U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 24-0166

CRAIG O. STEPHENSON Claimant-Petitioner v. METROPOLITAN STEVEDORE COMPANY and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	**NOT-PUBLISHED** DATE ISSUED: 12/23/2025 DECISION and ORDER

Appeal of the Order Denial of Attorney Fees Upon Reconsideration of Marco A. Adame II, District Director, United States Department of Labor.

Norman Cole (Brownstein Rask LLP), Portland, Oregon, for Claimant.

Scott E. Holleman (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Employer and its Carrier.

David Giannaula (Jonathan Berry, Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for

Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denial of Attorney Fees Upon Reconsideration of District Director Marco A. Adame II (OWCP No. LS-14498871) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (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.[1] *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950 (9th Cir. 2007).

On November 11, 2022, Dr. Todd Berinstein diagnosed Claimant with hearing loss and tinnitus, recommended annual hearing tests and continued use of hearing protection, and stated hearing aids "could be tried." EX 2 at 2. Claimant filed a claim seeking compensation for work-related hearing loss on December 8, 2022.[2] EX 1. Employer received notice of the claim on December 23, 2022. EX 6. It filed its Notice of Controversion (Form LS-207) and Notice of Payments (Form LS-208), documenting a payment of $1,197.76 to Claimant on January 20, 2023, with the Office of Workers' Compensation Programs (OWCP).[3] EX 7 at 1-3. Employer calculated the payment based on 1% monaural hearing loss and an average weekly wage of $2,515.30. *Id.* at 1.

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained an injury while working for Employer in the state of Washington. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] In a December 8, 2022 cover letter for the claim, Claimant's counsel stated "we seek payment of *compensation and medical services* for binaural hearing loss and tinnitus, payable from October 25, 2022, the date of injury, equal to 8.4 weeks, $14,085.71." EX 1 at 1-2 (emphasis added).

[3] Employer stated in its Notice of Controversion that it "accept[ed] loss as potentially noise induced and ha[d] begun medical and compensation (indemnity)

On January 24, 2023, Claimant requested an informal conference with the district director and identified "Occurrence of Injury," "Permanent Disability," and "Other Interest" as the issues requiring intervention. EX 8. On February 17, 2023, Employer filed a second Notice of Payments, documenting additional compensation paid between January 23, 2023, and February 19, 2023, totaling $6,707.48 toward payment in full of $11,422.84 for 13.1% monaural hearing loss. EX 7 at 5. The district director held an informal conference on March 9, 2023. EX 4. On March 13, 2023, Employer filed a third Notice of Payments, noting $11,422.84 in total payments for 13.1% monaural hearing loss. EX 7 at 7. On March 16, 2023, the district director recommended a payment of $14,085.71 for 4.2% binaural hearing loss, and Employer accepted the recommendation and filed a fourth Notice of Payments indicating $14,085.71 in total payments. EXs 4 at 3, 7 at 9, 8 at 7. On April 27, 2023, Employer paid $140.71 in interest. EX 7 at 11. Based on the parties' agreement, the district director issued a Compensation Order Awarding Benefits on May 10, 2023, confirming Employer's liability for Claimant's 4.2% binaural hearing loss with an award of $14,085.71 for the disability and an interest payment of $140.71 and of medical benefits under Section 7 of the Act, 33 U.S.C. §907. EX 2 at 1, 4.

On April 14, 2023, Claimant's counsel, Norman Cole (Counsel), filed an itemized fee petition with the district director, requesting an attorney's fee under Section 28 of the Act, 33 U.S.C. §928, totaling $7,174 for services and $15 in costs.[4] Cl. Petition and Affidavit for Attorney Fees and Costs (Petition). Employer requested sixty days to file objections, and the district director granted the request on April 28, 2023. Nevertheless, on June 27, 2023, the district director issued an Order Approving Attorney Fee, and Employer requested the order be withdrawn because it was issued before the sixty-day deadline elapsed. Employer also objected to Counsel's entitlement to an employer-paid fee because it paid "some" compensation for Claimant's disability within thirty days of receiving notice of the claim and Claimant did not obtain any relief with respect to medical benefits. Emp. Opposition to Claimant's Fee Petition. On June 30, 2023, Claimant responded to Employer's objections, reiterating his contentions. Cl. Reply to Emp. Objection to Attorney Fees.

The district director considered Employer's request to be a motion for reconsideration, and on January 29, 2024, he denied Counsel's application for an attorney's

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payments" and in its first Notice of Payments indicated it was "suspend[ing]" "[a]ll compensation, medical and indemnity" pending further investigation. EX 7 at 1-3.

[4] Counsel requested an hourly rate of $495 for himself, $485 for attorney Richard Mann, and $180 for paralegals Darlene Emerson and Karilyn Pilkington. Petition at 13, 20.

fee. Order Denial of Attorney Fees Upon Reconsideration (Order) at 1, 5-6 (unpaginated); District Director's July 3, 2023 Letter. The district director determined Employer was not liable for an attorney's fee under Section 28(a) because Employer had paid benefits for a 1% monaural hearing loss, based on Claimant's average weekly wage, within thirty days of receiving notice of the claim and Claimant did not seek approval or reimbursement for any medical benefits from Employer. Order at 2-3 (unpaginated). Specifically, the district director observed Employer's statements in its Notice of Controversion and Notice of Payments have no bearing on whether Section 28(a) is applicable because neither form is referenced in the "plain language" of 33 U.S.C. §928(a). *Id.* at 2-3 (unpaginated). The district director also determined Employer was not liable for a fee under Section 28(b), 33 U.S.C. §928(b), and because the case was not in a posture for a fee award under Section 28(c), 33 U.S.C. §928(c), he left that issue unaddressed. Consequently, he denied Counsel's fee application in its entirety. *Id.* at 3-6 (unpaginated).

On appeal, Claimant's Counsel only contends the district director erred in denying him an attorney's fee and costs under Section 28(a).[5] Employer and the Acting Director, Office of Workers' Compensation Programs (Director) filed responses, urging affirmance of the district director's denial. Counsel filed a reply brief reiterating his contentions.

Counsel contends the district director erred in denying him an employer-paid fee under Section 28(a) of the Act. He specifically argues the prerequisites were satisfied either by his success in obtaining compensation or medical benefits. Specifically, Claimant's Counsel asserts, despite Employer making a payment within thirty days of receiving notice of the claim, it indicated it only "potentially" accepted liability and "suspended" all future "compensation, medical and indemnity" pending further investigation, and did not "accept" liability as is required under the Act.[6] Cl. Brief at 4-11; Cl. Reply Brief at 7-8. Counsel explains "payment of some compensation [by Employer], but without a concession of liability for payment of compensation within the provisions of

[5] We affirm the district director's denial of an employer-paid attorney's fee under Section 28(b), 33 U.S.C. §928(b), as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007); Order at 4-6 (unpaginated). We also acknowledge Counsel's assertion in his appellate brief that he is not seeking a fee under Section 28(c).

[6] Claimant asserts the plain language of Section 28(a) includes "four triggers: (1) Employer or carrier declines to pay compensation within the prescribed thirty day period; (2) *The employer or carrier contends there is no liability for compensation*; (3) The person seeking benefits shall thereafter have utilized the services of an attorney; (4) Attorneys' prosecution of the claim was successful." Cl. Brief at 5-6 (emphasis added) (citation modified).

the Act, is the *equivalent of declining to pay compensation* on the ground that there is no liability for compensation" under Section 28(a). Cl. Brief at 7 (emphasis added). Additionally, he contends Employer's payment was a "sham payment" masking its investigation of the claim and intending to avoid liability for an attorney's fee. Cl. Brief at 7-10 (citing *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010), *rev'd on other grounds*, 656 F.3d 235 (4th Cir. 2011)). Finally, he contends he is entitled to an attorney's fee because he "secured [Claimant]. . . a right to medical services [Employer] had [initially] controverted." Cl. Reply Brief at 6; Cl. Brief at 6-7. Employer and the Director disagree with Counsel's characterization of the facts and interpretation of the Act.

Section 28(a) of the Act provides:

> 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. . . .

33 U.S.C. §928(a) (emphasis added). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, explained that Section 28(a) "imposes four conditions that must be satisfied in order to receive attorney's fees: (1) the claimant must file a claim with the [district director]; (2) the employer must receive notice of the claim from the [district director]; (3) the employer must decline to pay compensation or not respond within 30 days; and (4) the claimant must 'thereafter' utilize the services of an attorney to prosecute his claim." *Dyer v. Cenex Harvest States Co-op.*, 563 F.3d 1044, 1048 (9th Cir. 2009) (citing *Day v. James Marine, Inc.*, 518 F.3d 411, 414 (6th Cir. 2008)).

We are not persuaded by Counsel's assertion that "payment of some compensation . . . without a concession of liability . . . is the equivalent of *declining to pay compensation*" under the plain language of Section 28(a). Cl. Brief at 4-11 (emphasis added); Cl. Reply Brief at 7-8. While Section 28(a) contemplates whether an employer does not accept "liability for compensation," its relevance to attorney's fee liability is predicated on the employer declining to pay "any compensation" within the prescribed thirty days. 33 U.S.C. §928(a); *see Dyer*, 563 F.3d at 1048; *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1105 (9th Cir. 2003); *see also Lincoln v. Director, OWCP*, 744 F.3d 911, 916-917 (4th Cir. 2014), *cert denied*, 574 U.S. 932 (2014) (an employer's filing of a notice of controversion prior to its timely payment is not relevant to its fee liability under Section 28(a)); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59, 61 (1990) (employer's payment or non-payment

of compensation, rather than its filed "response," dictates fee liability under Section 28(a)). An employer's paying or not paying "any compensation" is the controlling event when considering the question of fee liability. *Lincoln v. Director, OWCP*, 744 F.3d 911, 915 (4th Cir. 2014), *cert. denied*, 574 U.S. 932 (2014) (if the employer pays "any" compensation to the claimant and contests only the total amount of benefits, it is sheltered from fee liability under Section 28(a)); *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (5th Cir. 1997) (where the employer initially controverted the claim but then began making voluntary payments of compensation to the claimant based on the rate to which he was ultimately found entitled, the court found the claimant was unsuccessful in gaining additional benefits and his counsel was not entitled to an attorney's fee pursuant to Section 28(b)). Consequently, we reject the notion that Employer's statements denying liability in its filings with OWCP trigger liability for an attorney's fee under Section 28(a) despite its actual payments. *See Dyer*, 563 F.3d at 1048; *Richardson*, 336 F.3d at 1105; *Lincoln*, 744 F.3d at 916-917; *Tait*, 24 BRBS at 61; Order at 2-3 (unpaginated).

Additionally, Employer's payment of $1,197.76 within the 30-day period was not a "sham payment."[7] *See* Cl. Brief at 7-10 (citing *Green*, 43 BRBS 173, *rev'd on other grounds*, 656 F.3d 235). In *Green*, the Board affirmed the ALJ's finding that the employer's payment of one dollar to the claimant within thirty days was merely an attempt to avoid fee liability rather than an actual payment of "any compensation" under Section 28(a). *Green*, 43 BRBS at 177. The United States Court of Appeals for the Fourth Circuit reversed the Board's decision on the merits and vacated the attorney's fee award. *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235 (4th Cir. 2011). Both the Director and Employer point out that in a subsequent case the Fourth Circuit affirmed a finding that an employer was not liable for an attorney's fee under Section 28(a) because it paid benefits for a .5% binaural impairment within the 30-day period – an amount equating to one week of compensation at the maximum compensation rate. *Lincoln*, 744 F.3d at 916; Dir. Brief at 8-9; Emp. Brief at 13-14. The court distinguished *Green* because the employer's payment in that case "was clearly untethered to the underlying claim and therefore was not 'compensation' at all." *Lincoln*, 744 F.3d at 916. In contrast, the payment of one week's benefits at the maximum compensation rate was "directly tied" to the claim and, thus, was "compensation" within the meaning of Section 28(a). *Id.*

In this case, the district director determined Claimant's Counsel did not establish entitlement to an attorney's fee under Section 28(a) because Employer made a payment to Claimant for 1% hearing loss within thirty days of receiving notice of the claim. Order at

[7] Employer paid $1,197.76 within thirty days of receiving written notice of the claim, the equivalent of benefits for a 1% hearing loss based on Claimant's average weekly wage. 33 U.S.C. §928(a); *see* Order 2-3 (unpaginated), 5; EX 7 at 1-3.

3, 5 (unpaginated). As Employer's timely payment was "directly tied" to Claimant's claim for hearing loss, his average weekly wage, and his compensation rate and was made within thirty days of receiving notice of the claim, we affirm the district director's finding that Counsel is not entitled to an attorney's fee under Section 28(a) with respect to Claimant's disability compensation claim.[8] *See Lincoln*, 744 F.3d at 916; *see also Richardson*, 336 F.3d at 1105; Order at 3-5 (unpaginated).

Claimant's Counsel alternatively asserts the conditions for fee shifting under Section 28(a) are met because Employer "declined to pay for medical services," Employer did not "allow [Claimant] an opportunity to obtain hearing aids," and Counsel successfully prosecuted this aspect of the claim by "secur[ing] [Claimant] . . . a right to medical services [Employer] had controverted." Cl. Brief at 5-7 (citing *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017)); Cl. Reply Brief at 5-6. The Director and Employer assert Employer is not liable for an attorney's fee because Counsel did not assist Claimant in obtaining any denied medical benefits. Dir. Brief at 7 n.4; Emp. Brief at 17-20. We agree with the arguments made by the Director and Employer.

In *Taylor*, the Board explained the term "compensation" in Section 28(a) is properly read as "disability and/or medical benefits" and 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. *Taylor*, 51 BRBS at 14. Specifically, the Board held that "[i]f any type of benefit is denied, and legal services are necessary to obtain the denied benefit, the claimant is entitled to an employer-paid fee because the employer's denial caused the need for attorney involvement." *Id.* The Ninth Circuit has defined "successful prosecution" as follows:

> While a party need not obtain monetary relief to prevail for purposes of such fee-shifting statutes, he must obtain some actual relief that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Succeeding on an issue alone is insufficient; even obtaining declaratory judgment will not result in the award of fees, unless it causes the defendant's behavior to change for the benefit of the plaintiff.

Richardson v. Cont'l Grain Co., 336 F.3d 1103, 1106 (9th Cir. 2003) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992)) (citations omitted). The court further explained the

[8] Although *Lincoln* is not controlling precedent in this case, which arises within the jurisdiction of the Ninth Circuit, we find its rationale persuasive based on the facts presented in this case.

claimant did not successfully prosecute his claim under Section 28(a) because "[t]here was no actual relief [], only the possibility of future relief." [9] *Id.*

In this case, Employer stated in its first Notice of Payments that it was "suspend[ing]" "[a]ll compensation, medical and indemnity," pending further investigation. EX 7 at 1-3. But the district director correctly noted Claimant did not seek approval or reimbursement for medical benefits. Order at 2-3 (unpaginated). Claimant's only evidence of past or potential future medical expenses was Dr. Berinstein's examination report, which recommended annual hearing tests and continued use of hearing protection, and stated hearing aids "could be tried." EX 2 at 2. And despite Claimant's assertion that Employer did not "allow [him] an opportunity to obtain hearing aids," Claimant did not provide any evidence that he sought authorization for hearing aids. Cl. Brief at 6-7; Order at 2-3 (unpaginated); Emp. Brief at 19-20. Moreover, Claimant does not allege that he sought reimbursement for his examination with Dr. Berinstein or that he requested authorization for any future medical treatment. Order at 2-3 (unpaginated); Cl. Brief at 6-7; Emp. Brief at 19-20. Furthermore, in requesting an informal conference with the district director, Claimant did not identify "Medical" as an issue requiring the district director's intervention and did not otherwise address the issue of medical benefits at the informal conference. EX 8. Finally, in his memorandum of informal conference, the district director did not recommend any payment for medical benefits, past or future. EX 4.

While Employer ultimately agreed Claimant was entitled to Section 7 medical benefits, Employer never made any payments for medical benefits and Claimant did not pursue the issue before the district director – beyond identifying it in his cover letter for the claim. *See* EX 2 at 4; Order at 2-3 (unpaginated). Consequently, Claimant has not successfully prosecuted this aspect of his claim under Ninth Circuit law because he did not receive any "actual relief" that "directly benefit[ed] him at the time of the [agreement]" – after Employer had initially declined to provide medical benefits, there is only "the possibility of future relief." *See Farrar*, 506 U.S. at 111; *Richardson*, 336 F.3d at 1106; *see also Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004) (a "successful prosecution" under the Act requires the claimant to obtain something of substance); *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 166 (5th Cir. 1993) (vacating an award of medical benefits and the related attorney's fee where the claimant "presented no evidence of medical expenses incurred in the past nor of medical treatment necessary in the future").

[9] "Whatever relief the plaintiff secures must *directly benefit him at the time of the judgment or settlement.* Otherwise the judgment or settlement cannot be said to 'affec[t] the behavior of the defendant toward the plaintiff.'" *Farrar*, 506 U.S. at 111 (citations omitted) (emphasis added).

Consequently, as the district director found, Counsel also is not entitled to an attorney's fee with respect to Claimant's claim for medical benefits.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge