

BRB No. 01-0618

DENITA SMITH)
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 Claimant-Respondent)
)
 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: April 25, 2002
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent)
)
)
 RICHARD B. DONALDSON, JR.)
)
)
 Petitioner) DECISION and ORDER

Appeal of the Order - Denial of Attorney's Fee of B.E. Voultzides, District Director, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden L.L.P.), Norfolk, Virginia, for claimant-respondent.

Bryan H. Schempf (Jones, Blechman, Woltz & Kelly, P.C.), Newport News, Virginia, for petitioner.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Petitioner¹ appeals the Order - Denial of Attorney's Fee (Case No. 5-99869) of

¹This appeal is brought by claimant's former attorney, Richard B. Donaldson, Jr., for services allegedly rendered on behalf of claimant while this case was pending before the district director. Claimant, following her dismissal of Mr. Donaldson, retained the services of Gregory E. Camden, who has filed a response brief with the Board on claimant's behalf. On July 16, 2001, Mr. Camden informed the Board that he no longer represented claimant.

District Director B.E. Voultsides rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The following facts are gleaned from the parties' briefs and attachments. Claimant suffered a work-related injury to her right arm in October 1995. Employer apparently accepted liability for this work-incident and paid claimant disability benefits until May 1999. On October 20, 1997, claimant retained the services of Attorney Richard B. Donaldson, Jr. On February 19, 1999, claimant dismissed Mr. Donaldson as her legal representative.

On March 4, 1999, Mr. Donaldson submitted a fee petition to the district director documenting the services that he allegedly rendered on claimant's behalf and requesting a fee of \$1,537.50, representing 10.25 hours of services rendered at a rate of \$150 per hour. On May 7, 1999, the district director declined counsel's request that an informal conference be scheduled. On July 5, 2000, the district director was again requested by counsel to address his pending fee petition. In a letter to counsel dated July 10, 2000, the district director declined to issue an order regarding counsel's fee request, stating that questions regarding successful prosecution, the explanation of the issues and claimant's financial ability to pay the fee remained unresolved. In response, Mr. Donaldson's office wrote the district director stating that claimant received assistance in receiving medical benefits and job rehabilitation during her representation by Mr. Donaldson. On September 6, 2000, the district director refused to impose liability for a fee on claimant, stating that he was unable to determine if claimant understood her counsel's representation, whether the services rendered by counsel were reasonable and necessary, and claimant's ability to pay the fee. On April 5, 2001, the district director issued an Order stating that the outcome of the instant case does not constitute a successful prosecution and that, accordingly, claimant and employer are not liable to claimant's counsel for any attorney's fees. The district director concluded, however, that if claimant's counsel believes that a good faith claim exists for an attorney's fee, an appropriate petition should be filed with the office before which the services were performed.

On appeal, claimant's former counsel challenges the district director's refusal to hold claimant liable for an attorney fee pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). Claimant responds, urging affirmance of the district director's order; alternatively, claimant avers that any fee due claimant's former counsel should be assessed against employer.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132. Under Section 28(a) of the Act, 33 U.S.C. §928(a), if an employer declines to pay any compensation

within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer. 33 U.S.C. §928(a). Under Section 28(b) of the Act, 33 U.S.C. §928(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b). If Section 28(a) or (b) do not apply, an attorney's fee may be made a lien upon the compensation due to claimant pursuant to 33 U.S.C. §928(c). *See generally Boe v. Dept. of the Army/MWR*, 34 BRBS 108 (2000). Under such circumstances, any fee approved must take into account the financial circumstances of the claimant. 20 C.F.R. §702.132(a).

We agree with claimant's former counsel that the district director Order cannot be affirmed. Specifically, the district director failed to adequately explain his decision in declining to award a fee in this case or to make the necessary findings regarding counsel's fee petition. *See Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, BRBS , BRB No. 01-0504 (Feb. 14, 2002). Initially, in denying any fee the Order is inadequate as it merely summarily states that the outcome of the case does not constitute a successful prosecution. The Order does not indicate, however, whether the district director considered counsel's assertions that claimant received medical benefits and vocational rehabilitation during the period of time that he was represented by counsel, which could support a fee payable by claimant.² *See Boe*, 34 BRBS 108. As the district director's attorney's fee Order does not adequately explain or resolve the issues raised by counsel, it must be vacated and the case remanded for more specific findings in accordance with Section 28 of the Act and 20 C.F.R. §702.132. *See generally Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988).

²Where counsel seeks a fee payable by employer, a "successful prosecution" is measured by claimant's success in view of the amounts paid or tendered by employer. *See* 33 U.S.C. §928(a), (b). In all other cases where benefits are paid, counsel may be awarded a fee for necessary work as a lien on claimant's compensation. Contrary to the district director's concerns, where claimant is liable for the fee the official awarding the fee is not required to conduct discovery, but should consider the amount of the fee in relation to the benefits received by claimant. Only where all benefits are denied is counsel not entitled to a fee. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999); *Rizzi v. Underwater Constr. Corp.*, 27 BRBS 273, *aff'd on recon.*, 28 BRBS 360 (1994), *aff'd*, 84 F.3d 199, 30 BRBS 44 (CRT)(6th Cir. 1996). However, counsel is entitled to a fee only for work the district director finds necessary to claimant's obtaining benefits.

In addition, as claimant's former counsel, in conformance with 20 C.F.R. §702.132, presented the district director with a documented fee petition itemizing the services which he allegedly rendered on behalf of claimant while this case was pending before the district director, the district director erred in not addressing the fee petition. Therefore, as in *Ferguson*, slip op. at 3-4, the case must be remanded for the district director to address whether the requested fee is reasonably commensurate with the necessary work performed, taking into consideration the quality of the representation, the complexity of the issues involved, the amount of benefits received by claimant and claimant's ability to pay the fee.³ *See Thompson*, 21 BRBS 94; 33 U.S.C. §928; 20 C.F.R. §702.132.

³In this regard, the district director has misinterpreted the Board's decision in *Sinclair v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 98-1013 (Mar. 4, 1999)(unpub.). *See* Letter dated August 14, 2000. Contrary to the apparent understanding of the district director, that official is not required to institute contact with claimant prior to considering counsel's fee request. Rather, the Board's holding in *Sinclair* states that the district director must make adequate findings in his fee order to support the fee awarded. In particular, in that case, the district director held claimant liable for his counsel's fee without an explanation regarding why claimant should be held liable for the fee, and he awarded the fee with no indication that he considered the regulatory criteria; the Board therefore remanded the case for the district director to render specific findings in accordance with Section 28 of the Act and Section 702.132 of the regulations. *See Sinclair*, slip op. at 2. These requirements contained in *Sinclair* are thus no different from those in any routine fee case.

Accordingly, the district director's Order is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge