GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 OCT 19 AM 11 20

CRB No. 15-095

DONNA JOHNSON,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF DISABILITY SERVICES,
Self-Insured Employer–Petitioner.

Appeal from a May 13, 2015 Order Awarding an Attorney's Fee
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 13-046, DCP No. 3011039877-0001

(Decided October 19, 2015)

Harold L. Levi for Claimant
Eric A. Huang for Employer

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

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER TO VACATE ATTORNEY FEE AWARD

This matter is an appeal of an attorney's fee award that was issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services on May 13, 2015. The award was made after issuance of Compensation Order (CO) on January 29, 2015 in which Claimant's claim for temporary total disability (TTD) benefits from April 30, 2013 to October 8, 2013 and causally related medical treatment was granted.

Claimant's counsel thereafter filed a Fee Petition on February 23, 2015. Counsel requested an attorney's fee award in the amount of $20,640.00 for 86 hours of work. In support of the requested amount, counsel asserted that the closed period of benefits totaled $15,181.35 and the amount of medical benefits that have accrued to date and which Employer has not paid **totals** ~~is a total of~~ $42,406.67.

In response to an Order to Show Cause issued by the ALJ, Employer asserted the following points:

1) Claimant produced no evidence of the actual benefit secured;
2) Claimant's medical benefits were never terminated therefore, a request for a fee based on awarded medical benefits is improper;
3) Claimant's itemized billing statement includes unreasonable and unjustified claims for fees.

Counsel responded to Employer's opposition.

With regard to Employer's point that Counsel has produced no evidence of the actual benefit secured, Counsel asserts Employer has admitted that since the issuance of the CO on January 29, 2015, it has failed to pay Claimant TTD benefits from April 30, 2013 to October 8, 2013 for a total of $15,181.35.

With regard to Employer's assertion that it never terminated medical benefits, Counsel asserted that Employer simply refused to pay Claimant's medical expenses when they were incurred and it delayed payments for medical treatment causing Claimant to become a debtor of her medical service providers for her causally related treatment.

With regard to Employer's third point that the itemized billing statement included unreasonable and unjustified claims for fees, specifically 26 hours of itemized time incurred after the submission of proposed compensation orders, Counsel asserted "much, if not virtually all of the 26 hours related specifically to Claimant's need for the medical treatment which Employer improperly terminated and which are now very much a part of the successful outcome of this process".

An Order Awarding Attorney's Fee (OAF) issued on May 13, 2015 which ordered Employer to pay Counsel $11,259.40 in a lump sum which according to the ALJ represents 20% of past due wage loss benefits and 20% of all future payment of benefits.

Employer appealed the OAF to the Compensation Review Board (CRB), citing the same arguments made to the ALJ and asserting the ALJ's award is arbitrary. Claimant's counsel has responded that the OAF granted the claim for attorney's fees based on the demonstrated medical and wage loss benefits and therefore the fee order was not arbitrary.

ANALYSIS

In the appeal of an Order which is not based upon an evidentiary record, the scope of review by the CRB and this Review Panel (the Panel) is limited to making a determination as to whether the Order under review is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezines, Administrative Law §51.03 (2001).

Because the Panel has determined that the OAF is not in accordance with the law, the OAF is vacated.

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 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.

Employer asserts *inter alia*:

> The decision by the ALJ to accept on faith the amounts articulated by the Claimant's counsel was arbitrary and capricious, not in accordance with law and the ALJ's conclusion as to the award amount is a clear abuse of discretion. Accordingly, the Fee Order should be vacated and the Fee Petition denied until such time that the amount of actual benefit secured can be proven.

Employer's Brief at 7.

As Counsel for Claimant asserts in his response to the AFR, "the CO was to have restored Claimant's wage loss benefits for the closed period—and yet [Employer] has not yet paid Claimant those benefits – even at this date nearly five months after the CO was issued". Claimant's Brief at 2.

While we agree that Employer's failure to pay benefits pursuant to the CO is problematic, finding Employer in default of AHD's CO is not within the authority of the CRB, although we do acknowledge that the PSWCA does provide a remedy for Employer's failure to pay benefits ordered by AHD[1].

The burden of proof is on the Claimant to submit documentation to prove the actual benefits secured when requesting a fee. 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. *Workcuff v. DC Housing Authority*, CRB No. 15-054, AHD No. PBL 12-022A, DCP No. 761001000200200006 (September 23, 2015) (*Workcuff*). As the CRB stated in *Workcuff*, the parties could stipulate to this amount, negating the need for any proof as the amount is then uncontested by the parties.

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.

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[1] 1-623.24(g) of the Act states:

> If the Mayor or his or her designee fails to make payments of the award for compensation as required by subsection (a-3)(1), (a-4)(2), or (b)(3) of this section, the award shall be increased by an amount equal to one month of the compensation for each 30-day period that payment is not made; provided, that the increase shall not exceed 12 months' compensation. In addition, the claimant may file with the Superior Court of the District of Columbia a lien against the Disability Compensation Fund, the General Fund of the District of Columbia, or any other District fund or property to pay the compensation award. The Court shall fix the terms and manner of enforcement of the lien against the compensation award.

In an effort to avoid any further appeals, we also caution that the Pre-Hearing Order for the Public Sector (PHO) which was initialed by both parties and entered by the ALJ at the formal hearing, contains the following stipulation:

6. Medical Bills Paid	(Claimant) Not paid since April 29, 2013
	(Employer) Injury- April 29, 2013

PHO at 2. To the right of the "Not paid since April 29, 2013, is handwritten "DOI – 4/30/2013" and to right of "Injury – April 29, 2013" is handwritten "10/8/13 to present". We assume the author of the handwritten portion is the ALJ. The indication that Employer stipulates that medical bills are paid as of October 8, 2013 correlates with the Claim for Relief set forth in the CO of "temporary total disability from April 30, 2013 to October 8, 2013 and reimbursement of causally related medical treatment" as well as the finding of fact by the ALJ:

> Claimant underwent the second foot surgery on October 8, 2013. (HT 37) At this point, Employer reinstated payments to Claimant for temporary total disability. (HT 37).

CO at 4.

Thus any causally related medicals awarded by the CO would be those incurred during the closed period of relief awarded. The ALJ should take this into consideration when determining if the total fee to which counsel is entitled exceeds 20% of the actual benefits secured according to D.C. Code § 1-623.27(2).

CONCLUSION AND ORDER

The OAF awarding an attorney fee of $11,297.00 be paid immediately is not in accordance with the law and the award is VACATED and the matter is REMANDED to AHD for the ALJ to consider the appropriate amount of attorney fee award in in accordance with 7 DCMR § 1-623.27 (B)(2) which includes proof of the actual benefits secured.

So ordered.