



BRB No. 24-0194 BLA

BONITA COLLINS
(o/b/o STANLEY E. COLLINS)

Claimant-Petitioner

v.

ROCKHOUSE COMPANY,
INCORPORATED

and

KENTUCKY EMPLOYERS' MUTUAL
INSURANCE

Employer/Carrier-
Respondents

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 07/09/2025

DECISION and ORDER

Appeal of the Proposed Order Supplemental Award Fee for Legal Services
of Debbie Quick, Claims Examiner, United States Department of Labor.

Evan B. Smith (AppalReD Legal Aid), Prestonsburg, Kentucky, for
Claimant.

Joseph D. Halbert (Halbert Legal, PLLC) Lexington, Kentucky, for
Employer.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES,
Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel (Counsel)¹ appeals Claims Examiner Debbie Quick's (the district director's) February 2, 2024 Proposed Order Supplemental Award Fee for Legal Services (Fee Award) (2N93V-2019128) issued with respect to an attorney fee petition pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The Miner filed a claim in 2015, which was later withdrawn.² Director's Exhibit 1. He filed a second claim, which the district director denied on March 20, 2018. Director's Exhibit 2. He took no further action on his second claim. The Miner filed his current, subsequent claim for benefits on May 8, 2019. Director's Exhibit 4; *see* 20 C.F.R. §725.309. Thereafter, the district director issued a Proposed Decision and Order Awarding Benefits. Director's Exhibit 107.

Counsel then filed a fee petition for work he performed before the district director from March 22, 2016 to December 7, 2018, and from January 9, 2019 to December 6, 2023. Counsel requested a fee of \$840.00 to Counsel's prior firm (for work performed before 2019) and a fee of \$8,039.96 to Counsel's current firm (for work performed from 2019 to 2022) for a total requested fee of \$8,790.00, representing 29.3 hours of services rendered at an hourly rate of \$300.00, as well as \$89.96 in costs. Employer objected to certain time entries. The district director disallowed fees for services she found Counsel performed in conjunction with the two prior claims, disallowed certain entries in the current claim as clerical in nature, and ordered Employer to pay a total fee award of \$7,825.00 and \$89.96 in costs to Counsel.³

¹ Counsel filed a notice of the Miner's death, which occurred on September 24, 2024, and a motion requesting that the Miner's widow, Bonita Collins, be substituted as Claimant, as she wishes to pursue the claim on the Miner's behalf. Claimant's Notice of Death & Motion to Substitute & Change Address. The Benefits Review Board grants Counsel's motion.

² A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

³ As discussed below, the amount of time the district director indicated she excluded from Counsel's fee does not coincide with the amount she awarded.

On appeal, Counsel challenges the district director's denial of 2.8 hours of services performed prior to 2019, which the district director found Counsel provided in conjunction with the Miner's prior claims.⁴ Employer responds, urging affirmance of the district director's denial of these time entries. The Acting Director, Office of Workers' Compensation Programs, did not file a response brief.

When an attorney prevails on behalf of a claimant under the Act, the employer or its insurer that is liable for benefits shall also pay a "reasonable attorney's fee" to the claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928. The amount of an attorney fee award is discretionary and will be upheld on appeal unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.⁵ *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

Counsel argues that the district director erred in denying 2.8 hours of legal services performed from 2016 to 2018 as part of the Miner's prior unsuccessful claims as the district director applied an incorrect legal standard and disallowed fees in "a blanket, arbitrary manner." Counsel's Brief at 13. Specifically, Counsel submits the correct standard is whether the work performed was necessary to obtain entitlement, and as long as a claim is ultimately successful, legal services at all levels of adjudication can be compensated, even if previously denied. *Id.* at 8-9. Thus, Counsel contends that work Counsel performed in the prior denied claims can be awarded as a fee if Counsel reasonably believed it was necessary to obtain entitlement at the time the work was performed. *Id.* at 11-13. We disagree that fees for work performed in unsuccessful prior claims can be awarded; however, we agree remand is required for the district director to more carefully assess Counsel's fee petition insofar as it relates to the current claim.

The district director denied 2.5 hours of legal services as non-compensable because these services were performed during the Miner's first claim, which he withdrew. Fee Award at 5 (citing 20 C.F.R. §725.306(b)). She also denied 0.30 hours of legal services as non-compensable because they were performed after the issuance of the Proposed Decision and Order denying benefits on March 20, 2018, in the Miner's second claim. *Id.*

⁴ We affirm, as unchallenged on appeal, the district director's denial of 2.5 hours of services as clerical in nature. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Supplemental Fee Award at 5; Counsel's Brief at 7.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his coal mine employment in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

Counsel is correct that the test for determining whether an attorney's services are compensable is whether the attorney at the time the work in question was performed could regard it as reasonably necessary to establish the claimant's entitlements to benefits. 20 C.F.R. §725.366(b); *see Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999); *Cecil v. Director, OWCP*, 3 BLR 1-257, 1-260 (1981). However, an attorney is eligible to receive a fee for such services only when they are performed in connection with the successful prosecution of a claim. 30 U.S.C. §928(a), as incorporated 30 U.S.C. §932(a); *see also Murphy*, 21 BLR at 1-120; *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105, 1-106 (1987). The Board has held that an attorney fee request for work performed with respect to a prior claim that was denied must be rejected, even though the claimant was later successful in obtaining benefits in a subsequent claim. *Broughton v. Director, OWCP*, 13 BLR 1-35, 1-36 (1989).

Counsel does not contend the Miner's prior two claims were successfully prosecuted. Indeed, he cannot, as a successful prosecution requires the claimant receive some economic benefit from the action or a favorable resolution. *See* 20 C.F.R. §725.367(a); *see also Director, OWCP v. Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991); *Markovich*, 11 BLR at 1-106. Rather, Counsel contends the statute and regulations "do not require that the time be incurred during the successful claim," and points to cases in which the Board found attorneys eligible for a fee when they performed necessary services, even when the claim was initially denied. Counsel's Brief at 8-10.

Initially, a plain reading of the statute and relevant regulation demonstrates that attorney fees are permitted for services in a single claim, but not all claims associated with a claimant. The regulation specifically refers to "a claim," singular: "any attorney who represents a claimant in the successful prosecution of a claim for benefits may be entitled to collect a reasonable attorney's fee" 20 C.F.R. §725.367(a). The statute similarly refers to "a claim."⁶ 33 U.S.C. §928(a). This reading is also supported by the legislative

⁶ The statute provides:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed . . . and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee

33 U.S.C. §928(a), as incorporated by 30 U.S.C. §932(a).

history of the Longshore and Harbor Workers' Compensation Act, which is the source of attorney fees in black lung claims:

Attorneys fees may only be awarded against the employer where the claimant succeeds, and the fees awarded are to be based on the amount by which the compensation payable is increased as a result of litigation. *Attorneys fees may not be assessed against employers (or carriers) in other cases.*

Baca, 927 F.2d at 1124 (quoting H.R.Rep. No. 1441, 92d Cong., 2d Sess. (1972)).

Further, while Counsel points to the Board's approval of fees in cases with "complex" procedural histories in which benefits were initially denied but ultimately awarded to assert that necessity of the services is the "critical criterion," he ignores the fact that the awarded fees were performed in proceedings involving a single successful claim.⁷ Counsel's Brief at 9-10; *see Murphy*, 21 BLR at 1-120 (fees allowed for services performed in a claim that was initially denied but ultimately awarded on modification); *Cecil*, 3 BLR at 1-263-1-265 (fees allowed for services performed in the claimant's denied Part B claim that were necessary to establish entitlement after the claimant was successful upon reconsideration of the same claim under Part C). While Counsel's position would limit the application of *Broughton* and the authority it relies on, he has pointed to no authority allowing fees for services performed in unsuccessful, closed, prior claims. Counsel's Brief at 10-13. Thus, we affirm the district director's exclusion of 2.5 hours performed in conjunction with the Miner's 2016 withdrawn claim. Fee Award at 5.

However, as Counsel argues, fees can be awarded for services performed in a successful claim before the creation of an adversarial relationship. Counsel's Brief at 12-13; 20 C.F.R. §725.367(a). Counsel explained that he performed work in 2018 "leading up" to the filing of the current claim. Counsel's Brief at 3-4. His fee petition includes time (0.2 hours) on October 25, 2018, for reviewing the Miner's file, discussing with the Miner where he was in the claims process, and which physician he would like to choose "for a new claim." Fee Petition at 4. The December 6, 2018 entry (0.10 hours) noted review of the March 2018 denial of benefits of the Miner's second claim. *Id.* The district director

⁷ Because a timely request for modification merely continues the same claim, *see* 20 C.F.R. §725.310, it has been held that a counsel's original services pursuing a claim prior to modification were necessary to ultimately obtain benefits in that claim on modification. *Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999). In contrast, where a claimant files a claim more than one year after the effective date of a final order denying a prior claim, the later claim is a separate, "subsequent claim." 20 C.F.R. §725.309(c).

did not determine if these services were performed in conjunction with the *current* claim, but rather assumed they were performed in conjunction with the Miner's prior denied second claim. Fee Award at 5. Thus, we vacate the district director's denial of these 0.30 hours of legal services and remand the case for the district director to determine if Counsel, at the time the work in question was performed, could regard it as reasonably necessary to establish entitlement to benefits in the current claim. *See* 20 C.F.R. §725.367(a); *see also* *Murphy*, 21 BLR at 1-120.

In addition, we note a mathematical error in the district director's Fee Award. The district director disallowed 2.5 hours of time as clerical and 2.8 hours for time she found was performed in conjunction with the Miner's prior claims, which totals 5.3 hours. Fee Award at 5. However, the district director also indicated that she approved 26.08 hours, which would have reduced Counsel's requested 29.3 hours by only 3.22 hours.⁸ *Id.* at 6. Thus, after addressing the issue regarding Counsel's services provided in 2018 on remand, the district director should also correct any mathematical errors in her fee award.

Finally, we note this claim is currently pending before the Office of Administrative Law Judges (Case No. 2022-BLA-05475). An award for attorney fees is enforceable and payable only when an award of benefits is final. *See* 20 C.F.R. §725.367(a); *see also* *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995); *Temple v. Big Horn Coal Co.*, 7 BLR 1-573, 1-576 (1984).

⁸ Reducing the requested fees by 5.3 hours would total 24 hours, or \$7,200.00 at the requested hourly rate of \$300.00.

Accordingly, we affirm in part and vacate in part the district director's Proposed Order Supplemental Award Fee for Legal Services and remand this case to the district director for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge