

BRB No. 13-0560

JAMES GRABBERT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	DATE ISSUED: <u>June 4, 2014</u>
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Compensation Order Denial of Attorney Fees of David Groeneveld, District Director, United States Department of Labor.

Scott N. Roberts (Law Office of Scott N. Roberts, LLC), Groton, Connecticut, for claimant.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order Denial of Attorney Fees (Case Nos. 01-160182, 01-154287) of District Director David Groeneveld 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). The attorney's fee award 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant sustained a work-related injury to his back on or about October 1, 2001, while working for employer as a welder. In a Decision and Order Awarding Benefits issued on May 6, 2005, Administrative Law Judge Colleen A. Geraghty awarded claimant continuing temporary total disability benefits commencing January 20, 2004, and reasonable and necessary medical treatment for claimant's work-related back condition. 33 U.S.C. §§907, 908(b). Subsequent to the issuance of Judge Geraghty's Decision and Order, a dispute arose regarding employer's continued liability for pain management treatment for claimant's work-related back condition. Specifically, pursuant

to Judge Geraghty's award of medical benefits, claimant sought employer's approval for Lidoderm patches, which were first prescribed by Dr. Cronin on July 9, 2008. The record reflects that, at some point, employer discontinued paying for these patches, and claimant incurred out-of-pocket expenses for their purchase. *See* April 8, 2013 Tr. at 9-17; Oct. 5, 2012 Tr. at 27-28, 31-32, 54; CX 6 (Oct. 5, 2012 hearing exhibit) at 22, 36, 45, 54, 67. Thereafter, a dispute arose as to the medical necessity of a pain pump recommended by Dr. Cronin. *See* April 8, 2013 Tr. at 17-24; Oct. 5, 2012 Tr. at 27, 31-32, 45-46; CX 6 (Oct. 5, 2012 hearing exhibit) at 1, 3, 7, 9, 12, 16, 18. Still another dispute arose on January 19, 2012, when employer filed a Section 22, 33 U.S.C. §922, petition for modification on the ground of a change in condition; employer asserted in this regard that it had established the availability of suitable alternate employment and therefore claimant was not entitled to receive ongoing total disability compensation.

A formal hearing was held before Administrative Law Judge Jonathan C. Calianos (the administrative law judge) on October 5, 2012; the issues in dispute were the nature and extent of claimant's disability and claimant's entitlement to medical treatment pursuant to Section 7 of the Act.¹ *See* Oct. 5, 2012 Tr. at 6, 31-32. A second hearing was held on April 8, 2013, regarding the reasonableness and necessity of the medical treatment sought by claimant, specifically, the Lidoderm patches and the pain pump. *See* April 8, 2013 Tr. at 6-12.

In his Decision and Order Awarding Benefits issued on April 9, 2013, the administrative law judge found, upon consideration of the evidence presented, the records of the October 5, 2012 and April 8, 2013 hearings, and the parties' stipulations, that claimant remains totally disabled and incapable of any employment. *See* April 9, 2013 Decision and Order at 2-3. Consequently, the administrative law judge denied employer's motion for modification, and ordered employer to continue to pay claimant temporary total disability benefits. *Id.* at 3. Pursuant to his Bench Decision in which he found that the Lidoderm patches and the pain pump prescribed for claimant are reasonable and necessary medical care under Section 7, the administrative law judge ordered employer to pay all reasonable and necessary medical expenses related to claimant's work-related back injury, including the Lidoderm patches and the pain pump, and to reimburse claimant for the out-of-pocket expenses he incurred with respect to his purchase of Lidoderm patches for the period from July 9, 2008 through the date of the administrative law judge's Order. *Id.* at 2-3; April 8, 2013 Tr. at 15-17, 22.

¹ At the October 5, 2012 hearing, testimony was taken and medical and vocational evidence was submitted relevant to the issue of whether employer demonstrated a change in condition by establishing the availability of suitable alternate employment. Subsequently, employer conceded that claimant remains incapable of performing alternate employment and, thus, totally disabled. *See* April 8, 2013 Tr. at 6-11.

On February 6, 2013, claimant's counsel submitted a fee petition to the district director seeking an attorney's fee of \$7,381.25, representing 24.25 hours of attorney time at a rate of \$300 per hour and 1.25 hours of paralegal time at a rate of \$85 per hour;² specifically claimant's counsel's fee petition itemized services performed before the district director from November 17, 2005 through January 5, 2012. By letter dated May 17, 2013, Wendy Papagolos, employer's workers' compensation specialist, objected to a fee for services performed prior to January 5, 2012, the date on which employer first received claimant's request for employer's authorization of a pain pump. By letter dated May 21, 2013, claimant's attorney responded to employer's objection. The district director denied claimant's counsel a fee under Section 28(a), (b) of the Act, 33 U.S.C. §928 (a), (b),³ stating that as the continuing temporary total disability benefits awarded by the administrative law judge to claimant are the same as those previously awarded by Judge Geraghty, it did not appear that claimant's counsel obtained any additional benefits for claimant. *See* Compensation Order at 1.

Claimant appeals the district director's denial of an attorney's fee. Employer has not responded to claimant's appeal.

We agree with claimant that the district director erroneously denied a fee to claimant's counsel on the basis that counsel did not gain any additional benefits for his client. It is undisputed that employer initiated Section 22 modification proceedings seeking to establish that claimant was no longer entitled to temporary total disability benefits and that, in the course of those proceedings, claimant was fully successful in defending his entitlement to a continuing award of temporary total disability benefits. This case, in which employer sought to modify claimant's previous compensation award, is analogous to one in which an employer appeals a compensation award; in both instances, the employer initiates proceedings to alter the award of benefits. It is well-established that claimant's counsel is entitled to an attorney's fee payable by employer for defending an award against employer's appeal. *See, e.g., Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 157 (2009); 20 C.F.R. §§702.134, 802.203. Likewise, where, as here, claimant successfully defends his award of benefits against employer's modification request, his counsel is entitled to an employer-paid fee. 33 U.S.C. §928(a), (b); 20 C.F.R. §702.134. Moreover, in this case, claimant successfully established entitlement to

² Claimant's counsel also submitted a fee petition to the administrative law judge to which employer did not respond. The administrative law judge treated the fee request as uncontested and, in a Supplemental Decision and Order Awarding Attorney Fees issued on May 23, 2013, awarded claimant's counsel his requested fee of \$33,661.14 for services performed before the administrative law judge.

³ The district director stated that he had taken into consideration employer's objection to the fee request but he did not address claimant's May 21, 2013 response to employer's objection.

specific medical treatment, namely, Lidoderm patches and a pain pump, which employer previously had refused to authorize. The Board has long held that a claimant who obtains a contested award of medical benefits is entitled to an attorney's fee payable under Section 28 of the Act. *See, e.g., A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30, 34 n.14 (2008); *cf. Barker v. U.S. Dep't of Labor* 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998) (First Circuit reserved the issue of whether medical benefits constitute "compensation" within the meaning of Section 28(b)). For these reasons, we vacate the district director's denial of a fee to claimant's counsel and we remand the case to the district director for further consideration of claimant's counsel's fee petition, employer's objections to the fee request, and claimant's counsel's response to employer's objections.

Accordingly, the district director's denial of an attorney's fee is vacated. The case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge