

BRB Nos. 96-1254
and 96-1254A

SHIRLEY SELLERS)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	DATE ISSUED:
)	
WASHINGTON HOSPITAL CENTER)	
)	
Self-Insured)	
Employer-Petitioner))	
Cross-Respondent)	DECISION and ORDER

Appeal of the Supplemental Award of Attorney Fees of Charles L. Green, District Director, United States Department of Labor.

Shirley Sellers, Upper Marlboro, Maryland, *pro se*.

Richard W. Galiher, Jr. (Galiher, Clarke & Galiher), Rockville, Maryland, for claimant.

Williams S. Sands, Jr. (Duncan & Hopkins, P.C.), Alexandria, Virginia, for employer.

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

PER CURIUM:

Employer appeals, and claimant cross-appeals without legal representation, the Supplemental Award of Attorney Fees (OWCP No. 40-176978) of District Director Charles L. Green 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973)(the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. See, e.g., *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

In a Compensation Order issued on March 22, 1989, claimant was initially awarded

compensation for a permanent partial disability due to an injury to her right knee and back she sustained during the course of her employment. *Sellers v. Washington Hospital Center*, Case No. 40-176978 (March 22, 1989). Pursuant to Section 22 of the Act, 33 U.S.C. §922, claimant sought modification of the 1989 award requesting that her benefits payments be increased and that employer accept liability for medical expenses incurred for psychiatric services. Administrative Law Judge Eric Feirtag denied claimant's request for an increase in her permanent partial disability benefits payments as there was insufficient evidence to support a finding of an increase in claimant's loss of earning capacity. *Sellers v. Washington Hospital Center*, 92-DCW-27 (Sept. 29, 1993). However, Judge Feirtag did find that claimant's psychiatric treatment was causally related to her work injury, and thus ordered employer to pay for the treatment. *Id.* This decision was appealed to the Board on November 5, 1993; however, prior to the Board's consideration of that appeal, claimant requested that the case be remanded to the district director for consideration of a second petition for modification. *Sellers v. Washington Hospital Center*, BRB No. 94-367 (Sept. 15, 1994). In her second petition for modification, claimant requested permanent total disability benefits from November 21, 1994, which Judge Feirtag awarded in a decision dated February 8, 1995. *Sellers v. Washington Hospital Center*, 92-DCW-27 (Feb. 8, 1995).

Subsequent to the issuance of the administrative law judge's decision, claimant's counsel submitted a petition for a fee to be assessed against claimant for work performed before the district director between the dates of August 12, 1983 and January 30, 1989, and November 12, 1993, and June 15, 1994, requesting \$8,454.50, representing 50.4 hours of legal services at \$150 per hour, 4.7 hours at \$175 per hour, and 1.2 hours at \$60 per hour. Claimant's counsel also submitted a petition for a fee to be assessed against employer for work performed before the district director between the dates of March 23, 1989 and March 31, 1992, requesting \$2,035 representing 5.4 hours of legal services at the hourly rate of \$150 and 7 hours at \$175 per hour.

In a Supplemental Award of Attorney Fees, the district director found that claimant's counsel's fee petition was reasonable and awarded counsel a fee to be assessed against employer in the amount of \$2,035, representing 5.4 hours of legal services at \$150 per hour and 7 hours of legal services at \$175 per hour. The district director also assessed a fee against claimant in the amount of \$5,630, representing 56.3 legal services at the hourly rate of \$100.

On appeal, employer contends that the district director erred in his award of an attorney's fee as he did not address employer's objections, which have been incorporated into this appeal. In addition, employer contends that the fee award is not commensurate with claimant's success, and that the fee petition fails to meet the requirements of the regulations. On cross-appeal, claimant, without legal representation, contends that she was never given notice of a pending fee petition for which she would be potentially liable, and that the district director did not consider her ability to pay the fee award.

Section 28(a) of the Act, 33 U.S.C. §928(a), provides that the employer is responsible for a reasonable attorney's fee in addition to the compensation award when it

denies claimant's entitlement to any compensation and thereafter claimant utilizes the services of an attorney who engages in a successful prosecution of the claim. See generally *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). An attorney's fee can be assessed against the employer pursuant to Section 28(b), 33 U.S.C. §928(b), if claimant obtains an award which is greater than the amount employer previously paid or tendered. See generally *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986)(*en banc*). If the employer is not liable for an attorney's fee, or a portion thereof, under either Section 28(a) or (b), the attorney's fee may be assessed against claimant as lien on the compensation award. See 33 U.S.C. §928(c); *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987). However, when assessing the fee against claimant, the district director must consider the financial circumstances of claimant in his award. See 20 C.F.R. §702.132(a). In addition, due process requires that a fee request be served on the other parties and that the parties be given a reasonable time to respond. 20 C.F.R. §702.132(a); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990)(Lawrence, J., dissenting on other grounds).

We must vacate the district director's fee award against claimant. Counsel's petition for an attorney's fee to be assessed against claimant indicates service only on employer's counsel, and not on claimant herself. Thus, claimant's due process rights were violated, and the district director is instructed on remand to allow claimant a reasonable opportunity to respond to the fee petition before a new award is issued. See *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). In addition, the district director did not discuss whether claimant can properly be held liable for any attorney's fee, as he did not first address employer's liability for the fee under Section 28(a) and (b). Only if the provisions of subsections (a) or (b) are not satisfied can claimant be held liable for the fee. *Ryan*, 19 BRBS at 212. If claimant is found liable for any part of counsel's fee, the district director must consider claimant's financial circumstances in awarding a reasonable fee. 20 C.F.R. §702.132(a).

Similarly, we must vacate the fee assessed against employer as employer correctly contends on appeal that the district director erred in failing to address its objections below. The district director found that "[b]ased upon consideration of the quality of representation, the issues involved and the results obtained," the fee requested was reasonable. The district director does not address employer's objections to specific services, counsel's hourly rate, or employer's contentions regarding whether the fee request is commensurate with the award of benefits. See *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992). Where a district director has not set forth a sufficient explanation of his reasons for awarding a fee, the Board is prevented from reviewing the award and will remand the case to the district director for an explanation. See, e.g., *Devine*, 23 BRBS at 288; *Speedy v. General Dynamics Corp.*, 15 BRBS 448 (1983). Therefore, the district director's award of an attorney's fee to be assessed against employer must be vacated, and the district director is instructed on remand to discuss employer's objections to the fee request prior to entering an award. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Accordingly, the Supplemental Award of Attorney Fees of the district director is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge