

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0181 BLA

BOBBY JO JUDE)
(o/b/o ROBERT CEDRIC JUDE and LOREN)
SIERRA JUDE, Minor Children of)
LORENZA CHILDRESS, Deceased Miner))

Claimant-Respondent)

v.)

TROJAN MINING)

and)

TRAVELERS INSURANCE COMPANY)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 03/19/2019

DECISION and ORDER

Appeal of the Attorney Fee Order of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Clayton Daniel Scott (Porter, Banks, Baldwin & Shaw, PLLC), Paintsville, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Attorney Fee Order (2012-BLA-05691) of Administrative Law Judge Jennifer Gee, rendered in connection with a miner's subsequent claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Claimant's counsel submitted a fee petition for legal services and costs associated with litigating the miner's claim before the Office of Administrative Law Judges (OALJ), for the periods of May 16, 2006 to July 12, 2007 (initial litigation), November 10, 2008 to May 3, 2010 (remand litigation) and April 20, 2012 to August 19, 2016 (modification litigation). Attorney Fee Order at 6. Upon consideration of employer's objections to the fee petition, the administrative law judge approved 60.45 of the hours billed at the hourly rate of \$300.00 and costs in the amount of \$681.84, for a total attorney fee of \$18,816.84. *Id.* at 13.

¹ The miner filed a subsequent claim on October 16, 2002, which was denied by Administrative Law Judge Thomas F. Phalen, Jr. on April 19, 2007, for failure to establish total disability. Director's Exhibits 5, 70. Upon consideration of the miner's appeal, the Board affirmed in part and vacated in part Judge Phalen's decision, and remanded the case for further consideration. *L.C. [Childress] v. Trojan Mining Co.* BRB No. 07-0911 BLA (July 16, 2008) (unpub.); Director's Exhibit 74. On remand, because Judge Phalen had retired, the case was reassigned to Administrative Law Judge Joseph E. Kane. In a Decision and Order on Remand issued on March 23, 2010, Judge Kane denied benefits, also finding that the miner did not establish total disability. Director's Exhibit 83. The miner requested reconsideration, which Judge Kane denied on April 26, 2010. Director's Exhibit 86. The miner next filed a timely request for modification on April 5, 2011. Director's Exhibit 87. While his modification request was pending before the Office of Administrative Law Judges, the miner died on July 31, 2012. Director's Exhibit 88. Following the miner's death, claimant pursued the miner's modification request and claim on behalf of his minor dependent children. On August 16, 2016, Administrative Law Judge William Dorsey issued a Decision and Order Awarding Benefits on Modification. Judge Dorsey found that the miner had complicated pneumoconiosis and that claimant thereby invoked the irrebuttable presumption at 20 C.F.R. §718.304. Judge Dorsey awarded benefits from June 2010, the month of the first evidence of complicated pneumoconiosis, to July 2012, the month in which the miner died. Employer filed an appeal with the Board on September 6, 2016, but later requested that it be dismissed. *Jude v. Trojan Mining Co.*, BRB No. 16-0369 BLA (Sept. 27, 2016) (unpub. Order).

On appeal, employer challenges the award of attorney fees. Claimant's counsel responds, urging affirmance of the fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.² See *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989); see *B & G Mining, Inc., v. Director, OWCP [Bentley]*, 522 F.3d 657 (6th Cir. 2008).

Employer alleges that claimant is liable for an overpayment in this case that exceeds the amount of benefits awarded on modification,³ and argues claimant's counsel "is not entitled to any attorney fees because he did not successfully prosecute the claim." Employer's Brief at 13. Employer's argument has no merit.

In order for an attorney to receive compensation for legal services performed on a claimant's behalf, there must be a successful prosecution of the claim. See 33 U.S.C. §928(a), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §725.367; *Beasley v. Sahara Coal Co.*, 16 BLR 1-16 (1991).⁴ Counsel is entitled to fees for all necessary services

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1-52, 6.

³ Employer notes that the district director issued a proposed Decision and Order awarding benefits on January 28, 2005, and that the miner/claimant received interim benefits during various phases of the litigation of the miner's claim. Employer's Brief at 12 n.4. Employer calculates that the total award of benefits on the miner's claim based Judge Dorsey's decision is \$28,462.20 and that claimant is possibly liable to the Black Lung Disability Trust Fund for a "potential overpayment" of \$42,427.00. *Id.* at 13.

⁴ There is no overpayment issue before us. However, even accepting employer's assertion that an overpayment occurred, we reject employer's argument that claimant's counsel is not entitled to attorney fees. A successful prosecution of a claim exists when the claimant receives an economic benefit resulting from an adversarial proceeding. See *Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999). In this case, employer concedes, based on its own calculations, that the award of benefits on modification reduced the total amount of the alleged overpayment due. Employer's Brief at 13. Because claimant has received an economic benefit - the reduction of the overpayment for which she is liable -

rendered on behalf of the claimant at each level of the adjudicatory process, even if he was unsuccessful at a particular level, so long as the claimant is ultimately successful in prosecuting the claim.⁵ *Murphy*, 21 BLR at 1-120; see *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-140 (1993). Further, the “standard test for the administrative law judge to consider in determining whether the services performed by [an] attorney were necessary is whether the attorney, at the time the work was performed, could reasonably regard the work as necessary to the establishment of entitlement.” *Murphy*, 21 BLR at 1-120.

Because claimant was awarded benefits on modification, claimant’s counsel is entitled to reasonable attorney fees for successfully prosecuting the miner’s claim. *Murphy*, 21 BLR at 1-120. Moreover, the administrative law judge specifically found that the legal work performed by claimant’s counsel before each of the three administrative law judges in the prior proceedings was reasonable and therefore compensable. Attorney Fee Order at 9. Because employer does not identify any specific error by the administrative law judge in finding the services performed by claimant’s counsel were necessary at the time the work was performed, we affirm her determination. 20 C.F.R. §§802.211(b) (listing requirements for an issue to be adequately briefed), 802.301(a) (Board not empowered to conduct de novo review of record); see *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). We therefore affirm the administrative law judge’s finding that claimant’s counsel is entitled to an attorney fee for work performed before the OALJ in the amount of \$18,816.84.

claimant’s counsel is entitled to attorney fees. 20 C.F.R. §725.367(a); *Murphy*, 21 BLR at 1-120.

⁵ Employer does not dispute that all of the prior proceedings relate to the miner’s subsequent claim filed on October 16, 2002, and that the modification proceeding also relates to that claim. See 20 C.F.R. §725.310.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge