GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-162

MAXINE MOCK-LIGGINS,
Claimant–Petitioner,

v.

LINENS OF THE WEEK and LIBERTY MUTUAL INSURANCE COMPANY,
Employer/Insurer-Respondent.

Appeal from a September 7, 2012 Order Awarding an Attorney's Fee by
Linda F. Jory, Administrative Law Judge
AHD No. 11-382, OWC No. 553404

Richard W. Galiher, Jr., Esquire, for the Claimant/Petitioner
Curtis B. Hane, Esquire, for the Employer-Insurer/Respondent

Before: JEFFREY P. RUSSELL,[1] MELISSA LIN JONES, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge,* for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

Maxine Mock-Liggins sustained a work related injury on December 10, 1999, when a vehicle in which she was sitting was struck by a truck in Respondent's parking lot. She struck her head on the headrest, and injured her neck, back and shoulders. She presented her claim for an award of permanent total disability at a formal hearing before an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES). On February 16, 2012, the ALJ issued a Compensation Order (CO) granting the claim.

[1] Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

Ms. Mock-Liggins, through counsel, filed a Petition for Award of Attorney's fees and costs, which sought to have her attorney's fees and the costs of litigation assessed against Linens of the Week (Respondent). The ALJ issued an Order to Show cause, giving Respondent the opportunity to object thereto.

Respondent filed an Opposition to the Petition, objecting to the amount of the attorney's fee being sought, as well as to the costs relating to the deposition of Dr. Kevin McGovern, Petitioner's treating physician, and the reports and attendance at the hearing of Dr. Richard Bussey, a vocational and rehabilitation counselor and expert.

Petitioner filed a Reply to that opposition (the Reply) addressing a number of Respondent's objections, and containing a Stipulation signed by Respondent's counsel that any fee and costs awarded would be paid in a lump sum.

On September 7, 2012 the ALJ issued an "Order Awarding Attorney's Fees", in which she awarded an amount in attorney's fees somewhat smaller than that which had been sought, and awarded the costs associated with Dr. McGovern's testimony. However, the ALJ denied any award of costs in connection with Dr. Bussey, and the award was made partially due and payable at once, with the remainder to be paid yearly thereafter as additional benefits became payable to Petitioner until the entire fee award was satisfied.

Petitioner has appealed the denial of reimbursement of Dr. Bussey's fees and charges, and the failure to award the attorney's fee in a manner consistent with the Stipulation that was filed with the Reply to Respondent's opposition to the Petition for Attorney's Fees. Neither Petitioner nor Respondent has appealed the amount of the attorney's fee award or the award of Dr. McGovern's charges.

STANDARD OF REVIEW

As an initial matter, in its review of an appeal of an Order issued under circumstances in which there is no evidentiary record, the Compensation Review Board (CRB) must affirm the 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).

ANALYSIS

Among the grounds for this appeal is Petitioner's claim that the ALJ failed to consider the contents of a document referred to as "Claimant's Reply to Employer's Objections" (the Reply). The Reply to Respondent's Response to the Show Cause Order was filed August 30, 2012, and it contained a signed stipulation by Respondent agreeing to payment of the attorney's fees ultimately awarded in a lump sum, among other things.

Review of the AHD administrative file reveals that the pleadings file does not contain the Petition for Attorney's Fees, nor does it contain "Claimant's Reply to Employer's Objections". The Docket Sheet likewise does not refer to their being filed.

Rather, the Docket Sheet indicates that: on February 16, 2012, the Compensation Order awarding the claimed permanent total disability was issued, and that Compensation Order is included in the pleadings file; on August 15, 2012, an Order to Show Cause was sent out, and that Order to Show Cause is also in the pleadings file; and that on September 7, 2012, an Order Awarding Attorney's Fees was sent out, and that order is likewise contained in the pleadings file.

However, we located the fee petition, the Reply and the attached Stipulation in a separate part of the file generally used to hold the contents of the evidentiary record.

Further, review of the AHD file reveals that a letter and an attached "Employer's Opposition to Attorney Richard Galiher's August 13, 2012 Application for Attorney Fee" bearing the date stamp of August 24, 2012, and appended thereto is a handwritten yellow "Post It" note, in red ink which reads:

Please !!
hole punch
and enter
these documents
on docket sheet
LFJ

We note that "LFJ" are the ALJ's initials. The Docket Sheet contains no reference to the letter or the Employer's opposition.

From this review of the contents of the agency AHD pleadings and evidentiary file, of which we take administrative notice,[2] it is evident that documents were filed that are not listed on the Docket Sheet. One of these documents contains a Stipulation of the parties which is contrary to a significant aspect of the Order Awarding Attorney's Fees, which is not only problematic from a legal perspective, but is corroborative of Counsel's suggestion in this appeal that the ALJ did not take the matters contained in the Reply into consideration. The Reply also contains a detailed itemization of the time expenditures claimed by Dr. Richard Bussey, which were apparently meant to respond to Respondent's complaint in its opposition to the fee petition that the witness's time expenditures were inadequately detailed.

It may be that the ALJ intentionally chose not to consider the contents of the Reply or to honor the Stipulation. It seems unlikely that Respondent would have objected to such consideration, given that the Reply included a Stipulation to which it was a party. The file contains no objection to the Reply that we have seen, nor is any such objection docketed. Regardless, we can not tell if the ALJ (1) considered the contents of the Reply, including the Stipulation, but found nothing therein relevant to her consideration, (2) decided not to consider it for some legal or procedural reason, or (3) was unaware that it had been filed and didn't consider it for that reason. Similarly, we are unable to discern whether the ALJ's failure to make the award in the manner stipulated between the parties

[2] See, *Renard v. DOES*, 731 A.2d 413 (D.C. 1999).

was due to a lack of awareness of the Stipulation, or because of some perceived legal or other problem rendering the stipulated procedure improper.

Because of these uncertainties, we deem it necessary to remand the matter to AHD for clarification from the ALJ concerning what pleadings and materials she had before her and considered in reaching her conclusions that the fees and costs awarded should be paid in the manner set forth in the Award rather than in the manner that the parties agreed upon by stipulation.

If the ALJ consciously decided not to consider the contents of Petitioner's Reply and the Stipulation, she should so state, and explain why, so that if an appeal follows, that decision can be reviewed to insure it was a reasonable exercise of discretion.

If on the other hand the failure to mention the matters raised in the Reply and Stipulation was due to the ALJ being unaware them, then the ALJ shall consider whether the Reply and Stipulation are properly before her, and if not state why not, and if so, further consider the manner in which the awarded fee is to be paid.[3]

Lastly, we turn to the crux of Petitioner's appeal, that being that it was an abuse of discretion for the ALJ to deny outright the fees charged by Dr. Bussey for his expert witness services. He argues that, in his professional judgment, Dr. Bussey was a necessary witness in this case in which Respondent contested the nature and extent of Petitioner's disability as well as the medical causal relationship between Petitioner's migraine headaches and the work injuries.

D.C. Code §32-1530 (d) provides in pertinent part:

> In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing at the instance of the claimant. Both the necessity for the witnesses and the reasonableness of the fees of expert witnesses must be approved by the Mayor, or the court, as the case may be.

The ALJ's stated reason for not awarding a fee for Dr.Bussey's services was that she felt that his testimony was uneeded, and amounted to nothing more than what she characterized as "merely stating the obvious, i.e., that the economy is not conducive to job placement."

We must respectfully disagree with the ALJ's assessment. First, it isn't entirely accurate. Review of Dr. Bussey's testimony, which covered approximately 20 transcript pages, made only one specific reference to the poor labor market as a factor in Petitioner's lack of employability. In contrast, he made multiple references to Petitioner's lengthy history of being out of work, her lack of current (as opposed to outdated 10 year old) workplace skills, and the fact that from a professional labor analyst's point of view there is no such employment category as "less than sedentary", a phrase used in Respondent's functional capacity evaluation (FCE) report to describe Petitioner's level of employability, assuming Petitioner did not suffer from debilitating migraine headaches.

[3] We note that there is no provision in the Act authorizing an award of fees on an annual basis.

Second, it seems counter-intuitive to suggest that retaining a vocational rehabilitation and labor market expert is not a reasonable and necessary practice in a claim for permanent total disability, particularly given that in this jurisdiction the nature and extent of a disability is a vocational concept that is informed by, but not determined by, a claimant's medical condition. See, *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007); and *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

Although the ALJ states in the order that she never referred to Dr. Bussey's testimony in coming to her conclusions, that is not the standard that determines whether an award of a fee is appropriate. We find the ALJ should have awarded a fee because Dr. Bussey's testimony was reasonably related to the issue(s) before the ALJ.

While the ALJ did not refer to his testimony in reaching her conclusions, there are circumstances where the outcome could have turned upon it. Had the ALJ found, as respondent argued, that the migraine headaches were not causally related to the work injury, and had the ALJ accepted Mr. Cort's opinion (expressed in his report of September 29, 2011, being EE 11, and found at page 61, in the second paragraph) that, but for the headaches, Petitioner was employable in her pre-injury job, the ALJ may well have denied the claim for permanent total disability because the work injury is not what prevents Petitioner from returning to a sedentary desk job such as the one she had when she was injured and the claimant would have failed in her obligation under *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) to establish a *prima facie* case of total disability. In that case, Dr. Bussey**'s** testimony would be needed to establish that even without her headaches, because of Petitioner's long removal from the job market and her outdated skills and considering other matters about which he testified, she is no longer capable of doing that type of work or competing with others to obtain it.

Since Petitioner had no way of knowing whether the ALJ was going to accept Mr. Cort's testimony or find that the headaches were related to the work injury, we can not agree that it was unnecessary for Petitioner's counsel to present Dr. Bussey's testimony.

Respondent's taking the positions that (1) medically, Petitioner can return to her pre-injury employment, regardless of her migraines, (2) even if the migraines are disabling, they are unrelated to her work injury, and (3) were it not for the migraines she is capable of performing her pre-injury job, rendered Dr. Bussey's testimony necessary. Denying their reimbursement on the grounds identified by the ALJ is an abuse of discretion.

CONCLUSION AND ORDER

The portion of the Order Awarding an Attorney's Fee awarding costs in connection with the deposition of Dr. McGovern, and the amount of the attorney's fee award are not the subject of this appeal and are affirmed.

Because neither the Reply to Respondent's opposition to the Petition for Attorney's Fees nor the Stipulation filed therewith are acknowledged or discussed in the Order Awarding Attorneys Fees, we are unable to assess whether the failure to make an award in a manner consistent with the Stipulation is within the ALJ's discretion, or an abuse thereof.

The denial of reimbursement of Dr. Bussey's fees and expenses is an abuse of discretion and is reversed and vacated.

The matter is remanded for further consideration of the claimed reimbursement with respect to any of the other objections raised by Respondent and in order for the ALJ to address the Reply and the Stipulation.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

February 11, 2013
DATE