

U.S. Department of Labor

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



BRB No. 20-0040

MICHAEL MAHNKE)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 03/23/2020
ELECTRIC BOAT CORPORATION)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

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

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

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

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

PER CURIAM:

Employer appeals the Compensation Order Awarding of Attorney Fees (OWCP No. 01-309383) 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 September 21, 2018, alleging he was exposed to loud noise at work. The district director served the claim on employer on October 1, 2018. Starting on September 6, 2018, claimant's counsel mailed several letters to employer asking for a copy of claimant's Yard Hospital medical records, including any hearing test results. Employer did not respond and, on February 20, 2019, claimant requested that the district director schedule an informal conference on the issue of his entitlement to obtain his medical records from employer's hospital. Thereafter, employer responded and sent the requested records to claimant. The district director issued a notice stating he would not schedule an informal conference as the medical records issue had been resolved.

After claimant's counsel received the medical records, he sent the relevant hearing tests to Dr. Worgul-Stankiewicz, Au.D, for her review in advance of her examination of claimant. On April 20, 2019, Dr. Worgul-Stankiewicz wrote a report recommending hearing aids for both ears due to hearing loss at the 4000 Hz level. On May 10, 2019, employer responded to counsel's April 22, 2019 request for hearing aids stating "Hearing aids will be authorized." EX 1 of Emp.'s Opposition to Fee Petition.

Thereafter, claimant's counsel filed an attorney's fee petition with the district director, seeking \$4,001.25, for 11.50 hours of attorney work at an hourly rate of \$310, .25 hours of paralegal work at an hourly rate of \$85, and costs of \$415. Employer objected to its liability for any fee under Section 28(a), 33 U.S.C. §928(a), because it agreed to pay medical benefits 11 days after receiving the claim for hearing aids.

The district director issued a compensation order holding employer liable for claimant's attorney's fee under Section 28(a). The basis for the award was employer's noncompliance with claimant's requests to forward the medical records until March 22, 2019, which occurred more than 30 days after employer received notice of the claim. The district director awarded counsel the requested attorney's fee of \$4,001.25.

Employer appeals the district director's award of an attorney's fee. Claimant filed a response, urging affirmance of the award of an employer-paid attorney's fee.

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 Act, 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). “Successful prosecution” is defined as the claimant’s obtaining “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.’” *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1106, 37 BRBS 80, 82(CRT) (9th Cir. 2003) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992)); *see also Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004).

Employer contends that merely providing a copy of claimant’s medical records does not constitute a “successful prosecution” under Section 28(a). Claimant responds that there was a successful prosecution because the medical records were “a necessary predicate” to scheduling a hearing evaluation for claimant, after which claimant received hearing aids more than 30 days after the claim was filed. We agree with employer that the district director’s award of an attorney’s fee cannot be affirmed. Obtaining a copy of claimant’s medical records does not constitute a “successful prosecution” of a claim because it did not entitle claimant to any benefits or “actual relief, or otherwise alter the legal relationship between the parties. *See Clark*, 38 BRBS at 72-73. Thus, employer cannot be held liable for an attorney’s fee under Section 28(a) on that ground. We therefore vacate the district director’s award of an attorney’s fee.

Claimant further contends employer is liable for an attorney’s fee under Section 28(a) as he successfully obtained hearing aids. We remand the case for the district director to address in the first instance whether employer is liable for an attorney’s fee under Section 28(a) due to claimant’s obtaining hearing aids. *See Taylor v. SSA Cooper, LLC*, 51 BRBS 11 (2017); *see generally Virginia Int’l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005); *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003), *aff’g Craig v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (en banc), *aff’d on recon en banc*, 36 BRBS 65 (2002); *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT).

Accordingly, we vacate the district director's Compensation Order Awarding of Attorney Fees and we remand the case for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge