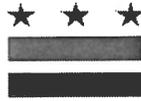


**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-054**

**WILLIAM A. WORKCUFF,  
Claimant-Respondent/Cross-Petitioner,**

v.

**DISTRICT OF COLUMBIA HOUSING AUTHORITY,  
Self-Insured Employer—Petitioner/Cross Respondent.**

Appeal of an March 9, 2015 Order by  
Administrative Law Judge Gwenlynn D'Souza.  
AHD No. PBL 12-022A, DCP No. 761001000200200006

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 SEP 24 AM 10:15

(Decided September 24, 2015)

Eric Adam Huang for Employer  
Harold Levi for Claimant

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

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

The facts and procedural history are set out in *Workcuff v. District of Columbia Housing Authority*, CRB No. 14-064, AHD No. PBL 13-148, 1-4 (December 23, 2014):

On February 21, 2002, Mr. William A. Workcuff injured his back while working for the District of Columbia Housing Authority (“Employer”) as a maintenance mechanic. In a Compensation Order dated January 14, 2004, Mr. Workcuff was

awarded ongoing temporary total disability compensation benefits and medical benefits. *Workcuff v. D.C. Housing Authority*, OHA No. PBL03-020A, MS-HCD002589 (January 14, 2004).

On October 27, 2011, the Public Sector Workers' Compensation Program issued a Notice of Intent to Terminate, and on April 6, 2012, it issued a Final Decision on Reconsideration; Mr. Workcuff's disability compensation benefits were terminated.

Following a formal hearing, an administrative law judge ("ALJ") issued a Compensation Order dated October 25, 2012. Mr. Workcuff's disability compensation benefits were reinstated from November 30, 2007 to the date of the formal hearing and continuing. *Workcuff v. D.C. Housing Authority*, OHA No. PBL12-022, DCP No. 761001000120020006 (October 25, 2012).

Employer appealed the October 25, 2012 Compensation Order on the grounds that the ALJ applied the incorrect standard of proof and the ALJ erred by excluding probative evidence. On August 9, 2013, the Compensation Review Board ("CRB") vacated the Compensation Order and remanded the matter. *Workcuff v. D.C. Housing Authority*, CRB No. 12-187, OHA No. PBL12-022, DCP No. 761001000120020006 (August 9, 2013).

The ALJ issued a Compensation Order on Remand on October 28, 2013. Mr. Workcuff's claim for relief was granted because "Employer has failed to show that there has been a change in Claimant's condition. Claimant continues to be [] temporarily totally disabled and is entitled to reinstatement of temporary total disability benefits." *Workcuff v. D.C. Housing Authority*, OHA No. PBL12-022, DCP No. 761001000120020006 (October 28, 2013), p. 7.

The Compensation Order on Remand was appealed to the CRB, in which appeal Employer contended the ALJ did not clearly articulate the burden of proof she used to review the evidence. Furthermore, Employer contended the ALJ's analysis of the Claimant's evidence was insufficient and did not clearly articulate whether the Claimant satisfied his burden. Employer also argued that the ALJ's analysis of Dr. Robert Gordon's IME opinion was not supported by substantial evidence and that it had no obligation to demonstrate available work existed. Employer requested the CRB vacate the Compensation Order on Remand.

In response, Mr. Workcuff asserted the ALJ properly reviewed and considered the totality of the evidence and complied with the directives in the August 9, 2013 Decision and Remand Order. Mr. Workcuff also argued the proper burden of proof rested with Employer:

Once a claimant has met his or her burden of proof and Petitioner has accepted a claim and paid the claimant benefits. . . the process changes dramatically. As Section 1-623.24 and relevant case law

show, the ultimate burden now rests with Petitioner to show a requisite change of condition by medical evidence sufficient to substantiate a modification or termination.

While Petitioner did not “accept” Respondent’s claim here in the first instance, the [Compensation Order on Remand] acknowledges that the Recommended Decision awarded Respondent wage loss and medical benefits judicially and Petitioner subsequently paid Respondent those benefits from 2002 to 2012 (CE-3; COR, p. 4). There is no question, then that [*D.C. Department of Mental Health v. D.C. Department of Employment Services*, 15 A.3d 692 (D.C. 2011)] and [*Washington Hospital Center v. D.C. Department of Employment Services*, 744 A.2d 992 (D.C. 2000)] (as is [*McCamey v. D.C. Department of Employment Services*, 947 A.2d 1191 (D.C. 2008)]) are inapplicable as Petitioner bears the ultimate burden of proof to establish by a preponderance of the evidence that it had grounds to justify the termination of Respondent’s benefits.

Mr. Workcuff requested the CRB dismiss the appeal because

[w]hile the [Compensation Order on Remand] perhaps need not have gone as far as it did, the ALJ gave a clear, concise and detailed justification for rejecting the AME medical evidence in favor of the testimony and medical evidence introduced by Respondent which is unassailable. Whether or not evidence in the record might have persuaded the CRB to reach the same conclusion independently, the evidence, including but not limited [to] the Gordon report and the addendum which the ALJ previously omitted, was unquestionably sufficient to support the findings of fact which the ALJ made in the [Compensation Order on Remand].

The [Compensation Order on Remand] considered all of Petitioner’s medical evidence. It did not impose any impermissible limitations or conditions or any requirements or considerations in the IME. At the same time it did not release the IME from providing support with a competent review and recitation of pertinent medical records and diagnostic studies. The [Compensation Order on Remand] simply held that weighing all of the evidence, Dr. Gordon’s report and addendums did not meet Petitioner’s burden of proof and it demonstrated why not. As we have shown, the fact trier’s evaluations made in this respect cannot be reversed unless they are found to be clearly erroneous.

Furthermore, Mr. Workcuff claimed the ALJ’s consideration of Employer’s failure to offer a light duty position is irrelevant, harmless error.

The CRB rejected most of Employer's arguments. However, it did find error in the manner in which the ALJ employed the "burden shifting" process in cases where the employer seeks to terminate ongoing benefits.

The CRB determined that once the government-employer had accepted and paid a claim for disability benefits, the employer had the burden of proving by a preponderance of the evidence that conditions have changed such that the claimant was no longer entitled to the benefits. The CRB stated that the employer first has the burden of producing current and probative evidence that claimant's condition has sufficiently changed to warrant a modification or termination of benefits. The CRB ruled that if the employer fails to present this evidence then the claim fails and the injured worker's benefits continue unmodified.

The CRB then stated that if the employer meets its initial burden, then the claimant has the burden of producing reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. The CRB then held that if this burden is met, then the evidence is weighed to determine whether employer met its burden of proving by a preponderance of the evidence that claimant's benefits should be modified or terminated. The April 23, 2014 Compensation Order was vacated and remanded to the Administrative Hearings Division for proceedings consistent with the CRB decision, with the CRB writing:

Employer's argument that the ALJ's analysis of whether Mr. Workcuff satisfied his burden gives us greater pause. Once Employer satisfied its burden of production, the burden of proof shifted to Mr. Workcuff "to show by a preponderance of the evidence that his . . . disability was caused by a work-related injury" [footnote omitted]. Although assessing whether a claimant satisfies a burden of proof by a preponderance of the evidence necessarily requires the ALJ consider and weigh all the evidence in the record, the ALJ ultimately ruled

[b]ased upon a further review of the record evidence as a whole, I find Employer has failed to show that there has been a change in Claimant's condition. Claimant continues to be [] temporarily totally disabled and is entitled to reinstatement of temporary total disability benefits.

Because the burden was not on Employer at this point in the adjudication, the law requires we remand this matter for the ALJ to assess whether Mr. Workcuff's current back condition is related to the injury he sustained on February 21, 2002 and whether that back condition results in a compensable disability.

DRO at 5-6.

On April 23, 2014, the ALJ issued another Compensation Order on Remand, in which the Claimant's benefits were once again restored. The Employer again appealed the Compensation Order on Remand to the CRB, asserting that the ALJ's "explanation is totally inadequate and cannot be upheld", which appeal the Claimant opposed.

For the reasons set forth below, we affirm the Compensation Order on Remand.

The December 23, 2014 Decision and Order was not appealed.

On January 20, 2015, Claimant's counsel submitted a fee petition to the ALJ requesting an award of an attorney's fee to be assessed against Employer in the amount of \$14,280.00 based upon 59.50 hours of work at a rate of \$240.00 per hour. Employer opposed. On March 9, 2015, an Order Regarding Fee Petition ("Order") was issued awarding Claimant's counsel a fee of \$12,060.00.

Employer appealed. Employer argues the award was erroneous as a matter of law because Claimant failed to prove the amount of actual benefits secured and that the amount requested is in excess of 20% of the benefits secured. Claimant opposes Employer's Application for Review, arguing that in its reply to Employer's opposition before the ALJ, Claimant counsel clarified his position relying in part on documentation Employer submitted. Claimant also argues that the award does not exceed 20% of the benefits secured.

Claimant also filed a Cross Application for Review, arguing the ALJ's reduction of the requested fee by 9.25 hours is arbitrary and capricious. Claimant also requests the CRB issue an Order for Employer to pay the fee award as Employer has not requested a stay of the attorney's fee order, similar to the provisions regarding payment of disability benefits, pursuant to 7 DCMR § 260.3.

Employer opposes Claimant's cross appeal. Employer argues any sanctions for non-payment of an attorney's fee is not supported by the Act, as the regulation cited by Claimant only pertains to Compensation Orders. Employer also argues that Claimant did not submit any supporting documentation of benefits secured to the ALJ in any submissions, including amendments. Employer argues Claimant's burden to prove the benefits secured has not been satisfied pursuant to *Jones v. University of the District of Columbia*, CRB No. 09-065, AHD No. PBL 06-112A (September 9, 2009).

#### **THE STANDARD OF REVIEW**

As an initial matter, in its review of an appeal from an Order when there is no evidentiary record, the Compensation Review Board (CRB) 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).

## ANALYSIS

Employer first argues that because Claimant provided no evidence of the benefits secured, the award of an attorney's fee was erroneous. We agree.

7 DCMR § 224.2 provides:

In determining whether to award attorney fees and the amount, if any, to be awarded, the following factors shall be considered:

- (a) The nature and complexity of the claim including the adversarial nature, if any, of the proceeding;
- (b) The actual time spent on development and presentation of the case;
- (c) The dollar amount of benefits obtained and the dollar amount of potential future benefits resulting from the efforts of an attorney;
- (d) The reasonable and customary local charge for similar services; and
- (e) The professional qualifications of the representative and the quality of representation afforded to employee.

As the Employer correctly points out, in *Jones v. University of the District of Columbia*, CRB No. 09-065, AHD No. PBL06-112A, DCP No. 761039-8001-2003-0003 (September 9, 2009), the CRB held that when assessing an attorney's fee for time spent before the Administrative Hearings Division ("AHD"), an administrative law judge must know the amount of actual benefits secured, and it is the petitioning attorney's responsibility to prove this amount:

We also disagree with Petitioner that the ALJ erred by placing the burden on her to produce evidence of the actual benefit secured. Petitioner cited no authority for her assertion that "it is simply more in line with our justice system to require the party opposing the fee to offer evidence in support of its opposition." (Memorandum at 6).

To the contrary, the ALJ's decision is more inline [*sic*] with our justice system. The ALJ, in dismissing the action, placed the burden of proof on the proponent of the motion. As the respondent correctly points out, placing the burden on the proponent is consistent with the District of Columbia's Administrative Procedures Act, which states in §2-509 (b):

In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof. Any oral and any documentary evidence may be received, but the Mayor and every agency shall exclude irrelevant, immaterial, and unduly repetitious evidence. Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Where

any decision of the Mayor or any agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such case shall on timely request be afforded an opportunity to show the contrary.

Petitioner is the requesting party. The ALJ's determination that she has the burden of proving the requisite statutory elements is neither arbitrary, capricious, nor an abuse of discretion, and is in accordance with the law.

*Id.*

Thus, claimants' attorneys are required to submit a detailed time itemization as well as explanation of why an attorney fee should be awarded for work performed in front of AHD, payable by the Employer. Claimant's attorneys are also required to submit proof of the benefits secured.

Turning to the Order, the ALJ states:

In the Fee Petition, Claimant's counsel contended that the total back pay amount is *roughly* \$80,000 and medical expenses to date are *approximately* \$13,000. Employer has provided no information to the contrary, but states that, *assuming Claimant's assertions*, such a calculation would result in a 26% award based on the total of the fee petitions related to the formal hearing and appeal. In reply, Claimant's counsel stated Claimant has been paid or is presently owed \$90,132.00 for TTD based on 75 payments of \$1,218, his doctor is owed *in excess of* \$15,000, and that future benefits will total *in excess of* \$2,400 per month. I find that the calculation of 75 payments of \$1,218 total \$91,350. Accordingly, I find the *estimated* total of accrued compensation is \$106,350 (\$91,350+\$15,000) and Claimant will receive \$2,400 a month for future benefits. (Italics added.)

Order at 5.

A review of the administrative file reveals that at no time did Claimant's attorney submit any documentation to support the "dollar amount of benefits obtained and the dollar amount of potential future benefits resulting from the efforts of an attorney." Even more problematic, the actual amount requested changed in the pleadings. The ALJ, in assessing the total amount of benefits secured, uses such terms as "roughly....estimated...assuming Claimant's assertions...in excess of..." in the above quoted paragraph to determine the total benefits awarded, and noted the Employer provided no information to the contrary.

This is in error. The burden of proof is on the Claimant to submit documentation to prove the actual benefits secured when requesting a fee. Underscoring this requirement, it has not gone unnoticed that the ALJ comes up with calculated a different figure when multiplying the payments received by 75, compared to the figure Claimant's counsel stated. This difference underscores the requirement that a claimant's attorney seeking a fee must submit evidence of actual benefits secured.

Until such time as claimant's attorney submits a fee petition which includes proof of the actual benefits secured, it cannot be said that any fee award would be in accordance with the law.<sup>1</sup> Therefore, the ALJ's order must be vacated and remanded for further action as the ALJ deems appropriate including re-opening the record for the submission of additional evidence to support the requested fee or dismissal of the fee request with leave to re-file within 30 days.

In an effort to avoid any further appeals, we also caution that when an amount certain is determined through evidence submitted, any fee is limited to the 20% statutory cap. We also must comment upon the ALJ's review of the time itemization. As the ALJ correctly noted, D.C. Code 1-623.27 provides, in relevant part:

(e)(1) In all cases, fees for attorney's representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the administrative law judge or any court for review of any action, award, order, or decision, the administrative law judge or court shall approve an attorney's fee for *the work done before the administrative law judge or court*, as the case may be, by the attorney for the claimant. (Emphasis added.)

Thus, any fee awarded by AHD is limited to the *work done before* the ALJ, beginning with the Application for Formal Hearing that was filed on April 13, 2012. Any work performed before the CRB, or relating to an appeal in front of the CRB, is not time that can be awarded by AHD, as any appellate work was not *work done before* the ALJ. Any fee awarded based on time before April 13, 2012 also is in error. On remand, the ALJ is reminded of this when assessing the time itemization.

Until such time as the Claimant provides proof of the actual benefit secured and the ALJ analyzes the fee request based on work performed before the ALJ pursuant to D.C. Code 1-623.27 and 7 DCMR § 224.2, Claimant's cross application is rendered moot.

#### CONCLUSION AND ORDER

The March 9, 2015 Order is not in accordance with the law. It is VACATED and REMANDED for further action as the Administrative Law Judge may require.

*So Ordered.*

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<sup>1</sup> We also note, the parties could stipulate to this amount, negating the need for any proof as the amount is then uncontested by the parties. The ALJ could also issue a show cause order and if Employer fails to respond, this failure to respond could be viewed as a waiver of any disagreement with the amount stated by claimant's counsel.