

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 07-004(A)(1)

In Re: Application for Approval of an Attorney's Fee

**FRANK HINES,
Claimant–Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer -Respondent**

Benjamin A. Klopman, Esquire for the Claimant
Sarah O. Rollman, Esquire for the Employer

Before: JEFFREY P. RUSSELL and HEATHER C. LESLIE, *Administrative Appeals Judges*, and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

ORDER DISMISSING PETITION FOR ATTORNEY'S FEE

This matter has a long and complex procedural history, most of which is not relevant to the pending Petition for Attorney for Approval of a Reasonable Attorney's Fee. Only such history as is relevant will be recounted.

An Administrative Law Judge (ALJ) in the hearings section in the Department of Employment Services (DOES) issued a Compensation Order on September 13, 2006. In that Compensation Order, the ALJ (1) denied Claimant's request for imposition of a bad faith penalty against WMATA for failure to pay a medical bill from a Dr. Harvey Fernbach, (2) ordered that Dr. Fernbach's bill nonetheless be paid and (3) granted WMATA's request that claimant Frank Hines's temporary total disability benefits be suspended for non-cooperation with vocational rehabilitation.

Mr. Hines and WMATA both appealed the Compensation Order to the Compensation Review Board (CRB). On December 22, 2006, a Decision and Remand Order was issued by the CRB, with the undersigned as Panel Chair, and with then Associate Administrative Appeals Judge Floyd Lewis and then Chief Administrative Appeals Judge E. Cooper Brown as Panel members joining. In the Decision and Remand Order, the CRB affirmed the denial of the penalty

assessment, but vacated the order to pay Dr. Fernbach's bill and the suspension of benefits. The matter was remanded with instructions to the ALJ to further consider those two issues, which were framed within the context of the question of whether there had been a change of conditions since the issuance of a prior Compensation Order in which a request for suspension of benefits had been denied by a different ALJ. *Hines v. WMATA*, CRB No. 07-004, AHD No. 98-263D, OWC No. 525288 (December 22, 2006).

In September 2007, Mr. Hines through counsel filed a fee petition with the CRB, seeking an award of an attorney's fee for work performed in the appeal to the CRB, and seeking further that the award be assessed against WMATA. On September 26, 2007, the CRB issued a Show Cause Order, directing that WMATA file any objection to the fee petition.

On September 28, 2007, Mr. Hines, through counsel, submitted a letter seeking to withdraw the fee petition without prejudice with the consent of WMATA, due to the recognition that the petition was premature given the remand to AHD for further consideration. On October 16, 2007, WMATA filed a response to the show cause order, reiterating its consent to the withdrawal of the fee petition without prejudice, and on November 20, 2007, the CRB issued an Order Denying Fee Petition Without Prejudice, denying the petition without prejudice as being premature, and citing D.C. Code §32-1530 (a). At that time, WMATA was represented by Alan D. Sundberg, Esquire, of the law firm of Freidlander, Mislner, Sloan, Kletzkun & Ochsman, PLLC.

On July 14, 2009, WMATA advised that its representation by Mr. Sundberg's firm was being ended, and that representation would thereafter be provided by Sara Rollman, Esquire, and WMATA's Office of General Counsel.

On February 26, 2010 the ALJ issued a Compensation Order on Remand. In it, the ALJ recited a claim for relief which, given the posture of the case, was inaccurate inasmuch as it repeated the claim for a penalty. It did state that Mr. Hines was seeking payment of Dr. Fernbach's bills and that WMATA sought suspension of benefits for non-cooperation with vocational rehabilitation. However, in identifying the "Issue" to be resolved, the ALJ identified a single question: "Is Employer liable for payment of Dr. Harvey Fernbach's fees in connection with claimant's treatment?" and made no reference to the non-cooperation issue.

The only "Conclusion of Law" the ALJ made was that WMATA "impliedly authorized claimant's psychiatric treatment by Dr. Fernbach", and the only order issued was that WMATA "remains liable for reimbursement of all medical expenses relative to claimant's treatment by Dr. Fernbach."

There is no record of either party appealing this Compensation Order on Remand. Thus, the CRB's vacating of the benefits suspension remained in place, and Mr. Hines has continued to receive ongoing temporary total disability benefits.

On July 23, 2013, Mr. Hines, through counsel, filed a Petition for Approval of a Reasonable Attorney's Fee with some additional time entries for services claimed to have performed before

the CRB subsequent to the prior fee petition being filed, and specifying an updated total of the value of temporary total disability benefits Mr. Hines has received due to their being reinstated.

On July 24, 2013, WMATA filed Employer's Opposition to Claimant's Application for Attorney's Fees. In it, WMATA raises no objection to the amount of the fee request and does not challenge the reasonableness of the time claimed to have been expended, the reasonableness of the hourly rate for which the fees sought would be calculated, the claim that counsel's representation of Mr. Hines before the CRB is properly to be considered a successful prosecution of the claim under circumstances that warrant an assessment against the employer, or the value of the benefits obtained by counsel on Mr. Hines's behalf through that successful prosecution.

The sole objection raised by WMATA is timeliness. Citing 7 DCMR § 224.7, WMATA maintains that "the application must be filed within six months after the compensation order is issued or a claim for benefits has become final or all appeals have been exhausted". WMATA argues that:

In the present case, the last order regarding temporary total disability benefits became final 30 days after the Compensation Review Board issued its September 16, 2006 decision. The fee petition in this case was not filed until July 18, 2013. The fee petition is almost seven years beyond the deadline.

There is no September 16, 2006 CRB decision. September 16, 2006 is the date of the Compensation Order in which the ALJ suspended Mr. Hines's benefits. That is the Compensation Order that was appealed to the CRB when, on December 22, 2006, the suspension was reversed and the matter remanded for further consideration. It shall be assumed that WMATA's argument is a six month period commenced on December 22, 2006 within which a fee petition had to be filed, being June 22, 2006. The July 23, 2013 fee petition was filed, therefore, according to WMATA, more than 6 years too late. Notably, the opposition makes no reference to the CRB order of November 20, 2007 deeming the fee petition premature as of that time, because there was as yet no Compensation Order on Remand disposing of the issue surrounding the suspension of benefits.

On July 31, 2013, Mr. Hines, through counsel, filed Petitioner's Response to Employer's Opposition to Petition for a Reasonable Attorney's Fee. In the Response, Mr. Hines asserts that the parties had agreed that WMATA would not raise timeliness as an issue while the remand was pending, and appended a letter from WMATA's prior counsel stating:

As discussed, I had intended to oppose the petition for attorney's fee, on the ground that the fee petition at this time is not ripe for adjudication, given the remand status of this case to the Administrative Law Judge.

Further to our discussion, it is my understanding that you are willing to withdraw the pending petition for attorney's fee at this time, subject to re-filing after we receive the new Compensation Order on Remand and resolution of the appeal to the Compensation Review Board (if any). In return, my client will specifically agree not to raise any objection to that attorney's fee petition on the basis of

timeliness of the filing of attorney's fee petition. In essence, we would agree that the time for filing the petition for attorney's fee will commence with the issuance of the Compensation Order on Remand, or the resolution of any subsequent appeal.

Exhibit 3, Petitioner's Response.

Although it may make no difference to the outcome, we must correct WMATA's assertion that the relevant time within which to file a fee petition for work performed before the CRB is 7 DCMR § 224.7. That regulation governs fee petitions following the issuance of Compensation Orders. The governing regulation for fee petitions concerning work performed before the CRB is 7 DCMR § 269.2, which provides:

Notwithstanding the time limits proscribed by 7 DCMR section 109 or DCMR section 224, an application for the Board of an award of an attorney's fee (including, where appropriate, request for reimbursement of costs) for legal work performed before the Board on behalf of a successful claimant shall be filed with the Board within ninety (90) calendar days after the claim for benefits becomes final and all appeals have been exhausted.

In this case, the claim for benefits became final when neither party appealed the deficient Compensation Order on Remand issued February 26, 2010 which, by failing to address the suspension of benefits, left the case *status quo ante*, with Mr. Hines having been reimbursed for the previously suspended benefits and entitled to receive ongoing temporary total disability. Mr. Hines and his counsel had until May 27, 2010 to file the petition for an attorney's fee. Obviously, this was not done. Thus, pursuant at least to the terms of the agreement of the parties, the July 23, 2013 filing is untimely.

Additionally, although neither party addresses it in their submissions, it must be recalled that the CRB issued the actual order dismissing the September 2007 fee petition as being premature. That order, dated November 20, 2007, concludes as follows:

As a matter of law and administrative policy, the petition is denied without prejudice to renewal *upon finalization of any order from AHD which determines Petitioner's entitlement to the benefits underlying the claim for an attorney's fee.*

Order Denying Fee Petition Without Prejudice, November 20, 2007.

There is no question that the February 26, 2010 Compensation Order on Remand failed to address the issue, despite the CRB's instructions that the issue be addressed. There is nothing within the four corners of the Compensation Order on Remand that suggests that the ALJ had any intention to reserve the issue or that another Compensation Order on Remand addressing the issue would be forthcoming.

Given that the ruling that was made was fully favorable to Mr. Hines, and that the failure to rule on the suspension issue meant that he would continue to receive those benefits, it may seem

counter-intuitive to expect that Mr. Hines would appeal the Compensation Order on Remand to the CRB. After all, he hadn't lost, except by omission, and that omission yielded the benefit of his continuing to receive temporary total disability benefits.

Either party could have appealed the Compensation Order on Remand for failing to resolve all issues and disputes presented for resolution. Either party appealing the matter to the CRB risked a remand for further consideration which might be decided against their interest.

Both parties, therefore, were faced with a choice: appeal the inadequate decision, or live with its consequences. No party appealed.

The consequence of not filing an appeal to WMATA was that it would have to reimburse the previously suspended benefits and continue to pay ongoing temporary total disability to Mr. Hines. By not appealing, WMATA accepted that consequence.

The consequence of not filing the appeal to Mr. Hines was that he retained his reimbursed temporary total disability benefits and continues to receive ongoing temporary total disability benefits. By not appealing, Mr. Hines risked nothing. Once the deficient Compensation Order on Remand became non-appealable, Mr. Hines retained his benefits status. Thus, the deficient order determined his status, albeit by default.

Assuming WMATA did not appeal, counsel had 90 days from the date of the deficient Compensation Order on Remand within which to re-file the fee petition. This was not done. Accordingly, the fee petition is dismissed as being untimely.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL,
Administrative Appeals Judge

September 11, 2013
DATE