

PART XI

ATTORNEY FEES

B. ATTORNEY FEES FOR SERVICES PERFORMED BEFORE THE BOARD

2. SUCCESSFUL PROSECUTION OF CLAIM BEFORE THE BOARD

While claimant's counsel is not entitled to a fee for work performed before the Board if the sole issue on appeal is liability for benefits, the Board will not separate out time spent on issues on which claimant did and did not have an interest in determining an appropriate fee award. *Yates v. Harman Mining Corp.*, 12 BLR 1-175 and 13 BLR 1-56 (1989). In contrast, where the only issue before the Board was the source of claimant's compensation and entitlement was not at issue, the Board declined to award a fee to claimant's counsel. *Harriger v. B & G Construction Co.*, 8 BLR 1-378 (1985); see also *Director, OWCP v. Palmer Coking Coal Co. [Manowski]*, 867 F.2d 552 (9th Cir. 1989).

CASE LISTINGS

DIGESTS

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).

Success in obtaining an award of benefits on modification accorded claimant's counsel the economic benefit requisite to establish a successful prosecution of the claim in qualifying for an attorney fee award. The Board reasoned that claimant's counsel could reasonably have regarded the work performed before the Board as necessary for successful prosecution of the claim at the time the work was completed. *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139-140 (1993), overruling *Clark v. Director, OWCP*, 9 BLR 1-211 (1986).

In a consolidated appeal of two cross-petitions for review challenging an attorney fee awarded by the Board for work performed before the Board, the Seventh Circuit dismissed the petitions for review as premature because the fee award was not final and appealable. The court recognized that in the underlying case, the administrative law judge had awarded benefits, and subsequently, the Board had remanded the case to the administrative law judge for further consideration on the merits. There being no final judgment entered on the merits of the case, the benefits award was not final. The Seventh Circuit thus found merit in the position of the Director, Office of Workers' Compensation Programs, that both petitions for review of the Board's fee award be dismissed for want of jurisdiction. **Zeigler Coal Co. v. Kerr [Griskell]**, 240 F.3d 572, 22 BLR 2-247 (7th Cir. 2000).

Claimant's counsel's work performed before the Board in defense of the award of attorney fees at the administrative law judge level is compensable. **Hawker v. Zeigler Coal Co.**, 22 BLR 1-177 (July 2, 2001)(Decision and Order on Reconsideration).

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