

BRB No. 98-0684 BLA

KENNETH KOCH)
)
 Claimant-Petitioner)
)
 v.)
)
 MIDDLEPORT MATERIALS,) DATE ISSUED:
 INCORPORATED,)
 KOCHER COAL COMPANY,)
 AUSTIN POWDER COMPANY,)
)
 and)
)
 TRAVELER'S INSURANCE COMPANY)
)
 Employers/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Supplemental Decision and Order of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Andrew C. Onwudinjo (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for claimant.

Frank L. Tamulonis, Jr. (Zimmerman, Lieberman & Derenzo, LLP), Pottsville, Pennsylvania, for employer, Middleport Materials, Incorporated.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order (96-BLA-1725) of Administrative Law Judge Ainsworth H. Brown awarding attorney's fees with respect to the prosecution of 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). The administrative law judge approved attorney's fees in the amount of \$72.50 assessed against employer. On appeal, claimant's counsel contends that the administrative law judge erred by reducing the number of hours for which he requested compensation. Employer responds, urging affirmance of the administrative law judge's finding that the services that claimant's counsel rendered were not necessary for the successful prosecution of claimant's claim for benefits. Employer also contends that claimant's counsel's requested hourly rate of \$145.00 is unreasonable. Lastly, employer contends that claimant's counsel requested compensation for an unreasonable number of hours since he failed to provide sufficient detail in his time entries and since he sought recovery of time for all services without regard to whether the services rendered were clerical or legal.

An award of attorney's fees is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Claimant's counsel contends that the administrative law judge erred by reducing the hours of service detailed in his request for attorney's fees. We disagree. Claimant's counsel filed a petition for attorney's fees, requesting \$1,087.50 for 7.50 hours of service at an hourly rate of \$145.00. On November 5, 1997, the administrative law judge issued an Order to Show Cause why claimant's counsel should be awarded attorney's fees. In response to the administrative law judge's Order to Show Cause, claimant's counsel requested that the administrative law judge approve his Application for Representative Fees. In his decision, the administrative law judge stated that "[i]t does appear from the tersely described entries that legal services were required to assist [claimant] respond (sic) to discovery on February 21, 1997 for a request for admissions and the preparation of a response on April 11, 1997." Supplemental Decision and Order at 2. The administrative law judge also stated that "[t]hese services consumed a half an hour." *Id.* Further, the administrative law judge found "the [hourly] rate of \$145.00 within the context of Black Lung hearing adjudication advocacy to be near the high end of what is reasonable, but not to be unconscionable." *Id.* In addition, the administrative law judge disallowed 7 hours of services performed by claimant's counsel before the administrative law judge between November 13, 1996 and April 23, 1997 because they were performed with regard to employer's request for

modification of the administrative law judge's findings concerning the responsible operator issue.

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's fee as claimant had no interest in the outcome of the appeal. See *Harriger v. B&G Construction Co.*, 8 BLR 1-378 (1985). In the instant case, the administrative law judge stated that claimant's "participation in the modification proceeding was limited to supplying information to help the putative responsible operators settle which one was to assume the financial responsibility for his benefits." Supplemental Decision and Order at 2. The administrative law judge further stated that "[t]he question of [claimant's] entitlement to benefits was not in contest." *Id.* Thus, because claimant had no interest in the outcome of the proceedings regarding employer's request for modification, we affirm the administrative law judge's disallowance of attorney's fees for services performed with regard to the responsible operator issue on modification. See *Harriger, supra*. Moreover, since the services performed by claimant's counsel on February 21, 1997 and April 11, 1997, solely pertained to the responsible operator issue, we reverse the administrative law judge's finding that claimant's counsel is entitled to fees for these services. See *Harriger, supra*.

Claimant's counsel asserts that the administrative law judge's interpretation of *Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993), erroneously limits the services which may be rendered by counsel to those that directly grant an economic benefit to claimants. In *Brodhead*, claimant appealed an administrative law judge's denial of benefits to the Board. However, the Board dismissed claimant's pending appeal without prejudice because claimant filed a request for modification with the district director. The district director subsequently awarded benefits and claimant's counsel requested an award of attorney's fees for the services performed before the Board. The Board, citing *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987), stated that an administrative law judge may award attorney's fees when there is a successful prosecution of a claim and the work performed was necessary to achieving an outcome in claimant's favor. The Board also stated that a successful prosecution of a claim exists when claimant receives an economic benefit from an adversarial proceeding. The Board reasoned that claimant's counsel's success in obtaining an award of benefits on modification afforded claimant the economic benefit requisite to a successful prosecution of the claim. Further, the Board reasoned that although the appeal was dismissed prior to a final disposition on the merits, claimant's counsel could reasonably have regarded the work performed before the Board as necessary for the successful prosecution of the claim at the time the work was completed. Hence, the Board awarded attorney's fees.

The administrative law judge stated that the case at hand could be distinguished from *Brodhead*, as here the “modification proceedings merely dealt with who was to write the checks for those benefits and to reimburse the Trust Fund for the benefits already paid.” Supplemental Decision and Order at 1. The administrative law judge rationally determined, therefore, that the present case does not fall within the Board’s holding in *Brodhead*, as claimant’s receipt of an economic benefit was not at issue. Thus, we reject claimant’s assertion that the administrative law judge’s interpretation of *Brodhead* was erroneous.¹

Accordingly, the administrative law judge's Supplemental Decision and Order awarding attorney's fees is affirmed in part and reversed in part.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

¹In view of our disallowance of claimant’s counsel’s request for attorney’s fees in this case, we decline to address employer’s contentions with regard to the reasonableness of claimant’s counsel’s hourly rate and the hours billed.