BRB Nos. 09-0869 BLA,
09-0870 BLA, and 10-0266 BLA

FLO RATLIFF (o/b/o and Widow of ZED RATLIFF) Claimant-Respondent v. DOMINION COAL CORPORATION and SUN COAL Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/19/2011 DECISION and ORDER

Appeal of the Decision and Order and the Order Awarding Attorney Fees of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Jonathan Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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:

Employer appeals the Decision and Order (08-BLA-5078, 08-BLA-0005) of Administrative Law Judge Pamela Lakes Wood denying employer's request to modify the award of benefits in a miner's claim, and awarding benefits in a survivor's claim. Both the miner's claim and the survivor's claim were 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). Employer also appeals the administrative law judge's subsequent Order Awarding Attorney Fees (08-BLA-5078, 08-BLA-0005).[1]

Procedural History

The miner filed a claim for benefits on July 26, 1984. Director's Exhibits M-1.[2] In a Notice of Initial Finding dated December 14, 1984, the district director found that the miner was entitled to benefits. Director's Exhibit M-14. After employer contested its liability, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits M-15, M-19. Employer, however, subsequently executed an "Agreement to Pay Benefits" on July 16, 1985. Director's Exhibit M-20. The district director issued an award of benefits on October 2, 1986, finding, *inter alia*, that the evidence established that the miner suffered from complicated pneumoconiosis. Director's Exhibit M-21. On November 4, 1991, the district director issued an Amended Award of Benefits, adding claimant as a dependent spouse. Director's Exhibit M-22. The miner continued to receive benefits until his death on October 3, 2006. Director's Exhibit S-7.

Claimant[3] filed a survivor's claim on October 23, 2006. Director's Exhibit S-1. In a Proposed Decision and Order dated May 7, 2007, the district director awarded benefits in the survivor's claim. Director's Exhibit S-24. By letter dated May 16, 2007, employer contested its liability in the survivor's claim. Employer also requested modification of the award in the miner's claim, arguing that the documents submitted in the survivor's claim demonstrate that the miner never actually suffered from complicated

[1] By Orders dated October 9, 2009 and March 24, 2010, the Board consolidated employer's appeals in BRB Nos. 09-0869 BLA, 09-0870 BLA, and 10-0266 BLA for purposes of decision only.

[2] The evidence in the miner's claim is identified with an "M," and the evidence in the survivor's claim is identified with an "S."

[3] Claimant is the surviving spouse of the deceased miner.

pneumoconiosis, thereby establishing a mistake in a determination of fact in the miner's claim.[4] Director's Exhibit M-24; Director's Exhibit S-25.

On July 26, 2007, the district director issued a Revised Proposed Decision and Order awarding benefits in the survivor's claim. Director's Exhibit S-26. On August 22, 2007, the district director issued a Proposed Decision and Order denying employer's request for modification of the miner's claim award. Director's Exhibit M-27.

At employer's request, both the miner's claim and the survivor's claim were forwarded to the Office of Administrative Law Judges for a hearing. Director's Exhibits M-30, S-32. The administrative law judge held a hearing on July 10, 2008.

The Administrative Law Judge's Decision and Order

In a Decision and Order dated September 4, 2009, the administrative law judge addressed both employer's request for modification of the award of benefits in the miner's claim, and the survivor's claim. In regard to employer's request for modification, the administrative law judge found that reopening the miner's claim would not render justice under the Act. Accordingly, the administrative law judge denied employer's request for modification. In her adjudication of the survivor's claim, the administrative law judge applied the doctrine of collateral estoppel to preclude relitigation of the issue of the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, employer contends that the administrative law judge erred in finding that reopening the miner's claim would not render justice under the Act. Employer also contends that the administrative law judge erred by applying collateral estoppel to award benefits in the survivor's claim. Claimant responds in support of the administrative law judge's denial of employer's request for modification in the miner's claim and the administrative law judge's award of benefits in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has not filed a substantive response to employer's appeal. In a reply brief, employer reiterates its previous contentions.

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[4] Employer noted that it previously requested modification of the miner's claim in a letter dated February 9, 2007. Although this letter is not found in the miner's claim, it was admitted as an exhibit in the survivor's claim. *See* Director's Exhibit S-23.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer's Request for Modification of the Miner's Claim

Employer sought modification of the miner's claim based upon a mistake in a determination of fact. 20 C.F.R. §725.310(a). Employer specifically contended that new evidence demonstrated that the miner never actually suffered from complicated pneumoconiosis. In support of its request for modification, employer submitted new CT scan evidence and treatment records.[6]

The Administrative Law Judge's Finding

In this case, the administrative law judge determined that reopening the miner's claim would not render justice under the Act. In making this determination, the administrative law judge explained that she was influenced by employer's lack of diligence in pursuing the miner's claim, employer's improper motive for seeking modification, and the futility of employer's motion for modification of the miner's claim. Decision and Order at 8-11.

Render Justice Under The Act

Although an administrative law judge may find a mistake in a determination of fact, the administrative law judge must ultimately determine whether reopening a claim will render justice under the Act. *O'Keeffe, v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971). The United States Court of Appeals for the Fourth Circuit has held that an adjudicator, in considering whether to reopen a claim, must exercise the discretion granted under 20 C.F.R. §725.310 by assessing any factors relevant to the rendering of justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *see also D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33 (2008). These relevant

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[5] The record reflects that the miner's coal mine employment was in Virginia. Director's Exhibit M-2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[6] Employer's new evidence included Dr. Scott's interpretation of an August 29, 2006 CT scan. Dr. Scott interpreted the CT scan as revealing "no convincing evidence of occupational pneumoconiosis." Director's Exhibit S-14.

factors include the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69.

In *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), the Board held that "while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw*, 33 BRBS at 72, *citing Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991). The Board reviews an administrative law judge's findings in this regard under the abuse of discretion standard. *Kinlaw*, 33 BRBS at 73.

In this case, the administrative law judge considered each of these relevant factors in assessing whether reopening the miner's claim would render justice under the Act. First, the administrative law judge found that employer was not diligent in pursuing modification of the miner's claim, noting that employer "waited two decades" to challenge the finding of complicated pneumoconiosis that was the basis of the award. Decision and Order at 10. Second, the administrative law judge questioned employer's motive for seeking modification, noting that employer acknowledged that its primary motivation in seeking modification of the miner's claim was to enhance its defense of the survivor's claim by precluding the application of collateral estoppel.[7] *Id.* Third, the administrative law judge found that employer's modification request was futile, as employer admitted that it was not seeking recovery of the benefits that it had paid in the miner's claim.[8] *Id.* The administrative law judge also noted that employer, in support of its modification request, had not submitted any "highly reliable evidence," such as autopsy evidence, that would call into question the finding of complicated pneumoconiosis in the miner's claim. *Id.* at 8, 11.

Employer contends that the "need for accuracy is a relevant factor" in determining whether to reopen the miner's claim. Employer's Brief at 16-17. However, the Fourth Circuit has held that the "modification of a black lung claim does not necessarily flow from a finding that a mistake was made in an earlier determination of fact." *Sharpe*, 495 F.3d at 131, 24 BLR at 2-66; *see also Kinlaw*, 33 BRBS at 73 (recognizing that the

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[7] At the hearing, employer's counsel acknowledged that "the primary purpose in filing the request for modification was to try to avoid the preclusive effect of a finding of complicated [pneumoconiosis] in the survivor's claim." Hearing Transcript at 10.

[8] At the hearing, employer's counsel stated that he did not think that employer was seeking a return of any benefits in the miner's claim. Hearing Transcript at 8.

interest in arriving at the correct result does not always override the interest in finality).

Given the valid bases provided by the administrative law judge for her finding (employer's lack of diligence in pursuing modification, employer's improper motive in seeking modification, and the futility of employer's modification request), we hold that the administrative law judge did not abuse her discretion in determining that reopening the miner's claim would not render justice under the Act. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69; *Kinlaw*, 33 BRBS at 73. We, therefore, affirm the administrative law judge's denial of employer's request for modification in the miner's claim. 20 C.F.R. §725.310.

Impact of the Recent Amendments on the Survivor's Claim

Subsequent to the issuance of the administrative law judge's Decision and Order, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. Relevant to this survivor's claim, Section 1556 amended Section 422(*l*) of the Act, 30 U.S.C §932(*l*), to provide that a survivor is automatically entitled to benefits if the miner filed a successful claim and was receiving benefits at the time of his death.[9] 30 U.S.C. §932(*l*).

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[9] As it existed prior to March 23, 2010, Section 932(*l*) provided that:

> In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981, [*sic*].

30 U.S.C. §932(*l*).

On March 23, 2010, Public Law No. 111-148 amended Section 932(*l*) as follows: "(b) Continuation of Benefits – Section 432(*l*) of the Black Lung Benefits Act (30 U.S.C. §932(*l*)) is amended by striking 'except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981'." Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(*l*)). Section 1556 of Public Law No. 111-148 provides further that "[t]he amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. §921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, §1556(c).

By Order dated June 18, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556. Claimant, employer, and the Director have responded.

Claimant contends that amended Section 932(*l*) mandates an award of benefits in the survivor's claim. The Director agrees with claimant. The Director specifically notes that the miner was receiving benefits pursuant to a final award on his claim at the time of his death, that claimant filed her survivor's claim after January 1, 2005, and, that her claim was pending on March 23, 2010. Citing *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989), employer argues that the operative date for determining eligibility for the automatic entitlement provisions of Section 932(*l*) is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer contends that, because the miner filed his claim before January 1, 2005, the amendments to Section 932(*l*) do not apply to claimant's survivor's claim. Employer further argues that the retroactive application of the automatic entitlement provisions of amended Section 932(*l*) to claims filed after January 1, 2005, constitutes a violation of its due process rights.

Employer's contentions have no merit. In a recent case, the Board held that the operative date for determining eligibility for survivors' benefits under amended Section 932(*l*) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. *Stacy v. Olga Coal Co.*, BLR , BRB No. 10-0113 BLA (Dec. 22, 2010).[10] The Board specifically held that, under amended Section 932(*l*), an eligible survivor who files a claim after January 1, 2005, that is pending on or after the March 23, 2010 effective date of the Section 1556 amendments, is entitled to benefits based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Stacy*, slip op. at 7; *see* 30 U.S.C. §932(*l*).

Employer's reliance upon the Board's *Smith* decision is misplaced. In *Smith*, the Board held that, although the miner's claim had been initially awarded by the district director and was in payment status at the time of his death, because the administrative law judge later denied the miner's claim, the widow was not entitled to derivative entitlement based on the miner's claim, but had to satisfy her burden of establishing that the miner's death was due to pneumoconiosis. *Smith*, 13 BLR at 1-19. The Board held that the administrative law judge, however, reasonably permitted the widow to benefit from the pre-January 1, 1982 filing date of the miner's claim in finding that the widow was entitled to the presumption set forth at 20 C.F.R. §718.303 in order to establish her entitlement to benefits. *Id.* However, the Board's decision in *Smith* is not relevant to the issue of the availability of derivative entitlement currently before the Board.

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[10] The employer in *Stacy v. Olga Coal Co.*, BLR , BRB No. 10-0113 BLA (Dec. 22, 2010) has filed an appeal with the Fourth Circuit.

Thus, because claimant filed her claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, claimant is derivatively entitled to survivor's benefits pursuant to Section 932(*l*).

We also reject employer's contention that the retroactive application of the automatic entitlement provisions of amended Section 932(*l*) to claims filed after January 1, 2005, constitutes "a due process violation." Employer's Supplemental Brief at 6. The Board rejected this same argument in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010).[11] We reject it here for the same reasons set forth in *Mathews*.

Accordingly, because claimant is derivatively entitled to benefits under the recent amendments to the Act, we remand this case to the district director for the entry of an award of benefits pursuant to amended Section 932(*l*).[12]

Attorney Fee Award

Employer also appeals the administrative law judge's Order Awarding Attorney Fees, for legal services performed by claimant's counsel in connection with both employer's request for modification of the award of benefits in the miner's claim, and the award of benefits in the survivor's claim. The administrative law judge awarded claimant's counsel a total fee of $9,840.00 for 18.80 hours of legal services at an hourly rate of $300.00 (Joseph E. Wolfe), 0.50 hours of legal services at an hourly rate of $200.00 (W. Andrew Delph), 17.00 hours of legal services at an hourly rate of $175.00 (Ryan C. Gilligan), and 11.25 hours of legal services at an hourly rate of $100.00 (legal assistants).

On appeal, employer contends that the administrative law judge's attorney's fee award is excessive. Neither clamant nor the Director has filed a response brief.

The amount of an attorney's fee 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 BLR 1-15 (1989).

Employer contends that the administrative law judge erred in her calculation of the

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[11] The employer in *Mathews v. United Pocahontas Coal Co.*, 24 BLR, 1-193 (2010) has filed a motion for reconsideration with the Board.

[12] In light of our disposition of this case, we need not address employer's contention that the administrative law judge erred by applying collateral estoppel to award benefits in the survivor's claim.

allowable hours.[13] 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 the service is excessive or unreasonable. *See Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

Employer contends that the entries on the following dates are clerical in nature, and should, therefore, have been disallowed: November 16, 2007, December 12, 2007, March 7, 2008, March 18, 2008, May 13, 2008, June 3, 2008, October 14, 2008, November 10, 2008, December 17, 2008, and January 2, 2009. The Board has held that clerical services are considered part of overhead expenses and are figured into the hourly rate. *See Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986). In this case, the administrative law judge agreed with employer that claimant's counsel was not entitled to the time that his paralegals spent on billing, making copies, and scanning documents, because these activities are clerical in nature, and, therefore, not compensable. Order Awarding Attorney Fees at 1. Consequently, the administrative law judge disallowed a total of 3.00 hours performed by counsel's paralegals for these activities. *Id.* at 1-2. However, in regard to the above-challenged entries, the administrative law judge found that, because this work involved "file analysis, client contact, document review and organization, correspondence, and calendaring," it represented "appropriate professional activities." *Id.* We affirm the administrative law judge's allowance of these entries, as within her discretion. *Abbott*, 13 BLR at 1-16; *Lanning*, 7 BLR at 1-316.

Employer also objects to the "numerous and unsupported and duplicative entries generally called '[a]nalyze file for follow[-]up.'"[14] Employer's Brief at 4. Employer contends that such a duplication of effort was "unsupported and unnecessary." *Id.* The administrative law judge did "not find any of the fees claimed to be for duplicative work." Order Awarding Attorney Fees at 2. The administrative law judge further found that the "work performed was appropriate," and that "the amount of time expended on each activity was not excessive." *Id.* We affirm the administrative law judge's

[13] Because employer does not challenge the hourly rates awarded by the administrative law judge, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

[14] Employer specifically objects to a total of 5.0 hours spent by paralegals and, on occasion, Joseph E. Wolfe, analyzing the file for follow-up on the following dates: November 21, 2007, January 2, 2008, January 26, 2008, April 2, 2008, June 12, 2008, June 24, 2008, July 16, 2008, October 9, 2008, November 3, 2008, November 10, 2008, December 3, 2008, December 10, 2008, December 30, 2008, January 8, 2009, February 2, 2009, February 20, 2009, March 2, 2009, June 29, 2009, August 1, 2009, and September 9, 2009. Employer's Brief at 4.

allowance of these entries, since the administrative law judge applied the proper standard to these requested hours, and did not abuse her discretion in allowing these entries. *Abbott*, 13 BLR at 1-16.

Because we reject all contentions of error raised by employer, we affirm the administrative law judge's attorney's fee award.[15]

Accordingly, the administrative law judge's Decision and Order denying employer's request for modification in the miner's claim is affirmed. In regard to the survivor's claim, this case is remanded to the district director for the entry of an appropriate order. The administrative law judge's Order Awarding 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

[15] An attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co*., 18 BLR 1-9, 1-17 (1995).