

BRB No. 99-0509

ROBERT TERRELL)
)
 Claimant-Respondent)
)
 v.)
)
 WASHINGTON METROPOLITAN)
 AREA TRANSIT AUTHORITY) DATE ISSUED: June 11, 2002
)
 Self-Insured)
 Employer)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Petitioner) ORDER

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board in connection with the Director's appeal in this case. He seeks a fee of \$4,148, plus expenses of \$192.89. Employer responds that it cannot be liable for any attorney's fee in this case. Claimant's counsel replies that employer is properly held liable for a fee. Alternatively, counsel seeks a fee imposed against claimant as a lien on his compensation.¹

Claimant was awarded permanent partial disability compensation for two injuries he sustained during the course of his employment with employer as a bus driver on June 4, 1977 and March 9, 1978. Pursuant to a compensation order issued by the district director in 1989, employer was awarded relief under Section 8(f) of the Act, 33 U.S.C. §908(f). After claimant underwent surgery on his neck in 1995, claimant filed a petition for modification under Section 22, 33 U.S.C. §922, alleging a change in condition and seeking permanent total

¹Counsel informed claimant by letter dated January 4, 2002, of his intention to seek a fee against claimant if necessary. This letter refers to a "fee agreement." Counsel is advised that Section 802.203(f) of the regulations governing attorney's fees for worked performed before the Board states, "No contract pertaining to the amount of a fee shall be recognized." 20 C.F.R. §802.203(f); *see also* 20 C.F.R. §702.132(a).

disability compensation. Both employer and the Director, Office of Workers' Compensation Programs (the Director), opposed claimant's request.

Claimant challenged the discovery requests filed by employer and moved to have employer dismissed from the case. In an Order issued on June 24, 1998, the administrative law judge granted claimant's motion, finding that since employer failed to establish that it would be adversely affected or aggrieved by any increased payments by the Special Fund to claimant, it was not a proper party to defend claimant's request for modification. Subsequently, in his Decision and Order, the administrative law judge found that claimant was entitled to permanent total disability compensation, commencing on January 18, 1996 and continuing, and further found that the Director was liable for claimant's counsel's attorney's fee.

The Director appealed the administrative law judge's dismissal of employer as a party. The Director contended that employer is always a necessary party at a formal hearing, and therefore need not establish that it is potentially adversely affected by the litigation as a prerequisite to standing. Alternatively, the Director argued that the administrative law judge erred in finding that employer's financial interest in the instant case was too remote to establish standing. The Director further contended that the administrative law judge erred in holding the Director liable for claimant's counsel's attorney's fee. Claimant responded, urging affirmance of the administrative law judge's decisions. Employer did not file a brief with the Board.

The Board first observed that Section 8(f)(2)(B) of the Act, 33 U.S.C. §908(f)(2)(B), implemented by 20 C.F.R. §702.148(b), which affords employers standing in claims being paid by the Special Fund, is inapplicable to the instant case as this regulation was promulgated pursuant to the 1984 Amendments, which are not applicable in D.C. Act cases. *Terrell v. Washington Metropolitan Area Transit Authority*, 34 BRBS 1, 2 (2000). The Board then addressed general principles of standing, see *Terrell*, 34 BRBS at 3, and agreed with the Director's contention that employer had a cognizable interest in the outcome of this case, as the amount of employer's assessment into the Special Fund, pursuant to Section 44 of the Act, 33 U.S.C. §944 (1982), is based on the proportion that its total payments under the 1928 Act have in relation to the total of such payments made by all carriers and self-insured employers. Contrary to the administrative law judge's finding, claimant's request for modification did not concern a speculative future injury, but an immediate request for increased compensation with the direct effect of increasing employer's assessment under Section 44. The Board thus remanded the case to the administrative law judge for a new hearing, with employer as a party. *Terrell*, 34 BRBS at 4.

With regard to the attorney's fee awarded by the administrative law judge, the Board vacated the award, holding that the administrative law judge erred in assessing the fee against

the Director, as the Special Fund cannot be held liable for an attorney's fee under Section 28. *Terrell*, 34 BRBS at 5, citing *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988). Moreover, neither the Board nor an administrative law judge has the authority to award fees and costs pursuant to Section 26 of the Act. *Terrell*, 34 BRBS at 5, citing *Boland Marine*, 41 F.3d 997, 29 BRBS 43(CRT); *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993). Claimant's subsequent appeal to the United States Court of Appeals for the D.C. Circuit was dismissed as interlocutory.² *Terrell v. Director, OWCP*, No. 00-1129, 2000 WL 1225777 (D.C. Cir. July 31, 2000).

We agree with employer that it cannot be held liable for claimant's attorney's fee for work performed before the Board in BRB No. 99-0509. Employer was excluded from the initial proceedings by the administrative law judge upon claimant's motion. Employer did not participate in the Director's appeal before the Board, and claimant argued in response to the Director's appeal for employer's continued exclusion from the case. Instructive on the fee issue in this case are cases addressing an employer's liability for claimant's attorney's fee where employer has been awarded Section 8(f) relief. Generally, if an employer continues to "contest" a claim in spite of its entitlement to Section 8(f) relief, it will be liable for claimant's fee. In *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989), the employer was awarded Section 8(f) relief on claimant's continuing award of permanent partial disability benefits. Claimant then sustained a new injury for which he filed a claim, and employer filed a motion for modification of the original award. The administrative law judge declined to consider employer's Section 22 motion, and awarded

²In his decision on remand, the administrative law judge disagrees with the Board's decision. He also states that the "Director refused to participate and insisted that [employer] defend the Fund," and further, that given the opportunity to do so, employer failed to produce any recent medical or vocational evidence. Thus, the administrative law judge again awarded claimant permanent total disability benefits, based on claimant's evidence. Subsequently, both the administrative law judge and the district director awarded claimant's counsel an attorney's fee payable by employer. Employer has appealed these fee awards, which remain pending before the Board. BRB Nos. 02-0395, 02-0515.

claimant permanent total disability benefits. Due to the prior award of Section 8(f) relief, the administrative law judge held the Special Fund liable for all benefits awarded. Employer appealed, *inter alia*, the administrative law judge's finding that it was liable for claimant's attorney's fee. The Board affirmed the fee award against employer, stating, "Because employer refused to enter into any stipulations at the hearing, actively litigated all of the issues in the claim, and argued that it had an economic interest in the outcome of the case, we conclude that claimant's successful prosecution of the claim satisfies the requirements of Section 28(b) and supports the administrative law judge's award of attorney's fees" notwithstanding that all compensation liability was the responsibility of the Special Fund. *Finch*, 22 BRBS at 202.

The Board and the Fifth Circuit also addressed this issue in *Rihner v. Boland Marine & Mfg. Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995). In *Rihner*, employer had been paying death benefits to the employee's widow, and subsequently to the employee's son for four years, when employer requested Section 8(f) relief. The request was denied by the associate director, on the grounds that the compensability of the death was questionable, as was the adult son's entitlement to death benefits. There also was no documentation submitted in support of the elements of Section 8(f). Employer suspended compensation payments, and the claim was referred to the administrative law judge, before whom employer contested the existence of a compensable injury, as well as its entitlement to Section 8(f) relief. The administrative law judge found the death work-related, and awarded employer Section 8(f) relief. The administrative law judge held the Special Fund liable for claimant's attorney's fees under Section 26 of the Act for unreasonably raising the issue of the compensability of the death, as, ultimately, no evidence was submitted in support of such a position.

On the Director's appeal to the Board, the Board held that employer was liable for claimant's attorney's fee, as employer stopped paying benefits to claimant and contested the compensability of the claim before the administrative law judge.³ Citing *Finch*, the Board stated that the award of Section 8(f) relief does not absolve employer of fee liability where it contested the claim on the merits. *Rihner*, 24 BRBS at 87-88. On appeal to the Fifth Circuit, the court affirmed the Board's holding that employer is liable for claimant's fee because it

³The Board also held that the Director was not "unreasonable" within the meaning of Section 26. On appeal to the Fifth Circuit, the court held that neither an administrative law judge nor the Board has the authority to apply Section 26. *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *see also Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993).

contested claimant's entitlement to benefits by suspending compensation and litigating the issues surrounding the compensability of the death, notwithstanding that the associate director first raised the issue of compensability or that the Special Fund is liable for the continuing benefits awarded. *Rihner*, 41 F.3d at 1006, 29 BRBS at 50-51(CRT). With regard to the fee request before the court, the court stated, " 'when an employer contests its liability in whole or in part and the claimant is ultimately successful, the employer and not the claimant must pay the claimant's attorney's fees for services necessary to that success.'" *Rihner*, 41 F.3d at 1007, 29 BRBS at 51(CRT), quoting *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 774 (5th Cir. 1981).

In contrast, the employer was found not liable for claimant's attorney's fees in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), and *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987). In *Holliday*, the claimant was awarded permanent total disability benefits, and employer was awarded Section 8(f) relief. Claimant appealed the date of permanency to the Board, seeking an earlier date for purposes of securing earlier cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f). Employer did not respond to claimant's appeal. The Board affirmed the date of permanency, and claimant appealed to the Fifth Circuit, wherein the court approved the Director's interpretation of Section 10(f) as allowing claimant to receive the adjustments that occurred while he was temporary totally disabled.⁴ Claimant's attorney sought a fee payable by employer or, alternatively, the Director. The Fifth Circuit held that employer cannot be held liable for the fee:

[S]ection 28 authorizes attorneys' fees in two situations only: (a) where the employer refuses to pay any compensation for a work-related injury, and (b) where the employer tenders partial compensation but refuses to pay the total amount claimed. In either case, the claimant must, of course, obtain the services of an attorney to prosecute his claim successfully. Neither situation exists here. The employer and carrier were actively involved only before the ALJ, and the ALJ awarded attorneys' fees against them. Neither the employer nor its carrier participated in the claimant's appeal before the BRB or before this

⁴This holding was subsequently overruled by *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (*en banc*).

court. They have not contested the claim here or there within the meaning of sections 28(a) or (b).

Holliday, 654 F.2d at 419, 13 BRBS at 743-744. Although not stated explicitly, the only rational basis for this holding is that employer was awarded Section 8(f) relief. See *Holliday*, 654 F.2d at 420 n.5, 13 BRBS at 744 n. 5. The court also held that the Special Fund could not be liable for claimant's attorney's fee as such is not authorized by Section 28 or 44 of the Act, and the "American Rule" is that parties bear their own fees unless a fee-shifting statute provides otherwise. *Holliday*, 654 F.2d at 419-421, 13 BRBS at 744-755.

Similarly, in *Ryan*, 19 BRBS 208, the employer and claimant entered into a stipulated agreement regarding claimant's entitlement to permanent total disability benefits. The only issue before the administrative law judge was employer's entitlement to Section 8(f) relief. The administrative law judge found that the private parties' agreement was not binding because the Special Fund had not participated in the agreement, and he awarded permanent total disability benefits, but commencing three and one-half months after the date the parties agreed upon. Employer was awarded Section 8(f) relief.

On claimant's appeal of the onset date, the Board held that the administrative law judge erred in upsetting the private parties' agreement, although it was appropriate to make necessary findings of fact in the claim for Section 8(f) relief, as between employer and the Special Fund. Claimant's attorney then submitted a fee petition for work performed before the Board. The Board held that employer cannot be held liable for the fee: "Since employer agreed that the employee was permanently totally disabled as of June 1, 1980, and did not contest claimant's argument on appeal that the administrative law judge erred in rejecting the deputy commissioner's award of benefits as of June 1, 1980, employer is not responsible for claimant's counsel's fee." *Ryan*, 19 BRBS at 212. The Board held that claimant is liable for the fee requested as a lien on her compensation. See 33 U.S.C. §928(c).

The instant case is similar to *Holliday* and *Ryan*, in that employer was granted Section 8(f) relief in the initial case, was dismissed from the modification proceedings by the administrative law judge on claimant's motion, and did not participate in the appeal before the Board; thus, employer was not an active litigant, and did not suspend compensation or contest the compensability of claimant's claim, as in *Finch* and *Rihner*. The fact that employer had an economic interest in the outcome (due to the increased assessment under Section 44 as explained in the Board's decision, 34 BRBS at 4), is not sufficient for employer to be held liable for claimant's attorney's fee for work performed before the Board under the facts of this case. Thus, we hold

that employer is not liable under Section 28 for claimant's attorney's fee for work performed before the Board in this appeal. Contrary to claimant's contention, the Board did not hold in its decision that employer is liable for claimant's attorney's fee. The Board held that the Director cannot be liable for claimant's fee under Sections 26 and 28, and that "employer may be potentially liable for such a fee." *Terrell*, 34 BRBS at 5. The Board was referring to the fee awarded by the administrative law judge, and did not hold that employer is in fact liable for such a fee.

We turn, then, to claimant's liability for the attorney's fee. Claimant obtained an award of permanent total disability, and thus, an attorney's fee for his counsel can be made a lien on his compensation. 33 U.S.C. §928(c). The regulation at 20 C.F.R. §802.203(e) states that "Any fee approved shall be reasonably commensurate with the necessary work done. . . ." Claimant first contended that the Director had no standing to appeal to the Board, and that the appeal was untimely. These contentions were rejected by Order dated September 7, 1999. In the appeal on the merits, claimant opposed the Director's contention that employer retained standing to oppose a modification request under the pre-1984 Amendment Act, and was unsuccessful in defending the administrative law judge's decision excluding employer from the proceedings. Therefore, we hold that counsel is not entitled to a fee for the work performed on research, motions or briefs, as claimant was unsuccessful in maintaining the status quo.

Thus, we disallow the following entries: (1) one hour at \$80/hr. (paralegal time) performed on February 3 and 10 1999, as work not performed before the Board;⁵ (2) 2 hours by Attorney Ravery at \$150/hr. on March 1, 1999, and April 28, 1999, and 5.20 hours by Attorney Ravery at \$80/hr. on May 5, 6, 7, 14, 1999; (3) 3.4 hours by Law Clerk Greenspan at \$80/hr. on March 5, 1999; and (4) 13.35 hours by Attorney Bender at \$200/hr. on March 3, 5, 8, 13, 1999, April 28, 1999, and May 4, 6, 7, 8, 10, 20, 24, 1999. We award claimant's counsel a fee 2.05 hours of services by Attorney Bender at \$200/hr., for a total fee of \$410,⁶ payable by claimant as a lien

⁵The Director's appeal was not filed yet with the Board, and the entries do not relate to work performed before the Board.

⁶This allows a fee for services relating to telephone calls to the Board and conferences with claimant on April 8, 1999, April 13, 1999 (.25 allowed of .5 requested), April 21, 23, 26,

on his compensation pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). In addition, claimant is liable for the requested costs of \$192.89.

1999, September 13 and 17, 1999, and February 18, 2000.

Accordingly, we award claimant's counsel an attorney's fee of \$410 for work performed before the Board in BRB No. 99-509, payable by claimant as a lien on his compensation. 33 U.S.C. §928(c). Claimant is liable for the requested costs of \$192.89.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge