GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

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DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 OCT 1 PM 1 40

CRB No. 15-128

GARY GRUENWALD,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA HOUSING AUTHORITY,
Self-Insured Employer-Petitioner.

Appeal from a July 14, 2015 Order Awarding Attorney's Fee
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL-13-039, DCP No. 761001-00101999-0003

(Decided October 1, 2015)

Bruce M. Bender for Claimant
Andrea G. Comentale for Employer

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge* and Heather C. Leslie and Jeffrey P. Russell, *Administrative Appeals Judges.*

LAWRENCE D. TARR for the Compensation Review Board.

DECISION AND ORDER VACATING ATTORNEY'S FEE AWARD

This case is before the Compensation Review Board ("CRB") on the Self-Insured Employer's Application for Review ("AFR") of the July 14, 2014 Order Awarding Attorney's Fee. Because we find the entry of the Order was not in accordance with the law, we VACATE it.

The relevant facts for this appeal are that Claimant, an administrative assistant, was injured on October 1, 1998 when he slipped and fell against a door, injuring his left shoulder and arm. Employer voluntarily accepted his claim for workers' compensation benefits and Claimant received permanent partial disability benefits for the 22.5% disability. Payments ended on February 7, 2005.

On February 19, 2013, Claimant requested that Employer increase his award but Employer declined. After receiving the Notice of Determination denying his request, Claimant filed for a formal hearing. A full evidentiary hearing was held before an administrative law judge ("ALJ")

on July 29, 2013. The ALJ issued his Compensation Order ("CO") on March 27, 2015 and determined Claimant was entitled to an additional 20% in permanent partial disability benefits. Employer filed its appeal of the ALJ's March 27, 2015 CO with the Compensation Review Board on April 27, 2015.

On April 23, 2015, Claimant's counsel filed with the ALJ a petition for an award of an attorney's fee. In response to a Show Cause Order, on May 27, 2015 Employer argued to the ALJ that consideration of the attorney's fee petition was not proper because of the pending appeal at the CRB. On July 14, 2015, the ALJ granted Claimant's counsel's fee petition and entered an Order requiring Employer to pay counsel the attorney's fee that he requested.

On July 21, 2015 the CRB decided the Employer's appeal of the March 27. 2015 CO and held that the ALJ lacked authority to award the additional permanent partial disability benefits. The CRB found the permanent partial disability benefit award was not in accordance with the applicable law and reversed and vacated the ALJ's award.

On August 13, 2015 Employer filed the present Application for Review ("AFR") appealing the ALJ's May 27, 2015 award of attorney's fee. Memoranda in support of and in opposition to Employer's AFR have been filed.

ANALYSIS

In our review of an appeal of an Order from the AHD which is not based upon an evidentiary record, the Board must affirm the Order 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).

In the case at bar, the ALJ entered an Order requiring Employer to pay Claimant's counsel an attorney's fee. The ALJ's Order is directly in conflict with the CRB's decision, issued almost three years ago, *Dixon-Cherry v D.C. Public Schools,* CRB No. 12-173, AHD PBL No. 11-039 (November 28, 2012) and our recent decision, *Atkins v. D.C. Department of Corrections*, CRB 15-052, AHD No. PBL 12-012, DCP No. 76103-20001-1999-0057 (September 11, 2015).

The facts in *Dixon-Cherry* parallel the facts in this case. On July 19, 2012, an ALJ entered an award in the claimant's behalf for temporary total disability benefits. On July 25, 2012, the claimant's counsel petitioned for a fee award. On August 20, 2012, the employer appealed the CO. On September 21, 2012, the ALJ awarded an attorney's fee. Employer appealed the assessment of the fee on October 22, 2012.

The CRB held

> Before addressing the merits of the Employer's appeal, 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, revised, or remanded,[1] the CO was not a final order that could serve as

[1] D.C. Code § 1-623.28(a).

> the basis for a fee petition. It was premature for the ALJ to award an attorney's fee.
>
> The CRB, on November 27, 2012, issued a decision, affirming the Compensation Order. That decision may, or may not, be appealed to the District of Columbia Court of Appeals. As such, we must vacate the September 21, 2012 award. The Claimant may, after all appeals are pursued and exhausted, resubmit the fee petition within the applicable statutory guidelines.

Id. at 3-4.

The ALJ did not cite nor distinguish the *Dixon-Cherry* decision. Instead, the ALJ relied on *Carrington v. D. C. Public Schools*, CRB No. 13-093, AHD No. PBL No. 12-041, DCP No. 30100942563-0001 (August 29, 2013) and on 7 DCMR § 260.1, neither of which relate to an attorney's fee. That authority relates to a stay of a compensation order and both stand for the proposition that absent a stay, the filing of an AFR does not relieve an employer from paying benefits awarded to a claimant.

The ALJ's award of an attorney's fee while an appeal was pending is not in accordance with the law and is hereby VACATED.[2]

To promote administrative economy, we should identify whether Claimant's attorney may apply for attorney's fees for his legal services at AHD in obtaining the award that the CRB reversed and vacated.[3]

An award of an attorney's fee against employer is authorized upon the successful prosecution of a claim before AHD or as a result of subsequent court appeal. D.C. Code § 1-623.27(b)(2) provides:

> If a person utilizes the services of an attorney-at-law in the successful prosecution of his or her claim under § 1-623.24(b) or before any court for review of any actions, award, order or decisions, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee . . . which fee award shall be paid directly by the Mayor or his or her designee to the attorney for the claimant. . . .

D.C. Code § 1-623.27(b)(1), defines what is meant by the "successful prosecution" of a claim:

> For the purposes of this subsection, the term 'successful prosecution' means obtaining an award of compensation that exceeds the amount that was previously awarded, offered or determined. The term 'successful prosecution' includes a reinstatement or partial reinstatement of benefits which are reduced or terminated.

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[2] Since an attorney has 30 days from decision to apply for a fee, the proper procedure would have been for the ALJ to take the fee petition under advisement.

[3] Although the CRB usually only considers those issues raised in the appeal, the CRB may consider other issues when the interests of justice so require. *See Jerome Mgt., Inc. v. D.C. Rental Housing Commission*, 682 A 2d 178, 229 n. 5 "Normally 'contentions not urged at the administrative level may not form the basis for overturning the decision on review." But 'courts may show a measure of flexibility in this regard when the interests of justice so require'" (quoting *Goodman v. D.C. Rental Housing Commission*, 573 A2d 1293,1301 (D.C. 1990).

The CRB finds that the determination as to whether there has been a successful prosecution is a determination that is made when all appeals of the claim before the ALJ have been concluded. When that determination is made, a fee may be awarded for all adjudicatory levels.

We agree with, and adopt as our own, the holding of the United States Department of Labor:

> In general, where there has been a successful prosecution of the claim, a claimant's attorney is entitled to compensation for all necessary work performed. Counsel is entitled to fees for all services rendered claimant at each level of the adjudication process, even if unsuccessful at a particular level, so long as counsel is ultimately successful in prosecuting a claim. However, where there has not been a successful prosecution, counsel is not entitled to a fee.

Clark v. Director, Office of Workers' Compensation Programs, 9 BLR 1-211 (1986),

The CRB acknowledges that our decision represents a departure from prior authority as set forth in *Atkins v. D.C. Department of Corrections*, *supra,* and *Lyles v. D.C. Department of Mental Health*, CRB No. 11-099(A) (February 13, 2013).

We have considered the matter further, and have come to the conclusion that deciding whether there has been a "successful prosecution" must take into account the final outcome of a claim, not the result of litigation at any given stage prior to the final determination.

Were it otherwise, there would be the illogical situation where a claimant's attorney would be denied an attorney's fee when the claim for benefits was denied at both AHD and the CRB, but the denial of benefits was ultimately reversed by the District of Columbia Court of Appeals. Similarly, under the prior authority, an attorney would be awarded a fee if a claimant prevails at AHD but the award of benefits is ultimately reversed by the CRB and the reversal is upheld by the Court of Appeals. The decision today avoids these incongruous outcomes.

Therefore, in the context of this litigation, Claimant's counsel would not be entitled to fees because counsel ultimately was not successful in prosecuting the claim.[4]

CONCLUSION

The July 14, 2005 Order Awarding Attorney's Fee is not in accordance with the law and is VACATED.

So ordered.

[4] The CRB has been informed that Claimant appealed the July 21, 2015 decision that reversed and vacated the ALJ's award of additional permanent partial disability benefits. Therefore, the definitive determination as to whether there has been a successful prosecution must wait for the DCCA's decision. On the record as it now stands, Claimant's counsel has not successfully prosecuted the claim.