U.S. Department of Labor

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

BRB No. 19-0147

CHARLIE GIBBONS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/30/2019
	)	
JEFFBOAT, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Attorney Fee Order and the Order Denying Employer's Motion for Reconsideration of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Douglas P. Matthews (King, Krebs & Jurgens, L.L.C.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Attorney Fee Order and the Order Denying Employer's Motion for Reconsideration (2018-LHC-00466) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). 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, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim on March 31, 2017, for a binaural hearing loss due to his work for employer from 1962 through 1983. Employer filed an LS-202 form on April 4, 2017, reporting the accident as an "allege[d] environmental hearing loss," followed by an

LS-208 form dated April 14, 2017, indicating it voluntarily paid claimant $250 in benefits on that date, but thereafter suspended payments due to the absence of medical support for the claim. An informal conference was held on September 26, 2017, culminating with a written recommendation on September 27, 2017, that employer pay claimant permanent partial disability benefits for a 52.95 percent binaural hearing loss based on an average weekly wage of $386.[1] It was also recommended that employer "provide authorization for the hearing aids" suggested by Dr. Brose and Dr. Mickler. Employer filed another LS-208 form on October 3, 2017, reflecting it "paid [claimant the] recommended amount per Informal Conference."[2]

Claimant, thereafter, sought a higher average weekly wage based on his Social Security Report of Earnings. Employer agreed to the use of that document but disputed whether the reported earnings contained a severance payment that should not be included in claimant's average weekly wage. Claimant requested the case be referred to the Office of Administrative Law Judges (OALJ) for a formal hearing on the average weekly wage issue.

While the case was pending before the OALJ, claimant and employer reached a Section 8(i) settlement, 33 U.S.C. §908(i), whereby claimant received $34,201.46 in disability benefits, and $5,000 for future medical care.[3] The parties' settlement agreement was approved by the administrative law judge on May 29, 2018. On June 22, 2018, claimant's counsel filed with the administrative law judge a petition seeking an attorney's fee totaling $2,877.50, representing 6.75 hours of attorney time at an hourly rate of $405, and 1.25 hours of attorney time at an hourly rate of $115. Employer objected, asserting it is not liable for any attorney's fees because the requirements for liability under Section 28(a) and 28(b) have not been met. 33 U.S.C. §928(a), (b).

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[1]The district director recommended using the average of the two audiograms submitted by the parties, i.e., the audiometric testing by Brittany Brose, Au.D., on April 19, 2017, which demonstrated a 55.9 percent binaural loss and an audiogram administered by Dr. Mickler on July 25, 2017, which revealed a 50 percent binaural loss. The district director initially miscalculated that figure as a 54.45 percent hearing loss but corrected the mistake in an amended recommendation dated September 29, 2017.

[2]Employer's October 3, 2017 form states that it paid claimant $27,251.25 in benefits for a 54.45 percent hearing loss based on an average weekly wage of $386.

[3]The agreed upon $5,000 in medical benefits consisted of $4,750 for future medical care for services not covered by Medicare and $250 for services covered by Medicare.

The administrative law judge held employer liable for an attorney's fee because employer agreed to pay additional compensation to claimant via the Section 8(i) settlement, thereby resulting in claimant's success in obtaining greater compensation than that initially paid by employer. Accordingly, the administrative law judge awarded claimant's counsel an attorney's fee of $2,877.50, payable by employer. The administrative law judge denied employer's motion for reconsideration, clarifying that employer is liable for the attorney's fee in this case under Section 28(b) of the Act. In reaching this conclusion, the administrative law judge, using the Ninth Circuit's interpretation of Section 28(b), found that following the informal conference issues remained in dispute and the parties reached a settlement before the OALJ with employer agreeing "to pay additional compensation to the Claimant" in the form of "*new* money payable to the Claimant totaling $5,000." Order Denying Recon. at 4 (emphasis in original). The administrative law judge found claimant "succeeded in obtaining a greater amount of compensation than initially paid by the employer," thereby entitling his counsel to an attorney's fee payable by employer under Section 28(b). *Id.*

On appeal, employer challenges the administrative law judge's finding that it is liable for an attorney's fee under Section 28(b).[4]

Employer contends the administrative law judge erred by applying the interpretation of Section 28(b) espoused by the United States Court of Appeals for the Ninth Circuit to determine its liability for an attorney's fee. Employer contends that as this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, which has not interpreted the statutory language of Section 28(b), the administrative law judge erred by not following the Board's decision in *Davis v. Eller & Co.*, 41 BRBS 58 (2007). Employer contends that, pursuant to *Davis*, it cannot be liable for an attorney's fee under Section 28(b).

Section 28(b) states:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to

[4]Claimant and the Director, Office of Workers' Compensation Programs (the Director), each requested extensions of time to file their respective response briefs. By Order dated May 3, 2019, the Board granted the motions, giving both parties ten days from the date of receipt of the order in which to file their responses. The Director subsequently filed a letter stating her intent not to participate in this appeal. Claimant has not filed any additional pleadings.

> which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. *If the employer or carrier refuse [sic] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled.* If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

33 U.S.C. §928(b) (emphasis added); *see also* 20 C.F.R. §702.316. Under the interpretation of Section 28(b) utilized by the Fourth, Fifth and Sixth Circuits, the following are prerequisites to an employer's liability: (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to accept the written recommendation; and (4) the employee's procuring of the services of an attorney to achieve a greater award than what the employer was willing to pay after the written recommendation. *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2003), *cert. denied*, 546 U.S. 960 (2005).

In contrast, the Ninth Circuit has held that an employer liable for an attorney's fee under Section 28(b) where the extent of liability is controverted after informal "proceedings" and claimant successfully obtains increased compensation regardless of whether employer specifically rejected an administrative recommendation. *See Matulic v. Director, OWCP*, 154 F.3d 1052, 1060-1061, 32 BRBS 148, 154(CRT) (9th Cir. 1998) (assessing fee under Section 28(b) where a written recommendation was "the functional equivalent of an informal conference" and claimant prevailed on disputed issues); *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 882, 11 BRBS 68, 73 (9th Cir. 1979) (assessing fee under Section 28(b) where case was forwarded for formal hearing without a recommendation and claimant prevailed on disputed issue; "We do not believe that the statute contemplates the making of a written recommendation by the deputy commissioner as a precondition to the imposition of liability for attorney's fees."); *McDonald v. Aecom Technology Corp*., 45 BRBS 45 (2011) (affirming fee award under Section 28(b) in a case arising in the Ninth Circuit as claimant obtained greater compensation; absence of informal conference on the issue in dispute does not preclude application of Section 28(b)).

In *Davis*, 41 BRBS 58, the Board addressed the split in the circuits' law in a case arising within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. Noting that the Eleventh Circuit had not addressed the statutory language of Section 28(b), the Board reviewed the differing interpretations and stated, "given the recent trend in the case law," that it would "adopt a stricter construction of Section 28(b)," as delineated by the Fourth, Fifth and Sixth Circuits, and "apply it in all circuits which have not addressed the issue." *Davis*, 41 BRBS at 62. Given that the Seventh Circuit has not addressed the statutory language of Section 28(b), the Board's decision in *Davis*, a case raised by employer in its motion for reconsideration but not addressed by the administrative law judge, dictates that employer's fee liability in this case be determined in light of the strict interpretation of Section 28(b). *See Devor v. Dep't of the Army*, 41 BRBS 77 (2007) (applying *Davis* in a case arising in the Third Circuit; lack of written recommendation precludes fee liability under Section 28(b)).

In this case, employer accepted the district director's September 27, 2017 recommendation and, within 14 days of receipt of the recommendation, paid claimant benefits on October 3, 2017.[5] As employer did not refuse the September 27 recommendation, one of the criteria for fee liability under Section 28(b) has not been satisfied. *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006); *see also Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT) (precluding fee liability if employer accepts a mistaken recommendation and claimant obtains a greater award). Therefore, we reverse the administrative law judge's fee award payable by employer.

[5]Employer accepted the recommendations pertaining to disability compensation as evidenced by its October 3, 2017 LS-208 stating that it paid claimant $27,251.25 in benefits for a 54.45 percent hearing loss based on an average weekly wage of $386. As for the recommendation that employer provide "authorization for the hearing aids," claimant's December 15, 2017 Pre-Hearing Statement concedes the parties reached agreement on "medical care" and denotes "average weekly wage" as the only issue to be presented for resolution at the formal hearing.

Accordingly, the administrative law judge's Attorney Fee Order and the Order Denying Employer's Motion for Reconsideration are reversed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge