

## PART XI

### ATTORNEY FEES

#### A. BOARD REVIEW OF ATTORNEY FEE AWARDS MADE BELOW

##### 4. SUCCESSFUL PROSECUTION OF THE CLAIM

Counsel is entitled to fees for all necessary services rendered claimant at each level of the adjudicatory process, even if he was unsuccessful at a particular level, so long as he is ultimately successful in prosecuting the claim. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); **Clark v. Director, OWCP**, 9 BLR 1-211 (1986); see also **Texas State Teachers' Association v. Garland Independent School District**, 109 S.Ct. 1486 (1989)(for the Supreme Court's discussion of successful prosecution of claims and entitlement to fee awards in civil rights cases).

#### CASE LISTINGS

##### DIGESTS

The Board refused to award an attorney fee where claimant sought modification of the administrative law judge's denial of benefits during the pendency of the appeal and benefits were awarded only after a new proceeding was held and additional evidence was submitted before the administrative law judge. Since the time spent before the Board was not necessary to the successful prosecution of the claim, counsel was not entitled to compensation for that time. **Clark v. Director, OWCP**, 9 BLR 1-211 (1986).

The Board affirmed the administrative law judge's determination that employer's withdrawal from controversy and acceptance of liability constituted a favorable resolution and, therefore, a successful prosecution of the claim, entitling counsel to compensation for the work performed before the administrative law judge. **Markovich v. Bethlehem Mines Corp.**, 11 BLR 1-105 (1987).

The Board, citing **Clark v. Director, OWCP**, 9 BLR 1-211 (1986), denied a fee request for work performed before the Board in a prior claim which was denied, though claimant was subsequently successful in his pursuit of benefits on a duplicate claim. **Broughton v. Director, OWCP**, 13 BLR 1-35 (1989).

Where the sole issue on appeal is the source of the payment of benefits rather than entitlement to benefits, counsel is not entitled to an attorney fee as claimant had no interest in the outcome of the appeal. **Harriger v. B & G Construction Co.**, 8 BLR 1-378 (1985); cf. **Yates v. Harman Mining Co.**, 12 BLR 1-175 (1989)[where entitlement was at issue, the Board declined to separate out time spent on issues in which claimant did and did not have an interest in the outcome of the litigation]; see also **Director, OWCP v. Palmer Coking Coal Co., [Manowski]**, 867 F.2d 552 (9th Cir. 1989).

In a case in which claimant's attorney pursued a MBO claim but there were not medical costs to be reimbursed by employer, the Board reversed the administrative law judge's award of attorney fees, holding that the "successful prosecution" of a claim requirement of Section 28 of the LHWCA, 33 U.S.C. §928, had not been met. **Beasley v. Sahara Coal Co.**, 16 BLR 1-6 (1991).

The Board held that claimant's counsel was entitled to attorney fees inasmuch as counsel successfully prosecuted the claim by reducing the overpayment amount owed by claimant before the administrative law judge and subsequently defeating the appeal of the overpayment adjustment before the Board. See 33 U.S.C. §928(a) as incorporated by 30 U.S.C. §932(a); **Markovich v. Bethlehem Steel Corp.**, 11 BLR 1-105 (1987). **Sosbee v. Director, OWCP**, 17 BLR 1-136 (1993)(en banc)(Brown, J., concurring).

Although the claim had been originally denied at the time that counsel represented claimant and counsel was not representing claimant at the time of a subsequent final award of benefits, since claimant was ultimately successful in establishing entitlement when represented by a subsequent counsel, claimant's original counsel may properly be awarded attorney fees for services rendered before the final award of benefits as he could reasonably have regarded the work he performed as necessary for the successful prosecution of the claim at the time the work was performed and the work was relevant to claimant's success in obtaining benefits, see **Murphy v. Director, OWCP**, 21 BLR 1-116 (1999).

Where counsel was successful in an appeal which sought to supplement statutory attorney fees awarded pursuant to 33 U.S.C. §928(a) to reflect delay in payment, the Fourth Circuit held that counsel was entitled to compensation for his attorney's fees and expenses incurred while pursuing statutory attorney's fees on appeal, even though the miner was not awarded enhanced black lung benefits as a result thereof. **Kerns v. Consolidation Coal Co.**, F.3d , 22 BLR 2- (4th Cir. 2001).

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