

BRB No. 05-0836 BLA

GARY L. HOWARD)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 04/28/2006
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Supplemental Award [of] Fee for Legal Services of Mary B. Tackett, Senior Claims Examiner, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Supplemental Award [of] Fee for Legal Services of Senior Claims Examiner Mary B. Tackett (the claims examiner), awarding attorney's fees for services rendered on an overpayment action in connection with a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is based on a claim for benefits filed with the Department of Labor on February 10, 1998. Director's Exhibit 1. The district director denied benefits. Claimant requested a hearing and an administrative law judge awarded benefits on August 31, 1999. The responsible operator declined to pay benefits, and the Black Lung Disability Trust Fund (the Trust Fund), began paying interim benefits. Upon consideration of the responsible operator's appeal, the Board vacated the award of benefits and remanded the case to the administrative law judge for

further consideration. *Howard v. Martin County Coal Corp.*, BRB No. 99-1305 BLA (Nov. 29, 2000)(unpub.). On remand, the administrative law judge denied benefits in a Decision and Order issued on June 13, 2001. Claimant appealed, and the Board affirmed the denial of benefits. *Howard v. Martin County Coal Corp.*, BRB No. 01-0771 BLA (May 20, 2002)(unpub.). Claimant then appealed to the United States Court of Appeals for the Sixth Circuit, which also affirmed the denial of benefits. *Howard v. Martin County Coal Corp.*, No. 02-3656, 89 Fed. Appx. 487 (6th Cir. Dec. 29, 2003).

On October 13, 2004, the district director notified claimant that there was an overpayment in the amount of \$21,619.44. Claimant, with the aid of counsel, requested waiver of the overpayment by completing and submitting an Overpayment Recovery Questionnaire. On November 10, 2004, the district director informed claimant that the overpayment would be waived. Claimant's counsel filed a fee petition on May 24, 2005 for services rendered in seeking waiver of the overpayment. On June 24, 2005, the district director awarded claimant's counsel a fee in the amount of \$250, but determined that it is the responsibility of claimant, rather than the Trust Fund, to pay the fee.¹

On appeal, claimant contends that the district director erred in finding claimant liable for the attorney's fee. The Director responds, urging affirmance of the Supplemental Award.

An award of attorney fees 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 law. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

In order to be entitled to an award of attorney's fees under Section 28(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a), claimant's counsel must engage in the successful prosecution of a claim.² See *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); see generally *Director, OWCP v. Baca*, 927 F.2d 1122, 15 BLR 2-42 (10th Cir.1991); *Yates v. Harman Mining*

¹ Because the award of attorney's fees in the amount of \$250, pursuant to 20 C.F.R. §725.366, is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

² A successful prosecution of a claim exists when claimant receives an economic benefit resulting from an adversarial proceeding. See 33 U.S.C. §928(a), as implemented by 20 C.F.R. §725.367(a); see also *Bethenergy Mines Inc. v. Director, OWCP [Markovich]*, 854 F.2d 632 (3d Cir. 1988), *aff'g sub nom. Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987).

Co., 12 BLR 1-175 (1989), *aff'd on recon.*, 13 BLR 1-56 (1989) (*en banc*). The defense of overpayment recovery involves adversarial proceedings in connection with a claim for benefits which may result in an economic benefit to the claimant, and, therefore, the successful defense of an overpayment recovery action is, in effect, the successful prosecution of a contested claim for the purposes of Section 28(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928(a), as incorporated by 30 U.S.C. §932(a). *Sosbee v. Director, OWCP*, 17 BLR 1-136 (1993)(Order)(*en banc*); *see also Bethenergy Mines Inc. v. Director, OWCP [Markovich]*, 854 F.2d 632 (3d Cir. 1988), *aff'g sub nom. Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987).

Claimant contends that the creation of an overpayment necessarily created an adversarial relationship between claimant and the district director, and thus the fee awarded for representation of claimant should be paid by the Trust Fund. Claimant's Brief at 5. In response, the Director relies on 20 C.F.R. §725.367(a), which provides that the Trust Fund is liable for an attorney's fee only where it "took action, or acquiesced in action, that created an adversarial relationship between itself and the claimant." 20 C.F.R. §725.367(a). The Director asserts that the district director never created an adversarial relationship with claimant because he made no determination that claimant had to repay the overpayment. Director's Response Brief at 3.

The regulation cited by the Director is inapplicable to this claim, which was filed before January 19, 2001, the effective date of revisions to the regulations. *See* 20 C.F.R. §725.2(c). Under the former regulations, case law required the creation of an adversarial relationship to trigger the Trust Fund's liability for an attorney's fee. In *Director, OWCP v. Bivens*, 757 F.2d 781, 787, 7 BLR 2-166, 2-173 (6th Cir. 1985), the Sixth Circuit court held that the Trust Fund could not be liable for attorneys' fees under Section 28(a) unless it took "some affirmative action which would put it in an adversarial position against the claimant" The court in *Bivens*, however, did not address when an adversarial relationship is created in an overpayment recovery proceeding. Contrary to the Director's position in the case at bar, we hold that it is a notice of an overpayment, rather than an adverse decision on a request for waiver of an overpayment, that creates a creditor-debtor relationship between the Trust Fund seeking repayment and claimant. Such a relationship is, by nature, adversarial.

In the instant case, the notice of overpayment received by claimant stated: "We have made a preliminary finding that you are **without fault** in the matter of the overpayment. Regardless, we are required by law to recover the overpayment unless you can show that such recovery would "defeat the purpose of the law" or "be against equity and good conscience". *See* OWCP letter of October 13, 2004 (emphasis in original). Moreover, the notice advised claimant of his legal rights and responsibilities in the overpayment proceedings, including advising him that he needed to either forward reimbursement to the Department of Labor or provide evidence and, if he wished, request

an informal conference on the matter. In addition, the notice specifically advised claimant, *inter alia*, that he had a right to bring a representative to an informal conference, wherein he could meet with an examiner to discuss the overpayment. *Id.* Given the nature of the overpayment notice, as described, *supra*, we hold that an adversarial relationship, triggering the Trust Fund's liability for the payment of claimant's attorney's fees, was created by its issuance. Thus, we reject Director's contrary position.

We therefore affirm the claims examiner's finding that claimant's counsel is entitled to a fee, but reverse her finding that claimant is responsible for the payment of attorney's fees, and order payment of the awarded fees by the Black Lung Disability Trust Fund.

Accordingly, the district director's Supplemental Award [of] Fee for Legal Services is affirmed in part, reversed in part, and modified consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge