

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-145

**KENNETH ALLEN,
Claimant-Petitioner,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF FIRE and
EMERGENCY MEDICAL SERVICES,
Employer-Respondent.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 FEB 23 AM 9 32

Appeal from an October 5, 2016 Order Denying Attorney's Fees
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 14-008, DCP No. 0468-WC-94-0500014

(Decided February 23, 2017)

Michael J. McAuliffe for Claimant
Rashaan Dickerson for Employer

Before GENNET PURCELL, LINDA F. JORY and HEATHER C. LESLIE *Administrative Appeals
Judges.*

GENNET PURCELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This matter is an appeal of an Order Denying Attorney's Fees ("Order") that was issued on October 5, 2016. The Order was issued following Claimant having prevailed at a formal hearing before an Administrative Law Judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Department of Employment Services on December 30, 2015. *Allen v. District of Columbia Department of Fire and Emergency Medical Services*, AHD No. PBL 14-008, (December 30, 2015).

The Compensation Order ("CO") issued by the ALJ was timely appealed by Employer to the Compensation Review Board ("CRB"). On June 22, 2016, the CRB issued its decision and order which affirmed the CO. *Allen v. District of Columbia Department of Fire and Emergency Medical Services*, CRB No. 16-010 (June 22, 2016).

On August 16, 2016, counsel for Claimant filed a Petition for Approval of Attorney's Fees ("Fee Application") with AHD seeking \$14,280.00 in attorney's fees and \$35.89 in costs for services performed before AHD related to the CO. The Fee Application averred that as a result of the CRB decision affirming the CO, Claimant would receive more than 146 weeks of temporary total disability compensation benefits; the amount of actual benefits "should exceed \$70,000.00." The Fee Application also averred that Claimant's compensation benefit payments would be ongoing and that counsel assessed payments due to him at the rate of \$300.00 per hour.

On June 21, 2016, Employer filed Employer's Opposition to Claimant's Fee Petition asserting that Claimant's Fee Application was untimely, that the requested hourly rate exceeded the maximum allowable rate established by DOES policy,¹ and that Claimant's itemized billing statement included unwarranted claims for fees.

On October 6, 2016, an Order denying Claimant's counsel's Fee Application, which is the subject of this appeal, was issued by AHD. The Order denied the award of an attorney's fee on the basis that the Fee Application was filed untimely.

On November 4, 2016, Claimant timely filed an Application for Review of Order Denying Claimant's Counsel's Petition for Attorney's Fees and Memorandum of Points and Authorities in Support of Application for Review of Order Denying Claimant's Counsel's Petition for Attorney's Fees ("Claimant's Brief") with the CRB.

On November 16, 2016, Employer filed its Employer's Opposition to Claimant's Application for Review of the Fee Petition ("Employer's Brief").

Claimant's benefit for back payments ordered to be reinstated as of October 10, 2013, and paid on or before July 21, 2016, were not received by Claimant until November 3, 2016.

ANALYSIS

As an initial matter, the facts underlying the claim for benefits under the District of Columbia Government Comprehensive Merit Personnel Act, D.C. Code §§ 1-601.1, *et seq.*, ("the Act") are not germane to this appeal, and thus will not be recited. An appeal of an Order that is not based upon an evidentiary record, must be affirmed by the CRB 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).

Claimant's counsel appeals the Order and asserts that notwithstanding the late filing of the Fee Application, he is entitled to the attorney's fee requested. Claimant's counsel asserts:

¹ On March 16, 2016, DOES issued Administrative Issuance 16-01 which increased the maximum hourly rate of awardable attorney fees to \$310 per hour for attorneys with twenty (20) years or more of experience. The increased rate of awardable attorney's fees pursuant to Administrative Issuance 16-01 only applies to new claims filed pertaining to injuries sustained on or after July 1, 2016.

Subparagraph (b) (2) of this statute states that an attorney's fee may not exceed 20% of the "actual benefit secured." It is quite true that the decision of the Compensation Review Board was issued on June 22, 2016. It is also true that the regulations implementing 1-623.27 state that the claim for fees shall be submitted in writing to the ALJ within thirty days of the issuance of a decision. Since the fee petition was not mailed until August 12, 2016 (and received by Judge Carney on August 16, 2016), Judge Carney is correct that the fee petition was filed beyond the thirty day time window. However, as was argued to Judge Carney, the delay was not the fault of Claimant or his counsel.

To properly comply with §1-623.27(b) (2), ("the 20% rule"), one must know how much the Claimant would receive in "actual benefits secured." Simply put, it was impossible to know that because the government would not say. Undersigned counsel called and sent emails, but did not receive any information about how much Mr. Carney [sic] would receive.

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Rather than wait any longer, on August 12, 2016, counsel filed a Petition for Approval of Attorney's Fees and "estimated" that Mr. Allen would receive over \$70,000.00. However, at that point Mr. Allen had received **nothing**.

Claimant's Brief at unnumbered page 3.

In opposition, Employer asserts that "[a]lthough the date of the CRB decision is relevant in calculating timeliness of Claimant's request for fees for work performed before the CRB, it has no bearing on the timeliness (or untimeliness) of Claimant's petition for fees before the OHA." Employer's Brief at 3. We agree.

In the alternative, Employer also argues:

However, even if the date of the CRB's issuance of its decision is used as the date by which to determine the timeliness of Claimant's petition for work performed before the OHA, Claimant's petition is nonetheless untimely, as Claimant's petition was filed over thirty days after the CRB's decision of June 22, 2016.²

Employer's Brief at 3.

Employer relies upon *Bonaparte v. District of Columbia Office of Tax and Revenue*, CRB No. 13-152, (February 12, 2014) for the proposition that "the initial fee petition is be filed within 30 days of the issuance, not the finalization, of the compensation order which results from the

² Notably, on September 19, 2016 Claimant's counsel submitted a separate fee application requesting payment for attorney's fees incurred by Claimant counsel's representation before the CRB. Subject to an amendment of the hourly rate from \$300.00 per hour to \$240.00 per hour, the CRB, on October 13, 2016 conditionally approved an award of fees assessed against Employer in the amount of \$3,648.00, for Claimant counsel's time spent before the CRB.

formal hearing.” While correctly restating the law, factually *Bonaparte* affirmed an award of an attorney’s fee which had been issued, the application for which was filed with AHD prior to the CO becoming a final order pursuant to the Act. In *Bonaparte*, the Fee Application was prematurely filed with AHD, not late, as in the case *sub judice*.

Notwithstanding this distinction, in light of the statutory language in D.C. Code § 1-623.27 (b) (2) limiting attorney fee awards to 20% of the “actual benefit secured”, the issue of the government’s approximate 13 week delay in reinstating Claimant’s benefit payments must be considered.

Regarding this delay, Claimant argues:

Mr. Allen’s benefits were reinstated as of August 21, 2016. However, the back payment (beginning October 10, 2013) was not received until November 3, 2016. This benefit was supposed to be paid on or before July 21, 2016 (thirty days after the Compensation Review Board order). However, the government waited almost four months to finally issue the payment. This was after numerous phone calls, emails and a letter from undersigned counsel.

Simply put, counsel cannot comply wit [sic] the 20% rule unless the government tells us how much is being paid. The government did not tell us that until November 3, 2016 (when the check was received). The check is in the amount of \$115,461.59. There is no explanation as to how that figure was reached.

Claimant’s Brief at unnumbered pages 3-4.

With regard to the government’s payment delay, Employer asserts that Claimant counsel’s Fee Application ultimately contained a “guesstimated” benefit figure of \$70,000.00 plus ongoing benefits from which Claimant counsel derived the requested 20% attorney fee amount; that, it was not until after the Fee Application was filed that Claimant learned the actual benefit figure amount. Employer argues further that Claimant counsel “could have performed the same guesswork within thirty days of the issuance of the CO . . . based on his guesswork, and the Petition would have been timely.” Employer’s Brief at 4. We agree.

The District of Columbia Municipal Regulations (“DCMR”) promulgated in accordance with Section 1-623.27(b)(2) of the Act specifically provides the filing deadline associated with the filing of claims for fees for representation of a claimant. Specifically, 7 DCMR § 132.1 provides:

Claims for fees for representation of a claimant shall be submitted in writing to the ALJ, if a hearing has been requested, within thirty (30) days of the issuance of a decision under § 130.12.

7 DCMR § 132.1.

In this case, the Fee Application seeking an award of attorney fees for services assessed before AHD was untimely filed. Had Claimant’s counsel filed a timely fee application averring that the

precise amount of benefits, from which a 20% fee amount could be calculated, was not yet available, and otherwise informed AHD of the delay in reinstatement and receipt of compensation benefits, and the collection efforts undertaken by Claimant's counsel prior to the statutorily mandated 30 day period for filing attorney fee applications, the ALJ could have, in the exercise of reasonable discretion, held the Fee Petition in abeyance, issued an order tolling to statute of limitations or dismissed the petition, without prejudice to its being re-filed at a later date, perhaps most logically upon reinstatement of the benefit payments.

Alternatively, as Employer persuasively argues in opposition of Claimant counsel's appeal, a timely submission of the Fee Application including the "guesstimated" benefit figure of \$70,000.00 would have also timely preserved Claimant counsel's standing to request attorney's fees pursuant to the Act. The determination that Claimant counsel's Fee Application was untimely is affirmed.

Finally, Claimant's Brief asserts that the original Fee Application filed at AHD erroneously calculated legal fees at the rate of \$320.00 per hour. In his appeal, Claimant's counsel stipulates to a recalculation of the attorney's fees based upon a \$240.00 per hour amount. This correction is noted herein for preservation upon appeal purposes only.

CONCLUSION AND ORDER

The Order denying Claimant counsel's attorney's fee is not arbitrary, capricious, or an abuse of discretion, and his decision to deny Claimant's counsel an attorney fee award is in accordance with the law. The Order is **AFFIRMED**.

So ordered.