

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-117

**WILLIAM MOSBY,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,
Self-Insured Employer-Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 NOV 23 AM 9 55

Appeal from a June 24, 2015 Order Awarding Attorney's Fee
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL-12-046A, DCP No. 30090448718-0001-0468-WC-09-0500537

(Decided November 23, 2015)

Richard J. Link for Claimant
Andrea G. Comentale for Employer

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

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER VACATING ATTORNEY'S FEE AWARD

This case is before the Compensation Review Board (CRB) on the Self-Insured Employer's Application for Review (AFR) of the June 24, 2015 Order Awarding Attorney's Fee. Because we find the entry of the Order was not in accordance with the law, we VACATE it.

The relevant facts for this appeal are that on April 17, 2015, a Compensation Order (CO) awarded William Mosby (Claimant) Public Sector Workers' Compensation (PSWC) benefits. On or about April 27, 2015, counsel for Claimant filed a Petition for Counsel Fees pursuant to D.C. Code § 1-623.27(b)(2). Employer filed a response to the petition asserting that an appeal of the April 17, 2015 CO was forthcoming; therefore the CO would not be a final decision for which an award of attorney fees could be made. On May 18, 2015, the April 17, 2015 CO was appealed to the CRB. On May 29, 2015, Employer responded to a May 19, 2015 Order to Show Cause directing Employer to respond to Claimant's Petition, stating that it had responded to the

Petition and stressed again that the request for attorney fees should not be granted because the April 17, 2015 CO, having been appealed was not final.

On June 24, 2015, the ALJ issued the Order Awarding Attorney Fees (Order) concluding Employer's argument "that the April 17, 2015 Compensation Order is not a final order, is not sufficient to determine the outcome of the request for attorney fees". Order at 2.

On July 24, 2015, Employer filed the present Application for Review (AFR) and Memorandum of Points and Authorities in Support of Petitioner's AFR appealing the ALJ's June 24, 2015 award of attorney's fee.

On September 18, 2015, the CRB decided the Employer's appeal of the April 17, 2015 CO. The CRB found the permanent partial disability benefit award was not in accordance with the applicable law and reversed and vacated the ALJ's award.

ANALYSIS

In our review of an appeal of an Order from the AHD which is not based upon an evidentiary record, the Board must affirm the Order 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).

In the case at bar, the ALJ entered an Order requiring Employer to pay Claimant's counsel an attorney's fee. The ALJ's Order is directly in conflict with the CRB's decision, issued almost three years ago, *Dixon-Cherry v D.C. Public Schools*, CRB No. 12-173, AHD PBL No. 11-039 (November 28, 2012) and our recent decision, *Atkins v. D.C. Department of Corrections*, CRB 15-052, AHD No. PBL 12-012, DCP No. 76103-20001-1999-0057 (September 11, 2015).

The facts in *Dixon-Cherry* parallel the facts in this case. On July 19, 2012, an ALJ entered an award in the claimant's behalf for temporary total disability benefits. On July 25, 2012, the claimant's counsel petitioned for a fee award. On August 20, 2012, the employer appealed the CO. On September 21, 2012, the ALJ awarded an attorney's fee. Employer appealed the assessment of the fee on October 22, 2012.

The CRB held:

Before addressing the merits of the Employer's appeal, we note that on September 21, 2012, the date of the award of attorney's fee, the CO was on appeal and pending resolution by the CRB. As the CO under review may be affirmed, modified, revised, or remanded,¹ the CO was not a final order that could serve as the basis for a fee petition. It was premature for the ALJ to award an attorney's fee.

¹ D.C. Code § 1-623.28(a).

The CRB, on November 27, 2012, issued a decision, affirming the Compensation Order. That decision may, or may not, be appealed to the District of Columbia Court of Appeals. As such, we must vacate the September 21, 2012 award. The Claimant may, after all appeals are pursued and exhausted, resubmit the fee petition within the applicable statutory guidelines.

Id. at 3-4.

The ALJ did not cite nor distinguish the *Dixon-Cherry* decision. Instead, the ALJ relied on *Carrington v. D. C. Public Schools*, CRB No. 13-093, AHD No. PBL No. 12-041, DCP No. 30100942563-0001 (August 29, 2013) which does not relate to an attorney's fee. That authority relates to a stay of a compensation order and both stand for the proposition that absent a stay, the filing of an AFR does not relieve an employer from paying benefits awarded to a claimant.

The ALJ's award of an attorney's fee while an appeal was pending is not in accordance with the law and is hereby VACATED.² See *Gruenwald v. District of Columbia Housing Authority*, CRB No. 15-128, AHD No. PBL-13-039, DCP No. 761001-00101999-0003.

CONCLUSION

The June 24, 2015 Order Awarding Attorney's Fee is not in accordance with the law and is VACATED.

So ordered.

² Since an attorney has 30 days from decision to apply for a fee, the proper procedure would have been for the ALJ to take the fee petition under advisement.