

BRB No. 99-0509

ROBERT TERRELL)
)
Claimant-Respondent)
)
v.)
)
WASHINGTON METROPOLITAN)
AREA TRANSIT AUTHORITY) DATE ISSUED: Dec. 6, 2002
)
Self-Insured Employer)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Petitioner) ORDER

DOLDER, Chief Administrative Appeals Judge:

Claimant's counsel has filed a timely motion for reconsideration of the Board's Order of June 11, 2002, *Terrell v. Washington Metropolitan Area Transit Authority*, 36 BRBS 69 (2002). 20 C.F.R. §802.407(a). This Order held that employer cannot be held liable for claimant's attorney's fee for the work counsel performed before the Board in BRB No. 99-0509. *Terrell v. Washington Metropolitan Area Transit Authority*, 34 BRBS 1 (2002). The Order further held claimant liable for a fee of \$410, as a lien on his total disability compensation award, 33 U.S.C. §928(c), as well as for expenses of \$192.89. On reconsideration, counsel seeks to hold claimant liable for the entire fee he requested in this matter, \$4,148.¹

¹Counsel attached to his motion a letter he sent to claimant advising him of his motion for reconsideration of the fee award. The motion itself also was served on claimant.

In awarding counsel a fee of \$410 payable by claimant under Section 28(c), out of the \$4,148 requested, the Board stated:

The regulation at 20 C.F.R. §802.203(e) states that “Any fee approved shall be reasonably commensurate with the necessary work done. . . .” Claimant first contended that the Director had no standing to appeal to the Board, and that the appeal was untimely. These contentions were rejected by Order dated September 7, 1999. In the appeal on the merits, claimant opposed the Director’s contention that employer retained standing to oppose a modification request under the pre-1984 Amendment Act, and was unsuccessful in defending the administrative law judge’s decision excluding employer from the proceedings. Therefore, we hold that counsel is not entitled to a fee for the work performed on research, motions or briefs, as claimant was unsuccessful in maintaining the status quo.

Terrell, 36 BRBS at 72-73. The Board then made specific itemized reductions in the fee request. The fee awarded represented services relating to telephone calls to the Board and conferences with claimant.

In his motion for reconsideration, counsel contends that the Board erred in disallowing a fee on issues on which claimant was unsuccessful before the Board, given that claimant succeeded in obtaining an award of permanent total disability benefits. Upon reconsideration, we agree with claimant’s counsel and therefore we grant his motion.

Initially, we observe that the case law requiring that a fee award take into account the limited or partial success of the petitioner applies to fee-shifting statutes. See *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988). Section 28 of the Longshore Act is such a fee-shifting statute, as subsections (a) and (b) provide for shifting liability to employer under certain circumstances. 33 U.S.C. §928(a), (b). In this case, however, we have previously held that subsections (a) and (b) are not applicable; thus fee liability is not shifted to employer. Rather, the fee is claimant’s liability, pursuant to Section 28(c), and may be a lien on his compensation. See *Terrell*, 36 BRBS at 72. Where claimant is liable for a fee, his counsel’s entitlement to an attorney’s fee is determined by the necessary work performed in securing an award.

Thus, the determination of the amount of the fee claimant must pay his counsel is governed by the regulation at 20 C.F.R. §802.203(e), which states:

Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, the amount of benefits awarded, and, when the fee is to be assessed against the claimant, shall also take into account the financial circumstances of the claimant. A fee shall not necessarily be computed by multiplying time devoted to work by an hourly rate.

The work counsel performed before the Board was “necessary,” in that he advocated a position protective of his client’s interest. Moreover, the legal issue presented by the Director’s appeal involved one of first impression before the Board, and it was clearly necessary for claimant to be represented on this issue, as the holding that employer was a proper party to defend against claimant’s petition for modification potentially exposed claimant to a new hearing on the merits. See *Terrell*, 34 BRBS 1. Finally, despite the Board’s remand on this issue, claimant was successful on remand before the administrative law judge in again having his permanent partial disability award modified to one for permanent total disability. A claimant’s ultimate success entitles his attorney to a fee for services rendered to claimant at each level of the adjudication process, even if claimant is unsuccessful at a particular level. This concept applies when a denial of benefits is reversed on an appeal to a higher tribunal. See *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). It also applies when arguments made on appeal lead the tribunal to remand the case, and the claimant succeeds on remand in obtaining benefits. See *Davis v. United States Department of Labor*, 646 F.2d 609 (D.C. Cir. 1980). In this case, the Director appealed, the case was remanded to the administrative law judge, and claimant retained entitlement to permanent total disability benefits notwithstanding that the Director “won” before the Board and claimant “lost.” Thus, we hold that claimant’s counsel is entitled to a fee for all services performed before the Board that are reasonably commensurate with the necessary work done, taking into account claimant’s ability to pay the fee. *Davis*, 646 F.2d 609; *Hole*, 640 F.2d 769, 13 BRBS 237; *Bakke v. Duncanson-Harrelson Co.*, 13 BRBS 276 (1980); 20 C.F.R. §802.203(e).

Having considered counsel’s fee petition, we find that all the work performed before the Board was necessary to protect claimant’s interests. Moreover, the hourly rates charged for lead counsel (\$200), associate counsel (\$150), and law clerk (\$80) services are reasonable and customary for the Washington, D.C. area. 20 C.F.R. §802.203(d)(4). On remand before the administrative law judge, claimant was awarded ongoing permanent total disability benefits of \$232.63 per week, commencing January 18, 1996. This award also entitles claimant to cost-of-living

adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f) (1982). Given this award of benefits, we find that claimant is financially able to pay his attorney the full amount requested, \$4,148, plus expenses of \$192.89.

Accordingly, counsel's motion for reconsideration is granted. 20 C.F.R. §802.409. The Board's decision at 36 BRBS 69 (2002) is modified to award counsel a fee of \$4,148, plus expenses of \$192.89, to be paid by claimant as a lien on his compensation award. 33 U.S.C. §928(c); 20 C.F.R. §802.203(e). In all other respects, the Board's Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the majority's determination that counsel is entitled to a fee and that employer cannot be held responsible for the fee because neither subsection (a) nor (b) of 33 U.S.C. §928 is applicable. Hence, I agree with my colleagues that claimant is liable for the fee pursuant to subsection (c) of Section 28.

I also agree with my colleagues' determination that counsel is entitled to compensation for all the work performed. I disagree with their opinion only insofar as it indicates that the teaching of *Hensley v. Eckerhart*, 461 U.S. 424 (1983) does not apply to the instant case because fee liability has not shifted to employer. I think that the *Hensley* analysis provides guidance whenever a judicial tribunal is responsible for directing an attorney's fee award. In light of *Hensley*, I would hold that counsel in the case at bar is entitled to a fee for all work performed because it was performed in pursuit of claimant's successful permanent total disability claim.

The majority suggests that under *Hensley*, counsel's work before the Board would not

be compensable because counsel was unsuccessful in opposing the Director's appeal of the administrative law judge's decision to preclude employer from participating in claimant's modification proceeding. The majority has determined that while employer would not be held liable for this work, it is reasonable to hold claimant liable because, in the majority's view, the work was necessary to the prosecution of the claim.

The flaw in the majority's analysis is that it fails to distinguish between substantive and procedural issues. Although claimant was unsuccessful in opposing employer's participation in the modification proceeding, this was purely a procedural issue. The prohibition against compensating attorneys for work on unsuccessful issues concerns substantive issues, *i.e.*, claims. Thus, the Supreme Court declared in *Hensley*, "no fee may be awarded for services on the unsuccessful claim." *Hensley*, 461 U.S. at 435. For example, the First Circuit held in *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988), that an administrative law judge had correctly applied the teaching of *Hensley*, when he reduced counsel's requested fee by the hours expended on the unsuccessful Section 49 claim and awarded a fee based on the successful disability claim.

In the case at bar, the entire litigation involved only one claim, a modification request for a permanent total disability award. Because the claim was successful, "under *Hensley*, any work done by [claimant's] attorney in its pursuit is subject to limitation only based upon an examination of whether the level of success achieved makes the hours reasonably expended a satisfactory basis for making a fee award." *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1540, 25 BRBS 161, 171(CRT) (D.C. Cir. 1982). Thus, *Hensley* does not authorize exclusion of counsel's work on the unsuccessful procedural issue and the work performed in the instant case would be compensable under *Hensley*, even if employer were liable. For that reason, I join in the majority's decision directing claimant to pay the entire fee requested.

REGINA C. McGRANERY
Administrative Appeals Judge