative law judge's award of benefits did not result from counsel's successful prosecution of either the miner's claim or the survivor's claim. In this regard, employer argues that, because the administrative law judge's denial of modification of the award of benefits in the miner's claim was based on her finding that reopening the claim would not render justice under the Act, claimant did not successfully demonstrate that the modification request had no merit. Employer maintains that the award of benefits in the survivor's claim was, likewise, not due to counsel's efforts, but was due to a "fortuitous legislative event," *i.e.* the enactment of amendments to the Act contained in Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010). Employer's Brief at 2-3; Reply Brief at 1-2. We reject employer's arguments.

Claimant's counsel is entitled to attorney fees payable by employer for the successful prosecution of a claim. *See* 33 U.S.C. §928; 20 C.F.R. §725.367; *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991). "Successful prosecution" of a claim requires success in establishing, or preserving, claimant's entitlement to benefits. *See Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 248, 38 BRBS 37, 39(CRT) (4th Cir. 2004); *Bethenergy Mines Inc. v. Director, OWCP [Markovich]*, 854 F.2d 632 (3d Cir. 1988), *aff'g Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987). In determining that claimant's counsel successfully prosecuted the claims at issue, the administrative law judge found that "but for the successful defense of employer's request for modification, claimant would not have prevailed in the Motion for Reconsideration [of the denial of her survivor's claim], because she would not have qualified for benefits under the . . . [automatic entitlement provisions contained in amended Section 422(l) of the Act, 30 U.S.C. §932(l)]." Order Granting Attorney Fees at 3. Contrary to employer's contention, the administrative law judge properly concluded that the work performed by claimant's counsel in defending the modification request was reasonable and necessary to uphold the award of benefits in the miner's claim, and the fact that "a fortuitous

⁴ The law of the United States Court of Appeals for the Eleventh Circuit is applicable, as the miner was employed in the coal mining industry in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

legislative event” later changed claimant’s burden of proof in the survivor’s claim has no bearing on whether the services were necessary at the time they were rendered. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984); *Busbin v. Director, OWCP*, 3 BLR 1-374 (1981). Therefore, we affirm the administrative law judge’s award of \$4,830.64 in attorney fees and expenses.

Accordingly, the administrative law judge’s Order Granting Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge