U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0647

JAMES WOMMACK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: July 28, 2017
CERES TERMINALS, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Denial of Petition for Award of Attorney Fee Pursuant to 928(b) and the Order Granting Motion for Reconsideration, Denying Request for a Hearing and Denying Petition for Award of Attorney Fees of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Edward T. Pinder and Jason A. Plotkin (Pinder Plotkin, LLC), Baltimore, Maryland, for claimant.

James M. Mesnard (Seyfarth Shaw, LLP), Washington, D.C., for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Denial of Petition for Award of Attorney Fee Pursuant to 928(b) and the Order Granting Motion for Reconsideration, Denying Request for a Hearing and Denying Petition for Award of Attorney Fees (2015-LHC-01665) of Administrative Law Judge Morris D. Davis 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 it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his right ankle on July 10, 2014, during the course of his employment for employer as a driver. Employer commenced paying compensation on July 17, 2014, and authorized medical treatment. Claimant returned to light-duty work in employer's office on July 21, 2014, and employer paid claimant compensation for temporary partial disability. 33 U.S.C. §908(e). Claimant filed a claim under the Act on July 29, 2014. Employer terminated its compensation payments on December 14, 2014, and filed a notice of controversion based on the opinion of Dr. Pollock that claimant could return to his regular duty and did not require additional treatment. On December 15, 2014, claimant's treating physician, Dr. Stern, referred claimant to Dr. Cerrato for evaluation and treatment; Dr. Cerrato did not see claimant at that time.

On February 15, 2015, claimant requested an informal conference on the following issues: authorization for medical treatment including possible tenosynvectomy and debridement; payment of outstanding medicals/reimbursement of medicals paid; and temporary total disability.[1] CX 8. The parties attended a telephonic informal conference on June 5, 2015. In his memorandum of informal conference dated June 15, 2015, the claims examiner stated the parties' positions as: claimant seeks temporary total disability and continued medical treatment; claimant asserts Dr. Stern is his treating physician; employer contends that claimant can return to full duty and requires no additional treatment; employer states Dr. Pollack, not Dr. Stern, is the treating physician; and claimant's compensation is limited to that awardable under the schedule. CX 10 at 20. The claims examiner wrote: "Based on the evidence at hand, this office determines that employer has work available within claimant's restrictions thus he is not entitled to Temporary Total Disability. The employer/carrier is instructed to authorize continued medical treatment for the work-related injury of July 10, 2014." *Id.* at 21.

By letter dated June 22, 2015, seven days after the memorandum of informal conference was issued, employer stated its acceptance of the informal conference recommendation, specifically accepting, "Dr. Stern as the treating physician and will authorize treatment." CX 11. On June 25, 2015, claimant requested that the case be transferred to the Office of Administrative Law Judges. Claimant raised the same issues he had raised in his February 2015 letter, and specifically sought treatment from Dr. Stern and Dr. Folgueras. *Compare* LS-18 *with* CX 8.

Thereafter, claimant was examined by Dr. Cerrato in August 2015, and she performed right ankle surgery on September 29, 2015. A November 10, 2015 letter from claimant's counsel to employer's counsel enclosed the surgeon's notes and an October 7, 2015 report from Dr. Stern opining on the necessity of the surgery. CX 13. On

[1] Claimant sought continuing compensation for temporary total disability from December 15, 2014. 33 U.S.C. §908(b).

November 12, 2015, employer answered claimant's interrogatories and specifically denied liability for medical benefits after December 22, 2014, and stated that Drs. Folgueras and Albuernes are not authorized physicians.[2] However, a January 6, 2016 email from employer's counsel states that it "will agree to the additional terms we discussed yesterday;" employer "will pay for the surgery performed by Dr. Cerrato and her treatment of [claimant]." EX 14. The parties requested a continuance on January 22, 2016, and the administrative law judge remanded the case to the district director on July 21, 2016, stating that the parties had resolved all issues.

Thereafter, claimant's attorney submitted a fee petition for work performed before the Office of Administrative Law Judges from June 25, 2015 to February 1, 2016. Counsel sought a fee of $23,780.02, representing $22,891.20 for attorney and paralegal services, plus expenses of $1,077.32.

In his Denial of Petition for Award of Attorney Fees Pursuant to 928(b) (Decision and Order), the administrative law judge found that counsel is not entitled to a fee payable by employer because employer did not refuse the informal conference recommendation and claimant did not secure an award greater than employer was willing to pay after issuance of the recommendation. Decision and Order at 2. The administrative law judge noted employer's letter agreeing to accept the informal conference recommendation and its submission of a billing statement showing, inter alia, 23 payments to Dr. Stern's practice group between July 2014 and February 2016. *Id*.

Claimant's counsel filed a motion for reconsideration. In his Order Granting Motion for Reconsideration, Denying Request for a Hearing and Denying Petition for Award of Attorney Fees (Order), the administrative law judge stated that employer unequivocally accepted the district director's recommendation by its June 2015 letter. The administrative law judge rejected claimant's contention that employer, in practice, did not accept the informal conference recommendation because it did not promptly authorize claimant's right ankle surgery by Dr. Cerrato, timely pay claimant's medical bills, and, in response to claimant's interrogatories, averred that claimant did not require medical treatment after December 22, 2014. Order at 2-3. The administrative law judge found that, in answering claimant's interrogatories, employer took an alternative litigation position on the medical benefits issue which is not an indication of non-acceptance. The administrative law judge also found that employer was entitled to question the reasonableness and necessity of specific medical benefits, i.e., Dr. Cerrato's surgery, notwithstanding its general acceptance after the informal conference of its liability for medical benefits and treatment by Dr. Stern. Moreover, the administrative

[2] Dr. Albuernes examined claimant's right ankle on November 18, 2014 and December 22, 2014, and he referred claimant to Dr. Folgueras.

law judge noted that late payment of bills could be attributable to billing issues. The administrative law judge concluded that employer was not liable for an attorney's fee because it accepted the informal conference written recommendation. Order at 3-4.

Claimant's counsel appeals the denial of an employer-paid fee under Section 28(b). 33 U.S.C. §928(b). Counsel asserts the administrative law judge erred by finding that employer's interrogatory answer challenging claimant's entitlement to medical treatment after December 22, 2014, did not supersede its written acceptance of the informal conference recommendation and did not constitute a rejection of the recommendation. Counsel also contends that the administrative law judge erred by denying a hearing to resolve issues of fact regarding employer's acceptance of the informal conference recommendation. Employer responds, urging affirmance of the administrative law judge's denial of an attorney's fee under Section 28(b). Claimant filed a reply brief.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, in order for employer to be held liable for an attorney's fee under Section 28(b), the district director must have held an informal conference and issued a written recommendation, the employer must have rejected that recommendation, and the claimant must have used the services of an attorney to secure greater compensation than the employer paid or tendered after the written recommendation.[3] *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*

[3] Section 28(b) states, in relevant part:

> If the employer or carrier pays or tenders payment of compensation without an award . . . and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] or Board shall set the matter for an informal conference and following such conference the [district director] or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse (sic) to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by employer or carrier, a reasonable attorney's fee . . . shall be awarded in addition to the amount of compensation. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

[*Hassell*], 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Moody*], 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005).

After claimant requested a hearing before the administrative law judge, he submitted interrogatories to employer, which its counsel answered on November 12, 2015. CX 12. Employer was asked to identify each medical expense for which it denied liability. Employer answered:

> On December 22, 2014, Dr. Matz indicated that the Claimant required no further treatment. The Employer denies it is responsible for any treatment after that date. Additionally, Dr. Folgueras and Dr. Albuerne's (sic) are not authorized treating physicians.

CX 15 at 4. Claimant argues that, by this answer, employer rejected the June 2015 informal conference recommendation that it continue to authorize medical treatment for claimant's work injury.

In his Order, the administrative law judge found that employer's taking this contrary position "does not negate its express acceptance of the District Director's recommendations." Order at 2-3. The administrative law judge found that employer continued paying for claimant's medical treatment and that "[A]lternative arguments are not uncommon in litigation and advancing a particular position is not an admission that an alternative position must be true or false." *Id*. at 3.

We reject claimant's contention of error. Interrogatory answers are not, per se, binding on the party. *Donovan v. Crisotomo*, 689 F.2d 869 (9th Cir. 1982); *R2 Medical Systems v. Katecho, Inc.*, 931 F.Supp. 1397 (N.D. Ill. 1996); *see also McNeese Reading & Bates Drilling Co.*, 749 F.2d 270 (5th Cir. 1985). The administrative law judge addressed claimant's contention that employer was bound by its interrogatory answer, *see Marcoin v. Edwin K. Williams & Co.*, 605 F.2d 1325 (4th Cir. 1979), and he rationally found that, on the facts here, employer was entitled to argue in the alternative – that is, employer could agree to pay medical benefits while advancing a litigation position contesting the compensability of medical treatment. *See generally Fed. Sav. & Loan Ins. Corp. v. Quality Inns Inc.*, 876 F.2d 353 (4th Cir. 1989); *see* discussion, *infra*. Therefore,

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33 U.S.C. §928(b). There is no contention that Section 28(a) applies in this case; employer paid benefits within the 30-day period after receiving notice of the claim. *See Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005).

as the administrative law judge's conclusion is rational, we affirm the finding that employer's November 2015 interrogatory answer challenging claimant's entitlement to medical treatment after December 2014 did not supersede its prior acceptance of the informal conference recommendation on June 22, 2015. *Cf. Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010) (where *employer* sought a hearing after purporting to accept the written recommendation, its actions before the administrative law judge demonstrated constructive non-acceptance).

Claimant also argues that employer's declining to promptly authorize Dr. Cerrato's foot surgery, and its non-payment or late payment of medical bills, established that employer, in practice, did not accept the informal conference recommendation.

On reconsideration, the administrative law judge stated that Dr. Stern's December 2014 referral to Dr. Cerrato and employer's January 2015 Notice of Controversion, which stated that claimant does not require further medical treatment, took place six months before the informal conference, which "does not disprove that employer accepted the District Director's recommendations." Order at 2. The administrative law judge found that employer's initial refusal to authorize Dr. Cerrato's September 2015 treatment, three months after the informal conference, was not "a constructive rejection of the recommendations in June 2015." *Id.* at 3. The administrative law judge also found that employer had continued paying for medical treatment, notwithstanding its interrogatory answer.[4] The administrative law judge noted employer's contention that its acceptance of the informal conference recommendation was not a waiver of its right to question the reasonableness of any specific treatment recommended by Dr. Stern and that it ultimately authorized the treatment by Dr. Cerrato.

The administrative law judge also rejected claimant's "constructive rejection" argument based on employer's not timely paying for medical care. Based on employer's submission of billing statements, the administrative law judge rejected as unfounded claimant's specific assertion of non-payment of prescriptions ordered by Dr. Stern in August 2014. Order at 3. The administrative law judge concluded, "[I] lack the ability to validate every bill was paid and paid in a timely manner, and I do not believe that even if I could it would show [constructive rejection]." *Id.*

[4] We agree with claimant that the administrative law judge erred in finding it significant that claimant was able to obtain treatment from Dr. Cerrato, notwithstanding employer's refusal to pay for it initially. This is irrelevant to whether employer "accepted" the informal conference recommendation. Any error is harmless, however, as the administrative law judge otherwise provided rational bases for finding that employer did not constructively reject the informal conference recommendation.

An employer may litigate the reasonableness of any specific medical expense. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). In this case, the record shows that Dr. Stern referred claimant to Dr. Cerrato in December 2014. CX 4. Claimant was last examined by Dr. Stern on January 5, 2015. Claimant was initially examined by Dr. Cerrato on August 19, 2015. She performed a debridement and repair of claimant's right Achilles tendon on September 29, 2015. *Id*. at 3; CX 12 at 3-4. Although, in February 2015, claimant listed the issues for the informal conference as "possible tenosynvectomy and debridement," claimant submitted no evidence that Dr. Stern's December 2014 referral to Dr. Cerrato, or the reasonableness and necessity of future surgery, was specifically addressed at the informal conference.[5] *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); CX 8. No specific medical treatment by Dr. Cerrato, or any other physician, was addressed or recommended. Employer was "instructed to authorize continued medical treatment." CX 8 at 2. Employer accepted the recommendation that Dr. Stern was the treating physician and it authorized treatment. Claimant, however, did not seek further treatment from Dr. Stern. Claimant instead treated with Dr. Folgueras, who recommended right ankle surgery the week after the informal conference in June 2015. Claimant was then examined by Dr. Cerrato on August 19, 2015, and she performed surgery in September 2015. Claimant returned to Dr. Stern in October 2015, and he opined that claimant's right ankle surgery was reasonable and necessary. CX 13 at 5. Employer then had claimant examined by Dr. Matz on December 2, 2015, who concurred with Dr. Stern's opinion. CX 16 at 4. Employer then accepted the compensability of Dr. Cerrato's treatment on December 28, 2015. CX 18.

This timeline of events does not mandate a finding that employer constructively rejected the informal conference recommendation. The administrative law judge rationally found that, by employer's general acceptance of medical liability, it was not compelled to immediately accept as compensable claimant's right ankle surgery. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *McCurley*, 22 BRBS 115. Employer agreed to pay for Dr. Cerrato's treatment approximately four months after claimant's first office visit to her. The administrative law judge was entitled to find that this delay in authorizing/paying for Dr. Cerrato's surgery was not tantamount to a rejection of the June 2015 recommendation. *See generally Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988) (deference due to the

[5] The pre-informal conference correspondence does not mention Dr. Cerrato. The informal conference recommendation states only that claimant requested continued medical treatment and that employer contested whether Dr. Stern is the treating physician. CX 10 a 1. Claimant's LS-18 Form also does not list the referral to Dr. Cerrato as a contested issue.

administrative law judge's findings and inferences). Moreover, we note that the issue of employer's liability for this specific treatment was not the subject of the informal conference recommendation. *R.S.* [*Simon*] *v. Virginia Int'l Terminals*, 42 BRBS 11 (2008).[6] Accordingly, we affirm the administrative law judge's rational finding that employer's actions with regard to claimant's post-informal conference ankle surgery do not constitute a constructive rejection of the written recommendation.

Finally, claimant's counsel contends the administrative law judge should have granted his request for a hearing to develop the record concerning employer's purported fee liability. The administrative law judge summarily denied the request for a hearing. Order at 4. It is well-established that a hearing on an attorney's fee petition is not required when the request is to the administrative body before whom the work was performed. *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded in part sub nom. Director, OWCP v. Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977). Absent a bona fide factual issue, no hearing is required. *See McCloud v. George Hyman Constr. Co.*, 11 BRBS 194 (1979). In this case, the facts were not disputed, the parties submitted documentation to the administrative law judge in support of their contentions regarding the conclusions to be drawn from the facts, and the administrative law judge was able to fully address the issues based on their submissions. Accordingly, we affirm the administrative law judge's denial of claimant's motion for a hearing, as counsel has failed to establish that the administrative law judge abused his discretion in this regard. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table).

[6] In *Simon*, the informal conference recommendation was that the employer pay the claimant temporary total disability benefits until he returned to work and then scheduled permanent partial disability for a 52 percent leg impairment. Afterward, the claimant made a claim that he developed back problems as a result of an altered gait. This issue was not the subject of an informal conference. The administrative law judge found the back injury related to the knee injury and awarded claimant temporary total disability for the back injury. The administrative law judge awarded claimant's counsel a fee under Section 28(b). The Board reversed the fee award, as claimant did not succeed before the administrative law judge on the issues on which employer had refused the informal conference recommendation. Thus, the requirement that there be a written recommendation was not met. *Simon*, 42 BRBS at 14; *see also Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

Accordingly, the administrative law judge's Denial of Petition for Award of Attorney Fee Pursuant to 928(b) and the Order Granting Motion for Reconsideration, Denying Request for a Hearing and Denying Petition for Award of Attorney Fees are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge