

BRB No. 04-0464 BLA

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| CURTISS WILLIAM MARTIN |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| PATIENCE, INCORPORATED |) | |
| |) | |
| and |) | |
| |) | |
| WEST VIRGINIA COAL WORKERS' |) | DATE ISSUED: 02/16/2005 |
| PNEUMOCONIOSIS FUND |) | |
| |) | |
| Employer/Carrier- |) | |
| Respondents |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Attorney Fee Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

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

Claimant's counsel appeals the Attorney Fee Order of Administrative Law Judge Gerald M. Tierney awarding attorney's fees for legal services performed in securing for claimant an award of benefits on a 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). Claimant's counsel filed a complete, itemized fee petition with the administrative law judge, requesting a total fee of \$3,433.00 for 18.75 hours of legal services at an hourly rate of \$150.00 and 1.25 hours of legal services at an hourly rate of

\$200.00,¹ and \$370.50 for expenses. No objection to the fee petition of claimant's counsel is contained in the record. Upon consideration of the fee petition, the administrative law judge found the hourly rates of \$150.00 and \$200.00 to be reasonable. Attorney Fee Order at 2. However, the administrative law judge disallowed 11.75 hours for services performed in Case No. 99-BLA-0065 because that claim was denied. *Id.* Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$1,645.00 for 7.5 hours of legal services at an hourly rate of \$150.00 and .75 hours of legal services at an hourly rate of \$200.00, with an additional \$370.00² for expenses. *Id.*

On appeal, claimant's counsel asserts that the administrative law judge erred in denying attorney's fees for 11.75 hours of legal services performed in Case No. 99-BLA-0065. Claimant's Counsel's Brief at 2-3. Employer has not responded to claimant's counsel's appeal of the administrative law judge's fee award. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.³

The award of an attorney's fee 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, *see Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Claimant's counsel asserts that the administrative law judge erred in disallowing 11.75 hours of legal services performed in Case No. 99-BLA-0065 because that claim was denied on August 27, 1999. Claimant's Counsel's Brief at 2-3. Claimant's counsel maintains that although the 99-BLA-0065 case was finally denied by the Board on November 17, 2000, claimant made a timely request for modification on this claim in January 2001. *Id.* at 2. Claimant asserts that he is entitled to fees for the work he performed in Case No. 99-BLA-0065 because the administrative law judge ultimately awarded benefits in Case No. 02-BLA-0027, which was claimant's request for modification in the same claim. *Id.*

¹In his Fee Petition, claimant's counsel noted that his hourly rate of \$150.00 is for "office services" and his hourly rate of \$200.00 is for "hearings." Fee Petition at 4, 6.

²The administrative law judge's reference to \$370.00 for expenses on page two of his Order contains a typographical error. The administrative law judge notes that claimant's counsel requested \$370.50 for expenses earlier in his Order.

³We affirm the administrative law judge's fee award for legal services performed and expenses incurred in Case No. 02-BLA-0027, as this award is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant's assertion has merit. The Board has held that in order to receive compensation for legal services performed on claimant's behalf, counsel must successfully prosecute the claim. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Director, OWCP v. Hemingway Transport Inc.*, 1 BRBS 73, 75 (1974); see *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105, 1-106 (1987). "A successful prosecution of a claim exists when claimant receives an economic benefit resulting from an adversarial proceeding." *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993)(Order)(*en banc*). Although claimant's claim was originally denied, claimant was ultimately successful in obtaining benefits on modification. Because modification is merely a continuation of the same claim, see 20 C.F.R. §725.310, claimant's counsel's original services pursuing this case prior to modification were necessary to ultimately obtaining benefits on modification. *Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999). Therefore, we hold that claimant's counsel may properly be awarded attorney's fees for services he rendered before the Office of Administrative Law Judges in Case No. 99-BLA-0065. We remand this case to the administrative law judge for him to consider counsel's fee petition for services performed in Case No. 99-BLA-0065.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge