

BRB No. 99-0103 BLA

ARMANDO VENICASSA)
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 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Award of Representative's Fee and Supplemental Decision and Order Award of Representative's Fee of John E. Ciszek, District Director, United States Department of Labor.

Robert L. Johnson (Tershel & Associates), Washington, Pennsylvania, for claimant.

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

PER CURIAM:

Claimant's counsel appeals the Decision and Order Award of Representative's Fee and Supplemental Decision and Order Award of Representative's Fee of District Director John E. Ciszek awarding attorney's fees for services rendered in connection with 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). After successfully establishing claimant's entitlement to benefits, claimant's attorney submitted fee petitions requesting a fee award of \$670.00, representing 6.7 hours of legal services at an hourly rate of \$100.00 for the period of January 7, 1986 through September 4, 1986, and for \$3145.00, representing 18.5 hours of legal services at an hourly rate of \$170.00 for the period of June 10, 1993 through October 3, 1995. The district director awarded fees for 6.7 hours of legal services at a rate of \$80.00 per hour and 12.75 hours of legal services at the rate of \$90.00 per hour and disallowed 5.75 hours for work that was not performed before the Office of the District Director. Counsel requested reconsideration of the attorney fee award and the district director approved a fee for an additional three hours of legal services but concluded that the rate of \$90.00 per hour was reasonable for that additional time. Accordingly, counsel was awarded a total fee of \$1953.50, representing 6.7 hours of legal services at a rate of \$80.00 per hour and 15.75 hours of legal services at a rate of \$90.00 per hour. On appeal, claimant's attorney contends that the district director erred in reducing the hourly rate awarded for the period of June 10, 1993 through October 3, 1995 from \$170.00 to \$90.00. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.¹

An award of attorney fees 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 law. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

In order to be entitled to an award of attorney's fees under Section 28(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a), claimant's counsel must engage in the successful prosecution of a claim.² See *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); see

¹The district director's determination that counsel is entitled to a fee for 6.7 hours of legal services at the rate of \$80.00 per hour and his disallowance of 2.75 hours are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-616 (1983).

²A successful prosecution of a claim exists when claimant receives an economic benefit resulting from an adversarial proceeding. See 33 U.S.C. §928(a), as

generally Director, OWCP v. Baca, 927 F.2d 1122, 15 BLR 2-42 (10th Cir. 1991); *Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), *aff'd on recon.*, 13 BLR 1-56 (1989) (*en banc*). As claimant's counsel has succeeded in obtaining benefits on claimant's behalf, counsel has successfully prosecuted the claim, and is entitled to attorney's fees.

implemented by 20 C.F.R. §725.367(a); see also *Bethenergy Mines Inc. v. Director, OWCP [Markovich]*, 854 F.2d 632 (3d Cir. 1988), *aff'g sub nom. Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987).

Claimant's counsel asserts that the district director arbitrarily reduced the requested hourly rate from \$170.00 to \$90.00. Counsel contends that the district director erred in reducing the hourly rate inasmuch as \$170.00 per hour is reasonable, given the delay in receiving payment and as counsel's regular fee at the time of service was \$150.00 per hour. We disagree. While an employer may be required to pay an enhanced attorney's fee due to delay, such an enhancement is not appropriate where the Black Lung Disability Trust Fund is liable for the fee because the Act does not specifically waive the government's sovereign immunity from an award of interest.³ See *Shaffer v. Director, OWCP*, 21 BLR 1-97 (1998)(*en banc*); *Griffin v. Director, OWCP*, 17 BLR 1-75 (1993); see also *Library of Congress v. Shaw*, 478 U.S. 310 (1986). Counsel also makes reference to fee awards in other cases in which a fee of \$150.00 per hour was awarded. Counsel's Brief at 3-4. These awards were based on the facts and circumstances of those particular cases, which are unrelated to the case before us and are not binding on the Board for purposes of this case. See *Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986). In the instant case, the district director found that an hourly rate of \$90.00 was reasonable, given the complexity of the legal issues, the qualifications of the representative, the level of the claim at the time of the legal representation and the fees charged in the same geographical area. See 20 C.F.R. §725.366(b); Decision and Order Award of Representative's Fee at 2; Supplemental Decision and Order Award of Representative's Fee at 2; *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); see also

³The United States Supreme Court rejected the argument that the no-interest rule does not prohibit the award of compensation for delay and stated that:

the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution: "[T]he character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." *United States v. Mescalero Apache Tribe*, 207 Ct. Cl. 369, 389, 518 F.2d 1309, 1322 (1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976).

Library of Congress v. Shaw, 478 U.S. 310 (1986). The Court further stated that "[i]nterest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money." *Id.* at 322.

Velasquez v. Director, OWCP, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988). Counsel has not shown the district director's reduction of the hourly rate to be arbitrary, capricious or an abuse of discretion, *Whitaker, supra*; *Abbott, supra*; *Marcum, supra*, and as \$90.00 per hour is a reasonable hourly rate, *Gillman v. Director, OWCP*, 9 BLR 1-7 (1986), we affirm the district director's reduction of the hourly rate from \$170.00 to \$90.00.

Accordingly, the district director's award of attorney fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge