BRB No. 10-0261

DAVID L. WILSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 02/16/2011
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	ORDER on MOTION FOR RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's Decision and Order in *Wilson v. Service Employees International, Inc.*, 44 BRBS 81 (2010). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer argues that the Board erred in reversing the administrative law judge's finding that claimant's counsel is not entitled to an attorney's fee payable by employer pursuant to Section 28(b), 33 U.S.C. §928(b). Claimant has not responded to employer's motion. For the reasons set forth below, we deny employer's motion and affirm the Board's decision.

To briefly reiterate, employer voluntarily paid temporary total disability benefits to claimant for work-related injuries he sustained in Iraq on or about September 7, 2005. On August 19, 2008, claimant filed a claim seeking permanent total disability benefits for his work-related injuries and employer did not controvert the claim. An informal conference was held by correspondence among the parties culminating in the district director's written recommendation on May 21, 2008, that claimant is entitled to permanent total disability benefits from March 31, 2008, until such time that employer establishes the availability of suitable alternate employment, and that no further cervical surgery was warranted. Employer continued to pay total disability benefits but did not pay the Section 10(f) adjustment which was initially due as of October 1, 2008. The administrative law judge thereafter found claimant entitled to temporary total disability benefits from September 21, 2005, through March 30, 2008, and permanent total disability benefits thereafter with cost-of-living increases pursuant to Section 10(f), 33 U.S.C. §910(f).

Claimant's counsel subsequently sought, but was denied an employer-paid attorney's fee, as the administrative law judge found Section 28(a) inapplicable because employer was paying compensation to claimant when he filed his claim, 33 U.S.C. §928(a), and Section 28(b) inapplicable because employer had complied with the recommendation of the district director, 33 U.S.C. §928(b), in that it continued to pay total disability benefits in conformance with the district director's recommendation. The administrative law judge also found that since claimant's entitlement to cost-of-living adjustments was not raised at the informal conference, it could not have been part of the district director's written recommendation.

In its decision, the Board reversed the administrative law judge's denial of an employer-paid attorney's fee under Section 28(b), since all the elements for fee liability under that provision had been met, *i.e.*, informal conference, written recommendation which included a Section 10(f) recommendation, employer's rejection of the written recommendation, and claimant obtaining greater compensation than that paid or tendered by employer following its rejection of the written recommendation. The Board specifically held that the district director's recommendation that employer pay claimant permanent total disability benefits includes entitlement to Section 10(f) adjustments as a matter of law. *Wilson*, 44 BRBS at 82-83. The Board thus remanded the case for the administrative law judge to determine the amount of the fee to which claimant's counsel is entitled. *Id.*

On reconsideration, employer argues that the Board's reversal of the administrative law judge's denial of an attorney's fee under Section 28(b) is contrary to the holding of the United States Court of Appeals for the Fifth Circuit in *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997). Employer maintains that the clear language of *Perez* establishes that there is no distinction between permanent total and temporary total disability benefits when determining whether an employer-paid attorney's fee is owed. In *Perez*, employer voluntarily paid temporary total disability compensation subsequent to the claimant's injury, and continued to make such payments after the claimant reached maximum medical improvement until the parties reached a settlement regarding the amount of weekly compensation. After the district director approved the parties' settlement pursuant to Section 8(i), the district director awarded claimant's counsel an attorney's fee. The Fifth Circuit held that an employer-paid attorney's fee under Section 28(b) was inappropriate on the basis that employer paid total disability benefits at all times and the case settled without resort to the Labor Department's informal dispute resolution procedure. In reaching this result in *Perez*, 128 F.3d at 910, 31 BRBS at 164(CRT), the court stated that "an award of attorney's fees under section 928(b) is appropriate only if the dispute has been the subject of an informal conference with the Department of Labor."

In this case, the district director's written recommendation encompassed payment of permanent total disability benefits, which, as the Board observed, employer rejected by not paying a Section 10(f) adjustment that became due on October 1, 2008, and by later challenging before the administrative law judge the extent of claimant's disability. *Wilson*, 44 BRBS at 83. Thus, this case is distinguishable from *Perez*, where the parties settled their dispute at the district director level via a settlement before an informal conference was held; this case required action by the district director to address the dispute. Employer's failure to accept the written recommendation, as it related to the Section 10(f) adjustment which became due as of October 1, 2008, required further proceedings before an administrative law judge in which claimant was successful. Thus, in accordance with Fifth Circuit precedent, claimant is entitled to payment of his attorney's fee under Section 28(b). *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979 (5th Cir. 2010)

Employer also argues that the following facts, in contrast to the Board's decision, support the administrative law judge's denial of an employer-paid attorney's fee: (1) there is no evidence that an informal conference was held; (2) that pursuant to *Thompson v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 71 (2010), the lack of a designated compensation rate in the written recommendation rendered the recommendation insufficient to shift fee liability to employer; and (3) there was no dispute over the amount of benefits and thus, no controversy in this case until after the formal hearing. Employer's contentions lack merit.

In its decision, the Board observed that "an informal conference was held by correspondence among the parties," which culminated in the district director's issuance of written recommendations. At the hearing, employer's counsel acknowledged that there was a dispute which ultimately resulted in the "informal conference recommendations" in this case. HT at 10-11. Although the Fifth Circuit has not addressed this issue, Section 702.311 of the regulations, 20 C.F.R. §702.311,[1] allows

[1] Section 702.311 states:

> The district director is empowered to resolve disputes with respect to claims in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date. This will generally be accomplished by informal discussions by telephone or by conferences at the district director's office. *Some cases will be handled by written correspondence*. The regulations governing informal conferences at the district director's office with all parties present are set forth below. When handling claims by telephone, or at the office with only one of the parties, the district director and his staff shall make certain that a full written record be made of the matter discussed and that such record be placed in the

correspondence between the parties and the district director to serve as the functional equivalent of an informal conference. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *see also R.S. [Simons] v. Virginia Int'l Terminals*, 42 BRBS 11 (2008); *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006); 20 C.F.R. §702.314. Employer's contention, therefore, is without merit.

Employer's reliance on *Thompson*, 44 BRBS 71, for the proposition that the lack of a specified compensation rate in the written recommendation precludes its liability for an attorney's fee under Section 28(b), is likewise misplaced. In *Thompson*,[2] the recommendation for temporary partial disability benefits required knowledge of claimant's wage-earning capacity with other employers, *see* 33 U.S.C. §908(e), (h), whereas here, the recommendation for permanent total disability benefits was based on claimant's average weekly wage with employer. Moreover, in contrast to *Thompson*, the district director in this case did not specifically state that a compensation rate could not be calculated. Rather, the district director recommended claimant's entitlement to permanent total disability benefits from March 31, 2008 to the present and continuing, based on the rate at which employer had already been voluntarily paying total disability benefits. CX 9; EX 1. Average weekly wage did not arise as an issue until after the case was referred for a formal hearing. *See* CX 13; EX 1. Employer thus cannot argue in this

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> administrative file. When claims are handled by correspondence, copies of all communications shall constitute the administrative file.

20 C.F.R. §702.311 (emphasis added).

[2] In *Thompson*, the employer argued that the district director's May 20, 2008, correspondence stating that claimant has a work-related left knee condition and that he is entitled to compensation for temporary partial disability for his right knee injury did not constitute a written recommendation under Section 28(b) because the district director specifically stated that she could not provide the applicable compensation rate due to the absence of sufficient wage information. The Board agreed, noting that "because the [district director's] May 20, 2008, letter specifically stated that a compensation rate could not be calculated, the letter does not constitute a written recommendation for purposes of conferring on employer liability for claimant's attorney's fee pursuant to Section 28(b)." *Thompson*, 44 BRBS at 73. The Board added that "[c]laimant was no longer working for employer and did not provide the district director with sufficient wage information from which she could calculate a compensation rate." Based on "these circumstances," the Board noted that "employer was unable to either accept or reject liability for the payment of temporary partial disability benefits," and thus reversed the district director's finding that employer is liable for an attorney's fee under Section 28(b).

case that it was unable to discern its liability for permanent total disability benefits such that it was unable to accept or reject the district director's written recommendation.

Employer's last argument, that it should not be liable for an attorney's fee under Section 28(b) because there was no controversy at the time the case was before the district director, is likewise without merit. Contrary to employer's position, a controversy arose at the time that it rejected the district director's written recommendation via its actions, in not paying the Section 10(f) adjustment which became due as of October 1, 2008, and in arguing, before the administrative law judge, that claimant was partially rather than totally disabled. *See generally Carey*, 627 F.3d 979. As employer's contentions are without merit, we deny its motion for reconsideration.

Claimant's counsel has filed a fee petition for work performed before the Board in this case. Counsel seeks an attorney's fee totaling $1,800.63, representing 2.25 hours of work at an hourly rate of $325, 4.5 hours of work performed by his associate at an hourly rate of $235, and .125 hours of work performed by his paralegal at an hourly rate of $95. Employer has not filed any objections to counsel's fee petition. As counsel was successful in this appeal, and as the overall fee is reasonable and commensurate with the necessary work performed, we grant counsel a fee in the amount of $1,800.63. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, employer's motion for reconsideration is denied and the Board's decision is affirmed. 20 C.F.R. §802.409. Claimant's counsel is awarded an attorney's fee of $1,800.63, for work performed before the Board, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge