

BRB No. 97-0848 BLA

ANNA FRAME)		
(Widow of WINFRED FRAME))		
)		
Claimant-Petitioner)		
)		
v.)	DATE	ISSUED:
)		
SEWELL COAL COMPANY)		
)		
Employer-Respondent)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Decision and Order Denying Attorney Fees and Decision and Order Denying Claimant's Request for Reconsideration of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Counsel for claimant¹ appeals the Decision and Order Denying Attorney Fees and Decision and Order Denying Claimant's Request for Reconsideration (96-BLA-1657) of Administrative Law Judge Vivian Schreter-Murray (the administrative law judge) on 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 district director found that claimant was entitled to benefits on the miner's October 20, 1992 duplicate claim.² The

¹Claimant is the widow of the deceased miner, Winfred Frame, who died on May 26, 1995. Director's Exhibit 1.

²The miner filed claims with the Social Security Administration (SSA) on December

district director also found that claimant was entitled to benefits on her July 27, 1995 survivor's claim. Director's Exhibits 13, 16. Subsequently, the West Virginia Worker's Compensation Division granted dependent's benefits to claimant based on the Occupational Pneumoconiosis Board's conclusion that occupational pneumoconiosis was a materially contributing factor in the miner's death. Director's Exhibit 20. Based on 20 C.F.R. §725.535(b), which requires that benefit payments to a beneficiary be reduced by an amount equal to any payment of State or Federal benefits which the beneficiary receives, the district director issued a Proposed Decision and Order on April 24, 1996 which found that claimant had been overpaid \$4,289.40, beginning May 1995, based on the offset she received from her State award of benefits. Director's Exhibit 22. Claimant challenged the district director's offset of benefits calculations, arguing that the district director should have credited claimant for attorney's fees and expenses, and arguing that the district director should not have found that claimant received benefits for the entire month of May. On May 30, 1996, the district director issued an Amended Proposed Decision and Order which found that claimant had been overpaid \$2,721.60, based on an increase in his calculations of the amount of the offset of benefits. Director's Exhibit 24. However, claimant again challenged the district director's offset of benefits calculations, arguing that the district director did not give her full credit for her attorney's fees and expenses. Director's Exhibit 25. On June 7, 1996, employer requested claimant's counsel to instruct claimant to issue it a check in the amount of \$2,721.60, based on the offset of benefits calculations of the district director. Director's Exhibit 24. On June 17, 1996, the district director issued a Proposed Decision and Order which found that claimant had been overpaid \$3,007.20,³

18, 1972 and January 18, 1973. After several denials by the SSA, the miner was denied benefits by the Department of Labor (DOL) on September 27, 1979 and May 21, 1980. Inasmuch as the miner did not pursue this claim any further, the denial became final. The miner filed a claim with the DOL on October 6, 1982. On April 22, 1987, Administrative Law Judge Robert J. Shea issued a Decision and Order denying benefits. This denial also became final because the miner did not pursue the claim any further. The miner's most recent claim was filed on October 20, 1992.

³The district director acknowledged that the DOL erred in computing the amount of the offset of benefits for August 1995, which added \$285.60 to the amount claimant had been overpaid. Director's Exhibit 26.

based on a recalculation of the offset of benefits. Director's Exhibit 26. Consequently, claimant requested a hearing on July 17, 1996. Director's Exhibit 27. While the case was pending before the Office of Administrative Law Judges (OALJ), employer and claimant agreed to settle on the amount of the offset of benefits, which resulted in claimant being overpaid \$1,360.80. Hence, the administrative law judge issued an Order of Dismissal on November 26, 1996.

Counsel for claimant subsequently requested legal fees of \$562.50 for 3.25 hours of legal services for work performed before the OALJ at hourly rates of \$150.00 and \$200.00.⁴

On February 3, 1997, the administrative law judge issued a Decision and Order Denying Attorney Fees. Further, in response to counsel for claimant's request for reconsideration, the administrative law judge issued a Decision and Order Denying Claimant's Request for Reconsideration on March 4, 1997. On appeal, claimant's counsel contends that the administrative law judge abused her discretion in denying his request for attorney's fees. Employer responds, urging affirmance of the administrative law judge's denial of attorney's fees. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

An award of attorney's fees is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. See *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

⁴Counsel for claimant's Application for Approval of a Representative's Fee lists his hourly rate for office services as \$150.00 and his hourly rate for hearings as \$200.00. However, claimant's counsel does not expressly indicate which hourly rate he applied to the various quarter-hour increments that are listed for the legal services that he performed before the administrative law judge.

Claimant's counsel contends that the administrative law judge abused her discretion in denying his request for attorney's fees. Specifically, claimant's counsel argues that the administrative law judge erred in finding that he did not successfully prosecute the claim by negotiating an increase in the offset of benefits calculated by the district director. We hold that counsel's contention has merit. The administrative law judge stated that "employer unilaterally decided to reduce the amount of money owed...[and that this] was not a negotiated settlement." Decision and Order Denying Attorney Fees at 1. The administrative law judge also stated "that Claimant's counsel did nothing to secure a successful prosecution." Decision and Order Denying Request for Reconsideration at 1. An administrative law judge may award attorney's fees when there is a successful prosecution of a claim. A successful prosecution of a claim exists when claimant receives an economic benefit from an adversarial proceeding. See *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987); see also *Sosbee v. Director, OWCP*, 17 BLR 1-136 (1993). In the instant case, claimant's counsel continued to pursue a further increase in the amount of the offset of benefits calculated by the district director despite employer's agreement with the district director's calculations with regard to the amount of offset of benefits claimant should receive.⁵ Since claimant received an economic benefit by reaching a settlement with employer for an increase in the amount of the offset of benefits calculated by the district director, we vacate the administrative law judge's finding that claimant's counsel is not entitled to attorney's fees, and remand the case to the administrative law judge to determine an appropriate award for attorney's fees to be paid by employer. See 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a); *Markovich, supra*; see also *Sosbee, supra*.

Accordingly, the administrative law judge's Decision and Order Denying Attorney Fees and her Decision and Order Denying Claimant's Request for Reconsideration are vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

⁵As previously noted, employer informed claimant's counsel that it agreed with the district director's calculations with regard to the amount of offset of benefits claimant should receive. Hence, employer's agreement with the district director's calculations placed employer in an adversarial position *vis-a-vis* claimant.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge