

BRB No. 93-1367
OWCP No. 06-090673

CHARLES C. WARREN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Employer/Carrier-)	
Respondents)	ORDER

The captioned case is before the Board on remand from the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone]*, 102 F.3d 1385, (5th Cir.), *vacating* 81 F.3d 561 (5th Cir. 1996). In its decision, the court reversed the Board's decision and remanded the case for further proceedings. Pursuant thereto, this case is remanded to the Office of Administrative Law Judges for further proceedings consistent with the Court's decision.

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed in the captioned appeal pursuant to 20 C.F.R. §802.203. Counsel requests a fee of \$375 for 2.50 hours of legal service at a hourly rate of \$150, in addition to photocopy expenses of \$8.25. Employer has filed objections to the fee request, contending that counsel is not entitled to a fee since no compensation or medical benefits has been gained by counsel. In addition, employer alleges that since the case is not final and there has been no successful prosecution of this claim, no fee should be awarded. Employer also objects to the hourly rate of \$150 and requests that the hourly rate be reduced to \$90, and further objects to the \$8.25 charge for photocopy expenses.

The Act provides that if counsel assists a claimant in the successful prosecution of a claim, that attorney shall receive a reasonable attorney's fee. 33 U.S.C. §928; *Davis v. U.S. Department of Labor*, 646 F.2d 609, 613 (D.C. Cir. 1980); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 773 (5th Cir. 1981); *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90, 93-94 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in part, part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *see also Director, OWCP v. Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991).

The purpose of Section 28 is to authorize such fees against employers "when the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation." *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1354, 27 BRBS 41, 57 (CRT)(5th Cir. 1993). The Tenth Circuit, in construing Section 28(a) in the context of a black lung claim, stated its view that the statute unambiguously provides for the award of attorneys fees "when claimant has gained some *economic* benefit." *Baca*, 927 F.2d at 1124 (emphasis added). Similarly, the Seventh Circuit in another black lung case concluded that "[a] victory on appeal that does not establish entitlement to a claim but merely keeps the claim alive does not make the victor a prevailing party entitled to attorney's fees." *Eifler v. Peabody Coal Co.*, 13 F.3d 236, 237-238 (7th Cir. 1993).

Claimant in this case has not prevailed on the merits as this case is being remanded. Moreover, even if claimant successfully pursues withdrawal of his claim on remand, he will not have prevailed in establishing entitlement as he will not obtain an award of benefits. Counsel's action in obtaining withdrawal of the claim and defending against employer's assertion that the claim is presently barred will only preserve claimant's potential for recovery when and if his asbestosis becomes disabling. *See Hole*, 640 F.2d at 769. Thus, the award of fees for this work is premature because claimant has yet to achieve the final remedy in the form of that relief which forms the basis of claims under the Act. *See Davis*, 646 F.2d at 613 n.6 (attorney's fee premature; claimant "won a battle, but did not thereby win the war"); *Richardson v. Penfold*, 900 F.2d 116, 118 (7th Cir. 1990)(fee award premature). Until claimant obtains an award of benefits, counsel cannot be awarded a fee.

The "Act ... requires on its face a showing of success on the merits before any fee becomes appropriate." *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 1536, 25 BRBS 161, 165 (CRT) (D.C. Cir. 1992); *see* 33 U.S.C. §928(d); *Thompson v. Potashnick Construction Co.*, 812 F.2d 574, 577 (9th Cir. 1987). The tactical victory enjoyed by claimant in this case does not measure up to that level, and claimant has yet to achieve even an "inchoate" right to compensation benefits. *Compare E.P. Paup Co.*, 999 F.2d at 1354, 27 BRBS at 57 (CRT).

Accordingly, in light of the above, the fee request is denied at this time.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge