U.S. Department of Labor

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

BRB Nos. 18-0529
and 18-0529A

TOLETHA ELERYAN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
REGIONAL NAF PERSONNEL OFFICE/BUREAU OF NAVAL PERSONNEL	)	DATE ISSUED: 03/29/2019
	)	
and	)	
	)	
CONTRACT CLAIMS SERVICES, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Supplemental Decision and Order – Awarding Attorney Fees of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Supplemental Decision and Order – Awarding Attorney Fees (2015-LHC-00148) of Administrative Law Judge Alan L. Bergstrom 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

On July 27, 2011, claimant sustained work-related injuries to her back, head, and legs while working for employer. Employer voluntarily paid claimant temporary total disability benefits from September 15, 2011 through August 31, 2012. 33 U.S.C. §908(b). Claimant filed a claim seeking continuing disability benefits after August 31, 2012, as well as medical benefits. Employer controverted the claim, contending that claimant's work-related disability had resolved, but that, if claimant was found to be entitled to additional benefits, any compensation paid between June 21, 2011 and June 9, 2012, was subject to forfeiture pursuant to Section 8(j) of the Act, 33 U.S.C. §908(j).[1]

In his Decision and Order, the administrative law judge concluded that claimant is not entitled to any disability compensation after August 31, 2012, but that claimant is entitled to reimbursement for the cost of medical treatment provided by Dr. Quidgley-Nevares from the date of her injury, July 27, 2011, through March 29, 2012. The administrative law judge also found that Section 8(j) is not applicable, and stated that claimant's counsel could file a petition for an attorney's fee based on his success in obtaining medical benefits for claimant. *Eleryan v. Regional NAF Personnel Office/Bureau of Naval Personnel*, 2015-LHC-00148 (Apr. 24, 2017), slip op. at 51.

Both parties sought reconsideration of the administrative law judge's decision. In her motion, claimant asserted that employer also should be held liable for her counsel's attorney's fee based upon her successful defense of employer's Section 8(j) claim. Employer, in its motion, sought reconsideration of the administrative law judge's findings regarding claimant's entitlement to medical reimbursement and its liability for claimant's counsel's fee based on the medical benefits issue. Without specifically addressing the

[1] Section 8(j) of the Act permits an employer to request that a disabled claimant report her post-injury earnings. If a claimant fails to report earnings from employment or self-employment, or knowingly and willfully omits or understates her earnings, she forfeits her disability benefits for the period of noncompliance. 33 U.S.C. §908(j); *see Cutietta v. Nat'l Steel & Shipbuilding Co.,* 49 BRBS 37 (2015).

merits of the parties' assertions, the administrative law judge denied both motions for reconsideration.

Claimant, without the assistance of counsel, appealed the administrative law judge's decision to the Board which affirmed the decision in its entirety. *Eleryan v. Regional NAF Personnel Office/Bureau of Naval Personnel*, BRB No. 17-0467 (Feb. 20, 2018) (unpub.).

Prior to the Board's decision, on May 30, 2017, claimant's counsel filed with the administrative law judge a petition seeking an attorney's fee of $25,980.60 for work performed before the administrative law judge. In his fee petition, counsel provided argument and evidence in support of his claimed hourly rate, but did not brief the issue of employer's liability for the requested fee. Employer filed objections in response to counsel's fee request, including a contention that because it had timely paid the medical charge of Dr. Quidgley-Nevares prior to the case's referral to the administrative law judge, it cannot be held liable for claimant's counsel's fee. Counsel replied to employer's objections, contending that in addition to the success in obtaining medical benefits, claimant had also "prevailed in defending" employer's Section 8(j) claim. Employer did not further reply.

In his Supplemental Decision and Order, the administrative law judge found that claimant's counsel is not entitled to an attorney's fee for services rendered in pursuit of disability benefits subsequent to August 31, 2012, because claimant was unsuccessful in obtaining such benefits. The administrative law judge also found that counsel is not entitled to a fee for services rendered for the medical reimbursement claim because employer had paid Dr. Quidgley-Nevares's charges prior to the district director's informal conference and claimant did not receive any additional medical benefits. The administrative law judge found, however, that claimant's counsel is entitled to a fee for the work he performed in successfully defending employer's Section 8(j) claim for a forfeiture credit. He determined that counsel performed 2.5 hours of work on that issue which, at an awarded hourly rate of $365, entitles claimant's counsel to a fee of $912.50, payable by employer.

On appeal, claimant's counsel contends the fee awarded for the successful Section 8(j) issue is unreasonably low. Counsel also contends the administrative law judge erred in determining that he is not entitled to a fee for services performed in support of claimant's claim for medical benefits. Employer responds, urging affirmance on these issues. BRB No. 18-0529. In its cross-appeal, employer challenges its liability for claimant's counsel's fee relating to the Section 8(j) forfeiture issue. BRB No. 18-0529A. Claimant did not file a response brief.

The Act provides that if counsel assists a claimant in the successful prosecution of a claim, that attorney is entitled to a reasonable attorney's fee. 33 U.S.C. §928;[2] *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997). The purpose of Section 28 is to authorize such fees against employers "when the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation." *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1354, 27 BRBS 41, 57(CRT) (9th Cir. 1993). Thus, the "Act . . . requires on its face a showing of success on the merits before any fee becomes appropriate." *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1536, 25 BRBS 161, 165(CRT) (D.C. Cir. 1992). In this regard, the United States Court of Appeals for the Ninth Circuit has stated that in order to be "successful" under the Act, a claimant "must obtain some actual relief that materially alters the relationship between the parties by modifying the defendant's behavior in some way that directly benefits the plaintiff." *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1106, 37 BRBS 80, 82(CRT) (9th Cir. 2003) (internal citations omitted). Similarly, the United States Court of Appeals for the Tenth Circuit has stated that Section 28 provides for the award of an attorney's fee "when claimant has gained some economic benefit." *Director, OWCP v. Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991).

The administrative law judge properly found that claimant did not prevail on either of the claims she raised before him. Her claim for ongoing disability benefits subsequent to August 31, 2012, was denied in its entirety. Contrary to claimant's contention on appeal, the award of medical benefits for treatment by Dr. Quidgley-Nevares through March 29, 2012, did not result in any additional reimbursement from employer because employer had paid all outstanding charges prior to the claim's transfer to the Office of Administrative Law Judges.[3] *See Peña-Garcia v. Director, OWCP*, 917 F.3d 61 (1st Cir. 2019) (claimant not successful because "there is no evidence that [employer] refused to pay" for medical procedure); Supp. Decision and Order at 3 – 4. We therefore affirm the administrative law judge's determination that claimant's counsel is not entitled to a fee payable by employer for the services performed in support of claimant's claim for medical benefits.

[2] Section 28 of the Act contains additional requirements for the payment of an attorney's fee to claimant's counsel, but the claimant's "success" in obtaining benefits is an overarching prerequisite.

[3] Prior to March 29, 2012, claimant was seen by Dr. Quidgley-Nevares on one occasion, January 9, 2012. Employer paid the charge for this visit on February 15, 2012, approximately eight months before the first informal conference was held before the district director. *See* Supp. Decision and Order at 4.

Moreover, we agree with employer that claimant's counsel is not entitled to an attorney's fee for the successful defense of the Section 8(j) forfeiture claim.[4] Employer correctly contends that as claimant's claim for disability benefits was denied in its entirety, claimant's successful defense of employer's Section 8(j) claim, while arguably resulting in a tactical victory, did not "modify the defendant's behavior" in a way that benefited claimant. *Richardson*, 336 F.2d at 1106, 36 BRBS at 82(CRT); *see Warren*, 31 BRBS 1; *Davis v. U.S. Dep't of Labor*, 646 F.2d 609, 613 n.6 (D.C. Cir. 1980) (attorney's fee premature; claimant "won a battle, but did not thereby win the war"). Specifically, although Section 8(j) was determined to be inapplicable, claimant did not thereby forestall application of a credit against future benefits because no additional benefits were awarded; thus, claimant did not succeed in establishing her right to additional compensation benefits which would have been subject to forfeiture had Section 8(j) been found applicable. In this regard, we disagree with our dissenting colleague that the non-applicability of Section 8(j) to this claim has resulted in claimant receiving some economic benefit. To the contrary, under the facts presented here, the Act contains no mechanism for the employer to recoup the compensation benefits that it voluntarily paid to claimant, and claimant's failure to prevail on her claim for ongoing disability benefits subsequent to August 31, 2012 effectively nullified any forfeiture action which might have been available to employer pursuant to Section 8(j). Consequently, regardless of the outcome of the Section 8(j) issue, claimant is entitled to retain the benefits voluntarily paid to her by employer despite her lack of success in pursuing her claim for additional compensation benefits.[5]

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[4] We note our dissenting colleague's reliance in part on the administrative law judge's statement that employer did not respond to claimant's contention that his success on the Section 8(j) issue supports fee liability under the Act. *See* Supp. Decision and Order at 6. We observe, however, that the administrative law judge had previously denied claimant's motion for reconsideration on this issue, a fact not addressed by the administrative law judge.

[5] An employer is not entitled to repayment by claimant for benefits to which a claimant ultimately is not entitled. *See Stevedoring Services of Am., Inc. v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992). Employer may recoup such payments only as a credit against subsequent benefits. Section 8(j) is one of three provisions in the Act permitting an employer to credit previously paid compensation. Pursuant to Section 8(j), the employer may recover compensation it has paid only by "a deduction from the compensation payable to the employee." 33 U.S.C. §908(j)(3). *See also* 33 U.S.C. §914(j) (if an employer has made advance payments of compensation, it shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due); 33 U.S.C. §922 (employer may obtain credit from unpaid compensation if modification proceedings result in a decreased compensation rate

As claimant did not obtain an award of benefits, or even an "inchoate" right to benefits under the Act, counsel was not successful before the administrative law judge. *See West v. Port of Portland*, 20 BRBS 162, *aff'd on recon.*, 21 BRBS 87 (1988). "There was no actual relief here, only the possibility of future relief."[6] *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT). Counsel, therefore, did not establish his entitlement to an attorney's fee under the Act. *Id.*; *Warren*, 31 BRBS 1. We therefore reverse the administrative law judge's award of an attorney's fee.[7]

Accordingly, the administrative law judge's Supplemental Decision and Order – Awarding Attorney Fees is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JUDITH S. BOGGS
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's determination that claimant's counsel is not entitled to an employer-paid fee with respect to medical benefits. Claimant was not successful within the meaning of Section 28, 33 U.S.C. §928, because the only medical benefit to which she was found entitled, a visit to Dr. Quidgley-Nevares on January 9, 2012, had already been

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that applies retroactively to past payments). Additionally, we note employer's statement that the applicability of Section 8(j) was raised as an affirmative defense should its challenge to claimant's claim for additional disability benefits prove to be unsuccessful; once claimant's claim for disability benefits was denied in its entirety, this issue became moot.

[6] Should claimant successfully obtain benefits pursuant to Section 22 of the Act, 33 U.S.C. §922, counsel may refile his fee petition based upon the "non-applicability" of Section 8(j)'s forfeiture provision. *See generally Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993).

[7] Therefore, we need not address the other contentions raised in claimant's appeal.

willingly paid by employer eight months before the first informal conference. *See Peña-Garcia v. Director, OWCP*, 917 F.3d 61 (1st Cir. 2019); Supp. Decision and Order at 4.

I dissent, however, from the majority's conclusion that claimant's counsel is not entitled to an employer-paid fee with respect to her successful defense of employer's claim under Section 8(j), 33 U.S.C. §908(j), that she must forfeit three weeks of previously-paid disability compensation.

As an initial matter, employer does not challenge the administrative law judge's finding that it "did not address fee-shifting liability related to [claimant's] successful defense of [e]mployer's §908(j) [forfeiture] claim." Supp. Decision and Order at 6. Because claimant specifically asserted entitlement to an employer-paid attorney's fee based on her success on the Section 8(j) claim, and employer did not contest her entitlement to a fee for that success, I would hold that employer forfeited the argument and cannot raise it for the first time on appeal to the Board. *R.H. [Harvey] v. Baton Rouge Marine Contractors, Inc.*, 43 BRBS 63 (2009), *aff'd sub nom. Louisiana Ins. Guaranty Ass'n v. Director, OWCP*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010)(objections to a fee petition raised for the first time on appeal will not be addressed). Thus, I would affirm the administrative law judge's finding that claimant is entitled to an employer-paid attorney's fee under Section 28 for establishing that her disability compensation payments are not subject to forfeiture. Supp. Decision and Order at 5-6.

Even if it were necessary to address the merits of employer's argument, I would hold that claimant's counsel is entitled to a fee award for her success on employer's forfeiture claim.

Under Section 8(j), an employer can require a disabled employee to report employment or self-employment earnings during any period in which compensation benefits are being paid. 33 U.S.C. §908(j)(1). This information allows the employer to determine whether a reduction or suspension of benefits is appropriate due to an improvement in the disabled employee's wage-earning capacity. *See Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 617, 40 BRBS 5, 9(CRT) (3d Cir. 2006); *see also* 33 U.S.C. §922 (allowing modification of an award due to a change in conditions). Any employee who fails to report her earnings, or who knowingly and willfully omits or understates her earnings, "forfeits [her] right to compensation with respect to any period during which [she] was required to file such report." 33 U.S.C. §908(j)(2). An employer who prevails on a forfeiture claim is entitled to a credit, which can be recouped by reducing future benefits owed to the claimant. 33 U.S.C. §908(j)(3).

As stipulated by the parties, claimant injured her head, back, and legs in July 2011 after slipping on a wet floor while working as a caterer at the Norfolk Naval Base. In June

2012, employer hired a firm to conduct an investigation into claimant, which included internet searches, video surveillance, and contacting her by telephone. EXs 29, 32. Based on information learned in that investigation, employer accused claimant of intentionally omitting from her Section 8(j) report a total of $101.90 in payments she received from working as marketing representative for a product sales company called 5Linx. Emp. Closing Brief at 53 - 61. Employer also accused her of "lying [under oath] at the hearing about [this] outside employment activity" and "evading disclosure" of that employment in her answers to interrogatories which, employer also notes, were made under oath. Thus, although employer had voluntarily paid claimant disability compensation from September 15, 2011 through August 31, 2012, it argued that she must forfeit, due to her alleged dishonesty and misrepresentations, disability compensation she received between July 2, 2011 and June 9, 2012.

The administrative law judge denied employer's request for forfeiture, finding that none of the money claimant received from 5Linx was for work performed after she became disabled: $26.90 was for "residual commissions" for work she did before her injury, while the remaining $75 was for "bonuses" for which employer "introduced no evidence which would establish that [they] were made as a result of work activity by the [c]laimant." Decision and Order at 46. He found that claimant's relationship with 5Linx "did not rise to the level of work," the payments were "not earned income from gainful employment," and thus claimant is not subject to "a forfeiture of disability benefits" under Section 8(j). *Id*.

Employer does not, and indeed cannot, dispute that claimant was wholly successful in defeating its claim for forfeiture under Section 8(j), thus establishing her legal entitlement to the compensation payments she received between July 2, 2011 and June 9, 2012. Employer instead argues that because forfeited benefits are recoverable only as an offset against a future award of compensation, 33 U.S.C. §908(j)(3), claimant's success hinges not on whether she defeated the forfeiture claim, but on whether she prevailed on the separate issue of entitlement to ongoing disability compensation. In other words, claimant was not actually successful because, even though she defeated the Section 8(j) forfeiture claim, employer would not have had a viable way to recoup those benefits even if she had not prevailed.

Employer's argument is not only circular, it misconstrues the meaning of success for purposes of receiving an award of attorney's fees under the Act. The purpose of Section 28 is to award an employer-paid fee "when the existence or extent of liability is controverted and the claimant succeeds in establishing liability *or* obtaining increased compensation." *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1354, 27 BRBS 41, 57(CRT) (9th Cir. 1993) (emphasis added). Thus, in order to be "successful," a claimant "must obtain some actual relief that materially alters the relationship between the parties

by modifying the defendant's behavior in some way that directly benefits the plaintiff." *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1106, 37 BRBS 80, 82(CRT) (9th Cir. 2003) (internal citations omitted).

Here, employer controverted the extent of its liability by arguing that claimant must forfeit disability compensation due to her alleged dishonesty in failing to report $101.90 in income from 5Linx. Claimant succeeded in establishing employer's liability for those benefits, thus increasing her award beyond that which employer was willing to pay, by proving that the disability compensation she received between July 2, 2011 and June 9, 2012 is not subject to forfeiture. Claimant obtained relief to the extent that $900 in disability compensation is not subject to forfeiture, and employer's behavior is modified to the extent that it is not legally entitled to demand forfeiture of that money from claimant. Claimant did not, as employer alleged, engage in dishonesty or lies about her income or employment. Instead, she was not required to report those payments because they were for work performed prior to her injury and prior to her receipt of disability compensation. Claimant thus not only succeeded on the merits, *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992), she "gained some economic benefit" by establishing her legal entitlement to keep $900 in previously-paid benefits.[8] *Director, OWCP v. Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991).

Had employer not disputed its liability for previously-paid disability compensation payments by raising a Section 8(j) forfeiture claim, claimant's lack of success in receiving an award of future disability compensation would have precluded an award of attorney's fees. *See* 33 U.S.C. §928(a); 20 C.F.R. §702.134(a); *West v. Port of Portland*, 20 BRBS 162, *aff'd on recon.,* 21 BRBS 87 (1988). Employer did dispute its liability, however, requiring claimant to employ the services of an attorney to defend her entitlement to those

[8] In *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003), the administrative law judge determined that the claimant was not entitled to additional compensation for his back injury because the injury had resolved two months before the employer ceased paying benefits. Because the claimant's injury had resolved, his assertion that he might receive employer-paid medical benefits in the future "if his back injury resurfaces," presented only the "possibility of future relief." *Id.*, 336 F.3d at 1106, 37 BRBS at 82(CRT). Thus, the court held that he was not "successful," and therefore not entitled to an employer-paid attorney's fee under Section 28, because he did not obtain "actual relief." *Id*. In contrast, claimant's success in this case does not hinge on a hypothetical possibility that she might suffer some additional harm in the future for which employer might be liable; her success is defined by the actual relief she obtained from the administrative law judge's finding that she is definitively not required to forfeit past disability compensation.

benefits and protect her economic and non-economic[9] interests. Claimant was wholly successful on this issue and therefore is entitled to an employer-paid attorney's fee for those services.[10]

Finally, I would reject claimant's argument that the administrative law judge erred in awarding counsel only $912.50 for 2.5 hours of work on this issue. The fee applicant bears the burden of establishing the reasonableness of the number of hours expended and the administrative law judge's award will be set aside only upon a showing that he abused his discretion. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 227, 43 BRBS 67, 70(CRT) (4th Cir. 2009). Despite alleging entitlement to an employer-paid fee based on claimant's success on the Section 8(j) claim, the administrative law judge found that counsel failed to document or identify the services "related to the hours and personnel involved" on that issue. Supp. Decision and Order at 6. With no information from counsel regarding the services performed, the administrative law judge proceeded to identify each task he considered necessary to prevail on this claim and the number of hours that were reasonable for that purpose, ultimately identifying a total 2.5 hours for reviewing documents, discussing the issue with claimant, attending the portion of the hearing during which claimant testified on the issue, and drafting a four-page response to employer's arguments. *Id*. The administrative law judge is in the best position to evaluate the necessity of the services performed before him, and although he could have justified awarding counsel more than 2.5 hours for these services, I cannot say that he abused his discretion.

I therefore would affirm the administrative law judge's decision in its entirety.

GREG J. BUZZARD
Administrative Appeals Judge

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[9] *See Stevedoring Services of Am., Inc. v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992) (suggesting that knowing and willful misrepresentation of income under Section 8(j) might also expose a claimant to criminal penalties under 33 U.S.C. §931).

[10] Although the administrative law judge did not identify whether he was awarding a fee under Section 28(a) or 28(b), remand is not required for him to make a specific finding on this issue. Employer does not raise any allegation of error in this regard, but instead argues only that prevailing on a Section 8(j) claim does not constitute "success" within the meaning of Section 28. *See Nordahl v. Oceanic Butler, Inc.*, 20 BRBS 18 (1987), *aff'd*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988).