

BRB No. 12-0462 BLA

FERN MULLINS)	
(Widow of BENNETT MULLINS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
TOPPER COAL COMPANY,)	DATE ISSUED: 06/26/2013
INCORPORATED)	
)	
and)	
)	
LIBERTY MUTUAL INSURANCE GROUP)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

William Roberts Lawrence, Pikeville, Kentucky, for claimant.

William A. Lyons and W. Barry Lewis (Lewis and Lewis Law Offices),
Hazard, Kentucky, for employer/carrier.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen
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:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-5896) of Administrative Law Judge John P. Sellers, III (the administrative law judge), rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Claimant filed this survivor's claim on February 24, 2011.¹

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that the survivor of a miner, who was eligible to receive benefits at the time of his or her death, is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

On May 23, 2012, the administrative law judge held a teleconference with the parties to determine whether there were any substantive issues to be determined that necessitated a formal hearing. *See* Decision and Order at 2. At that time, employer stated that a request for modification had been filed in the miner's claim that was still pending before the district director. *Id.* Employer, therefore, argued that the case should be held in abeyance pending a decision by the district director on employer's request for modification in the miner's claim. In the alternative, employer argued that it should be allowed to submit evidence regarding the cause of the miner's death. At the conclusion of the teleconference, the administrative law judge rejected employer's arguments and denied its request to hold the case in abeyance. *Id.* at 2-3.

In his Decision and Order Awarding Benefits, dated May 29, 2012, the administrative law judge found that the record supports a finding that claimant is the surviving widow of the miner, who was finally awarded benefits during his lifetime. The

¹ Claimant is the widow of the miner, who died on February 7, 2011. Director's Exhibit 6. The miner was determined to be entitled to federal black lung benefits at the time of his death pursuant to a claim filed on October 28, 2002, which was awarded by Administrative Law Judge Larry S. Merck in a Decision and Order on Remand – Award of Benefits issued on October 4, 2010. On September 27, 2011, the Board affirmed Judge Merck's award of benefits. *Mullins v. Topper Coal Co.*, BRB No. 11-0157 BLA (Sept. 27, 2011)(unpub.). No further action was taken on the miner's claim until employer filed a request for modification on February 10, 2012. Administrative Law Judge's Exhibit 2.

administrative law judge further found that employer is the responsible operator. Addressing the merits, the administrative law judge found that, because claimant filed this claim after January 1, 2005, the claim was pending after March 23, 2010 and claimant is the surviving widow of the miner, this claim meets the threshold requirements for application of amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of February 2011, the month of the miner's death.

On appeal, employer challenges the administrative law judge's award of survivor's benefits, arguing that the administrative law judge erred in not holding this case in abeyance pending resolution of the modification request that is currently before the district director in the miner's claim. In the alternative, employer argues that the administrative law judge erred in not holding a hearing in the survivor's claim in order to allow employer the opportunity to submit new evidence relevant to the cause of the miner's respiratory condition and, thus, the miner's death. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's award of benefits, arguing that the administrative law judge properly denied employer's request to hold the survivor's claim in abeyance pending the outcome of the modification proceedings in the miner's claim. Additionally, the Director argues that there is no merit to employer's contention that the administrative law judge should have, *sua sponte*, evaluated the miner's claim in light of the new evidence submitted by employer. Consequently, because claimant meets the requirements of amended Section 932(l), the Director urges affirmance of the award of survivor's benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In awarding derivative survivor's benefits under amended Section 932(l), the administrative law judge reasonably exercised his discretion in denying employer's request to hold the survivor's claim in abeyance pending resolution of employer's request for modification of the award of benefits in the miner's claim. 20 C.F.R. §725.455(c); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc). Employer's

² As the miner was employed in the coal mining industry in Kentucky, the law of the United States Court of Appeals for the Sixth Circuit applies. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 1.

contention that the administrative law judge erred in not considering the newly discovered evidence, *sua sponte*, and employer's arguments regarding the administrative law judge's right to find a material change in conditions in the miner's claim based on this new evidence, are misguided. Employer's Brief at 13-17. Contrary to employer's suggestion, the only claim currently before the administrative law judge is the survivor's claim filed on February 24, 2011. At the time of the administrative law judge's Decision and Order in the survivor's claim, the request for modification in the miner's claim was before the district director. The administrative law judge, therefore, lacked jurisdiction to consider employer's arguments regarding the issues on modification. 20 C.F.R. §725.310; *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987); *Dingess v. Director, OWCP*, 12 BLR 1-141 (1989). Consequently, the administrative law judge rationally found that the Board's September 27, 2011 decision affirming Administrative Law Judge Larry Merck's Decision and Order on Remand – Award of Benefits in the miner's claim became final, because employer did not appeal it within sixty days of the date of its issuance. 20 C.F.R. §802.406(a); *see also* 20 C.F.R. §§725.479, 725.482.

Moreover, as the administrative law judge properly stated, a request for modification, by its mere filing, does not alter the finality of an award of benefits. *See* 20 C.F.R. §§725.502(a)(1), 725.480; *Hansen v. Director, OWCP*, 984 F.2d 364, 367, 17 BLR 2-48, 2-51 (10th Cir. 1993) (“[u]nlike motions for reconsideration, the C.F.R. contains no provisions indicating that a motion for modification affects the finality of an order”); *see also National Mines Corp. v. Carroll*, 64 F.3d 135, 141, 19 BLR 2-329, 2-344 (3d Cir. 1995) (“as a general rule, the mere existence of modification proceedings does not affect the finality of an existing award of compensation”); *Hudson v. Pine Ridge Coal Co.*, 2012 WL 386736, No. 2:11-00248 (S.D. W.Va. Feb. 6, 2012) (“[employer's] pending petition for modification does not disturb the finality of the ALJ's order ... only a timely petition for appeal and stay to the Benefits Review Board, or the timely filing of a motion to reconsider before the ALJ could have prevented the ALJ's order from becoming final for purposes of Section 921(d), even though it remained subject to modification under section 922”). Consequently, the administrative law judge rationally found that there was a final award of benefits in the miner's claim, thereby meeting one of the threshold requirements of derivative entitlement under amended Section 932(l). Because employer does not otherwise challenge the administrative law judge's findings that claimant filed her claim after January 1, 2005, and that her claim was pending after March 23, 2010, we affirm the administrative law judge's finding that claimant is entitled to receive survivor's benefits pursuant to amended Section 932(l), 30 U.S.C. §932(l); Director's Exhibit 5.

Lastly, claimant's counsel (counsel) has filed a complete, itemized statement requesting a fee for services performed on June 25, 2012 in this appeal pursuant to 20 C.F.R. §802.203. Counsel requests a total fee of \$150.00 for .5 hours of legal services at

an hourly rate of \$300.00. No objections to the fee petition have been received.

Counsel is entitled to an attorney's fee, payable by employer, for successful prosecution of the claim. *See* 33 U.S.C. §928, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993). A fee petition will be granted if the services for which counsel seeks compensation were necessary to the proper conduct of the case and the time expended on such services was reasonable. 20 C.F.R. §802.203(e); *see Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984); *Marcum v. Director, OWCP*, 2 BLR 1-894, 1-901 (1980).

After reviewing counsel's fee petition, we approve counsel's hourly rate of \$300.00 and the .5 hours of services as reasonable in this case. Accordingly, we hold that counsel is entitled to receive a fee, payable directly to counsel by employer, of \$150.00 for legal services performed before the Board. *See* 33 U.S.C. §928; 20 C.F.R. §802.203; *see Lanning*, 7 BLR at 1-316; *Marcum*, 2 BLR at 1-901.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed. Additionally, counsel is awarded a total fee of \$150.00.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge