

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-064 (A)

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

WILLIAM WORKCUFF,
Claimant,

v.

DISTRICT OF COLUMBIA HOUSING AUTHORITY,
Employer.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 SEP 23 AM 10 50

(Issued September 23, 2015)

Harold L. Levi for Claimant
Eric Adam Huang for Employer

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

Jeffrey P. Russell for the Compensation Review Board; Heather C. Leslie, *concurring*.

ORDER DENYING AN AWARD OF AN ATTORNEY'S FEE WITHOUT PREJUDICE

Counsel for Claimant filed a Fee Petition seeking an award of \$9,960.00 as an attorney fee for work performed before the Compensation Review Board (CRB), to be assessed against Employer, for the successful prosecution of the above noted claim, based upon having expended 41.50 hours prosecuting the claim before the CRB. That representation included defending three appeals of orders awarding Claimant back pay and medical bills. The final Decision and Order of the CRB affirmed the award.

A Show Cause Order was issued by the CRB directing Employer to file any opposition to the assessment of said fee against it.

Employer filed "Employer's Opposition to Fee Petition" (Employer's Opposition). In it, Employer raises the following objections to the request:

1. The Fee Petition "provides no evidence of the actual benefit secured";
2. The Fee Petition "improperly requests an award of attorney's fees in excess of the benefits allegedly secured"; and
3. The Fee Petition "includes unreasonable and unjustified claims for fees".

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.

Regarding the first two objections, review of the fee petition confirms that it contains no purported calculation or statement as to the amount “of the actual benefit secured”. Although Employer suggests that the petition asserts that the amount is \$93,000.00 (Employer’s Opposition, p. 4), that assertion is contained in none of the filings supporting the fee petition, nor is there any explanation as to how Employer arrived at that figure.

While it is arguable that the amount could be calculated by resort to the Agency record, it is incumbent upon the party seeking the relief to set forth how the amount of the relief is to be determined, so that if there is a dispute or disagreement between the parties, the source of the disagreement can be identified and resolved.

Also, Employer is correct that D.C. Code § 1-623.27(2) limits awards to 20% of the benefits secured. However, all awards made for attorney fees include the caveat that the total fee to which an attorney is entitled is limited to 20% of the actual benefits secured. Approval of an amount of an earned fee greater than 20% of the amount of benefits accrued as of the date of the fee award does not violate the Act, when the compensation award provides for ongoing additional future benefits and additional attorney fees will become due.

Otherwise put, it is not error for an award to be made which is greater than 20% of the accrued amount due as of the date of the award. If an attorney has expended efforts which, based upon consideration of the factors set forth in the regulations is greater than 20% of the benefits due as of the date of the award, the award may also specify that as additional benefits become due, additional attorneys fees are to be made up until the total amount of the approved fee award has been paid.

As stated in *Borum v. The John F. Kennedy Center for the Performing Arts*, CRB Consolidated Appeal Nos. 09-102 and 09-118, AHD No. 06-228B, OWC No. 575208, AHD No. 06-228A, OWC No. 575208 (November 10, 2011):

It is the established rule that, where the benefits secured through the efforts of an attorney are ongoing disability indemnity benefits which would not have been paid in the absence of those efforts, the value of the ongoing benefits are included in the calculation of the "actual benefits secured" such that as those additional benefits are paid out, additional attorney's fees become payable up to the total amount of the approved fees. This is true under both the public and private sector acts. See, *Lee v. District of Columbia General Hospital*, CRB No. 09-053 (June 29, 2009); *Martin v. District of Columbia Department of Corrections*, CRB No. 08-212 (April 14, 2009); *Batista v. Capitol Paving of D.C.*, Dir. Dkt. No. 02-60A, OHA No. 00-193 (January 8, 2003).

Lastly, Employer objects to an assessment for four separate time entries on the attachment to the Fee Petition which Claimant submits to establish the amount of time expended on the case. Time entries to which Employer objects are (i) 3.00 hours on December 12 and December 27, 2012, (ii) 1.25 hours on August 12, 2013, (iii) 0.5 hours on November 27, 2013, and (iv) 1.50 hours on December 24, 2014.

Regarding item (i), 1.25 hours on December 12, 2012 for "prepare CRB pleading re: holding in Ashton", review of the CRB file confirms the filing of "Claimant-Respondent's Statement Regarding Omission of a Material Footnote" being filed on or about December 13, 2012. There does not appear to be any question that the work was performed. We see no reason to disallow the time required to prepare that pleading.

Regarding December 27, 2012, 1.75 hours for "Review Employer filing and reply", the CRB file does not contain any Employer filing around that date, nor does it contain any "reply" to such filing. Accordingly, the 1.75 hours for that time is disallowed.

Regarding the November 25, 2013 entry .50 hours for "Review correspondence from Huang and reply", although the CRB has no correspondence of that date, Employer does not assert that Mr. Huang did not correspond with Mr. Levy and that Mr. Levy did not respond to that correspondence. The time is accordingly allowed.

Regarding item (ii), 1.25 hours on August 12, 2013 hours for receiving and reviewing the CRB Decision and Remand Order and conferring with Claimant, the CRB did issue a Decision and Remand Order on August 9, 2013, and the CRB file contains Claimant's Motion for Reconsideration thereof filed August 15, 2013. There is no reason to disallow the time for work performed as entered on the time sheet.

Regarding item (iii) 0.50 hours on November 27, 2013, as with the November 25, 2013 entry, although the CRB has no correspondence of that date, Employer does not assert that Mr. Huang did not correspond with Mr. Levy and that Mr. Levy did not respond to that correspondence. The time is accordingly allowed.

Regarding item (iv), 1.50 hours on December 24, 2014 for “Review DO; conference with Workcuff”, a Decision and Order was issued by the CRB December 23, 2014. We see no validity in a complaint about the time spent reviewing that document and conferring with Claimant. Accordingly, the time is allowed.

Thus, we disallow 1.75 hours on December 27, 2012, reducing the approved number of hours to 39.75, yielding in the amount of \$9,540.00 as representing the calculation of the amount of a fee earned based upon time expended.

Employer raises no other objections to the amount of the fee sought to be assessed, or the request that the fee be assessed against Employer.

Upon the premises considered, the award of an attorney’s fee is denied without prejudice, subject to the filing of a new fee petition that includes a statement of the amount of the benefit claimed to have secured through the services of the attorney, including the method and manner of their calculation, and omitting the request for the hours that have been determined herein to be disallowed. Upon such filing, the CRB shall issue a show cause order directing Employer to show cause why the amount specified is in error, and based upon what response, if any, is filed by Employer, the CRB shall further consider the petition.¹

So ordered.

HEATHER C. LESLIE, *concurring.*

I concur with the panel. I write separately to note, pursuant to *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 has held that when assessing an attorney’s fee for time spent before the Office of Hearings and Adjudication, Administrative Hearings Division (“AHD”), an administrative law judge must know the amount of actual benefit 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.”

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,

¹ Of course, if the parties wish, they may enter into a stipulation or stipulations regarding the applicable figures, thereby simplifying the process of consideration.

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., (citation omitted)

Thus, Claimants' attorneys are required to submit a detailed time itemization as well as an explanation of why an attorney fee should be awarded for work performed in front of AHD, payable by the Employer. Claimants' attorneys are also required to submit proof of the benefits secured, absent a stipulation by the parties of the actual amount of benefits secured to date.