



BRB No. 17-0103

LUIS PEÑA GARCIA)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CALZADILLA CONSTRUCTION)	DATE ISSUED: <u>Sept. 13, 2017</u>
CORPORATION)	
)	
and)	
)	
IMS INSURANCE COMPANY OF)	
PUERTO RICO)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Denying Attorney Fees and Costs and the Order Denying Claimant’s Petition for Reconsideration of Lystra D. Harris, Administrative Law Judge, United States Department of Labor.

Emilio F. Soler, San Juan, Puerto Rico, for claimant.

Manuel Porro-Vizcarra, San Juan, Puerto Rico, for employer/carrier

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney Fees and Costs and the Order Denying Claimant’s Petition for Reconsideration (2011-LDA-00021) of Administrative Law Judge Lystra D. Harris 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 Defense Base Act, 42 U.S.C. §1651 *et*

seq. (the Act).¹ 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his back at work on May 16, 1994, resulting in permanent total disability. In March 2010, Dr. Sanchez-Caso recommended a multi-level lumbar laminectomy, decompression, and spinal fusion. Employer denied claimant's request that it authorize this procedure at Beth Israel Spine Institute in New York, New York (New York). Claimant, therefore, requested that the case be referred to the Office of Administrative Law Judges for a hearing to resolve this dispute. After the parties unsuccessfully attempted to settle this issue, a hearing was conducted in Puerto Rico in September 2015. The parties stipulated that claimant's disability is permanent and total and that employer is providing medical benefits. Decision and Order Awarding Medical Benefits (Decision and Order) at 2. The sole issue before the administrative law judge was whether surgery and rehabilitation services in New York were reasonable and necessary for the treatment of claimant's work injury. *Id.*; *see also* Tr. at 6-7.

In her decision, the administrative law judge found that claimant established that the proposed spinal surgery was necessary for claimant's work-related back injury, which employer had not disputed. Decision and Order at 12; *see* Tr. at 7. The administrative law judge further found that claimant has the right to select his own physician; however, "[N]o evidence was presented that [the surgery] could not be performed in Puerto Rico." *Id.* at 13; *see also id.* at 14. Accordingly, the administrative law judge found that, while claimant is free to undergo the surgery anywhere he chooses, employer is liable only for the costs associated with obtaining the procedure and rehabilitation in Puerto Rico. *Id.* at 15. This decision was not appealed.

Claimant's counsel submitted a fee petition to the administrative law judge in which he sought a fee of \$60,515, representing 232.75 hours at an hourly rate of \$260, plus costs of \$4,000. Employer submitted objections contending, *inter alia*, that it had not disputed claimant's right to undergo the proposed surgery in Puerto Rico, and that claimant did not succeed in securing employer's liability for surgery in New York. Therefore, employer contended that claimant's counsel is not entitled to an attorney's fee.

¹ It appears that this case's designation as a Defense Base Act case may be in error, but was not corrected at the administrative law judge level. *See* Decision and Order Awarding Benefits, 2006-LDA-00140 (July 30, 2009); Order of Remand, 2005-LDA-00002 (Aug. 14, 2006).

The administrative law judge found that claimant was not successful in establishing employer's liability for the cost of back surgery and rehabilitation in New York.² Thus, the administrative law judge concluded that claimant's attorney is not entitled to an attorney's fee and costs. Supplemental Decision and Order Denying Attorney Fees and Costs (Supplemental Decision and Order) at 7. On reconsideration, the administrative law judge rejected claimant's contention that her finding claimant had the right to choose to undergo treatment in New York was a "successful prosecution" entitling claimant's attorney to a fee payable by employer. Order Denying Claimant's Petition for Reconsideration (Order) at 4.³ Claimant's counsel appeals the denial of an attorney's fee.

On appeal, claimant contends that his attorney is entitled to a fee because, as a result of the administrative law judge's decision, he obtained the right to undergo surgery in New York. Employer responds that the administrative law judge properly denied claimant's attorney a fee because claimant did not establish that spinal surgery in New York, rather than at a facility in Puerto Rico, was reasonable for the treatment of his work-related injury.

In her supplemental decision, the administrative law judge found no evidence that employer had refused to authorize the proposed spinal surgery in Puerto Rico. The administrative law judge restated the sole issue she adjudicated as:

Is spinal surgery and post-surgical rehabilitation [in New York] reasonable, necessary or appropriate for treatment of any work-related injury, impairment, or disability suffered by Claimant?

² The administrative law judge specifically found: "Claimant did not gain any additional benefit above beyond what he would have received had he not initiated this claim. Had Carrier asserted that it would refuse to pay for *any portion* of Claimant's surgery and rehabilitation if it were performed in New York, Claimant would have been successful in litigating his case. However, in the present case Carrier never refused to pay for Claimant's surgery." Supplemental Decision and Order at 6.

³ On reconsideration, the administrative law judge noted that her decision "affirmed Claimant's right to obtain surgery in New York" but held that "Claimant's choice of medical provider was unreasonable and Carrier only had to cover the cost of treatment in Puerto Rico" Order at 4. She concluded that claimant's reconsideration petition does not either establish a manifest error of law occurred or present newly discovered evidence which would warrant reconsideration of her previous decisions. *Id.*

Supplemental Decision and Order at 5, *quoting* Decision and Order at 3. As the administrative law judge found employer is not liable for the cost of treatment in New York, she concluded that claimant did not prevail in his claim by virtue of the proceedings before her. *Id.* at 6. Thus, the administrative law judge concluded that claimant's lack of successful prosecution precludes his attorney's entitlement to a fee under the Act.

On claimant's motion for reconsideration, the administrative law judge rejected claimant's contention that, by virtue of her decision, he had obtained the right to choose a medical provider or physician for the proposed surgery, and thus successfully prosecuted the claim. Order at 3-4. The administrative law judge rejected this contention, finding that claimant's right to choose a medical provider is limited by his burden of showing that the treatment proposed is reasonable and necessary, and that, in this case, claimant did not establish that treatment in New York was reasonable and necessary. *Id.* at 4. Thus, the administrative law judge denied claimant's motion for reconsideration and affirmed her denial of an attorney's fee.

In order to be entitled to an attorney's fee under Section 28 of the Act, 33 U.S.C. §928, claimant must, at a minimum, secure additional compensation or a benefit that the employer contested.⁴ *Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998) (declining to address whether medical benefits are "additional compensation" under Section 28(b) because claimant did not obtain contested medical benefits); *see also Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). Claimant argues that his obtaining the right to choose to have his treatment in New York entitles his attorney to a fee. We reject claimant's argument.

The only issue addressed in this case concerned employer's liability for medical treatment in New York. Claimant did not prevail on this issue. Claimant's "right to choose" to have the surgery in New York is not a "victory" under the Act, because employer's liability is limited to the cost of surgery and rehabilitation in Puerto Rico, which employer had agreed to before the proceedings were initiated at the Office of Administrative Law Judges.⁵ Thus, claimant did not obtain a tangible benefit that

⁴ Section 28(a) refers to a "successful prosecution of the claim." 33 U.S.C. §928(a). Section 28(b) requires the claimant to obtain compensation greater than the amount paid or tendered by employer. 33 U.S.C. §928(b).

⁵ Claimant does not contest the administrative law judge's finding that the carrier did not refuse to pay for claimant's surgery, and the carrier did not assert "that it would refuse to pay for *any portion* of Claimant's surgery and rehabilitation if it were performed in New York." Supplemental Decision and Order at 6.

employer had denied him.⁶ *See Barker*, 138 F.3d 431, 32 BRBS 171(CRT); *Clark*, 38 BRBS 67. Therefore, the administrative law judge properly denied claimant's counsel an attorney's fee.

Accordingly, the administrative law judge's Supplemental Decision and Order Denying Attorney Fees and Costs and the Order Denying Claimant's Petition for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁶ A claimant has a statutory right to choose an attending physician. 33 U.S.C. §907(b); 20 C.F.R. §702.403. However, a claimant may not thereafter change physicians without obtaining the prior consent of the district director or employer. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406(a) (consent "shall be given" where initial choice is not an appropriate specialist). The administrative law judge rationally found, on the facts of this case, that employer's non-liability for treatment in New York undermined any (questionable) "success" claimant had in obtaining the ability to elect to have treatment in New York.