



BRB No. 17-0268

LEROY SMITH)	
(DECEASED))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: <u>Dec. 13, 2017</u>
)	
NICOR NATIONAL)	
)	
and)	
)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY OF PITTSBURGH,)	
PENNSYLVANIA)	
)	
Employer/Carrier-)	ORDER on MOTION for
Respondents)	RECONSIDERATION

Claimant’s counsel has filed a timely motion for reconsideration of the Board’s Decision and Order in the captioned case, *Smith v. Nicor National*, BRB No. 17-0268 (Sept. 20, 2017) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer opposes claimant’s motion. We deny the motion for reconsideration and affirm the Board’s decision.

In his motion for reconsideration, counsel contends, *inter alia*, it was necessary that he, on many occasions, write to employer’s carrier about late checks sent to claimant. Counsel contends this “dispute,” which prompted him to request an informal conference before the district director, served as the functional equivalent of the informal conference required by Section 28(b), 33 U.S.C. §928(b). The Board, in rejecting this contention, stated those “letters cannot be considered ‘an informal conference by correspondence’ because they are not ‘between’ the district director and the parties.” *Smith*, slip op. 5 n. 5.

As stated in our prior decision, the United States Court of Appeals for the Fifth Circuit has strictly interpreted Section 28(b), and held that the following are prerequisites to an employer’s liability under Section 28(b): (1) an informal conference on a disputed issue has been held; (2) a written recommendation from the district director on that issue has been made; (3) the employer refuses to accept the written recommendation; and (4) the employee achieves a greater award than that which the employer was willing

to pay after the written recommendation . . . If any element is missing, an employer cannot be held liable for a fee under Section 28(b).” *Smith*, slip op. at 4 (internal citations omitted). Counsel’s letter to employer’s carrier dated October 29, 2009, includes the statement that “[b]y copy of this letter to [the district director’s office] I am requesting a conference with [a claims examiner] and your attorney,” as soon as it can be scheduled. Counsel, however, has not shown that the district director responded to or acted upon his request, as there is no evidence that this informal conference occurred. Moreover, even assuming the correspondence between the parties could serve as the functional equivalent of the informal conference required by Section 28(b), employer cannot be held liable in this case for claimant’s attorney’s fee pursuant to Section 28(b) because there is no evidence that the district director issued a recommendation, written or otherwise, regarding the parties’ dispute over the late payment of compensation. *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh’g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *see also Pittsburgh & Conneaut Dock v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Devor v. Dep’t of the Army*, 41 BRBS 77 (2007). We, therefore, deny claimant’s motion for reconsideration and again affirm the district director’s findings that counsel has not satisfied the requirements of Section 28(b) and thus, is not entitled to an employer-paid attorney’s fee under that provision.¹

¹We reject the other contentions raised by counsel in his motion for reconsideration as these issues were fully addressed by the Board in its decision and counsel has not raised any error in the Board’s consideration of them. The successful pursuit of claimant’s claim is, in light of the facts of this case, insufficient to establish his entitlement to an employer-paid attorney’s fee under either 33 U.S.C. §928(a) or (b), because the specific requirements to establish employer’s liability under those provisions have not been met. *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010); *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

Accordingly, counsel's motion for reconsideration is denied. The Board's decision is affirmed. 20 C.F.R. §802.409.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge