



BRB No. 18-0124

KELLY ZARADNIK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
THE DUTRA GROUP, INCORPORATED)	
)	DATE ISSUED: <u>June 19, 2018</u>
and)	
)	
SEABRIGHT INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Deferring Ruling on Fee Petition of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law), Coronado, California, for claimant.

Barry W. Ponticello and Renee C. St. Clair (England, Ponticello & St. Clair), San Diego, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Deferring Ruling on Fee Petition (2012-LHC-00988) of Administrative Law Judge Jennifer Gee rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We will review the administrative law judge's Order for abuse of discretion and compliance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant filed a claim for benefits under the Act against employer on October 12, 2011, seeking compensation for cumulative trauma injuries to her hips, back, and hands, and for her pulmonary conditions, alleging that her work for employer contributed to, aggravated and/or accelerated her underlying orthopedic and respiratory

conditions. Employer controverted the claim. On August 25, 2015, Administrative Law Judge William Dorsey awarded claimant temporary total disability benefits for her orthopedic and respiratory conditions. On October 15, 2015, Judge Dorsey issued an Order Granting Reconsideration, in which he considered whether claimant's untimely notice of her injury prejudiced employer. Finding that it did not, Judge Dorsey affirmed the award. On October 10, 2015, claimant's counsel filed a fee petition with the Office of Administrative Law Judges (OALJ). Employer filed objections to the fee petition, and counsel replied.

Employer appealed Judge Dorsey's decisions on the merits to the Board, and claimant cross-appealed, contesting the finding that claimant's disability was temporary rather than permanent. The Board rejected employer's appeal, but vacated the award of temporary disability benefits and remanded the case for further consideration as to the nature of claimant's disability. *Zaradnik v. The Dutra Group, Inc.*, BRB No. 16-0128 (Dec. 9, 2016) (Boggs, J., concurring and dissenting). On September 22, 2017, the Board denied employer's motion for reconsideration. Employer appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit; however, the court dismissed the appeal for lack of jurisdiction because the Board had remanded the case for further proceedings. *The Dutra Group, Inc. v. Zaradnik*, No. 17-73093 (9th Cir. May 22, 2018).

On January 26, 2017, claimant's counsel filed a supplemental fee petition with OALJ. Claimant's fee petition and supplemental fee petition have not been adjudicated and remain pending before OALJ. On December 12, 2017, Administrative Law Judge Jennifer Gee issued an Order Deferring Ruling on Fee Petition, stating that it was premature to rule on counsel's fee petition in view of the pending appeal at the Ninth Circuit.¹ Counsel appeals this order, asserting that Ninth Circuit policy requires trial courts to promptly determine attorney fee applications so as to avoid piecemeal appellate litigation. Employer responds that the Board should decline to address counsel's contentions, as the appeal is interlocutory. Employer further contends that Judge Gee properly held counsel's fee petition in abeyance. Counsel filed a reply.

Counsel's appeal is of a non-final order. Interlocutory review is appropriate in that "small class [of cases] which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541, 546 (1949). Under this "collateral order doctrine," review of an interlocutory order will be undertaken if the following three criteria are satisfied: (1) the order must conclusively

¹ Judge Gee also noted that Judge Dorsey had retired, and that the case would be assigned to a new administrative law judge.

determine the disputed question; (2) the order must resolve an important issue that is completely separate from the merits of the action; and (3) the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988).

We reject employer's contention that counsel's appeal should be dismissed as interlocutory. While the appeal is not of a final order, the appeal is reviewable under the "collateral order doctrine." *See Rivere v. Offshore Painting Contractors*, 872 F.2d 1187, 22 BRBS 52(CRT) (5th Cir. 1989). First, the order conclusively determines the disputed question, *i.e.*, the administrative law judge held the fee petition in abeyance. The second requirement of the doctrine is also satisfied, as the order resolves an issue that is completely separate from the merits of the action. The third prong is also satisfied as the issue raised would be unreviewable after a final order issues, as the issue would be moot. *Id.*; *see also Niazzy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987). As all three criteria are satisfied, we will review the merits of claimant's appeal.

Counsel contends it was error for the administrative law judge to hold his fee petition in abeyance. Counsel asserts that Ninth Circuit policy requires trial courts to promptly address attorney fee applications, thereby enabling expeditious appellate consideration thereof along with any appeals on the case-in-chief.

We observe that counsel's appeal appears to be moot. The administrative law judge deferred a ruling on counsel's fee petition during the pendency of employer's appeal at the Ninth Circuit. That appeal has now been dismissed. Nonetheless, because the proceedings in this case are not final, we will address counsel's contention for the purposes of reiterating well-established principles and discouraging future filings of this nature.

We reject counsel's assertion that the administrative law judge erred in holding his fee petition in abeyance until all appeals are exhausted. An administrative law judge may issue a fee award while an appeal of the underlying compensation order is pending, if it furthers the goal of administrative efficiency. *See Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998); *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987). However, the administrative law judge does not abuse her discretion in declining to issue a fee award while an appeal is pending. Significantly, claimant must have "successfully prosecuted" her claim before employer can be held liable for any attorney's fee, *see* 33 U.S.C. §928(a), (b), and both the degree of claimant's success and the amount of benefits awarded are factors in determining the amount of a fee award. These factors may not be quantifiable until all appeals are exhausted. *See* 20 C.F.R. §702.132; *see, e.g., Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992). While the Ninth Circuit has expressed a preference that piecemeal litigation over the merits and fees be avoided, *see Metcalf v. Borba*, 681 F.2d 1183 (9th Cir. 1982), there is no case

precedent mandating that an administrative law judge issue a fee award while appeals are pending.²

Moreover, even if a fee award is entered, it is not final and enforceable until all appeals in the case are exhausted. *Christensen v. Stevedoring Services of America, Inc.*, 430 F.3d 1031, 39 BRBS 79(CRT) (9th Cir. 2005); *Thompson v. Potashnik Constr. Co.*, 812 F.2d 574 (9th Cir. 1987). Claimant's counsel may seek to have the delay in the payment of his fee taken into consideration by the administrative law judge in determining the amount of the attorney's fee. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999). Thus, counsel's concern that a delay in ruling on a fee petition is a "threat to the integrity of the Longshore system" is unfounded.³ Claimant's counsel has not established that administrative law judge's abeyance order constitutes an abuse of her discretion or is contrary to law.

² The Board's fee regulation at 20 C.F.R. §802.203(c) specifically permits the filing of fee petitions for work before the Board *after* the administrative law judge acts on remand or the appellate proceedings have concluded.

³ That is particularly the case here since claimant's degree of success is not yet established and determination of the attorney fee properly awaits action on the merits of claimant's case.

Accordingly, we affirm the administrative law judge's Order Deferring Ruling on Fee Petition.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge