

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-164

**JANET HILL,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH,
Employer-Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 MAR 23 PM 12 48

Appeal from a September 24, 2015 Order Awarding an Attorney's Fee
by Administrative Law Judge Gwendolyn D'Souza
AHD No. PBL 15-007, DCP No. 0468-14-000960

(Decided March 23, 2015)

Harold L. Levi for Claimant
Andrea G. Comentale and Lindsay M. Neinast for Employer

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

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This matter is an appeal of an attorney's fee award that was issued in the above noted case on September 24, 2015. The award was made following Respondent's having prevailed at a formal hearing before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services. That hearing resulted in the issuance of a Compensation Order (CO) on July 14, 2015, in which Respondent's claim for relief was granted in full.

The CO was not appealed.

On August 5, 2015, Claimant filed an application for an attorney's fee to be assessed against Employer. Employer filed an opposition on August 19, 2015. In that opposition, Employer

raised two objections: Employer argued (1) that some of the time entries submitted in support of the claimed fee were excessive or insufficiently detailed and should be eliminated; and (2) that the award of ongoing fees into the future as additional benefits become payable to Claimant pursuant to the award up until the amount of the fee that was approved is paid in full, is contrary to the express wording of the fee statute.

The ALJ considered these objections, and reduced the number of allowable hours billed by 3.75 hours, and determined that Claimant's Counsel was entitled to a fee based upon 64.50 hours, at an hourly rate of \$240.00 per hour. The resultant amount of attorney's fees earned based upon the hours approved and the hourly rate applied is \$19,029.82.

The ALJ further determined that the amount of the benefits secured as a result of Claimant's counsel's efforts accrued as of the date of the fee award was \$43,270.01. Twenty percent of the accrued benefits secured is therefore \$8,654.00.

The operative portion of the September 4, 2015 Order Regarding Fee Petition, which is clear, unambiguous and conforms to the regulations and statutes governing attorney fees, reads as follows:

Having given due and sufficient consideration to Counsel's Petition for Attorney's Fee [and] Employer/Insurer's objections thereto, as well as the Act, its implementing regulations and applicable case law, the January 20, 2015 Fee Petition is hereby **GRANTED** in part and **DENIED IN PART**. It is hereby **ORDERED** that Claimant's counsel is awarded an attorney's fee in the amount of \$15,480.00, which is payable as follows. It is further **ORDERED** that Employer shall pay Claimant's counsel the attorney's from 20% of the gross benefit received. It is further **ORDERED** that Employer shall pay Claimant's counsel the balance of the attorney's fee award from 20% of the gross amount of any future payment of compensation up to and until the balance of [the attorney fee award is paid].

Order Regarding Fee Petition, at 4, 5.

Employer filed an Application for Review and memorandum of points and authorities in support thereof (Employer's Brief) with the Compensation Review Board (CRB), asserting that the portion of the fee order awarding attorney's fees as additional benefits are secured by Claimant is contrary to law and ought to be vacated.

Claimant filed an Opposition to Application for Review and memorandum of points and authorities in support thereof, asserting that the award is in all respects supported by the law and regulations, is within the proper discretion of the ALJ, is not arbitrary or capricious, and should be affirmed.

Because the award is in accordance with well-established precedent we affirm the fee award.

STANDARD OF REVIEW

As an initial matter, in our review of an appeal of an Order from the AHD which is not based upon an evidentiary record, the 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 only takes issue with the portion of the Fee Order that awards payment of additional fees in the future as additional benefits are secured on Claimant's behalf as they become payable, until such time as the total amount of the earned fee approved has been paid. That is, Employer does not contest the approval of the number of hours expended, the hourly rate at which the fee is sought to be paid, the amount of the benefits secured to date as a result of Counsel's successful prosecution of the claim, or that that prosecution was successful under the law.

Employer's legal argument is premised solely upon the language in D.C. Code § 1-623.27(b)(2) requiring that an attorney's fee award shall be made in the form of a Compensation Order, and that it is to be paid within 30 days of that Compensation Order. Employer argues that this language limits the fee to 20% of the amount of the benefits secured as of the date of the award of the fee, because benefits paid thereafter could not possibly be paid within those 30 days.

Before discussing Claimant's response, we note that Employer is not asserting that the ALJ misapplied existing case law or precedent. Without explicitly stating it, Employer asks that we change existing law and restrict fees to 20% of benefits secured as of the date of the award of the fee.

We note that this approach would render all awards subject to a limitation not found in the regulations or the statute -- the length of time it takes an ALJ in AHD, or a CRB review panel to dispose of a claim, an appeal or an application for an attorney's fee. A quickly issued award may lower the attorney fee to be paid, while a delayed award may increase it. There is no suggestion by Employer that the legislature intended that the amount of an attorney's fee award depend on the time it takes to consider and dispose applications for a formal hearing, for review of an award, or for an attorney's fee.

Claimant responds by relying upon a number of cases in which the CRB has enunciated the principle underlying the ongoing nature of the award.

Claimant points out that the CRB ruled in *Martin v. District of Columbia Department of Corrections*, CRB No. 08-212 (April 14, 2009), as follows:

[R]ather than limiting the attorney fee to 20% of the disability benefit award amount secured by Petitioner up to the date of the Compensation Order (the "accrued amount"), the ALJ should have additionally provided that with each future periodic payment of disability compensation paid to Petitioner an additional payment of attorney's fees be made in the amount of 20% of the periodic disability payment at that time, until such time as Petitioner's counsel

had received the entire fee approved or Petitioner is no longer receiving compensation, whichever first occurs....

The ALJ's decision to cap Petitioner's attorney's fee award at a total amount not to exceed 20% of the temporary total disability benefits as of the date of the Compensation Order awarding benefits is not in accord with applicable law.

Claimant's Brief at 3, 4.

Similarly, Claimant points to our decision in *Lee v. District of Columbia General Hospital*, CRB No. 09-053 (June 29, 2009), quoting as follows:

[The] virtually identical ... attorney fee provisions of the D.C. Workers' Compensation Act ... which has been interpreted by this agency "from time immemorial" to permit "recovery of 20% of post-judgment compensation received by a claimant as a lien against future payments, up to the maximum allowable fee recovery to which the claimant's attorney is otherwise entitled. ... The Board in *Martin* similarly interpreted Section 1-623.24(g). As the CRB therein stated, "We discern nothing within the public sector act that dictates following any other course than that endorsed under the private sector act.... [A]ttorney's fee awards are to be calculated as a percentage of the entire amount of [the] benefits award received by the claimant.... In order to effectuate this goal in situations where the total fee award exceeds the benefits secured by the claimant up to the issuance of the fee award, the ALJ is to enter an award for 20% of the actual benefits paid. Further, according to the Board's directive the ALJ is to order that employer pay counsel an amount equal to 20% of each future payment of compensation (in addition to the amount paid to the injured worker) until such time as counsel has received the entire fee approved or claimant is no longer receiving compensation, whichever comes first.

Claimant's Brief at 4.

It is the clear intent of a statute that awards attorney's fees in addition to compensation for an injury is to promote the availability of counsel to claimants. The attorney fee provisions enacted by the legislature accomplish that goal through two parameters. First, the objective value, in terms of time expended, expertise of counsel, the complexity of a case, and the amount of the outcome at stake, are considered to arrive at what the value of the attorney's services are, as a professional matter. Second, an attorney can be awarded that amount, but subject to a 20% limit of the benefits awarded. There is no reason why the 20% limit should arbitrarily be determined by how long it takes an ALJ or a CRB review panel to dispose of a claim, appeal or a fee application.

CONCLUSION AND ORDER

The Order Regarding Fee Petition is not arbitrary, capricious, or an abuse of discretion. It is in accordance with established law and is affirmed.

So ordered.