

U.S. Department of Labor

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



BRB Nos. 21-0407
and 21-0573

CHARLES THOMPSON)

Claimant)

ERIC DUPREE)

(Former attorney for Claimant))

Petitioner)

v.)

RESOURCE CONSULTANTS)

and)

CONTINENTAL INSURANCE)

COMPANY/CNA INTERNATIONAL)

and)

TRAVELERS CASUALTY INSURANCE)

COMPANY)

Employer/Carriers-)

Respondents)

SERCO INCORPORATED)

and)

AIG CHARTIS INSURANCE COMPANY)

DATE ISSUED: 3/15/2022

ORDER on MOTION for
SUMMARY AFFIRMANCE

and

Employer/Carrier-)
Respondents) DECISION and ORDER

Appeals of the Order Approving Agreement for Distribution of Attorney's Fees of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor, and the April 22, 2021 Letter of Marco A. Adame II, District Director, United States Department of Labor.

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

Karen M. Beeman and Maryann C. Shirvell (Laughlin, Falbo, Levy & Moresi, LLP), Sacramento, California, for Resource Consultants, Incorporated, and Continental Insurance/CNA International.

Patricia Mackay Clotiaux, St. Paul, Minnesota, for Resource Consultants, Incorporated, and Travelers Casualty Insurance Company.

Barry W. Ponticello and Renee C. St. Clair (England Ponticello & St. Clair), San Diego, California, for SERCO Incorporated and AIG Chartis Insurance Company.¹

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

BOGGS, Chief Administrative Appeals Judge:

Claimant's former counsel, Eric Dupree (Dupree), appeals Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Order Approving Agreement for Distribution of Attorney's Fees (2013-LDA-00061, 00062, 00063) and District Director Marco A. Adame II's April 22, 2021 Letter (OWCP Nos. 15-047204, 18-093129, 18-100941) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651

¹ During Claimant's overseas work, Employer operated under the name Resource Consultants and was insured by Continental Insurance Company/CNA International. During Claimant's stateside work, Resource Consultants was insured by Travelers Casualty Insurance Company. Resource Consultants later changed its name to SERCO and its insurance carrier to AIG Chartis Insurance Company. Resource Consultants, SERCO, and its Carriers shall be collectively referred to as Employer.

et seq. (Act).² 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. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007). This case is before the Benefits Review Board for the second time.

The facts are well known to the parties, and we will not repeat them here except as necessary. In its prior decision, the Board affirmed the ALJ’s denial of an Employer-paid attorney’s fee for Dupree, reversed his finding that he lacks jurisdiction to address Dupree’s fee petition, and remanded the case for him to address Dupree’s request for an attorney’s fee in accordance with the terms of the 2015 settlements.³ *Thompson v. Resource Consultants*, BRB No. 20-0106 (Aug. 12, 2020) (unpub.). On remand from the Board’s decision, the ALJ approved an agreement between Dupree and Claimant’s present counsel, Robert E. Walsh (Walsh), whereby Walsh agreed to “pay Dupree Law the amount of \$18,750 from the \$25,000 previously awarded” to Walsh under the approved 2015 settlements, “in full satisfaction of the fees and costs incurred by Dupree Law in representing Claimant.” ALJ Order at 2.

Dupree also filed a fee petition with the district director seeking \$18,157.95 for services performed before the Office of Workers’ Compensation Programs between November 12, 2010, and June 26, 2019.⁴ By letter dated April 22, 2021, the district director denied Dupree’s “request for action on attorney fees.”

² We consolidate the appeals in BRB Nos. 21-0407 and 21-0573 for purposes of this decision. *See* 20 C.F.R. §802.104(a).

³ In November 2015, Employer and Claimant, represented by Robert E. Walsh, entered into three Section 8(i) settlements, 33 U.S.C. §908(i), one with each Carrier. Pursuant to the aggregate settlements, Employer and its Carriers agreed to pay Claimant a lump sum of \$275,000 to discharge their liability under the Act for Claimant’s work-related lower back injury. They also agreed to a total of \$25,000 in attorney’s fees. Two of the settlements state Walsh would satisfy Dupree’s attorney’s fee, while the third settlement is silent on this issue.

⁴ Dupree requested a fee for 23.30 hours of his services at \$575 per hour, 7 hours of Attorney Paul Myers’s services at \$425 per hour, 10.6 hours of paralegal/law clerk time at \$150 per hour, and costs of \$195.45.

Dupree appeals both the district director's denial of a fee and the ALJ's Order approving the Dupree/Walsh agreement. Employer/Carriers respond, urging the Board to reject Dupree's arguments. Dupree has filed reply briefs.

BRB No. 21-0407

Dupree contends the district director's fee denial is erroneous. He seeks remand for the district director to award him a reasonable Employer-paid fee. However, the district director has not yet issued a final order that resolves Dupree's request for an attorney's fee. *See* 33 U.S.C. §919(e) (a "compensation order" is one that rejects the claim or makes an award); *see Maria v. Del Monte/Southern Stevedore*, 22 BRBS 132 (1989) (en banc); *Anweiler v. Avondale Shipyards, Inc.*, 21 BRBS 271 (1988); *see also* 20 C.F.R. §702.371. Section 802.201(a) of the Board's regulations provides "[a]ny party or party-in-interest adversely affected or aggrieved *by a decision or order* . . . may appeal *a decision or order* of an administrative law judge or [district director]..." 20 C.F.R. §802.201(a) (emphasis added). The district director's denial of Dupree's "request for the District Director to take action" on his fee application is not an appealable order. Not only does it not take the form of an order, it also denied Dupree's "*request for action* on attorney fees" rather than denying the actual attorney fee petition itself. A ruling on an attorney's fee petition must be addressed in an order, not a letter. *Thornton v. Beltway Carpet Serv.*, 16 BRBS 29 (1983).

Moreover, the issuance and filing of a compensation order is not an empty ministerial act. Its creation and filing in the district director's office are prerequisites for the Act's jurisdictional requirements. Section 21(a) provides an order becomes effective only when it is filed in the office of the district director. 33 U.S.C. §921(a). Section 19(e), in turn, requires, before filing is complete, a copy of the order "must be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each." 33 U.S.C. §919(e). And inasmuch as an order is not effective until it is filed with the district director, Section 21(b)(5) only grants the Board the authority to hear appeals taken within 30 days of that filing. 33 U.S.C. §921(b)(5). Thus, while the district director's letter may contain the information needed to create an order, it is not an order sufficient by itself to confer jurisdiction. *Id.* And while remand is regrettably inefficient under these circumstances, it is also necessary. *Id.*

As there is no appealable order before us, we dismiss Dupree's appeal in BRB No. 21-0407. We remand the case for the district director to execute an order encompassing his denial of Dupree's attorney fee petition. *Id.*

BRB No. 21-0573

Dupree also challenges the ALJ's order merely to raise the issue of Employer's liability for his fee. He acknowledges the Board already addressed this issue in its August 2020 decision, and he now moves for summary affirmance of the ALJ's order to expedite his appeal of the issue to the United States Court of Appeals for the Ninth Circuit. Employer and its Carriers respond, asserting Dupree's motion for summary affirmance should be denied as premature and the case, once consolidated with the appeal of the district director's April 22, 2021 letter, be fully adjudicated by the Board.⁵

In contrast to the parties' contentions, Employer's liability for an attorney's fee was not addressed by the ALJ in his Order and is not properly before the Board now. Prior to the ALJ's Order, Dupree and Walsh "filed an agreement for distribution of a portion of the awarded \$25,000 in fees to Dupree Law." ALJ Order at 2. After review of that agreement, the ALJ "approved [it] as to all terms contained therein." *Id.* The ALJ's Order addresses only the terms of the Dupree/Walsh agreement and, therefore, does not in any way address, or render findings on, Employer's liability to Dupree for an attorney's fee. It concludes only that the fee awarded to Dupree via the 2015 settlements and the Dupree/Walsh agreement is "in full satisfaction of the fees and costs [he] incurred" in representing Claimant in these matters. As such, the limited issue in this appeal is whether the ALJ's Order accurately captures the Dupree/Walsh agreement and is in accordance with law -- not, as Dupree suggests, the question of whether Employer is liable for any additional attorney fees. No party challenges the ALJ's interpretation and ensuing approval of the Dupree/Walsh agreement. We therefore affirm the ALJ's directive that Walsh pay Dupree Law "\$18,750 from the \$25,000 previously awarded in full satisfaction of the fees and costs incurred by Dupree Law in representing Claimant" in pursuit of his claim for benefits, Order at 2. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Moreover, the ALJ's consideration of Employer's liability for attorney fees beyond those explicitly delineated in the 2015 settlements was fully considered and resolved by the Board in the prior appeal of this case.⁶ *Thompson*, slip op. at 5-8. As none of the

⁵ Employer maintains both appeals involve the same fact patterns and the same issue of Employer's liability for an attorney's fee to Dupree beyond the amount agreed upon in the 2015 settlements, and this requires a full resolution by the Board through a complete consideration of the existing record. As we have dismissed the appeal of the district director's letter, Employer's arguments are moot.

⁶ We reiterate, as the ALJ previously found, Dupree requested he be removed from the service sheet in this case and never filed an attorney's fee lien before the settlements were approved. *Thompson*, slip op. at 6. As such, we previously held neither the ALJ nor

exceptions to the law of the case doctrine is applicable,⁷ we hold the Board's decision on this issue constitutes the law of the case, and we decline to address the parties' contentions any further.⁸ See *Schwirse v. Marine Terminals Corp.*, 45 BRBS 53 (2011), *aff'd sub nom. Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013) (fully-addressed issue is law of the case); *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002). Consequently, we grant Dupree's motion for summary affirmance of the ALJ's Order.

Accordingly, we dismiss Dupree's appeal of the district director's April 22, 2021 letter, and we remand the case to him for action in accordance with this decision. BRB

the parties had an obligation to protect any interest he may have had to an attorney's fee beyond those the 2015 settlements fully resolved. *Id.* at 8.

⁷ To apply the law of the case doctrine, there must have been a change in the underlying factual situation, intervening controlling case authority, or a demonstration that the Board's first decision was clearly erroneous. See generally *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69, 70 n.4 (2005). None is present here.

⁸ Granted, the Dupree/Walsh agreement contains two clauses stating Dupree is not waiving his claim to seek additional attorney's fees for work in this case, payable by Employer. However, as the ALJ's Order does not address that issue, only counsel representing Dupree and Walsh are signatories to the approved agreement, and Employer's liability for attorney fees in this case has already been fully resolved, we decline to consider the legality of those waivers at this time.

No. 21-0407. We affirm the ALJ's Order Approving Agreement for Distribution of Attorney's Fees. BRB No. 21-0573.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

Buzzard, J., concurring and dissenting

I concur in the majority's decision to affirm the ALJ's order approving the attorney fee settlement between Claimant's earlier counsel, Mr. Dupree, and his subsequent counsel, Mr. Walsh. I respectfully dissent, however, from the majority's dismissal of Mr. Dupree's appeal of the district director's order denying him an Employer-paid attorney fee.

The district director's order is not merely a letter declining to consider whether Mr. Dupree is entitled to fees. The district director concluded he is without jurisdiction to award an attorney fee to Mr. Dupree because, consistent with the Board's prior holding, Claimant and Employer previously settled the underlying claim, including payment of benefits and attorney fees; the ALJ retained jurisdiction over any subsequent disputes between Mr. Dupree and Mr. Walsh over the distribution of the attorney fees; and when such a dispute arose, the Board held Employer is not liable for additional fees to Mr. Dupree and remanded the claim to the ALJ to consider whether Mr. Dupree is entitled to a portion of the attorney fees Employer paid to Mr. Walsh.

The district director's statement that he was denying Mr. Dupree's "request for action on attorney fees," along with his rationale that the Board's previous decision "outlin[ed] the process for Mr. Dupree to have his attorney fee issue properly addressed" – i.e., Employer is not liable for additional fees and Mr. Dupree's remedy is limited to filing a petition with the ALJ for a portion of the fees Employer paid to Mr. Walsh – constitutes a "decision" rejecting Mr. Dupree's fee petition. It therefore is appealable to the Board. *See* 33 U.S.C. §919(e) (a "compensation order" is one that rejects the claim or makes an award); 20 C.F.R. §802.201(a) ("[a]ny party or party-in-interest adversely

affected or aggrieved by a decision or order . . . may appeal a decision or order of an administrative law judge or [district director]....”).

Thus, rather than remanding the claim to the district director to restate his reason for denying counsel’s fee petition, I would adjudicate the appeal.

GREG J. BUZZARD
Administrative Appeals Judge