

BRB Nos. 96-0383 BLA
and 96-0384 BLA

HELEN HAYES)
(Widow of DENVIN HAYES))
)
Claimant-Respondent)
)
v.)
)
JEWELL SMOKELESS COAL COMPANY)
) DATE ISSUED:
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Supplemental Decision and Order of Joel R. Williams, Administrative Law Judge, United States Department of Labor, and the Supplemental Award of Stuart C. Glassman, District Director, United States Department of Labor.

C. Randall Lowe (Tate, Lowe & Rowlett), Abingdon, Virginia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson, & Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals¹ the Supplemental Decision and Order (85-BLA-5152 and

¹Employer filed separate appeals of the administrative law judge's decision and the district director's award; however, the Board consolidated these appeals for the

90-BLA-2594) of Administrative Law Judge Joel R. Williams and the Supplemental Award (of District Director Stuart C. Glassman awarding attorney's fees 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

purpose of decision only by Order dated January 18, 1996.

et seq. (the Act). Claimant's² counsel has also filed a petition requesting \$4,500.00 for services before the Board.

The administrative law judge awarded claimant's counsel fees of \$5,869.50 for forty-six hours of services at an hourly rate of \$125.00 and expenses of \$119.50. The district director awarded counsel \$2,239.50 for twenty-six and three-quarter hours of services at an hourly rate of \$80.00.

On appeal, employer contends that the administrative law judge and the district director erred in awarding attorney's fees for services related to case No. 85-BLA-5152 in which the Board affirmed the denial of benefits. Claimant's counsel responds, urging affirmance of the fee awards and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The award of attorney's fees pursuant to Section 28 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) and implemented by 20 C.F.R. §725.367(a), is discretionary and will be sustained 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), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

²Claimant is Helen Hayes, the miner's widow. The miner, Denvin Hayes, filed a claim for benefits on July 16, 1981 and died on June 19, 1988. Director's Exhibits 1, 54. Initially Administrative Law Judge Bernard J. Gilday issued a Decision and Order denying benefits and an Order denying Petition for Modification (85-BLA-5152). Subsequently, Administrative Law Judge Joel R. Williams issued a Decision and Order granting modification and awarding benefits on the miner's claim with derivative benefits to the miner's widow (90-BLA-2594). On appeal, the Board affirmed the opinions of Judges Gilday and Williams and the award of benefits on the miner's claim. *Hayes v. Jewell Smokeless Coal Co.*, BRB Nos. 86-1668 BLA and 86-1668 BLA-A (Feb. 27, 1995)(unpub.).

Marcum requires a two-tier analysis: the adjudication official must first determine whether the service was necessary to the proper conduct of the case, and, if so, whether the time expended performing the service was excessive or unreasonable. *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984).

On appeal, employer contends that claimant's counsel is not entitled to attorney's fees for services rendered prior to April 1987 because case No. 85-BLA-5152 resulted in a Decision and Order denying benefits which was affirmed by the Board. Employer's Brief at 6. Counsel is entitled to fees for all necessary services rendered claimant at each level of the adjudicatory process, even if he were unsuccessful at a particular level, as long as he is ultimately successful in prosecuting the claim. 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993)(*en banc*).

In this case, benefits were not finally denied on the miner's claim, case No. 85-BLA-5152, because the miner's widow filed a petition for modification of the denial pursuant to 20 C.F.R. §725.310 on June 6, 1989. A hearing was held on the modification issue before Judge Williams, and the claim was assigned a second case number, No. 90-BLA-5152. Judge Williams then awarded benefits on the miner's claim, and the Board affirmed that award. *Hayes, supra*. Thus, claimant's counsel was ultimately successful in obtaining an award of benefits on the miner's claim.

Further, the administrative law judge and the district director's office considered the fee petitions and determined that the services were necessary for the successful prosecution of the claim. Supplemental Decision and Order at 2; Letter from claims examiner dated October 24, 1995. Inasmuch as these findings are within the discretion of the administrative law judge and the district director and employer has not demonstrated that they are either arbitrary or capricious, see *Abbott, supra; Marcum, supra*, we affirm these findings and the awards of attorney's fees.

For services before the Board, counsel requests a fee of \$4,500.00 for thirty-six hours at an hourly rate of \$125.00. No objections to this fee petition have been received. We find the fee requested to be reasonable and commensurate with counsel's work before the Board and award counsel a fee of \$4,500.00.

Accordingly, the administrative law judge's Supplemental Decision and Order awarding a fee of \$5,750.00 plus \$119.50 in costs and the district director's Supplemental Award of \$2,239.50 are affirmed, and counsel is awarded a fee of \$4,500.00 for work before the Board.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge