



BRB No. 20-0103

JAMES DOHERTY, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	
)	
Self-Insured)	DATE ISSUED: 04/30/2020
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Supplemental Order Upon Reconsideration of Award of Attorney Fees Under Section 28(a) of David Groeneveld, District Director, United States Department of Labor.

Scott N. Roberts (The Law Office of Scott N. Roberts, LLC), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

Stefan Babich (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor, Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Order Upon Reconsideration of Award of Attorney Fees Under Section 28(a) (OWCP No. 01-308624) of District Director David 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, 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 filed an LS-203 claim form on May 10, 2018, alleging he was exposed to loud noise at work. That same day, he served the claim directly on employer and requested that employer provide, inter alia, his medical records from its Yard Hospital, including his audiologic records. Director's Exhibit (DX) 1, 2. The district director formally notified employer of the claim on May 22, 2018. DX 4.

On June 5, 2018, employer requested that claimant's attorney provide, inter alia, all medical records relating to his hearing loss claim. DX 5. Employer filed an LS-202 report of injury on June 14, 2018, in which it checked the "no" box indicating it was not authorizing medical care. DX 3. On December 18, 2018, claimant's attorney again requested employer provide the Yard Hospital medical records. DX 7. Thereafter, on February 8, 2019, claimant's attorney forwarded 12 pages of audiologic records, which he stated he recently received from employer's Yard Hospital, to Dr. Worgul-Stankiewicz, Au.D, for her review in advance of her examination of claimant. DX 8. Following her examination of claimant, Dr. Worgul-Stankiewicz wrote a report on February 27, 2019, recommending hearing aids for both of claimant's ears due to his work-related tinnitus and hearing loss. DX 9. On March 22, 2019, employer authorized bilateral hearing aids for claimant based on Dr. Worgul-Stankiewicz's report and its Yard Hospital records. DX 11.

Thereafter, claimant's counsel filed an attorney's fee petition with the district director, seeking \$4,508.75 for 13 hours of attorney work at an hourly rate of \$310, 75 hours of paralegal work at an hourly rate of \$85, and costs of \$415. DX 13. Employer objected to liability for any fee because it agreed to pay medical benefits 12 days after receiving a request for claimant's treatment on March 11, 2019. DX 14.

The district director acknowledged employer's objection in his Compensation Order Awarding of Attorney Fees, but determined it was liable under Section 28(a), 33 U.S.C. §928(a), for the requested attorney's fee of \$4,508.75. Employer moved for reconsideration. In his Supplemental Order Upon Reconsideration of Award of Attorney Fees Under Section 28(a) (Order on Recon.), the district director reversed his fee award.

He stated employer is not liable for a fee because it had not controverted the claim or declined to pay benefits.¹ Citing *Dyer v. Cenex Harvest States Co-op.*, 563 F.3d 1044, 1048, 43 BRBS 32, 34(CRT) (9th Cir. 2009) for the proposition that an employer is relieved of fee liability if it “respond[s to a claim] within 30 days,” the district director found employer “responded” by asking for claimant’s medical records within 30 days. He further found claimant did not request any specific benefits and therefore it was unclear “what, if anything, the employer/carrier would be expected to deliver[.]” Order on Recon. at 5.

On appeal, claimant challenges the denial of an attorney’s fee under Section 28(a). Employer responds that the district director’s denial is in accordance with law and should be affirmed. The Director, Office of Workers’ Compensation Programs (the Director), responds that the district director erred on reconsideration in reversing his fee award.

Section 28(a) of the Act states:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney’s fee against the employer or carrier. . . .

33 U.S.C. §928(a). Section 28(a) applies when an employer declines to pay any benefits within 30 days of receiving notice of a claim from the district director. *See, e.g., Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007). An employer’s inaction during the 30-day period has been held to constitute a “decline to pay” and its voluntary payment of benefits after the 30-day period expires does not prevent application of Section 28(a).² *Richardson v. Continental Grain*

¹ The district director determined that Section 28(b), 33 U.S.C. §928(b), is inapplicable because no informal conference was held. Supplemental Order at 5. This determination is unchallenged.

² Contrary to the district director’s statement, *Dyer* does not support the proposition that providing *any* response to a claim relieves an employer of fee liability. That case involved an employer held liable for fees because it specifically contested the claim and refused to pay benefits, and thus did not address whether any response to a claim is

Co., 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *see also Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005); *Mangiantine*, 42 BRBS 30.

In this case, employer received notice of the claim from the district director on May 22, 2018, disputed claimant's entitlement to medical benefits in its LS-202 form dated June 14, 2018, by checking the "no" box on the form and did not agree to provide claimant bilateral hearing aids until March 22, 2019. In his Order on Reconsideration, the district director stated employer initiated an investigation within the initial 30-day period by requesting that claimant's attorney submit medical documentation of claimant's hearing loss and it was not evident what benefits employer could have been expected to provide, presumably because claimant did not request any particular benefits. Order on Recon. at 4-5. We agree with claimant and the Director that the district director erred in denying an employer-paid attorney's fee under Section 28(a).

Section 28(a) provides employers with incentive to pay benefits because if it does, it is not liable for claimant's attorney's fee under this subsection. The term "compensation" in this section is properly read as "disability benefits and/or medical benefits" in order to satisfy its purposes. *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017). Thus, the precise meaning of the phrase "declines to pay any compensation" depends on what benefits are claimed and what benefits the employer declined to pay. *Id.* at 14. If the claim is for medical benefits and the employer refuses to pay any of those benefits within 30 days of receipt of the claim, then the employer becomes liable for an attorney's fee in the event the employee's claim succeeds. *See, e.g., Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

Moreover, in *Craig, et al. v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (decision on recon. en banc), *aff'd on recon. en banc*, 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003), the Board rejected the employer's argument that it could not have paid hearing loss benefits

sufficient. When read in context and in a manner consistent with Section 28(a) and the precedent of the United States Court of Appeals for the Ninth Circuit, *Dyer's* statement that an employer is liable for fees if it "does not respond [to the claim] within 30 days" describes instances when an employer does not formally "decline to pay" compensation, but does so by its inaction. *Richardson*, 336 F.3d at 1105, 37 BRBS at 81(CRT); *see also Day v. James Marine, Inc.*, 518 F.3d 411, 414, 42 BRBS 15, 16(CRT) (6th Cir. 2008) (describing the "decline to pay" element as "the employer must decline to pay compensation *or allow 30 days to lapse without paying compensation*") (emphasis added). In this case, employer both formally declined to authorize medical benefits on its LS-202 form and, by its inaction, did not provide those benefits until well after the 30-day period.

within the 30-day time frame because it did not know what amount to pay, holding nothing in the Act requires a claimant to submit evidence of disability or impairment with a claim for compensation, and receipt of the notice of the claim triggers the commencement of the 30-day period under Section 28(a). The Board stated that the 30-day period allows an employer sufficient time to have a claimant examined and to determine whether to pay benefits or to controvert the claim. *Craig*, 36 BRBS at 66-67; *Craig*, 35 BRBS at 169-170. The United States Court of Appeals for the Fifth Circuit affirmed *Craig*, holding a claimant need not supply evidence of the extent of his disability with his claim for compensation. An employer is free to schedule a hearing loss evaluation for the claimant so it may ascertain the amount it owes and begin paying benefits within the 30-day period Section 28(a) provides. Payments outside the 30-day period are irrelevant for purposes of avoiding fee liability under Section 28(a). *Alario*, 355 F.3d at 852-853, 37 BRBS at 118-119(CRT). Thus, the fact claimant did not claim any particular benefit on his claim form is not dispositive of employer's liability for an attorney's fee under Section 28(a).

In this case, that employer voluntarily paid benefits upon receiving Dr. Worgul-Stankiewicz's report in March 2019 does not negate it "declined to pay any benefits" before the expiration of the 30-day period following its receipt of the notice of the claim in May 2018, and specifically declined a request for medical benefits within that period.³ *Taylor*, 51 BRBS 11. Therefore, we agree with claimant's counsel and the Director: employer's failure to pay any benefits during the 30-day period after it received notice of the claim equates to its having "declined to pay any compensation" under Section 28(a).⁴ *Mangiantine*, 42 BRBS 30. As claimant's attorney succeeded in obtaining medical benefits after employer declined to provide them within 30 days of receiving notice of the claim, it is liable for an attorney's fee under Section 28(a) as a matter of law. *Taylor*, 51 BRBS 11; *Mangiantine*, 42 BRBS 30.

³ We note claimant's attorney obtained the medical records employer relied upon, in part, to authorize medical benefits from employer's Yard Hospital and were, therefore, immediately available for employer to timely investigate the claim. DX 11.

⁴ We reject employer's reliance on *Blayman v. Electric Boat Corp.*, 263 F. App'x 152 (2d Cir. 2008). In *Blayman*, the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, held the claimant's attorney was not entitled to a fee under Section 28(a) for obtaining an order continuing employer's voluntary payment of medical benefits. *Id.* at 155. In this case, unlike *Blayman*, employer declined to pay any medical benefits within 30 days after receiving the claim from the district director.

Accordingly, we reverse the Supplemental Order Upon Reconsideration of Award of Attorney Fees Under Section 28(a) denying claimant's counsel an attorney's fee under Section 28(a), and we reinstate the district director's Compensation Order Awarding of Attorney Fees. Employer is liable for a fee to claimant's counsel of \$4,508.75.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge