

BRB No. 98-0298 BLA

WILLIAM F. HARRISON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
RIVER MINING COMPANY)	DATE ISSUED:
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Supplemental Decision and Order and Supplemental Decision and Order on Reconsideration of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Deron L. Johnson (Boehl, Stopher & Graves), Prestonsburg, Kentucky, for employer.

J. Matthew McCracken (Judith E. Kramer, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIUM:

Claimant's counsel appeals the Supplemental Decision and Order and Supplemental Decision and Order on Reconsideration (93-BLA-0582) of Administrative Law Judge John

C. Holmes denying 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). On August 5, 1997, claimant's counsel submitted a complete itemized attorney fee petition requesting a total fee of \$3075.00, representing twenty-one and one-half hours of legal services performed before the administrative law judge, at an hourly rate of \$150.00. On October 9, 1997, the administrative law judge issued his Supplemental Decision and Order denying claimant's attorney a fee for his services in the overpayment action. The administrative law judge determined that claimant gained no benefit from counsel's representation. Accordingly, attorney fees were denied. The administrative law judge subsequently denied claimant's request for reconsideration. On appeal, claimant's attorney contends that the administrative law judge erred in not awarding a fee for his services. Employer responds asserting that the administrative law judge properly denied claimant's counsel a fee. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that claimant's counsel is entitled to a fee in this case.

An award of attorney 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 into the Act by 30 U.S.C. §932(a), claimant's counsel must engage in the successful prosecution of a claim.¹ *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 proceedings² in connection with a claim for benefits which may result in an economic benefit to the claimant, and, therefore, the successful defense of an

¹ 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).

² The notice of overpayment reflects the existence of a creditor-debtor relationship between the party seeking repayment and claimant, which is undeniably adversarial. Because it is the notice of overpayment which establishes the adversarial relationship between claimant and the party seeking repayment, it is that event which triggers liability for attorney's fees.

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). Based upon the facts of this case, we agree with claimant and the Director that counsel is entitled to a fee for his services. Counsel, in this case, did not reduce the overpayment amount but did obtain a payment plan instead of a lump sum remittance that was requested by employer. By obtaining this payment plan instead of the lump sum remittance, there was an economic benefit to claimant as claimant benefits from the use of the money while employer loses the time value of the money. Consequently, because employer's pursuit of recovery of the overpayment was adversarial to claimant and claimant's counsel obtained an economic benefit for claimant, we reverse the administrative law judge's finding that claimant's counsel is not entitled to attorney's fees and remand the case for further findings with respect to the fee amount.

On remand, the administrative law judge must consider the applicable mandatory factors found at 20 C.F.R. §725.366(b), which include the quality of representation, qualifications of the representatives, complexity of the legal issues involved, level of proceedings to which the claim was raised, and the level at which counsel entered the proceedings. 20 C.F.R. §725.366(b); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *see also Velasquez v. Director, OWCP*, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988).

Accordingly, the administrative law judge's Supplemental Decision and Order and Supplemental Decision and Order on Reconsideration denying claimant's counsel attorney fees are vacated and the case is remanded to the administrative law judge for further reconsideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge