



BRB No. 16-0548

RANDOLPH BESSARD	)	
	)	
Claimant-Petitioner	)	
	)	
TONY B. JOBE	)	
(Former attorney for claimant)	)	
	)	
Respondent	)	
	)	
v.	)	
	)	
C & D PRODUCTION SPECIALIST	)	DATE ISSUED: <u>May 10, 2017</u>
COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
LOUISIANA WORKERS'	)	
COMPENSATION CORPORATION	)	
	)	
Employer/Carrier	)	DECISION and ORDER

Appeal of the Second Supplemental Decision and Order Awarding Attorney's Fee and the Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Randolph Bessard, Abbeville, Louisiana.

Tony B. Jobe (Law Offices of Tony B. Jobe), Madisonville, Louisiana.

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

PER CURIAM:

Claimant, without representation, appeals the Second Supplemental Decision and Order Awarding Attorney's Fee and the Order Denying Motion for Reconsideration (2012-LHC-1984) of Administrative Law Judge Lee J. Romero, Jr., 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 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, an abuse of discretion or not in accordance with law. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684 33 BRBS 187 (CRT) (5<sup>th</sup> Cir. 1999). This case is before the Board for the fourth time.

After sustaining a work-related injury on November 21, 1997, claimant retained Mr. Jobe (counsel) as his attorney, who represented him from June 1998 through April 14, 2014. An informal conference was held on January 2, 2003, and the case was forwarded thereafter to the Office of Administrative Law Judges (OALJ). Administrative Law Judge Romero issued a remand order on November 5, 2003, because all the issues were resolved as of that time. However, a dispute subsequently arose regarding medical benefits, and the case was referred back to the OALJ on August 24, 2004.<sup>1</sup> By Order dated January 17, 2006, Administrative Law Judge Avery canceled the scheduled hearing and remanded the case because, again, all issues had been resolved. The case was referred to the OALJ for a third time on August 23, 2012, resulting in Judge Romero's March 21, 2013 decision awarding claimant various periods of temporary total and partial disability benefits from December 23, 1997 through July 21, 2001, permanent total disability benefits from August 27, 2006 and continuing, and medical benefits arising from claimant's work-related back injury. Counsel filed a fee petition with Judge Romero (the administrative law judge). The administrative law judge awarded an attorney's fee to counsel for work performed at the OALJ level during this particular referral, i.e., from August 23, 2012 through the March 21, 2013 decision, in the amount of \$16,132.50, payable by employer. Counsel also filed a fee petition with the district director, who, on July 25, 2013, awarded counsel \$49,040 in attorney's fees, payable by employer pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), for work performed between November 1, 2003 and August 23, 2012.

Claimant terminated his relationship with counsel effective April 14, 2014, and thereafter represented himself in settlement negotiations. By letter dated May 5, 2014, employer and claimant submitted to the district director an application for a Section 8(i) settlement, 33 U.S.C. §908(i), which was approved by the district director on May 8, 2014. Pursuant to the settlement, employer agreed to pay claimant a lump sum of \$625,000 to discharge its liability under the Act. The agreement also recognized that counsel would file a fee petition for services he performed on claimant's behalf, but it stated that employer would not be responsible for those fees.

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<sup>1</sup>Claimant, at this time, sought medical benefits relating to a surgical procedure, reimbursement of medical travel expenses, and psychiatric care.

Counsel filed with the district director an Application and Memorandum of Law in Support of a Lien on Benefits Awarded to Claimant seeking an attorney's fee under Section 28(c) of the Act, 33 U.S.C. §928(c). Counsel sought \$19,238.10, representing \$1,378.10 for attorney services performed in 2014 and paralegal services performed between June 26, 2013 to April 12, 2014 at the district director level, \$11,940 for "uncompensated" work performed during periods between August 24, 2004 and January 17, 2006, when the case was before the OALJ for the second time, and a combined \$5,920 for "uncompensated" pre-controversion services performed between November 5, 2003 and August 24, 2004, as well as for work performed between November 1, 2003 through August 21, 2012, related to travel reimbursement and the removal of medical records from the administrative file under the Privacy Act.

The district director denied counsel's request for fees pertaining to work performed at the OALJ level and awarded counsel an attorney's fee totaling \$1,365, payable by claimant as a lien against his compensation, 33 U.S.C. §928(c). The Board affirmed the district director's award of an attorney's fee of \$1,365, payable under Section 28(c) as a lien against claimant's compensation, as well as the district director's denial of an attorney's fee for work performed by counsel at the OALJ level. Pertinent to this appeal, the Board informed counsel that he "may file an itemized petition with the administrative law judge for consideration of an award of attorney's fees as a lien against claimant's compensation pursuant to Section 28(c)." *Bessard v. C & D Production Specialist Co., Inc.* [*Bessard I*], BRB No. 15-0071 (Aug. 25, 2015), *aff'd on recon. en banc* (Dec. 15, 2015).

Counsel thereafter submitted to the administrative law judge a request for an attorney's fee payable by claimant pursuant to Section 28(c), totaling \$11,100, representing 37 hours of attorney services performed between 2004 and 2006 at an hourly rate of \$300. The administrative law judge issued to claimant an order to show cause why he should not be ordered to pay the requested fee. Claimant, without representation, submitted a response objecting to his liability for any attorney's fees, stating counsel had already received a fee of \$78,182.35 and that counsel's work did not benefit him. In his Second Supplemental Decision and Order Awarding Attorney's Fee dated April 20, 2016, the administrative law judge, after making reductions in the requested hourly rate and itemized entries, awarded counsel a fee totaling \$5,385, payable under Section 28(c), as a lien upon claimant's compensation.<sup>2</sup>

Claimant filed a motion for reconsideration, contending that with monthly expenses totaling nearly \$1,800 it would be a "financial hardship for me to pay

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<sup>2</sup>The administrative law judge found counsel entitled to a fee for 35.9 hours of service at an hourly rate of \$150.

incrementally towards an attorney fee that has been awarded” to counsel. Claimant’s M/R Letter at 2. The administrative law judge ordered counsel to show cause why claimant’s motion for reconsideration should not be granted. Counsel responded that claimant’s financial circumstances do not preclude him from payment of the awarded attorney’s fee, as evidenced by his primary ownership of four properties in Vermilion Parish, Louisiana. The administrative law judge, by Order dated June 17, 2016, denied claimant’s motion for reconsideration.

Claimant filed this appeal. Counsel responds, urging affirmance of the administrative law judge’s attorney’s fee award. Claimant has filed a reply. As claimant appeals without counsel, we will address the findings of the administrative law judge that are adverse to claimant.

We first address the contention that counsel’s fee petition was not timely filed. The administrative law judge stated that counsel’s January 2016 fee petition, for work performed at the OALJ level between 2004-2006, appears to have been filed ten years late. The administrative law judge stated that “[s]uch a dilatory filing should warrant a dismissal” of the fee application, but he nevertheless decided to consider the merits of the fee petition. Second Supplemental Decision and Order Awarding Attorney’s Fee at 3.

Counsel filed a fee petition for these services, incorrectly, with the district director on May 21, 2014. Upon the Board’s affirmance of the district director’s finding that he could not address this portion of the fee petition, counsel filed a fee petition with the administrative law judge in January 2016. Contrary to the administrative law judge’s statement that the fee petition was filed ten years late, claimant’s claim for monetary compensation was not successfully prosecuted until March 2013, and the petition was initially filed, albeit incorrectly with the district director, in May 2014.<sup>3</sup> Although the administrative law judge has discretion to address a late-filed fee petition, we must remand the case for the administrative law judge to reconsider the timeliness issue as it pertains to liability for an attorney’s fee. In this regard, the administrative law judge should address counsel’s apparent failure to seek a fee for those services, payable by employer, at the time he filed his fee petition with the OALJ in 2013.<sup>4</sup> *See* Supplemental

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<sup>3</sup>As it relates to claimant’s potential liability for an attorney’s fee we note that any success claimant had in obtaining medical benefits while the case was at the OALJ level between 2004 and 2006, did not result in any monetary award of compensation. Moreover, the fee petition incorrectly filed with the district director was filed shortly after claimant obtained additional compensation in the 2014 settlement.

<sup>4</sup>As it relates to the June 13, 2013 Supplemental Decision and Order Awarding Attorney’s Fees, counsel states “the [administrative law judge] did not consider charges for time spent before the [administrative law judge] between August 25, 2004 and

Decision and Order Awarding Attorney's Fees dated June 13, 2013. Consequently, we remand this case for the administrative law judge to again address the timeliness of counsel's fee petition and to consider whether employer can be held liable for a fee for work performed in 2004-2006. The administrative law judge must address whether counsel has met the threshold for entitlement to an attorney's fee payable by claimant pursuant to Section 28(c), i.e., counsel is not entitled to an employer-paid attorney's fee under Section 28(a) or 28(b), 33 U.S.C. §928(a), (b), for the services in question performed at the OALJ level between 2004-2006. *See Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 73 (Hall, J., concurring), *aff'g on recon.* 41 BRBS 1 (2007) (Hall, J., dissenting on other grounds), *aff'd*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Thompson v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 71 (2010). If employer can be held liable for counsel's fee,<sup>5</sup> then consideration of claimant's liability under Section 28(c) is unnecessary. For purposes of administrative efficiency, however, we shall address the administrative law judge's findings pursuant to Section 28(c).

If the employer is not liable for an attorney's fee under Section 28(a) or Section 28(b), Section 28(c) provides that the attorney's fee may be assessed against claimant and may be made a lien on claimant's compensation. 33 U.S.C. §928(c); *Simmons v. Huntington Ingalls, Inc.*, 48 BRBS 45 (2014), *aff'd sub nom. Albe v. Director, OWCP*, 600 F. App'x 252 (5th Cir. 2015); *Thompson*, 44 BRBS 71; *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000). In reviewing a request for an attorney's fee pursuant to Section 28(c), the administrative law judge should review counsel's fee petition to determine the necessity of the services provided and the reasonableness of the fee claimed in relation to the degree of success. 20 C.F.R. §702.132.<sup>6</sup> The administrative

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January 17, 2006." *See Counsel's Fee Petition* dated January 13, 2016 at 3. However, counsel does not assert that he submitted at that time an itemized petition for a fee for these services payable by employer pursuant to Section 28(a) or 28(b), 33 U.S.C. §928(a), (b). *See Supplemental Decision and Order Awarding Attorney's Fees* dated June 13, 2013.

<sup>5</sup>If, on remand, the administrative law judge determines that employer can be held liable, he must provide employer with the opportunity to file objections to counsel's fee petition.

<sup>6</sup>20 C.F.R. §702.132(a), in relevant part, states:

Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded, and when the fee is to be assessed against the claimant, shall also take into account the financial circumstances of the claimant.

law judge must also consider the claimant's financial ability to pay the attorney's fee. *Id.* Furthermore, consistent with the express terms of Section 28(c), a fee award must "fix" the lien upon the compensation due claimant and the "manner of payment."<sup>7</sup> *Simmons*, 48 BRBS at 46 (it is counsel's responsibility to have the administrative law judge "fix in the award approving the fee, such lien and manner of payment," in accordance with the requirements of Section 28(c) and the administrative law judge must specify the "manner of payment").

In this case, the administrative law judge did not assess whether the work counsel performed at the OALJ level from 2004-2006 was necessary and whether the fee requested was reasonably commensurate with any necessary work done to achieve success on the medical benefits issue.<sup>8</sup> *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). Moreover, although finding claimant liable for an attorney's fee under Section 28(c), the administrative law judge did not specifically "fix" the "manner of payment" of the attorney's fee.<sup>9</sup> *Simmons*, 48 BRBS at 46. For these reasons, we vacate the administrative law judge's assessment of the attorney's fee against claimant, and remand the case for the administrative law judge to make additional findings. *See Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002). If claimant has additional evidence regarding his financial circumstances, he may submit it to the administrative law judge on remand.

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<sup>7</sup>33 U.S.C. §928(c) provides, in pertinent part, that:

An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the [district director], Board, or court shall fix in the award approving the fee, such lien and manner of payment.

<sup>8</sup>We affirm the administrative law judge's reduction of counsel's requested hourly rate from \$300 to \$150 for work performed between 2004-2006 and reduction of 1.1 hours of "clerical work" in the requested number hours as neither finding is challenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2004).

<sup>9</sup>We note, in this case, there is no further compensation due as employer paid a lump sum to claimant pursuant to the Section 8(i) settlement, 33 U.S.C. §908(i). Consequently, there can be no lien upon the compensation due claimant. Nonetheless, the "manner of payment" was not "fixed."

Accordingly, the administrative law judge's awarded hourly rate of \$150 and rejection of 1.1 of the hours requested by counsel are affirmed. The administrative law judge's award of an attorney's fee pursuant to Section 28(c) is otherwise vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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GREG J. BUZZARD  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge