U.S. Department of Labor

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

BRB No. 17-0438

RAMON RIVERA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/24/2018
	)	
AMERI-FORCE	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	ORDER on MOTION for RECONSIDERATION

GILLIGAN, Administrative Appeals Judge:

Claimant filed a timely Motion for Reconsideration of the Board's decision in this case, *Rivera v. Ameri-Force*, BRB No. 17-0438 (Feb. 28, 2018). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant contends the Board erred in reversing the district director's fee award pursuant to Section 28(b), 33 U.S.C. §928(b). In the alternative, claimant contends the Board should remand the case for the district director to reconsider employer's liability for an attorney's fee under Section 28(a), 33 U.S.C. §928(a). Employer responds, opposing claimant's motion and urging the Board to affirm its decision. We grant claimant's motion for reconsideration, and we grant, in part, the relief requested. 20 C.F.R. §802.409.

Section 28(b) provides an employer 14 days after its receipt of the district director's written recommendation within which to accept such recommendation. If the employer does not accept the recommendation within that timeframe, it may be held liable for claimant's attorney's fee if the other requirements of Section 28(b) are satisfied. 33 U.S.C. §928(b); *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on reh'g* 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000); 20 C.F.R. §702.316.

In this case, employer received the August 24 recommendation on August 29, making September 12 the deadline for accepting the recommendation. However, on September 7, within the 14-day acceptance period, the claims examiner issued another recommendation. Employer accepted that recommendation and, within 14 days of receiving it, on September 16, paid claimant the recommended benefits. Because a written recommendation was issued prior to the expiration of the initial 14-day period, the Board held that a new 14-day period commenced upon employer's receipt of the September 7 recommendation. *Rivera*, slip op. at 4; *see* 20 C.F.R. §§702.134(b), 702.316. We reject claimant's challenges to this holding and affirm the Board's decision that employer is not liable for an attorney's fee under Section 28(b) in this case because it accepted and paid benefits based on the September 7 recommendation.[1] *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT); *Wilson v. Virginia Int'l Terminals,* 40 BRBS 46 (2006).

However, we find merit to claimant's alternate assertion that this case should be remanded for the district director to consider whether employer is liable for an attorney's fee under Section 28(a) because it did not pay medical benefits within 30 days of receiving the notice of the claim in 2015. Claimant states he requested authorization for hearing aids/medical benefits multiple times, including with his 2015 claim for benefits, with the audiologist's report on December 17, 2015, and again on June 7, 13, and 14, 2016, before the informal conference. Although the district director found employer paid benefits within 30 days of receipt of its claim, he did not address whether employer paid medical benefits within 30 days of the receipt of the claim therefor. Comp. Order at 3.[2] Thus, we remand

[1] Claimant also is not entitled to an employer-paid fee under Section 28(b) based on his claim for medical benefits. Presuming the August 24 recommendation for medical benefits remained effective because the September 7 recommendation did not address medical benefits, the September 12 email memorialized the parties' phone conversation wherein employer unconditionally offered claimant $5,000 for medical benefits. This offer timely occurred on the last day of the 14-day period following employer's receipt of the August 24 recommendation, and claimant did not obtain greater medical benefits than employer tendered. Cl. M/Recon at exhs. U-V; Emp. C at exhs. P-Q. Moreover, medical benefits were not addressed as an issue at the informal conference. Thus, at least one pre-requisite for an employer-paid fee under Section 28(b) is missing. *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000).

[2] We reject employer's assertion that claimant cannot raise Section 28(a) as a basis for fee liability in his motion for reconsideration because it was not raised on appeal. Liability under Section 28(a) was raised before the district director. Claimant was not

the case for him to do so. *Taylor v. SSA Cooper, LLC*, 51 BRBS 11 (2017) (fee liability under Section 28(a) is predicated on whether employer paid the disability and/or medical benefits claimed within 30 days of its receipt of the claim); *see also Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991); *Marks v. Trinity Marine Group*, 37 BRBS 117 (2003); *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989).

Accordingly, claimant's motion for reconsideration is granted, and the relief requested is granted in part. 20 C.F.R. §802.409. The case is remanded to the district director for consideration of whether employer is liable for claimant's attorney's fee under Section 28(a). In all other respects, the Board's decision is affirmed.

SO ORDERED.

RYAN GILLIGAN
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I agree with my colleagues' decision to affirm the Board's holding that employer is not liable for an attorney's fee under Section 28(b), 33 U.S.C. §928(b). However, I would reject claimant's contention that employer is liable for a fee under Section 28(a), 33 U.S.C. §928(a), as claimant previously conceded this issue.

Claimant asserts for the first time in these proceedings that employer is liable for his attorney's fee under Section 28(a) because it "failed to authorize medical benefits" within 30 days of receiving notice of the claim. Claimant's Motion for Reconsideration at

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aggrieved by the district director's finding that Section 28(a) is not applicable until the Board reversed the finding that Section 28(b) applies.

13 (citing *Taylor v. SSA Cooper, LLC*, 51 BRBS 11 (2017)).[3] When the matter was before the district director, claimant's argument regarding employer's Section 28(a) liability was limited to his contention that employer failed to pay any disability compensation after receiving notice of the claim. Fee Petition at 3-6. The district director rejected claimant's argument, stating, "The employer received notice of the claim on or about December 11, 2015. The [e]mployer paid benefits on December 21, 2015." Compensation Order at 3. In response to employer's appeal to the Board, claimant specifically conceded that employer's liability for fees under Section 28(a) was "justifiably negate[d]" because it engaged in the "legitimate practice" of "mak[ing] an initial payment of minimal compensation" and thereafter terminating its payment of benefits. Claimant's Response at 16 (citing *Lincoln v. Director*, OWCP, 744 F.3d 911 (4th Cir. 2014), *cert. denied*, 135 S.Ct. 356 (2014)).[4] Thus, the Board did not address the district director's findings with respect to Section 28(a), but presumed for purposes of appeal that this section is not applicable to claimant's fee petition.[5] *Rivera v. Ameri-Force*, BRB No. 17-0438 (Feb. 28, 2018), slip op. at 5 n.4.

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[3] In *Taylor*, the Board held, "[I]f both medical and disability benefits are claimed, and the employer pays one but not the other type of benefit [within 30 days of receiving notice of the claim], the employer is liable for an attorney's fee [under Section 28(a)] if the claimant is later successful in obtaining the denied benefit." *Taylor*, 51 BRBS at 14. Because the employer paid for claimant's medical benefits, but did not make any disability compensation payments within 30 days of receiving notice of the claim, the Board reversed the administrative law judge's denial of an attorney's fee under Section 28(a).

[4] In *Lincoln*, the United States Court of Appeals for the Fourth Circuit held that an "employer is sheltered from fee liability under §928(a)" if it pays "some compensation" that is "directly tied" to the injury. *Lincoln*, 744 F.3d at 915-916. Thus, the court upheld a district director's denial of an employer-paid attorney's fee under Section 28(a) where the employer, within 30 days of receiving notice of the claim, paid the claimant the equivalent of one week of permanent partial disability compensation, and thereafter declined to make additional compensation payments until the claim was settled.

[5] After conceding that employer's liability under Section 28(a) was negated, claimant argued that "Policy Considerations" nevertheless warrant a finding that employer "frustrated the timely resolution of this claim" and therefore should be held liable for his attorney's fee. Claimant's Response Brief at 15-19. The identified policy considerations relate primarily to employer's alleged bad faith in engaging in discovery and other procedural matters, but were unrelated to the question of whether this claim meets the requirements for an employer-paid fee under Section 28(a). Moreover, claimant did not address the fact on which his *Taylor* argument is now based, i.e., that employer failed to

Even assuming that the Board's holding in *Taylor* constitutes a change in law that warrants consideration of claimant's Section 28(a) argument despite its not having been raised before the district director, *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995),[6] *Taylor* was issued on June 30, 2017, and, thus, is not a change in law with respect to the filing of claimant's response to employer's appeal in August 2017. Claimant's concession that this claim does not meet the requirements for an employer-paid fee under Section 28(a) came after the point in time at which he should have been aware of a potential argument relating to employer's alleged failure to authorize medical benefits.[7] Therefore, I would hold that claimant conceded the issue of employer's liability for an attorney's fee under Section 28(a) and cannot raise it for the first time in a motion for reconsideration.[8] *Keller v. U.S.*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995) (concessions made in pleadings are binding on the party making them and may not be controverted on appeal); *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002) (Board will not address an issue raised for the first time in a motion for reconsideration).

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authorize the payment of any medical benefits within 30 days of receiving notice of the claim.

[6] *See also Martinez v. Mathews*, 544 F.2d 1233 (5th Cir. 1976) (court may address a pure question of law raised on appeal if a refusal to consider it would result in a miscarriage of justice); *but see Z.S. v. Science Applications Int'l Corp.,* 42 BRBS 87 (2008) (if the issue raises a mixed question of law and fact and requires making findings of fact, the Board will not address it).

[7] Additionally, claimant did not attempt to supplement his argument in the eight months between the Board's decision in *Taylor* and its issuance of the underlying decision in this case. Even had the Board wanted to raise *sua sponte* the issue addressed in *Taylor*, neither claimant's fee petition before the district director nor his response to employer's appeal before the Board provides sufficient information from which the Board could have concluded that *Taylor* might be at issue in this case based on employer's alleged failure to authorize medical benefits.

[8] Moreover, the Board has held that an appellee need not file a cross-appeal to raise an argument that supports an administrative law judge's ultimate decision but attacks its reasoning, even if the Board's consideration of that argument would result in a remand. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998). Thus, claimant was neither obligated to make any concessions regarding employer's liability under Section 28(a) nor precluded from raising the potential applicability of *Taylor* in his response brief to the Board.

Accordingly, I would deny claimant's motion for reconsideration.

GREG J. BUZZARD
Administrative Appeals Judge