

BRB No. 05-0472 BLA

LUCILLE CHRISTIAN)	
(Widow of MARION CHRISTIAN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 03/29/2006
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION AND ORDER

Appeal of the Supplemental Award [of] Fee for Legal Services of Lucille S. Potter, Senior Claims Examiner, Office of Workers' Compensation Programs, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 Award [of] Fee for Legal Services of Lucille S. Potter, Senior Claims Examiner (the claims examiner), awarding attorney's fees for services rendered on an overpayment action in connection with 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). This case is based on claims for benefits filed

with the Department of Labor on August 20, 1998 (miner's claim) and September 18, 2000 (survivor's claim).¹ The district director initially awarded benefits in both claims. The responsible operator controverted the claim, and a hearing was held before an administrative law judge in both claims on June 11, 2002. A Decision and Order Denying Benefits was issued on May 29, 2003. On July 16, 2004, the district director issued two overpayment letters (notices) wherein he found an overpayment in the amount of \$12,186.70 in the miner's claim, and an overpayment in the amount of \$11,898 in the survivor's claim. Claimant, through counsel, requested waiver of the overpayments. Director's Exhibit 1. On October 25, 2004, the district director informed claimant that the overpayments would be waived. Claimant's counsel filed a fee petition on January 12, 2005 for services rendered in seeking waiver of the overpayments. Unnumbered Exhibit. On February 7, 2005, the district director awarded claimant's counsel a fee in the amount of \$950, but determined that it is the responsibility of claimant, rather than the Black Lung Disability Trust Fund (Trust Fund), to pay the fee.²

An award of attorney's fees 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); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

In order to be entitled to an award of attorney's fees under Section 28(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a), claimant's counsel must engage in the successful prosecution of a claim.³ See *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); see generally *Director, OWCP v. Baca*, 927 F.2d 1122, 15 BLR 2-42 (10th Cir.1991); *Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), aff'd on recon., 13 BLR 1-56 (1989) (en banc). The defense of overpayment recovery involves adversarial proceedings in connection with a claim for

¹ Claimant is the surviving spouse of the miner, Marion Christian, who died on September 1, 2000, while his claim was still pending.

² Since the award of attorney's fees in the amount of \$950, pursuant to 20 C.F.R. §725.366, is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

³ A successful prosecution of a claim exists when claimant receives an economic benefit resulting from an adversarial proceeding. See 33 U.S.C. §928(a), as implemented by 20 C.F.R. §725.367(a); see also *Bethenergy Mines Inc. v. Director, OWCP [Markovich]*, 854 F.2d 632 (3d Cir. 1988), aff'g sub nom. *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987).

benefits which may result in an economic benefit to the claimant, and, therefore, the successful defense of an overpayment recovery action is, in effect, the successful prosecution of a contested claim for the purposes of Section 28(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928(a), as incorporated by 30 U.S.C. §932(a). *Sosbee v. Director, OWCP*, 17 BLR 1-136 (1993)(Order)(*en banc*); see also *Bethenergy Mines Inc. v. Director, OWCP [Markovich]*, 854 F.2d 632 (3d Cir. 1988), aff'g sub nom. *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987).

Claimant argues that the creation of an overpayment necessarily created an adversarial relationship between claimant and the district director, and thus the fee awarded for representation of claimant should be paid by the Trust Fund. The Director responds that, while the regulations do not set forth specifically when the Trust Fund is responsible for the payment of claimant's attorney's fees when the issue is waiver of an overpayment, the triggering event is when an adversarial relationship exists. The Director relies on the decision of the United States Court of Appeals for the Fourth Circuit in *Clinchfield Coal Co. v. Harris*, 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998) as support for his position.⁴ In *Harris*, the Court deferred to the Director's interpretation of the statute, that the triggering event for the payment of claimant's attorney's fees by the opposing party, is the beginning of an adversarial relationship. *Harris*, 149 F.3d at 310, 21 BLR at 2-486; See 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a). The Court, in *Harris*, however, did not specifically address when an adversarial relationship is created in an overpayment recovery proceeding. Contrary to the Director's position, we hold that it is a notice of an overpayment, rather than an adverse decision on a request for waiver of an overpayment, that creates a creditor-debtor relationship between the party seeking repayment and claimant. Such a relationship is, by nature, adversarial.

In the instant case, the notices of overpayment received by claimant both stated: "We have made a preliminary finding that you are **without fault** in the matter of the overpayment. Regardless, we are required by law to recover the overpayment unless you can show that such recovery would "defeat the purpose of the law" or "be against equity and good conscience". See OWCP letters of July 16, 2004. (emphasis in original). Moreover, these notices advised claimant of her legal rights and responsibilities in the overpayment proceedings, including advising claimant that she needed to either forward reimbursement to the Department of Labor or provide evidence and, if she wished, request an informal conference on the matter. In addition, these notices specifically advised claimant, *inter alia*, that she had a right to bring a representative to an informal

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, since the miner's last coal mine employment took place in West Virginia. Director's Exhibit 2. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

conference, wherein she could meet with an examiner to discuss the overpayment. *Id.* Given the nature of the overpayment notices, as described, *supra*, we hold that an adversarial relationship, triggering the Trust Fund's liability for the payment of claimant's attorney's fees, was created by their issuance. Thus, we reject Director's contrary position. *See Harris*, 149 F.3d at 310, 21 BLR at 2-486.

We, therefore, affirm the claims examiner's Supplemental Award [of] Fee for Legal Services, but reverse his finding that claimant is responsible for the payment of attorney's fees, and order payment of the awarded fees by the Black Lung Disability Trust Fund.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge