BRB No. 11-0866

| | | |
|---|---|---|
| ANTHONY DiBLASE, JR. | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| LOGISTEC OF CONNECTICUT, INCORPORATED | ) | DATE ISSUED: 09/19/2012 |
| | ) | |
| | ) | |
| and | ) | |
| | ) | |
| SIGNAL MUTUAL INDEMNITY ASSOCIATION | ) | |
| | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Compensation Order Denial of Attorney Fees of David B. Groeneveld, District Director, United States Department of Labor.

David A. Kelly (Montstream & May, L.L.P.), Glastonbury, Connecticut, for claimant.

Neil J. Ambrose (Letizia, Ambrose & Falls, P.C.), New Haven, Connecticut, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Compensation Order Denial of Attorney Fees (Case No. 01-150967) of District Director David B. Groeneveld rendered on a claim filed pursuant to 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 law. *Roach v. New York Protective Covering Co.,* 16 BRBS 114 (1984); *Marcum v. Director, OWCP,* 12 BRBS 355 (1980).

This case has been before the Board previously. Claimant sustained injuries to his right and left shoulders while working for employer on December 28, 1999, and August 26, 2000, respectively. Employer voluntarily paid periods of temporary total and temporary partial disability benefits. Claimant sought an award of medical benefits. Having determined that claimant's bilateral shoulder injuries were work-related, the administrative law judge awarded medical benefits for ongoing treatment; however, he denied claimant's request for benefits related to a formal physical therapy program. Subsequent to the award, claimant's counsel petitioned for, and was awarded, an attorney's fee for work performed before both the administrative law judge and the district director. Employer appealed the fee awards, and the Board modified the administrative law judge's fee award and vacated the district director's fee award, remanding the case to him for further consideration of the fee petition and employer's objections. *DiBlase v. Logistec of Connecticut, Inc.*, BRB Nos. 06-0485, 06-0587 (Jan. 31, 2007) (unpub.).

On remand, the district director awarded the requested fee, rejecting employer's objections. Employer appealed. On appeal, the Board again vacated the fee award, as the district director did not determine the date a controversy over medical benefits arose, whether services on the losing issue of liability for physical therapy was severable from the issues on which claimant prevailed, and whether any of the entries in the fee petition pertained to work on a collateral matter in state court. *A.D. [DiBlase II] v. Logistec of Connecticut, Inc.*, BRB Nos. 07-0711, 08-0121 (April 28, 2008).[1]

In late 2008, based on the recommendation of his treating physician, Dr. Spak, claimant requested authorization for left shoulder surgery. Employer disputed the need for surgery and had claimant examined by its expert, Dr. Ruwe. Dr. Ruwe stated that surgery was unnecessary and recommended an "AC injection" instead. Claimant also pursued authorization for surgery under the state workers' compensation program, and the state commission ordered an independent evaluation by Dr. Kaplan. Prior to receiving Dr. Kaplan's report, the parties held a telephonic informal conference to address claimant's request for surgery under the Act. Employer states it had agreed to authorize the surgery if Dr. Kaplan so recommended. The district director, therefore, made no recommendation and waited for Dr. Kaplan's opinion. Following the informal conference, the parties received Dr. Kaplan's report. Dr. Kaplan stated that surgery was not warranted but advised claimant to undergo MRIs to confirm his recommendation. In a follow-up evaluation, and after reviewing the MRIs, Dr. Spak agreed that surgery was not warranted. There appears to have been no further action by the district director and,

[1]In that decision, the Board also affirmed the administrative law judge's denial of disability benefits after November 26, 2001, as claimant's decrease in earnings was not due to his work injuries. *DiBlase II*, slip op. at 12. The record does not contain the district director's decision on the fee request after the second remand.

in February 2010, claimant requested the case be transferred to the Office of Administrative Law Judges. In July, he asked that the hearing be canceled. In August 2010, claimant's counsel filed an application for an attorney's fee for work performed before the district director in this matter.

Counsel requested a fee for work performed between July 16, 2008, and March 14, 2010, in the amount of $2,349.50, representing 6.9 hours of attorney services at $315 per hour, .2 hour of attorney services at $285 per hour, and 1.4 hours of paralegal services at $85 per hour. Employer objected to its liability for any fee because it had voluntarily paid for claimant's medical evaluations, MRIs, and "AC injection," and counsel obtained no benefits for claimant; moreover, it asserted, the MRIs were the result of action in the state workers' compensation claim.

The district director denied claimant's counsel an employer-paid attorney's fee under Section 28(a), 33 U.S.C. §928(a), and rejected his contention that the two MRIs constituted a benefit gained for claimant. Rather, the district director agreed with employer that the MRIs were merely diagnostic tests requested by the state's commissioned physician, Dr. Kaplan, to confirm objectively his opinion that claimant did not need shoulder surgery. Thus, the district director found that the two MRIs, for which employer paid, did not constitute the benefit of surgical authorization as sought by claimant.[2] Accordingly, the district director denied counsel's request for an employer-paid fee because claimant did not achieve a successful prosecution of his claim as required by Section 28(a) of the Act. Claimant appeals the denial of a fee, and employer responds urging affirmance.

Claimant's counsel asserts that he is entitled to an employer-paid attorney's fee under Section 28(a) of the Act as he was partially successful in obtaining previously denied medical benefits on behalf of claimant. Counsel argues that the district director erred in denying a fee merely because the treatment obtained did not lead to the requested surgical intervention. Counsel specifically argues that, through his services, claimant obtained the benefit of two MRIs, an injection, and additional consultation with Dr. Spak, which were medical services previously denied claimant.

[2]The district director found that, even if the MRIs could be construed as a "benefit gained by claimant," they were obtained via claimant's state workers' compensation claim and any fee to which counsel might be entitled should be obtained under the state act. Employer noted in its response to this appeal that counsel's fee request was denied by the state commissioner and his decision was upheld by the workers' compensation board and the court of appeals. *DiBlase v. Logistec of Connecticut, Inc.*, 123 Conn. App. 753 (2010).

Generally, Section 28(a) of the Act applies when an employer declines to pay any benefits within 30 days of receiving notice of the claim, while Section 28(b) applies where the employer begins paying benefits voluntarily, and then a controversy arises regarding the claimant's entitlement to benefits. 33 U.S.C. §928(a), (b); *A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007). Although the district director applied Section 28(a) to ascertain employer's liability for counsel's fee, and counsel argues that he is entitled to a fee under Section 28(a), Section 28(b) properly applies to this case as employer voluntarily paid benefits at the commencement of the claim, and claimant has not filed a new claim. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006) (Section 28(b) applies where no new claim is filed but employer refuses to pay additional compensation); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011) (Section 28(b) applied initially, but claimant filed an aggravation claim and employer failed to pay benefits within 30 days of the new claim, making Section 28(a) applicable); *DiBlase II*, slip op. at 5-6 (Board applied Section 28(b)). Nevertheless, any error is harmless as both subsections provide that there must be a degree of success before employer may be held liable for claimant's attorney's fee. Section 28(a) provides that an attorney may only obtain an employer-paid fee if the attorney's services result "in the successful prosecution of [the claimant's] claim[.]" 33 U.S.C. §928(a). Section 28(b) provides that an employer is liable for a fee if the attorney's services result in the claimant's being awarded an amount that "is greater than the amount paid or tendered" by the employer. 33 U.S.C. §928(b); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976); *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987). In this case, there was no successful prosecution or award of additional benefits.

The sole issue at the informal conference before the district director was claimant's request for authorization for left shoulder surgery. While this case was before the district director, but subsequent to the informal conference, the consensus of the doctors was that surgery was not warranted. Thus, despite claimant's having his shoulder condition further analyzed and treated with an injection, for which employer paid, counsel was not successful in obtaining the treatment which claimant initially sought – surgery. As counsel's services did not result in benefits obtained for claimant, he is not entitled to an employer-paid fee under either Section 28(a) or (b). *See generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992); *West v. Port of Portland*, 20 BRBS 162, *aff'd on recon.*, 21 BRBS 87 (1988). Moreover, even if the MRIs could be considered a "benefit" obtained, they were the result of actions in the state claim, and counsel is not entitled to a fee under the Act for work performed in the state claim absent a showing that those services were necessary to establish entitlement under the Act. *See generally Kinnes v. General Dynamics Corp.*, 25 BRBS

311 (1992); *Roach*, 16 BRBS 114. As claimant's counsel has not established that the district director erred in denying an attorney's fee in this case, we affirm the denial of an employer-paid attorney's fee.

Accordingly, we affirm the district director's Compensation Order Denial of Attorney Fees.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge