BRB No. 02-0789 BLA

CHARLES W. BLAKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
METEC LEASING, INCORPORATED	)	
	)	DATE
Employer-Petitioner	)	ISSUED:_____
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	

DECISION and ORDER

Appeal of the Supplemental Decision and Order – Awarding Attorney Fees of Administrative Law Judge Daniel J. Roketenetz, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order – Awarding Attorney Fees (1999-BLA-810) of Administrative Law Judge Daniel J. Roketenetz with respect to 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). The relevant procedural history of this case is as follows: Claimant, a living miner, filed an application for benefits on March 18, 1986, which was denied by Administrative Law Judge James W. Kerr, Jr., on the ground that the existence of pneumoconiosis was not established. The Board affirmed the denial of benefits. *Blake v. Metec Leasing, Inc.*, BRB No. 92-1975 BLA (Nov. 19, 1993)(unpub.). Within a year, claimant wrote

a letter to the Department of Labor and submitted new evidence. This was construed as a request for modification. Judge Kerr denied the request, finding again that the existence of pneumoconiosis was not established. Claimant again requested modification within a year of the denial and submitted additional evidence. The district director denied the request. After the deadline for responding to the district director's finding expired, claimant submitted a letter in which he asked for more time to submit evidence. This was construed as a third request for modification and was denied by Administrative Law Judge Daniel L. Leland, who determined that claimant did not prove that he had pneumoconiosis.

Claimant filed a fourth request for modification, which was granted by Administrative Law Judge Roketenetz (the administrative law judge), who also determined that claimant is entitled to benefits on the merits. The Board affirmed the award of benefits and denied employer's request for reconsideration. *Blake v. Metec Leasing, Inc.*, BRB No. 01-0168 BLA (Oct. 31, 2001)(unpub.); *Blake v. Metec Leasing, Inc.*, BRB No. 01-0168 BLA (Apr. 17, 2002)(unpub.). Counsel submitted a fee petition to the administrative law judge in which he sought $17,297.34 for 103 hours of services and $1243.49 in expenses for the period from June 6, 1995, which coincided approximately with claimant's second request for modification, through October 9, 2000. In the Supplemental Decision and Order which is the subject of this appeal, the administrative law judge noted employer's objection to the time spent in connection with the unsuccessful requests for modification, but rejected it based upon the Board's decision in *Murphy v. Director, OWCP*, 21 BLR 1-117 (1999). Accordingly, he awarded the entire amount requested by counsel.

Employer contends that the administrative law judge erred in finding that counsel was entitled to compensation for the services performed in conjunction with claimant's unsuccessful modification requests. Employer also asserts that the administrative law judge did not adequately address whether the services performed were reasonable and necessary. Claimant has responded and urges affirmance of the administrative law judge's Supplemental Decision and Order. The Director, Office of Workers' Compensation Programs, has not responded in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In resolving the issue of whether counsel is entitled to a fee for services performed in connection with the denied requests for modification, the administrative law judge relied upon the Board's published Decision and Order in *Murphy*. The Board held in *Murphy* that the attorney who represented a miner in a denied claim was entitled to attorney fees when the miner retained another attorney and filed a modification request that ultimately resulted in the award of benefits. The Board held that under §928(a) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901 *et seq.*, which is incorporated into the Act by §932(a), the miner's counsel was entitled to compensation because a final award of benefits was ultimately made and counsel could have reasonably regarded the work he performed as necessary to the establishment of entitlement.

Employer argues that the Board's decision in *Murphy* conflicts with holdings of the United States Supreme Court and the United States Courts of Appeals and reflects a misinterpretation of the relevant statutory language. These contentions are without merit. With respect to the case law, employer cites the Supreme Court's decision in *Hensley v. Eckerhart, et al.*, 461 U.S. 424 (1983) and the United States Court of Appeals for the Seventh Circuit's decision in *Eifler v. Peabody Coal Co.*, 13 F.3d 236, 18 BLR 2-86 (7th Cir. 1993), in support of its argument.

[1] In *Hensley*, the Court addressed 42 U.S.C. §1988, which authorizes the award of a reasonable attorney's fee to prevailing parties in civil rights litigation. The Court held that in order for a party to "prevail," the party must succeed on a significant issue in litigation which achieves some of the benefit the party sought in bringing suit. 461 U.S. at 433. The Court also indicated that when a plaintiff presents distinctly different claims for relief that are based on different facts and legal theories, an attorney's work on one claim will be unrelated to his work on another claim. The Court held that in light of the Congressional intent to limit attorney fee awards to "prevailing parties," such claims must be treated as if they had been raised in separate lawsuits and no fee can be awarded for services performed in connection with claims that failed. 461 U.S. at 436-437. In *Eifler*, the Seventh Circuit held that a victory on appeal that keeps a claim alive, but does not establish entitlement, is not a "successful prosecution" under Section 928(a). *Eifler*, 13 F.3d at 238, 18 BLR at 2-87.

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as claimant's coal mine employment occurred in Alabama. ALJ Decision and Order dated Sept. 27, 2000, at 6-7 n.3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Contrary to employer's contentions, the decisions in *Hensley* and *Eifler* do not provide either binding or persuasive precedent in this case. In *Hensley*, the Supreme Court was interpreting a fee-shifting statute with terms that are very different from those set forth in Section 928 of the LHWCA and incorporated into the Act. Significantly, pursuant to Section 928, "successful prosecution" of a claim, rather than identification as the "prevailing party," is the condition precedent to an award of attorney's fees. In addition, in contrast to claims pursued in the context of civil rights litigation, an application for black lung benefits does not present "distinctly different claims" based on different facts and legal theories. Applications for benefits under the Act require proof of the same basic facts – the existence of pneumoconiosis arising out of coal mine employment and total disability or death due to pneumoconiosis - which correspond to discrete elements of entitlement that are defined in the Act and the implementing regulations. Regarding *Eifler*, the Seventh Circuit did not indicate that the claimant's attorney was not entitled to compensation for the services performed in connection with claimant's appeal before the court; it merely held that because the case was remanded for further proceedings on the merits of entitlement, the court could not grant an enforceable award of attorney's fees.

Regarding the question of statutory interpretation, we reject employer's allegation that the Board misread Section 928(a) in *Murphy*. Rather, the Board properly held that in Section 928(a), the "successful prosecution of [the] claim" is identified as the condition precedent to the award of attorney's fees and that a "successful prosecution" occurs when the claimant realizes an economic benefit at the conclusion of adversarial proceedings. *Murphy*, 21 BLR at 1-120, *citing Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993); *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987); *see also Sosbee v. Director, OWCP*, 17 BLR 1-136 (1993)(*en banc*)(Brown, J., concurring). Thus, the Board determined correctly that failure at an intermediate step does not preclude an attorney from receiving compensation for services rendered at that level of the proceedings provided that claimant is ultimately successful in obtaining benefits.

Employer also argues that under *Hensley* and its progeny, the administrative law judge was required to consider the amount of compensation that resulted from the award of benefits on modification in assessing the reasonableness of the fee request. Specifically, employer asserts that because the administrative law judge awarded benefits only from the date of claimant's fourth request for modification in 1998 and claimant died not long after the administrative law judge's award of benefits, the amount of counsel's attorney fee should be correspondingly reduced. Employer's allegation of error is without merit. In pursuing the claim in this case, counsel assisted claimant in obtaining a lifetime award of benefits. Counsel could not have foreseen claimant's death when he undertook the work that was necessary to the successful prosecution of the claim. *See Lanning v. Director, OWCP*, 7 BLR 1-314 (1983).

Employer further contends that the administrative law judge's award of an attorney's fee must be vacated on the ground that the administrative law judge did not determine whether all of the time counsel spent in conjunction with the failed requests for modification had an impact on the ultimate award of benefits. In support of this argument, employer states that counsel should receive compensation only for the time spent developing the evidence upon which the administrative law judge relied in awarding benefits.
[2] Similarly, employer argues that the administrative law judge did not adequately address the reasonableness and necessity of the time claimed by counsel pursuant to the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), or the case law regarding attorney fee awards at the administrative law judge level.

There is no merit in employer's arguments. Claimant's counsel is not required to prove a causal nexus between each of the services rendered and the ultimate award of benefits, but rather only has to establish that he reasonably viewed the work as necessary to the successful prosecution of the claim at the time that he performed it. *See Lanning*, 7 BLR at 1-316. In addition, because employer has not set forth any specific objections to counsel's time entries or identified how the factors set forth in 20 C.F.R. §725.366 have not been met in this case, we decline to disturb the administrative law judge's findings, as they are not arbitrary or capricious and do not represent an abuse of discretion. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

[2] Employer alleges that this time consists of the 6.75 hours that claimant's counsel spent in obtaining opinions from claimant's treating physicians.

Accordingly, the Supplemental Decision and Order – Awarding Attorney Fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge