BRB Nos. 99-0369
and 99-0369A

MARY J. HAWKINS (Widow of GILBERT W. HAWKINS)	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	
HARBERT INTERNATIONAL, INCORPORATED	)	DATE ISSUED: Dec. 21, 1999
and	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
Employer/Carrier-Respondents Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Robert J. Williams, Lake Charles, Louisiana, for claimant.

Patrick E. O'Keefe (Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P.), New Orleans, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and employer cross-appeals the Supplemental Decision and Order Awarding Attorney Fees (91-

LHC-1649) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act), as extended by the Defense Base Act (DBA), 42 U.S.C. §1651 *et seq*. We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Gilbert W. Hawkins (decedent) worked as a pipeline supervisor on a public works project in Cairo, Egypt. On December 21, 1989, he died as a result of acute heart failure during the course of his employment with employer. Thereafter, claimant, decedent's widow, filed a claim for death benefits under the DBA. In the initial Decision and Order in the instant case, Administrative Law Judge Edward Terhune Miller found that decedent's death was work-related and, alternatively, that his death occurred within a "zone of special danger" which was created by the conditions of his work and the fact that his employment was in Egypt. Consequently, Judge Miller awarded claimant and her minor children death benefits and $3,000 for funeral expenses. 33 U.S.C. §909. Employer subsequently began making compensation payments to claimant pursuant to Judge Miller's award. On appeal, the Board affirmed the finding that decedent's death was work-related and the award of benefits. *Hawkins v. Harbert/Jones*, BRB No. 94-2810 (Dec. 23, 1997)(unpublished).

Thereafter, a controversy arose as to whether Robert King Everett, claimant's son and decedent's step-son, remained a child subsequent to his eighteenth birthday on October 25, 1993, pursuant to Section 2(14) and (18) of the Act, 33 U.S.C. §902(14), (18), when he was still attending the tenth grade at Parkview Baptist School (Parkview), a non-accredited private high school. Mr. Everett graduated from Parkview on May 16, 1996. An additional issue arose as to whether Mr. Everett remained a student under the Act after May 6, 1996, the date he began attending the carpentry program at Louisiana Technical College. On August 5, 1996, after receiving correspondence from both parties, Claims Examiner Evelyn M. Leggitt of the Office of Workers' Compensation Programs, determined that claimant was not entitled to receive dependency benefits for Mr. Everett as of May 1, 1995, and that employer was entitled to a credit of $50 per week until its overpayment was recouped. Employer thereafter ceased paying dependency benefits to claimant with regard to Mr. Everett, and decreased its compensation payments an additional $50

per week. A second claims examiner, Fred Miers, agreed that claimant was not entitled to dependency benefits for Mr. Everett for the 1995-1996 school year, but reinstated such benefits effective May 6, 1996, as a result of Mr. Everett's matriculation at Louisiana Technical College. It is undisputed that employer did not reinstate the payment of these benefits; it is further undisputed that Mr. Everett graduated from Louisiana Technical College on December 19, 1997, and can no longer be considered a student. As the issues could not be administratively resolved, the case was referred to the Office of Administrative Law Judges.

In his Decision and Order, Administrative Law Judge Clement J. Kennington (the administrative law judge) found that as an educational institution, Parkview did not satisfy any of the requirements under Section 2(18)(A)-(D) of the Act, 33 U.S.C. §902(18)(A)-(D), as the parties stipulated that it was not approved or supported by the State of Louisiana, and the administrative law judge found that it was not accredited by the state or a recognized accrediting agency and that its credits were not accepted by at least three institutions on the same basis as those from an accredited institution. Thus, the administrative law judge found that Mr. Everett was not a "student" within the meaning of Section 2(18) while attending Parkview subsequent to his eighteenth birthday on October 25, 1993. Nevertheless, the administrative law judge determined that claimant established student status for Mr. Everett during his enrollment at Louisiana Technical College, an accredited vocational school, from May 6, 1996 to December 19, 1997, and that claimant was entitled to dependency benefits for Mr. Everett during this period.[1] Accordingly, the administrative law judge awarded employer a credit for all dependency compensation paid to claimant on behalf of Mr. Everett subsequent to his eighteenth birthday, with the exception that claimant was entitled to dependency benefits on behalf of Mr. Everett for the period from May 6, 1996 until December 19, 1997.

Subsequent to the administrative law judge's Decision and Order, claimant's counsel submitted a fee petition to the administrative law judge requesting a fee of $8,375, representing 83.75 hours at an hourly rate of $100. In a Supplemental Decision and Order, the administrative law judge found that counsel's fee must be reduced due to the limited success in achieving dependency benefits, and disallowed 50 percent of counsel's requested hours. Thus, the administrative law judge awarded claimant's counsel an attorney's fee of $4,187.50.

On appeal, claimant contends that the administrative law judge erred in finding

[1]This finding is unchallenged on appeal.

that Mr. Everett was not a "student" while attending Parkview subsequent to his eighteenth birthday. Specifically, claimant asserts that the accreditation provision under Section 2(18) of the Act was not meant to apply to high schools, and therefore, claimant should have been entitled to dependency benefits on behalf of Mr. Everett for the period he attended Parkview subsequent to his eighteenth birthday. Alternatively, claimant avers that the administrative law judge's denial of dependency benefits for this period violates the freedom of religion clause of the First Amendment and the equal protection clause of the Fourteenth Amendment of the Constitution, as it penalizes claimants who send their children to religious, non-accredited schools. Claimant further contends that the administrative law judge erred in awarding employer a credit for the period Mr. Everett lost his student status, arguing that employer is not entitled to recover any overpayment. Employer responds, urging affirmance of the administrative law judge's Decision and Order. In its cross-appeal, employer challenges the administrative law judge's award of an attorney's fee to claimant's counsel. Specifically, employer asserts that since employer was awarded a credit for overpayment of compensation and claimant did not achieve an award of greater compensation, claimant's counsel is not entitled to an award of an attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). Claimant responds, urging affirmance of the administrative law judge's award of an attorney's fee.

The threshold issue presented by the instant appeal is whether the administrative law judge erred in determining that Mr. Everett was not a student during the period he attended Parkview, and in denying claimant dependency benefits for this period. Section 9 of the Act provides that a surviving widow with a child or children is entitled to benefits equaling 50 percent of the employee's average weekly wage, plus an additional 16 and 2/3 percent of such wages for each surviving child, provided that the total does not exceed 66 and 2/3 percent of the employee's average weekly wage. 33 U.S.C. §909(b). Section 2(14) defines "child" in pertinent part as follows: "Child . . . include[s] only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined [by the Act] . . . ." 33 U.S.C. §902(14). The statute thus divides children into two groups: those under eighteen years of age, and those over eighteen who are students or who meet certain requirements of dependency. *See Doe v. Jarka Corp. of New England*, 21 BRBS 142, 144 (1988). The provision defining the word "student" is found at Section 2(18) of the Act, which provides:

> The term "student" means a person regularly pursuing a full-time course of study or training at an institution which is–

> (A) a school or college or university operated or directly supported by the United States, or by any State or local government or political subdivision thereof,
>
> (B) a school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body,
>
> (C) a school or college or university not so accredited but whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or
>
> (D) an additional type of educational or training institution as defined by the Secretary . . .

33 U.S.C. §902(18)(A)-(D). Section 2(18) further provides that a person forfeits his status as a student after he reaches the age of twenty-three or has completed four years of education beyond the high school level, and that a "child shall not be deemed to have ceased to be a student during any interim between school years if the interim period does not exceed five months . . . ." 33 U.S.C. §902(18)(D).

At the hearing, claimant attempted to establish, through the testimony of Parkview's pastor and principal, the Reverend Randall Chesson, that Parkview was accredited by the National Private School Accreditation Alliance (NPSAA), a private accreditation association.[2] While the administrative law judge questioned whether the NPSAA was recognized by the State of Louisiana within the meaning of Section 2(18)(B), Mr. Chesson's July 2, 1996 letter established that Parkview did not initiate an accreditation request with the NPSAA until that date, which was two months after Mr. Everett graduated from Parkview. *See* Cl. Ex. 11; Tr. at 85, 226-227. Thus, the administrative law judge found that Parkview was not accredited by any agency at the time Mr. Everett was in attendance at that institution. *See* Decision and Order at 7-8.

Claimant first contends that the accreditation provision of Section 2(18) was

[2]In the instant case, there is no evidence in the record that Parkview is accredited by the State of Louisiana.

meant to apply only to schools of higher learning and not to high schools, and therefore, the administrative law judge's denial of dependency benefits for the period Mr. Everett attended Parkview subsequent to his eighteenth birthday should be reversed. We disagree. When interpreting a statute, the starting point is the plain meaning of the words of the statute. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992); *Mallard v. U.S. Dist. Ct. for the Southern District of Iowa*, 490 U.S. 296 (1989). If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency that administers the policy under the statute, must give effect to the unambiguously express intent of Congress. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Section 2(18)(B) of the Act provides that one definition of the term "student" shall be a person who attends an institution which is "a school *or* college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body." 33 U.S.C. §902(18)(B)(emphasis added). Contrary to claimant's contention, the use of the word "or" in this provision is clearly disjunctive, presenting three alternatives for delineating the types of accredited institutions a person must attend in order to be deemed a student under the Act. The plain meaning of Section 2(18)(B) indicates that Congress did not intend to define the term "school" as being synonymous with "college or university," but rather, meant to expand the definition of "student" to include those older than eighteen and attending schools other than colleges or universities. This would include vocational schools as well as high schools. Had Congress meant for the term "school" to be synonymous with "college or university," it would have left this term out of Section 2(18)(B) entirely. Thus, the administrative law judge's determination is in accordance with the language of Section 2(18)(B).[3] Indeed, the Board has held that the surviving child of a maritime employee who attended high school subsequent to his eighteenth birthday was a student pursuant to Section 2(18) of the Act. *See Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

We reject claimant's contention that the denial of dependency benefits while Mr. Everett was attending Parkview subsequent to his eighteenth birthday is a

[3]Claimant's contention that the "transfer of credits" provision contained in Section 2(18)(C) is indicative of its application to only institutions of higher learning is contradicted by the testimony of Mr. Chesson, who stated that in Louisiana, credits can be readily transferred from one high school to another. He stated further that credits achieved at Parkview can be transferred to other high schools, although the recipient high school has the right to insist on a proficiency test. *See* Tr. at 82-84.

violation of the freedom of religion clause in the First Amendment of the Constitution and the equal protection clause of the Fourteenth Amendment.[4] Section 2(18)(B) provides only one of three types of private institutions under Section 2(18) in which a surviving child over eighteen years of age may attend in order to be considered a student, and thus a child under Section 2(14). In addition to accredited private schools, Section 2(18) includes non-accredited private schools whose credits are accepted, on transfer, by at least three institutions on the same basis as if transferred from an institution so accredited, and any additional institution defined by the Secretary. *See* 33 U.S.C. §902(18)(C), (D). Reverend Chesson conceded that the former was not the case with regard to Parkview, and claimant did not assert that Parkview came under the latter provision. *See* Decision and Order at 8 n.7. Thus, claimants who send their children to non-accredited private, religious schools will not be penalized if other available criteria are met.

[4]We note that claimant has provided no legal citation for this assertion.

Moreover, the relevant case law does not support claimant's contention. It is well-settled that a person may not be compelled to choose between the exercise of religious beliefs and participation in a public program, *see Everson v. Board of Education*, 330 U.S. 1 (1947). In addition, the free exercise clause of the First Amendment protects areas of conduct that are beyond the power of the state to control, even under regulations of general applicability. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972). Nevertheless, it is equally well-settled that the Constitution does not forbid a state from regulating private, religious schools in a reasonable, nondiscriminatory fashion, as such regulations come within the state's power in the area of health, safety and public welfare. *See Board of Education v. Allen*, 392 U.S. 236 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Thus, the denial of certain benefits to a private, religious school that fails to meet a state's accreditation policy will not be constitutionally invalid under either the free exercise of religion clause of the First Amendment or the equal protection clause of the Fourteenth Amendment. *See Windsor Park Baptist Church, Inc. v. Arkansas Activities Association*, 658 F.2d 618 (8th Cir. 1981)(exclusion of private school that refused to obtain state accreditation from participation in interscholastic activities did not violate the First or Fourteenth Amendments). These decisions indicate that the Act's prohibition of dependency benefits for a child's attendance at an institution that does not meet delineated minimum requirements is a constitutionally valid classification. Accordingly, we affirm the administrative law judge's finding that, under Section 2(18), Mr. Everett was not a student while attending Parkview after his eighteenth birthday on October 25, 1993 through May 6, 1996. Consequently, we affirm the administrative law judge's determination that claimant is not entitled to dependency benefits for this period.

Claimant next contends that the administrative law judge erred in granting a credit to employer for all dependency benefits paid to claimant on Mr. Everett's behalf from October 25, 1993, advancing two theories. First, claimant asserts that employer should be estopped from receiving a credit, as it was unfair for employer to wait until after Mr. Everett graduated from Parkview to assert that Mr. Everett's attendance of Parkview failed to qualify him as a student under the Act. We reject claimant's contention. The Act imposes no duty on the part of employer to raise the issue of Parkview's status as a qualified institution under Section 2(18) prior to Mr. Everett's graduation. Moreover, there appears to be no evidence of bad faith on the part of employer; employer's business is in Cairo, Egypt, not Louisiana, and thus it did not have easy access to information on Parkview's qualifications.

Second, claimant asserts that in its compensation payments to claimant, employer cannot be entitled to a credit with regard to an overpayment of benefits it paid to Mr. Everett, as the claims of claimant and Mr. Everett are separate, and thus,

any recoupment employer receives violates Section 14(j) of the Act, 33 U.S.C. §914(j). We disagree. Section 14(j) allows employer to receive a credit for its prior payments of compensation against any compensation subsequently found due. 33 U.S.C. §914(j); *Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1998). In the instant case, claimant's argument must fail as Section 9(b) of the Act, 33 U.S.C. §909(b), provides for the payment of one death benefit where a decedent is survived by a spouse, including additional compensation for surviving children. *See generally Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).[5] Thus, contrary to claimant's contention, this case does not contain two separate death claims with benefits paid separately to individuals. In fact, employer paid benefits only to claimant as decedent's widow; while claimant also received increased compensation payments on behalf of Mr. Everett, employer never paid benefits directly to Mr. Everett. Thus, it is appropriate that any overpayments employer made to claimant on behalf of Mr. Everett be credited against its future compensation liability to claimant, pursuant to Section 14(j). Accordingly, we affirm the administrative law judge's award of a credit to employer.

Lastly, we address employer's appeal of the administrative law judge's award of an attorney's fee. In his Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee, but reduced counsel's requested hours by 50 percent, inasmuch as counsel achieved a 50 percent success rate on the issues presented to the administrative law judge. In its cross-appeal, employer asserts that since the administrative law judge's decision did not award claimant greater compensation than what she already was receiving, but rather, awarded employer a partial credit, counsel is not entitled to an award of an attorney's fee under Section 28(b) of the Act.[6]

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[5]In *Lewis*, the Board held that where a widow filed a death benefits claim while the employer was making death benefits payments to the deceased employee's two surviving children, the claim was timely filed under Section 13(a), 33 U.S.C. §913(a). The Board affirmed the administrative law judge's interpretation of Section 9 as providing for one death benefit. *Lewis*, 19 BRBS at 91-92.

[6]Relying on the holding of the United States Court of Appeals for the Fifth Circuit in *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162 (CRT)(5th Cir. 1997), employer additionally contends that it is not liable for an attorney's fee under Section 28(b), as an informal conference with regard to the payment of dependency benefits was never held. However, *Perez* is distinguishable from the instant case. Initially, it is noted that while technically no informal conference was held with regard to the payment of dependency benefits, two claims examiners considered the matter based on the documentary evidence and issued orders. Thus, the Act's informal

processes were applied. Moreover, in *Perez*, the court held that "Section 28(b) gives an employer an opportunity to avoid the payment of attorney's fees by either (1) accepting the Board's or Commissioner's recommendations or (2) refusing those recommendations but tendering a payment that is accepted by the claimant." *Perez*, 128 F.3d at 910, 31 BRBS at 163 (CRT). In the instant case, employer did not reinstate, or tender, any dependency benefits subsequent to a claims examiner's determination that employer was liable for dependency benefits for the period Mr. Everett attended Louisiana Technical College.

Under Section 28(a) of the Act, if an employer declines to pay compensation within 30 days after receiving written notice of a claim from the district director, and claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a). Pursuant to Section 28(b) of the Act, when an employer pays or tenders benefits without an award and thereafter a controversy arises over additional compensation due, the employer shall be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b); *see*, *e.g.*, *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

Contrary to employer's assertion, it never paid or tendered benefits without an award. Rather, employer first began paying benefits to claimant subsequent to Judge Miller's initial Decision and Order in 1994. Nevertheless, this case is governed by Section 28(b). It is undisputed that employer was paying claimant benefits, including benefits for Mr. Everett, prior to the time it took this matter to a claims examiner. Therefore, it is accurate to state that when employer contacted the claims examiner, a controversy developed over additional compensation due claimant based on the dependency of Mr. Everett. Employer was effectively controverting claimant's entitlement to any dependency benefits on behalf of Mr. Everett after he reached the age of eighteen, and in fact, ceased paying such benefits in August 1996. Claimant, thereafter, was forced to utilize the services of an attorney in order to recover her asserted full compensation. In considering whether claimant successfully prosecuted its case, the administrative law judge found that while claimant failed to establish dependency benefits for Mr. Everett while attending Parkview after his eighteenth birthday, claimant successfully asserted her entitlement to dependency benefits for the time Mr. Everett attended Louisiana Technical College, a period of one and one-half years, and thus, achieved a 50 percent success rate. Thus, counsel's services resulted in claimant's partially successful defense of her death benefits.

It is apparent that claimant succeeded in obtaining greater benefits than those paid or tendered by employer and is thus entitled to payment of her fees under Section 28(b). Section 28(b) states that once a controversy arises over the amount of compensation to which claimant is entitled, the matter is set for informal conference, following which, the district director issues a recommended disposition. If employer refuses to accept this recommendation, it may tender the compensation, if any, which it believes claimant is entitled to receive; if claimant refuses to accept this amount and thereafter utilizes the services of an attorney, she is entitled to payment of that attorney's fee so long as she obtains greater compensation than that tendered or paid. Here, the district director made a recommendation that

employer pay benefits including the increased amount for Mr. Everett during his attendance at Louisiana Technical School. Employer rejected this recommendation, and claimant thereafter utilized the services of an attorney and obtained greater benefits than those employer agreed to pay. The fact that employer obtained a credit for its payments during the period when claimant was attending Parkville is immaterial in view of claimant's success in obtaining augmented benefits based on Mr. Everett's attendance at Louisiana Technical School which employer had refused to pay. Accordingly, since claimant's counsel's services resulted in the successful defense of employer's reduction of dependency benefits for the one and one-half year period Mr. Everett attended Louisiana Technical College, we affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee under Section 28(b) of the Act.

Accordingly, the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge