

BRB No. 09-0391 BLA

ROBERT DUNCAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS’	)	DATE ISSUED: 01/20/2010
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Denying Attorney’s Fee of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford Law Offices PLLC), Harlan, Kentucky, for claimant.

Emily Goldberg-Kraft (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers’ Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney’s Fee (2004-BLA-6350) of Administrative Law Judge Richard K. Malamphy rendered on a miner’s claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).

The relevant procedural history of this case is as follows. Claimant filed his application for benefits on July 9, 2002, and the district director awarded benefits. The putative responsible operator challenged its designation as the responsible operator, as well as claimant’s eligibility for benefits, and the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Interim benefits were paid to claimant

out of the Black Lung Disability Trust Fund (Trust Fund). The administrative law judge subsequently determined that the Trust Fund was the party liable for the payment of benefits, but ruled against entitlement. Claimant filed a motion for reconsideration and, on January 31, 2007, the administrative law judge issued a Decision and Order on Reconsideration pursuant to 20 C.F.R. Part 718, releasing the putative responsible operator from liability, and ordering the Trust Fund to pay benefits. Claimant's counsel timely filed an application for an attorney's fee, requesting a total fee of \$3,700 for 18.5 hours of legal services rendered from March 2, 2004, the date the putative responsible operator requested a hearing, through February 2, 2007, the date counsel received the Decision and Order on Reconsideration awarding benefits, at the rate of \$200 per hour. No objections were filed to this fee application. By Supplemental Decision and Order dated February 13, 2009, the administrative law judge denied claimant's attorney's fee petition for legal work performed while this case was pending before the Office of the Administrative Law Judges. Supplemental Decision and Order at 3.

On appeal, claimant challenges the administrative law judge's denial of his attorney's fee petition. The Director, Office of Workers Compensation Programs (the Director), responds, urging the Board to vacate the denial of an attorney's fee and remand this case for the administrative law judge to reconsider the fee petition in accordance with the provisions at 20 C.F.R. §725.366.

The amount of an attorney's fee award pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a), is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Claimant contends, and the Director concurs, that the administrative law judge abused his discretion in denying counsel's fee petition. The parties argue that the administrative law judge incorrectly found that the Trust Fund was not liable for the payment of an attorney's fee on the ground that there had never been an adversarial relationship between claimant and the Director. We agree.

The regulation at 20 C.F.R. §725.367 sets forth the circumstances under which an attorney's fee shall be payable by a responsible operator or the Trust Fund, and states, in part, that:

An attorney who represents a claimant in the successful prosecution of a claim for benefits may be entitled to collect a reasonable attorney's fee from the responsible operator that is ultimately found liable for the payment of benefits, or, in a case in which there is no operator who is liable for the

payment of benefits, from the fund. *Generally, the operator or fund liable for the payment of benefits shall be liable for the payment of the claimant's attorney's fees where the operator or fund, as appropriate, took action, or acquiesced in action, that created an adversarial relationship between itself and the claimant.*

20 C.F.R. §725.367(a)(emphasis added).

In denying claimant's attorney's fee petition, the administrative law judge determined, pursuant to Section 725.367, that for the Trust Fund to be held liable for the payment of an attorney's fee in this case, the district director must have taken action that was adverse to claimant's interests, such as denying benefits, thereby creating an adversarial relationship. Supplemental Decision and Order at 2. Citing *Director, OWCP v. Bivens*, 757 F.2d 781, 7 BLR 2-166 (6th Cir. 1985), the administrative law judge noted that, because the initial, and only, finding by the district director was that claimant was entitled to benefits, and because the Director never disputed claimant's entitlement to benefits, the Director was never in an adversarial relationship with claimant. *Id.* at 3. The administrative law judge further concluded that, even though claimant's last employer created an adversarial relationship with claimant when it contested both its liability as the designated responsible operator and claimant's entitlement to benefits, it could not be held liable for the payment of an attorney's fee, as it had been dismissed from any liability for the payment of benefits in this case. *Id.*

The Director argues, however, that the instant case is factually distinguishable from *Bivens*, where no one ever disputed the claimant's entitlement to benefits. We agree with the position of the Director that, in situations such as this, where there has been an adjudicative proceeding because "someone" contested liability, the party ultimately held responsible for the payment of benefits is also responsible for the payment of an attorney's fee, regardless of which party created the adversarial relationship. Director's Brief at 2-3; *see generally Director, OWCP v. South East Coal Co. [Spicer]*, 598 F.2d 1046 (6th Cir. 1979)(Trust Fund held liable for payment of attorney's fee award to a claimant whose work as a coal miner ended before January 1, 1970; immaterial that the Director never declined to pay benefits, as the miner's last employer contested entitlement, and with the enactment of the 1977 amendments, the Trust Fund was placed in the position of the employer); *Director, OWCP v. Black Diamond Coal Mining Co. [Frederick]*, 598 F.2d 945, 2 BLR 2-17 (5th Cir. 1979). Furthermore, the Director acknowledges that, while Section 725.367 does not directly address this issue, the regulation contains no provision that would negate imposing liability on the Trust Fund for the payment of an attorney's fee when the operator that created an adversarial relationship is later dismissed by the administrative law judge. *See* 20 C.F.R. §725.367.

In view of the foregoing, we vacate the administrative law judge's denial of an attorney's fee, and remand this case for the administrative law judge to reconsider counsel's fee petition in accordance with Section 725.366.

Accordingly, the administrative law judge's Supplemental Decision and Order Denying Attorney's Fee is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge