

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-052

**ALMA ATKINS,
Claimant–Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer–Petitioner.**

Appeal from a March 4, 2015 Order awarding an Attorney’s Fee by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 12-012, PSWCP No. 76103-20001-1999-0057

(Decided September 11, 2015)

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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Harold Levi for Claimant
Andrea Comentale for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This matter is an appeal of an attorney’s fee award that was issued in the above noted case on March 4, 2015. The award was made following Respondent’s having prevailed at a formal hearing before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services. That hearing, conducted on April 17, 2012, resulted in the issuance of a Compensation Order on January 31, 2014 (the CO), in which Respondent’s claim for relief was granted in full.

Petitioner appealed the CO to the CRB on December 22, 2014.

On December 15, 2014 Respondent filed a petition for an attorney’s fee award before the ALJ in AHD. Petitioner filed an opposition to the fee petition in AHD, seeking dismissal of the fee

petition, arguing that it was premature and citing *Dixon-Cherry v. District of Columbia Public Schools*, CRB No. 12-173, AHD No. PBL 11-039 (November 28, 2012) (*Dixon-Cherry*).

Citing *Murray v. District of Columbia Department of Youth Rehabilitation Services*, CRB No. 14-088, AHD No. PBL 13-037, DCP No. 30100886102-0001 (November 26, 2014)(*Murray*), the ALJ granted the requested fee.

On March 25, 2014, the CRB issued a Decision and Order affirming the CO.

On April 2, 2015, Petitioner filed an Application for Review and Memorandum in support thereof (Petitioner's Brief) with the CRB, appealing the fee order, arguing that the award was premature.

Respondent has filed an Opposition to Application for Review and memorandum in support thereof (Respondent's Brief), arguing that the award is consistent with the law.

Because the time for consideration of a fee award was not ripe at time the petition for the award was filed and at the time the Order making the award was issued, the Order of March 4, 2015 is vacated. Because the CRB has now decided the appeal of the CO and in that Decision and Order the CO was affirmed the matter shall be remanded for consideration of the fee petition.

ANALYSIS

As an initial matter, in our review of an appeal of an Order from the AHD which is not based upon an evidentiary record, the Board must affirm said decision unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See*, 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW § 51.03 (2001).

Petitioner in its Brief argues:

[*Dixon-Cherry*] was an appeal from an order awarding attorney's fees following the issuance of a compensation order that was appealed to the CRB. In reversing the order awarding attorney's fees, the CRB stated:

We note that on September 21, 2012, the date of the award of attorney's fee, the CO was on appeal and pending resolution by the CRB. As the CO under review may be affirmed, modified, or remanded, the CO was not a final order that could serve as a basis for a fee petition. It was premature for the ALJ to award attorney's fee.

Dixon-Cherry at 2.

Petitioner's Brief, p. 3.

The ALJ misreads the CRB's holding in *Murray*. That case stands for the proposition that an attorney's fee must be filed within 30 days of the issuance of a Compensation Order. Quoting *Murray*:

Thus, under the regulations [7 DCMR § 32.1], a claim for an attorney's fee must be filed within 30 days of the *issuance* of a Compensation Order. There is no provision either permitting or requiring the extension of that time period. There is no regulatory or statutory provision permitting or requiring that the fee petition be filed upon the expiration of the time for filing an appeal, nor is there any provision of the [Private Sector Workers' Compensation Act] or the regulations permitting or requiring that the time for filing a request for an attorney's fee be made only after the Compensation Order becomes final.

Murray, supra, p. 3 (emphasis in original).

We are aware that the appeal of the CO resulted in a CRB Decision and Order affirming the CO on March 25, 2015. *Atkins v. District of Columbia Department of Corrections*, CRB No. 15-153, AHD No. PBL 12-012, PSWCP No. 76103-20001-1999-0057 (March 25, 2015). Nonetheless, the fee award was premature in that the appeal was pending at the time it was issued. We have no indication that the Decision and Order affirming the CO has been appealed to the District of Columbia Court of Appeals (DCCA).

In her Opposition, Claimant argues that the current rules requiring the filing of a fee petition within 30 days of the issuance of a Compensation Order yet requiring that a Compensation Order be final and all appeals exhausted (or the time for such appeals has run without an appeal being filed) prior to an award are "traps for the unwary" and serve no purpose. We disagree.

Filing a fee petition within 30 days of the issuance of a Compensation Order promotes the orderly and timely proceeding of litigation. Requiring finality of a decision upon which the petition is based prior to an award of an attorney's fee promotes administrative economy and avoids the unwieldy specter of granting fee awards, having them paid, and then if a decision is reversed (which is not infrequent) requiring repayment of the fee, or some complex system of accounting for and crediting fees awarded, paid, then ultimately found to have been unwarranted.¹

The award of the attorney's fee while the underlying CO was on appeal to the CRB was an abuse of discretion and not in accordance with the law. The matter is now final, however, inasmuch as there has been no appeal of the Decision and Order to the DCCA. Thus, the time for consideration of the fee petition has arrived.

CONCLUSION AND ORDER

The award of the attorney's fee while the underlying CO on appeal to the CRB was an abuse of discretion and not in accordance with the law. The Order is VACATAED and the matter is

¹ In cases such as this, however, we note that it might be advisable for the ALJ to officially note that the fee petition has been filed and will be taken under advisement pending the outcome of any appeal taken.

remanded to the Administrative Hearings Division for such further proceedings in consideration of the fee petition are appropriate.

So ordered.