

BRB No. 13-0190 BLA

JUANITA PICKENS)	
(Widow of JAMES L. PICKENS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
COWIN & COMPANY, INCORPORATED)	DATE ISSUED: 01/31/2014
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Granting in Part and Denying in Part Claimant's Petition for Attorneys' Fees of Lystra A. Harris, 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.

Barry H. Joyner (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Granting in Part and Denying in Part Claimant's Petition for Attorneys' Fees (2011-BLA-05336) of Administrative Law Judge Lystra A.

Harris (the administrative law judge), rendered in connection with on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).¹ Claimant's counsel submitted a fee petition to the administrative law judge, requesting a total fee of \$12,224.00 representing 47.25 hours of legal services by claimant's counsel at an hourly rate of \$250.00 and 5.5 hours of services performed by a legal assistant at an hourly rate of \$75.00.² Employer objected to the number of hours and services for which fees were requested. The administrative law judge rejected employer's arguments regarding \$2,537.50 in fees requested for work performed by claimant's counsel from May 26, 2011 to April 12, 2012, rendered in connection with employer's request for modification in the miner's claim. The administrative law judge found that they "were necessary in order to protect the widow's award of benefits." Order Granting in Part and Denying in Part Claimant's Petition for Attorneys' Fees at 3. The administrative law judge next found that \$3,950.00 requested for work performed in the survivor's claim between October 19, 2011 and November 14, 2011, related to preparing claimant's post-hearing brief, was excessive. *Id.* at 4. The administrative law judge reduced the fee by \$1,975.00, which was one-half of the requested amount. *Id.* The administrative law judge next disallowed \$2,375.00 for work performed on December 27 and 28, 2011, which involved work performed before the Board. *Id.* at 4-5. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$7,874.00 for legal services performed while the case was before the Office of Administrative Law Judges (OALJ).³ *Id.* at 5.

On appeal, employer challenges the administrative law judge's award of attorney fees to claimant's counsel. Specifically, employer challenges the administrative law judge's award of attorney's fees for work performed by claimant's counsel in connection

¹ Claimant is the widow of the miner, who was awarded black lung benefits on February 3, 1994, and was receiving federal black lung benefits at the time of his death on October 5, 2010. Director's Exhibits 1, 5. Claimant filed her claim for survivor's benefits on November 8, 2010. Director's Exhibit 2. The district director awarded benefits on November 11, 2010, finding that claimant was derivatively entitled to survivor's benefits under amended Section 422(l) of the Act, 30 U.S.C. §932(l). Employer contested the award of benefits and the case was referred to the Office of Administrative Law Judges (OALJ). In a Decision and Order issued on June 7, 2012, Administrative Law Judge Ralph A. Romano awarded survivor's benefits.

² Claimant's counsel's fee petition contains a \$1.00 accounting error; the correct total is \$12,225.00.

³ The administrative law judge's award also contains a \$1.00 accounting error; the correct total is \$7,875.00.

with employer's request for modification in the miner's claim. In addition, employer contends that the administrative law judge's reduction in the fee awarded for preparing the post-hearing brief was inadequate. Claimant's counsel has responded in support of the fee award. The Director, Office of Workers' Compensation Programs (the Director), has also filed a response, agreeing with employer that the administrative law judge erred in awarding attorney's fees for services performed in the miner's claim, but on alternative grounds.

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).

Claimant's counsel entered her appearance as claimant's representative on April 20, 2011, while the survivor's claim was before the OALJ. Prior to the hearing, employer sought discovery in the miner's closed claim. Claimant's counsel responded to employer's discovery request in the miner's closed claim on May 26, 2011. The hearing in the survivor's claim was subsequently held on July 13, 2011, before Administrative Law Judge Ralph A. Romano; employer challenged only the constitutionality of the amendments.⁵ Thereafter, on September 27, 2011, employer filed a petition for modification of the award of benefits in the miner's closed claim which the district director denied on January 14, 2012. Employer requested a hearing, and the case remains pending in the OALJ. The miner's claim was not consolidated with the survivor's claim. Meanwhile, on June 7, 2012, Judge Romano issued his Decision and Order awarding survivor's benefits. Employer did not appeal the award of survivor's benefits.

Claimant's counsel filed her fee petition on July 2, 2012, and employer filed objections on July 12, 2012. By Order issued on November 9, 2012, the attorney fee

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, 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.

⁵ Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress revived Section 932(l) of the Act, which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

petition was assigned to the administrative law judge due to Judge Romano's retirement. On December 12, 2012, the administrative law judge accepted claimant's counsel's untimely response to employer's objections to the fee petition. After consideration of the fees requested and the objections raised, the administrative law judge issued the Order Granting in Part and Denying in Part Claimant's Petition for Attorneys' Fees.

On appeal, employer maintains that the administrative law judge erred in awarding attorney's fees to claimant's counsel for work she performed in connection with employer's request for modification in the miner's claim. Employer argues that claimant's counsel should have been awarded fees only for services performed before the administrative law judge in connection with the survivor's claim. Employer's Brief at 2. Employer asserts that the administrative law judge's "rationale for allowing compensation for these services" was erroneous. *Id.* Employer further contends that the administrative law judge was not authorized to rule on the necessity of the services performed by claimant's counsel in matters pending before a different tribunal. *Id.*; *see* 20 C.F.R. §725.367(b).

Claimant's counsel disagrees and maintains that "the widow's eligibility for derivative benefits was placed in jeopardy by [employer's] decision to seek modification" of the miner's award of benefits. Claimant's Brief at 3. Thus, claimant's counsel argues, her work on matters related to employer's request for modification in the miner's claim while the survivor's claim was pending was justified. *Id.* In his response brief, the Director observes that employer filed its request for modification in the miner's claim with the district director on September 27, 2011 and that the district director denied employer's request for modification in the miner's claim in a Proposed Decision and Order dated January 14, 2012. Director's Letter Brief at 2. The Director also notes that subsequently, on February 17, 2012, employer requested a hearing in the miner's claim before the OALJ. *Id.* The Director further states that the district director referred the modification request in the miner's claim to the OALJ on April 9, 2012.⁶ *Id.* The Director thus maintains that since claimant's counsel's work, in connection with employer's request for modification in the miner's claim, was performed before the district director, the administrative law judge was not authorized to award a fee for those services. *Id.* Employer replies and agrees with the Director's view that the administrative law judge should not have awarded a fee for services performed in connection with employer's request for modification in the miner's claim.

⁶ The Director, Office of Workers' Compensation Programs, indicates that the request for modification in the miner's claim is currently pending with Administrative Law Judge Adele H. Odegard at the OALJ and is designated OALJ Case No. 2012-BLA-05699. Director's Letter Brief at 2.

The Act provides that when a claimant wins a contested case, the employer, its insurer, or the Black Lung Disability Trust Fund shall pay a “reasonable attorney’s fee” to claimant’s counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). 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). The regulations provide, in pertinent part, that “[a] representative seeking a fee for services performed on behalf of a claimant shall make application therefor to the district director, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed,” and “[u]pon receipt of a request for approval of a fee, such request shall be reviewed and evaluated by the appropriate adjudication officer and a fee award issued.” See 20 C.F.R. §725.366(a), (d).

Although the administrative law judge found that the legal services performed by claimant’s counsel in connection with employer’s request for modification in the miner’s claim were necessary to protect the widow’s award of benefits,⁷ see Order Granting in Part and Denying in Part Claimant’s Petition for Attorneys’ Fees at 3, we agree that the services performed by claimant’s counsel from May 26, 2011 to April 12, 2012, in connection with employer’s pending request for modification in the miner’s claim were not services performed before the administrative law judge. Thus, the administrative law judge was not authorized to award an attorney’s fee to claimant’s counsel for the services performed from May 26, 2011 to April 12, 2012, in connection with employer’s request for modification in the miner’s claim. See *Abbott*, 13 BLR at 1-16; *Matthews v. Director, OWCP*, 9 BLR 1-184, 1-186 (1986). We, therefore, vacate the administrative law judge’s attorney’s fee award with respect to the fees awarded for the itemized time entries related to services performed from May 26, 2011 to April 12, 2012, in connection with employer’s request for modification in the miner’s claim.⁸

⁷ The administrative law judge’s reliance on *Duke v. Cowin & Co.*, 25 BLR 1-55 (2012), is misplaced. In *Duke*, the Board upheld an administrative law judge’s award of an attorney’s fee where the work performed by counsel in defending against the employer’s request for modification in the miner’s lifetime claim was found to be reasonably necessary to preserve the widow’s entitlement to survivor’s benefits in the *consolidated* survivor’s claim. However, this case is distinguishable as the miner’s claim was not before the administrative law judge.

⁸ This does not include the October 13, 2011, one-quarter of an hour of services related to the survivor’s claim.

Finally, employer avers that, while the administrative law judge disallowed one-half of the fees requested for preparing the post-hearing brief, “claimant’s counsel’s services were mostly unnecessary” and “[e]ven the reduced amount awarded by the [administrative law judge] was excessive.” Employer’s Brief at 4. Employer fails, however, to brief this contention or to provide any support for its argument. *Id.* Consequently, because employer failed to adequately brief this issue, we will not address it. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

In summary, we modify the administrative law judge’s award to correct the mathematical error and to reflect only the award of attorney’s fees for services performed in connection with the survivor’s claim. Accordingly, claimant’s counsel is entitled to an attorney’s fee of \$5,275.00 for legal services performed in the survivor’s claim.

Accordingly, the administrative law judge's Order Granting in Part and Denying in Part Claimant's Petition for Attorneys' Fees is affirmed in part, vacated in part and modified in part. We order employer to pay claimant's counsel \$5,275.00 for legal services rendered to claimant in connection with her survivor's claim while the case was before the Office of Administrative Law Judges.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge