



BRB No. 26-0017
Case No. 2023-LDA-02096

ARBEN SAHITI

Claimant-Petitioner

v.

SERVICE EMPLOYEES
INTERNATIONAL, INCORPORATED

and

THE INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA

Employer/Carrier-
Respondents

NOT-PUBLISHED

DATE ISSUED: 08/14/2026

ORDER

ROLFE, Acting Chief Administrative Appeals Judge, and GRESH,
Administrative Appeals Judge:

On October 23, 2025, Claimant filed an appeal of Administrative Law Judge (ALJ) Pamela A. Kultgen's Order Directing Claimant to Pay Reasonable Fee to Expert Witness (Fee Order) (2023-LDA-02096). 33 U.S.C. §921(a); 20 C.F.R. §§802.201, 802.205(a). The Benefits Review Board assigned Claimant's appeal docket number 26-0017. 20 C.F.R. §802.210. We dismiss Claimant's appeal of the ALJ's Fee Order for the reasons discussed below.

Claimant filed a claim under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act), as extended by the Defense Base Act, 42 U.S.C. §§1651-1655, seeking benefits for alleged psychological injuries related to his work for Employer. On January 23, 2024, at Employer's request, Dr. Jesse M. Smotherman performed a psychological evaluation of Claimant. Employer's Exhibits (EXs) 11, 12. The case was transferred to the Office of Administrative Law Judges, and District Chief ALJ Jonathan C. Calianos subpoenaed Dr. Smotherman for a deposition at Claimant's

request. On January 14, 2025, Claimant deposed Dr. Smotherman. Joint Exhibit (JX) 6. Employer and its Carrier (Employer) sent Claimant an invoice for payment of a \$4,000 fee for Dr. Smotherman's deposition testimony, apparently for four hours of "preparation" and deposition testimony at \$1,000 per hour, and Claimant did not pay. Emp. Motion to Compel Payment of a Reasonable Fee for Expert Deposition (Mot. to Compel) at 13, Exhibits F, G, H. On March 24, 2025, District Chief ALJ Calianos reassigned the case to the ALJ.

On August 18, 2025, Employer filed a motion asking the ALJ to compel Claimant to pay Dr. Smotherman \$1,000 per hour for his four hours of deposition testimony and an unspecified amount of "preparation" time ("approximately three to five hours preparing for the deposition"). Emp. Mot. to Compel at 12, 15, 17, 21-22. At an August 29, 2025 hearing, the parties discussed Employer's motion, but Dr. Smotherman did not testify, and the ALJ scheduled another hearing for September 26, 2025. Aug. 29, 2025 Hearing Transcript (HT) at 7-22. The ALJ also allowed Claimant to respond to Employer's motion, and Claimant argued in his subsequent response that the record was incomplete and that the ALJ should deny or defer ruling on Employer's motion until the record is fully developed and he has had an opportunity to fully respond to the reasonableness of any fee for Dr. Smotherman. *Id.* at 7-10; Cl. Response to Emp. Mot. to Compel (Cl. Response).

On September 5, 2025, the ALJ granted Employer's Motion to Compel payment of a reasonable fee, but the ALJ could not determine if the requested fee was reasonable because a "flat fee" invoice had been submitted instead of an itemized bill. Sept. 5, 2025 Order at 3-4. She directed Employer to provide the number of hours worked and a reasonable hourly rate to determine the reasonable fee to be paid. *Id.* at 5. Employer subsequently requested permission to file a reply, which the ALJ granted. In Employer's September 23, 2025 "Reply Motion," Employer asserted Dr. Smotherman spent 4.5 hours preparing for the deposition and 4 hours testifying and, therefore, should be paid for a total of 8.5 hours at a rate of \$800 per hour (which amounts to a fee of \$6,800). Emp. Reply Motion Regarding Expert's Reasonable Fee (Reply Motion) at 4. Employer also asked the ALJ to award interest due to the late payment of the fee. *Id.* at 4-5.

The ALJ subpoenaed Dr. Smotherman at Claimant's request, and on September 26, 2025, the ALJ reconvened the hearing so the parties could obtain Dr. Smotherman's testimony. Sept. 26, 2025 HT. The ALJ indicated at the hearing that she would issue an order finding \$800 per hour is a reasonable fee rate, and she would award a fee for Dr. Smotherman's time preparing for and testifying at the deposition and hearing. *Id.* at 67-69. Claimant objected to the ALJ issuing such an order and requested to brief the issue, but the ALJ denied Claimant's request, stating the issue had already been briefed and as Claimant had the opportunity to "set a record" at the hearing. *Id.* at 68.

On the same day, the ALJ issued her order, the subject of this interlocutory appeal, stating:

Formal rules of procedure do not apply to proceedings under the Longshore Act, but they nevertheless provide helpful guidance on questions of procedure. 33 U.S.C. §923. The Federal Rules of Civil Procedure provide that “A party may depose any person who has been identified as an expert whose opinions may be presented at trial.” Fed. R. Civ. P. 26(b)(4)(A). If a party seeks discovery from an expert, they must “pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A)” unless “manifest injustice would result.” Fed. R. Civ. P. 26(b)(4)(E).

Fee Order at 3. The ALJ determined \$800 per hour is a reasonable fee rate and, relying on the Federal Rules of Civil Procedure (FRCP) 26(b)(4)(E), ordered “Claimant/Claimant’s counsel” to pay Dr. Smotherman for his time related to his preparation for and testimony at his deposition and the hearing “via the method indicated on the invoice/bill.”¹ *Id.* at 5-6.

Claimant thereafter filed this interlocutory appeal, requesting the Board reverse or order the ALJ to correct her Fee Order and deny Employer’s Motion to Compel and Reply Motion. Cl. Brief at 5-9, 55. Employer responds, urging the Board to uphold the ALJ’s Fee Order. Emp. Brief at 1-2, 39 (unpaginated). Claimant filed a reply reiterating many of his contentions. Cl. Reply at 1-3, 29.

Claimant’s appeal is of a non-final, or interlocutory, order which neither awards nor denies benefits. *See* 33 U.S.C. §919(c). The Board generally does not undertake review of a non-final order. *See, e.g., Newton v. P & O Ports La., Inc.*, 38 BRBS 23, 24 (2004); *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114, 117 (1994). The Board will undertake an interlocutory review only if the non-final order conclusively determines a disputed question, resolves an important issue which is completely separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988) (“collateral order doctrine”); *Zaradnik v. The Dutra Grp., Inc.*, 52 BRBS 23, 24 (2018), *appeal dismissed*, 792 F. App’x 518 (9th Cir. 2020). If the order at issue fails to satisfy any one of these requirements, the Board nonetheless may, in its discretion, decide the appeal if it is necessary to direct the course of the adjudicatory process, or if a party has been denied due process of law. 33 U.S.C. §923(a) (Board is not bound by formal rules of procedure);

¹ Claimant filed a motion for extension of time to file a motion for reconsideration of the ALJ’s Fee Order, and the ALJ granted his motion, but Claimant never filed a motion for reconsideration due to the government shutdown. Cl. Brief at 25 n.49.

Pensado v. L-3 Commc'ns Corp., 48 BRBS 37, 37 (2014); *Newton*, 38 BRBS at 25; *Baroumes v. Eagle Marine Servs.*, 23 BRBS 80, 82 (1989); *Niazy v. The Cap. Hilton Hotel*, 19 BRBS 266, 269 (1987).

Here, the first two elements of the collateral order doctrine are met. The ALJ's Fee Order conclusively determined the question of whether immediate payment of expert witness fees is required, and that procedural requirement is completely separable from the merits of the underlying claim. But the ALJ's Fee Order will not be effectively unreviewable on appeal from a final judgment. The third element is not met because Claimant will not be effectively denied review by waiting for a final judgment in this case to appeal. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108-109 (2009); *Newton*, 38 BRBS at 24-25. To the contrary, the questions regarding expert witness fees – including their reasonableness and payment – will be fully addressable at the conclusion of proceedings and a final judgment in this case, when discovery is completed and the complete record is available, and those issues can be assessed properly. The inability to obtain immediate appellate review of a discovery order that “may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final . . . judgment . . . has never sufficed.” *See Carpenter*, 558 U.S. at 107 (citation omitted); *Ashmore v. CGI Grp., Inc.*, 860 F.3d 80, 88 (2d Cir. 2017). Nor are we persuaded that the interlocutory appeal is necessary to direct the course of the adjudicatory proceedings below. *See Newton*, 38 BRBS at 24-25.²

Accordingly, we dismiss Claimant's appeal of the ALJ's Order Directing Claimant to Pay Reasonable Fee to Expert Witness and remand the case to the ALJ to continue

² Claimant asserts the ALJ violated his due process rights by not allowing him the opportunity to respond to Employer's “Reply Motion.” Cl. Brief at 3, 7-9, 11-18, 20, 22-23. Due process requires a party be afforded notice of the claim and the opportunity to respond. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *see also Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Because Claimant had the opportunity to cross-examine Dr. Smotherman at the hearing, Sept. 26, 2025 HT at 25, 27, 30-32, 34, 61-67, and the ALJ noted Claimant had the opportunity to set the record at the hearing, *id.* at 68, we cannot say that Claimant was denied the opportunity to present his case on Dr. Smotherman's fee given that he had notice of the motion and hearing. *Newton*, 38 BRBS at 25.

Moreover, once discovery is completed as directed by the ALJ and the ALJ issues a final judgment or decision on the merits of entitlement in this case, the ALJ's interlocutory Fee Order will be reviewable and any party remaining aggrieved may appeal the ALJ's decision and the ALJ's Fee Order. *See Burns v. Director, OWCP*, 41 F.3d 1555, 1561-1562 (D.C. Cir. 1994); *Butler*, 28 BRBS at 118.

proceedings in this case.³ Any party aggrieved by the ALJ's final decision awarding or denying benefits may file an appeal with the Board.⁴ 33 U.S.C. §921(a), (b); 20 C.F.R. §802.205.

SO ORDERED.

JONATHAN ROLFE, Acting Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

JONES, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to dismiss Claimant's appeal of the ALJ's Fee Order. Claimant's counsel has identified circumstances that warrant the Board stepping in to direct the course of the adjudicatory process. *See Pensado v. L-3 Commc'ns Corp.*, 48 BRBS 37, 37 (2014); *Baroumes v. Eagle Marine Servs.*, 23 BRBS 80, 82 (1989). Claimant's counsel points out that in its Motion to Compel, Employer stated:

NSG [the vendor that compensates Dr. Smotherman as an independent contractor] has made clear that it will not proceed with additional depositions while this invoice remains outstanding, thereby impeding case progress. . . . Moreover, the vendor, NSG, has halted the scheduling of depositions with

³ If Claimant and his counsel refuse to pay, the ALJ can certify the facts to the relevant District Court in accordance with Section 27(b) of the Act, 33 U.S.C. §927(b). *See Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4, 6-8 (2003).

⁴ If the ALJ awards Claimant benefits, his counsel could seek an attorney's fee and costs under Section 28(a), (d), 33 U.S.C. §928(a), (d), and subsequently appeal any adverse ruling. If the ALJ denies Claimant benefits, he could appeal the ALJ's decision and interlocutory Fee Order.

experts in other matters involving Claimant's counsel due to this nonpayment, further disrupting discovery and resolution of claims.

Emp. Mot. to Compel at 20-21, Exhibit H; Cl. Brief at 30 n.67; Sept. 26, 2025 HT at 25. In essence, the consequences of the Fee Order are unreviewable on appeal from a final judgment because other claimants represented by this same attorney quite possibly are being prevented from obtaining the proof needed to secure benefits in their cases as a result of the ALJ's order in this case. Procedural mechanisms cannot and should not be weaponized to functionally deny claimants access to the adjudicatory process. Consequently, I would void the ALJ's order and remand this case such that Claimant and his counsel are not responsible for paying the invoice at this time but more importantly so that counsel is not stymied in his ability to represent his clients in other cases who are being denied due process.

For these reasons, I respectfully dissent.

MELISSA LIN JONES
Administrative Appeals Judge