

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB 09-065

VALERIE JONES,

Claimant–Petitioner,

v.

UNIVERSITY OF THE DISTRICT OF COLUMBIA,

Self-Insured Employer–Respondent.

Appeal from an Order Denying Attorney Fees
Administrative Law Judge Joan E. Knight
AHD No. PBL 06-112A, DCP No. 761039-8001-2003-0003

Kirk D. Williams, Esquire, for the Claimant-Petitioner

Pamela L. Smith, Esquire, for the Respondent-Employer

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL,
Administrative Appeals Judge, and LAWRENCE D. TARR,¹ *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005), by which the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*(Act).

¹ Administrative Law Judge Tarr is appointed by the Director of the Department Of Employment Services (DOES) as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-06 (May 20, 2009) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

OVERVIEW

This appeal challenges a March 20, 2009, Order of Denial issued by an Administrative Law Judge (ALJ) from the Administrative Hearings Division, Office of Hearings and Adjudication, District of Columbia Department of Employment Services (DOES). In that order, the ALJ denied Claimant-Petitioner's counsel's request for a fee of \$3,360.00.

Claimant-Petitioner (Petitioner) sustained an injury while working for Employer-Respondent (Respondent) on November 14, 2002. Her claim was accepted and Petitioner received temporary total benefits in the weekly amount of \$448.16 beginning on December 7, 2002. On April 25, 2008, Respondent notified Petitioner that it was reducing her weekly benefit to \$105.50.

On May 22, 2008, Petitioner's counsel filed an Application for a Formal Hearing challenging the benefit reduction. A formal hearing took place on August 12, 2008. Each side submitted evidence and called one witness. On October 22, 2008, the ALJ issued a Compensation Order (CO) in which she held that Respondent improperly adjusted Petitioner's weekly wage and restored Petitioner's benefits to their pre-adjustment level. *Jones v. University of the District of Columbia*, AHD No. PBL 06-112A, DCP No. 761039-8001-2003-0003. Respondent did not appeal this decision.

On December 15, 2008, Petitioner's counsel filed a request for an attorney's fee award. Counsel requested a fee of \$3,360.00, for 14.00 hours of legal services at the rate of \$240.00 per hour.

The ALJ issued an Order to Show Cause directing Respondent to file objections to the requested attorney's fee. Respondent filed several objections; that a fee award is inappropriate because Petitioner's counsel failed to establish that the fee request did not exceed 20% of the actual benefits secured, that D.C. Official Code § 1-623.27 limits the benefits against which the 20% is measured to 30 days from the CO, and that the hours submitted for legal services is excessive. Petitioner's counsel filed a response to Respondent's objections on January 21, 2009, and again requested a \$3,360.00 fee.

On February 10, 2009, the ALJ issued a second Order to Show Cause, noting, among other matters, that Petitioner's counsel "had not stated the amount of disability compensation benefits claimant received as a result of the legal services Counsel provided claimant at AHD."

The ALJ ordered Petitioner's counsel to submit a document that stated the amount of disability compensation benefits that Petitioner received because of his legal services through the date of the show cause order. The ALJ ordered Respondent to show cause why an Order based on this amount should not be entered. The ALJ also ordered Respondent to submit a statement showing the total amount of benefits Petitioner received after her benefits were restored pursuant to the CO and the amount of disability benefits Petitioner presently and continuously receives.

Neither party complied with the second Order to Show Cause. Petitioner's counsel did not submit the computations as ordered by the ALJ. Instead he responded by advising the ALJ that he had requested that Respondent provide a full accounting.

Respondent also did not provide the information ordered by the ALJ. Instead of providing the lump sum and future payments made pursuant to the October 22, 2008, CO, it appears Respondent submitted payments made in 2006, pursuant to a May 15, 2008, CO.

The ALJ then issued the Order of Denial that is the subject of this appeal. The ALJ declined to issue any award for an attorney's fee because:

Although this agency recognizes Counsel has secured restoration of Claimant's benefits, as well as, present and continuing benefits pursuant to the CO, it is still noted that Counsel's request for fees in the amount of \$3,360.00 is not supported by a sum certain from which to derive the 20% required in order to award a reasonable attorney's fee.

On review, Petitioner argues that the ALJ erred by holding that there must be evidence of the actual benefits secured before an attorney's fee may be awarded and erred by holding that Petitioner had the burden of producing this evidence.

ANALYSIS

Since the Order under review is not one based on an evidentiary record produced at a formal hearing, the applicable standard of review by which we assess the determination reached by AHD is whether the decision 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).

Petitioner first argues that the Act does not require evidence of the actual benefit secured in order to obtain an award of attorney fees. We disagree.

D.C. Official Code § 1-623.27 (b) (2) states:

If a person utilizes the services of an attorney-at-law in the successful prosecution of his or her claim under § 1-623.24(b) or before any court for review of any actions, award, order, or decisions, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee, *not to exceed 20% of the actual benefit secured*, which fee award shall be paid directly by the Mayor or his or her designee to the attorney for the claimant in a lump sum within 30 days after the date of the compensation order. (Italics added)

As the italicized section of this statute mandates, an ALJ may not award an attorney fee that exceeds 20% of the actual benefit secured. Therefore, the ALJ must know the amount of actual benefit secured to insure that the awarded fee does not exceed the statutory restriction.

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 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.

We also disagree with Petitioner's assertion that the only way a claimant can obtain evidence of the benefits paid is to get the information from the Respondent and that this "would do nothing but delay and unnecessarily impede an otherwise streamlined process." (Memorandum at 6). Petitioner's argument fails to acknowledge that the Petitioner, as the recipient of the benefit payments, also is in possession of payment information.

Certainly, there may be times when a claimant may not be able to produce payment information. In such cases, we anticipate the administrator of the Disability Compensation Program would voluntarily disclose payment information. Otherwise, an ALJ could order such disclosure, as the ALJ did in this case, or a claimant may request payment information through formal discovery.

Lastly, we point out that the ALJ denied the fee request. The ALJ did not dismiss it. Therefore, Petitioner may refile his request upon obtaining the information regarding the actual benefit secured.

CONCLUSION

The March 20, 2009, Order of Denial is neither arbitrary, capricious, nor an abuse of discretion and is in accordance with the law.²

² We do not agree with Petitioner, as argued in his Motion For Summary Reversal and Remand, filed while this appeal was pending, that the CRB's decision in *Martin v. D.C. Department of Corrections*, CRB No. 09-065, AHD No. PBL 08-212, AHD No. 761032-0003-2002-0010 (April 14, 2009) requires summary reversal of the March 20, 2009, Order of Denial. The *Martin* decision did not involve the issues raised by this appeal; that a claimant must present evidence that the requested fee does not exceed 20% of the actual benefit secured and that a claimant has the ultimate burden of proof.

ORDER

The March 20, 2009, Order of Denial is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

Lawrence D. Tarr

LAWRENCE D. TARR

Administrative Appeals Judge

September 9, 2009

DATE