

RUSSELL JENSEN)	
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Claimant-Petitioner)	
)	
v.)	
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WEEKS MARINE, INCORPORATED)	DATE ISSUED: 11/12/2004
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Order of Ralph A. Romano, Administrative Law Judge,
United States Department of Labor.

James R. Campbell, Middle Island, New York, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy,
New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order (1995-LHC-00217) of Administrative Law Judge Ralph A. Romano denying an attorney's fee 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case has a protracted procedural history which is well known to the parties and need not be repeated here. See *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2^d Cir. 2003); *Jensen v. Weeks Marine, Inc.*, BRB Nos. 02-0333, 02-0545, 02-0575 (Jan. 15, 2003) (unpub.); *Jensen v. Weeks Marine, Inc.*, 35 BRBS 174 (2000); *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). Ultimately, the United States Court of Appeals for the Second Circuit affirmed the administrative law judge's finding that claimant's award of benefits

for permanent total disability should be modified as of March 2, 1998, to a scheduled award of permanent partial disability benefits, which employer had already paid.

Relevant to the current appeal, in 1998 the administrative law judge awarded claimant's counsel an attorney's fee of \$13,350, representing 53.4 hours at the requested hourly rate of \$250, and \$2,100.45 in costs. Employer appealed this award to the Board on the ground that the administrative law judge had not adequately considered its objections to the requested fee. The Board noted that, at the time the administrative law judge entered his fee award, he had properly held employer liable for the fee because claimant had been successful in defending his award of permanent total disability benefits. *Jensen*, 33 BRBS at 101 n.6. The Board, however, vacated the fee award and remanded, because the administrative law judge had not discussed employer's objections. *Id.* at 101-102.

In 2001 and 2003, claimant's counsel corresponded with the administrative law judge, seeking to have him address his entitlement to an attorney's fee, pursuant to the Board's initial decision. Employer opposed the fee request on the ground that claimant did not successfully defend his award of total disability benefits. In an Order dated November 14, 2003, the administrative law judge denied claimant an attorney's fee and costs. Claimant appeals, and employer responds, urging affirmance.

Claimant contends that footnote 6 in the Board's first decision and the Board's remanding the case to the administrative law judge for reconsideration of the fee award in light of employer's objections constitutes the law of the case. Claimant also relies on employer's payment of benefits for total disability during the pendency of this matter to establish that his claim was successful.

Claimant is entitled to an attorney's fee only if he successfully obtains benefits or defends his entitlement to benefits previously awarded. 33 U.S.C. §928(a), (b); *see, e.g., Adkins v. Kentland Elkhorn Coal Corp.*, 109 F.3d 307 (6th Cir. 1997); *Director, OWCP v. Baca*, 927 F.2d 1122 (10th Cir. 1991); *Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9th Cir. 1989); *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997). In this case, claimant did not successfully defend his entitlement to total disability benefits as the administrative law judge's modification of the total disability award to one for scheduled partial disability was upheld on appeal. *Jensen*, 346 F.3d at 277, 37 BRBS at 102(CRT). The remand instructions and footnote in the Board's first decision merely described the procedural posture of the case at that juncture: claimant was then successful and if claimant remained successful, the administrative law judge was required to examine counsel's fee petition more critically in light of employer's objections. The Board, however, vacated the fee award and therefore it did not remain in effect. *Jensen*, 33 BRBS at 101-102. Moreover, the law of the case doctrine is not binding in the face of changed factual circumstances, such as here where claimant formerly was successful and

eventually was not. *See generally White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting). The fact that employer paid benefits to claimant during the pendency of the appeals, to which claimant ultimately was not entitled, does not establish the “success” necessary to entitle claimant to an attorney’s fee. *See* 33 U.S.C. §914(f); *see generally Barker v. U.S. Dep’t of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998). Finally, employer cannot be held liable for costs pursuant to Section 28(d), 33 U.S.C. §928(d), when it is not liable for an attorney’s fee under Section 28(a) or (b). *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). Therefore, we affirm the administrative law judge’s denial of an attorney’s fee award as it is in accordance with law.

Accordingly, the administrative law judge’s Order denying an attorney’s fee is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge