U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0143

BYRON ADAMS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
TRAPAC, LLC	)	
	)	
and	)	DATE ISSUED: July 8, 2016
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	ORDER on MOTIONS for
Intervenor-Respondent	)	RECONSIDERATION

Employer and the ILWU-PMA Welfare Plan (the Plan) have filed timely motions for reconsideration of the Board's October 30, 2015 Decision and Order in the captioned case, *Adams v. Trapac, LLC*, BRB No. 15-0143 (Oct. 30, 2015) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. We deny the motions and affirm the Board's decision.[1]

In its motion for reconsideration, employer asserts the Board erred in rejecting its contention that the Supreme Court's decision in *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. ___, 135 S.Ct. 2158 (2015) precludes employer's liability for an attorney's fee for the defense of the Plan's fee petition. Employer additionally asserts that the Board erred in awarding the Plan's counsel an attorney's fee for the Plan's pursuit of medical benefits

[1] We deny the Plan's motion to strike employer's motion for reconsideration. 20 C.F.R. §802.219.

as the Act does not provide authority for holding employer liable for the Plan's attorney's fee. We reject these contentions.

For the reasons stated in *Clisso v. Elro Coal Co.*, BRB No. 15-0010 BLA (Jun. 17, 2016) (published order), we reject employer's contention that the Board incorrectly found *Baker Botts* inapplicable to a fee awarded pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). We additionally reject employer's assertion that the Plan's counsel is not entitled to an attorney's fee payable by employer pursuant to Section 28 of the Act, because the Act "simply does not contain a specific and explicit provision for a private health insurer such as [i]ntervenor to obtain attorney fees from an employer/carrier." Emp. Mot. at 3. As the Board previously explained, contrary to employer's assertion, pursuant to Section 7(d)(3), 33 U.S.C. §907(d)(3), the Plan may be a "party in interest" seeking medical benefits on behalf of claimant. As such, Section 28(a) provides the requisite statutory basis for a fee award because it entitles "the person seeking benefits" to a "reasonable attorney's fee against the employer or carrier" upon the successful prosecution of his claim.[2] *Adams*, slip op. at 3-4 (citing *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993);[3] *Grierson v. Marine Terminals, Corp.*, 49 BRBS 27 (2015)). We, therefore, deny employer's motion for reconsideration. 20 C.F.R. §802.409.

With respect to the Plan's motion for reconsideration, it asserts the Board erred in vacating the administrative law judge's fee award on the ground that it included a fee for the Plan's work pursuing its Section 17, 33 U.S.C. §917, lien on claimant's disability award. The Plan does not challenge the Board's holding that a Section 17 lienholder is not entitled to an employer-paid fee because it is not a "person seeking benefits" under Section 28(a). Rather, the Plan asserts that the Board's decision in *Grierson*, 49 BRBS 27, entitles it to an award for all requested attorney's fees because its work on the Sections 7 and 17 issues was "inextricably intertwined."[4] We reject this contention.

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[2] Section 2(1) of the Act, 33 U.S.C. §902(1) states that, as used in the Act, "The term 'person' means individual, partnership, corporation, or association."

[3] In *Hunt*, a doctor and a physical therapist retained their own counsel and intervened in a claim for disability benefits, seeking payment for medical services provided to the claimant after the employer ceased paying benefits. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held that the medical providers were "part[ies] in interest," *see* 33 U.S.C. §907(d)(3), seeking the reasonable value of medical treatment, and, therefore, were "persons seeking benefits" under the Act for purposes of Section 28(a). *Hunt*, 999 F.2d at 423-424, 27 BRBS at 91(CRT).

[4] In *Grierson*, the Board stated that the administrative law judge rationally found that the legal services of the Plan's attorneys on the issues concerning the claimant's

Unlike *Grierson*, the administrative law judge here assumed that employer is liable for a fee for the Plan's attorney's work on the Section 17 lien issue, and he did not address whether the Plan's work pursuant to Sections 7 and 17 was "inextricably intertwined." As the Plan is not entitled to an attorney's fee payable by employer for pursuing its lien under Section 17, it has not stated a basis for reconsideration of the Board's decision. We, therefore, deny the Plan's motion for reconsideration. 20 C.F.R. §802.409. The Board's decision remanding the case to the administrative law judge to reconsider the amount of the attorney's fee for which employer is liable is affirmed.

Accordingly, the motions for reconsideration of employer and the Plan are denied. The Board's decision is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

claim for medical benefits and the Plan's lien were too intertwined to permit him to sever them, as both issues turned on whether the claimant's disabling symptoms were work-related. The Board further held, however, that the employer could be held liable only for those services provided by the Plan's attorneys to the extent the services protected an entitlement interest belonging to the claimant that was not otherwise protected by the claimant's attorney. *Grierson*, 49 BRBS at 30.