BRB No. 10-0246

ALEXANDER TROTTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CP&O, LLC	)	DATE ISSUED: 08/20/2010
	)	
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Denying Attorney Fee and Paralegal Fee Petition of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Attorney Fee and Paralegal Fee Petition (2009-LHC-01758) of Administrative Law Judge Alan L. Bergstom rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant suffered a work-related injury to his face and left eye on February 5, 2008. He began treatment with Dr. Karakla, who performed surgery on February 13, 2008. Employer voluntarily paid temporary total disability benefits and medical benefits. On April 21, 2009, Dr. Karakla referred claimant to a pain management specialist as claimant continued to complain of pain related to the injury. Claimant requested authorization for treatment with a pain management specialist by letter dated May 8, 2009. As employer did not respond to the request, claimant requested an informal conference with the district director on the issue of medical treatment. On June 8, 2009, claimant requested an update from employer regarding his request for a referral to a pain management specialist. Employer did not respond to this request and an informal conference was held on June 17, 2009. Employer did not appear at the informal conference and the district director requested employer to provide its position in writing. Employer averred that the requested treatment was not related to claimant's work injury on February 5, 2008, and thus urged the district director to deny claimant's request for treatment with a pain management specialist. On June 25, 2009, the claims examiner recommended in writing that employer authorize the referral to pain management as requested by claimant's treating physician, stating that the treatment was related to the work injury in February 2008.

As of July 21, 2009, employer had not authorized the treatment pursuant to the recommendation, and claimant requested that the case be transferred to the Office of Administrative Law Judges (OALJ) for resolution. On August 10, 2009, claimant's counsel spoke with employer's medical case manager, Ms. Kulick, who advised that she would be scheduling an appointment for claimant with The Center for Pain Management. However, by September 2, 2009 the appointment had not been scheduled and claimant again requested that the case be transferred to the OALJ. Claimant was notified that the case had been transmitted to the OALJ on August 13, 2009, and, on September 28, 2009, the OALJ scheduled the case for a hearing on February 10, 2010. By letter dated September 29, 2009, Ms. Kulick notified claimant's counsel that an initial pain management appointment had been scheduled for November 3, 2009. Thereafter, claimant requested that the hearing scheduled for February 2010 be removed from the docket and the case remanded to the district director.

Subsequently, claimant's counsel filed an application for an attorney's fee for work performed before the administrative law judge in the amount of $1,089.75, representing 2.91 hours of legal services at the hourly rate of $300 and .75 hours of paralegal services at the hourly rate of $95. Employer filed objections, contending that it cannot be held liable for claimant's attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), that the billing rate is excessive for the Tidewater, Virginia, market, and that a number of the services were not necessary to resolve the outstanding issue.

The administrative law judge found that employer accepted the district director's written recommendation that it authorize pain management treatment at The Center for Pain Management and that employer communicated its acceptance to claimant's counsel by letter dated August 4, 2009. Thus, the administrative law judge found that as the case was not transferred to the OALJ until after employer's acceptance, employer cannot be held liable for claimant's counsel's fee for work performed before the administrative law judge. 33 U.S.C. §928(b).

On appeal, claimant contends that employer had not authorized the medical treatment by July 21, 2009, which was the date claimant requested that the case be transferred to the OALJ for a hearing. In addition, claimant contends that on August 10, 2009, employer advised that it would schedule an appointment, but that an appointment had not been scheduled by the time the case was transferred to the OALJ. Moreover, claimant notes that employer did not schedule medical treatment until over five months after the district director's written recommendation, which was well after the fourteen days in which employer had to comply. Claimant argues in the alternative that the fees are "wind-up" services performed after August 10, 2009. Employer responds, urging affirmance of the administrative law judge's finding that it is not liable for claimant's attorney's fee pursuant to Section 28(b).

In order for an employer to be held liable for claimant's attorney's fee pursuant to Section 28(b), the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the instant case arises, has held that Section 28(b) requires all of the following: (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to adopt the written recommendation; and (4) the employee's procuring of the services of an attorney to achieve a greater award than what the employer paid or tendered after the written recommendation.[1] *Virginia Int'l*

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[1] Section 28(b) of the Act provides that:

> If the employer or carrier pays or tenders payment of compensation without an award…and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] or Board shall set the matter for an informal conference and following such conference the [district director] or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and

Terminals, Inc. v. Edwards, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005); *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody],* 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006). In this case, the administrative law judge properly found that the first two requirements were satisfied. Claimant contends that the administrative law judge erred in finding that employer timely accepted the district director's written recommendation. We agree that the administrative law judge's finding that employer is not liable for claimant's attorney's fee in this case is in error.

On June 25, 2009, the district director issued a written recommendation that employer authorize claimant's treatment with a pain management specialist based on the referral of Dr. Karakla, claimant's treating physician. The district director specifically rejected employer's contention that the treatment was not necessary for claimant's work-related injury. Employer did not accept this recommendation within 14 days, 20 C.F.R. §702.316, and on July 21, 2009, claimant requested that the case be transferred to the OALJ for resolution.[2] Moreover, although employer acknowledged acceptance of the district director's recommendation by telephone on August 10, 2009, an appointment was not actually scheduled for November 3, 2009 until September 29, 2009.[3] The case was referred to the OALJ on August 13, 2009. Thus, substantial evidence does not support

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> if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee…shall be awarded in addition to the amount of compensation. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b).

[2] The administrative law judge found that employer's claims manager contacted claimant's counsel on August 4, 2009, to notify him that employer accepted the district director's recommendation and would schedule an appointment with The Center for Pain Management. On appeal, claimant's counsel denies that this conversation took place. We note this alleged acceptance is not within the 14 days allowed for employer's acceptance of the district director's recommendation, is after the date claimant requested that the case be transferred to the OALJ, and thus does not affect our disposition of this appeal.

[3] Employer eventually scheduled claimant with an alternate pain management specialist, Dr. Spear, as The Center for Pain Management refused to schedule an appointment due to a payment dispute with employer in unrelated cases.

the administrative law judge's finding that employer accepted the district director's written recommendation that it authorize claimant's treatment with a pain management specialist in a timely manner. Employer's inaction required claimant to pursue authorization for medical treatment before the OALJ. Thereafter, the issue concerning the medical treatment was resolved in claimant's favor. Thus, based on these facts, claimant's counsel is entitled to a reasonable attorney's fee payable by employer pursuant to Section 28(b) as all of the prerequisites for liability under that provision have been met. *See Moody,* 474 F.3d 109, 40 BRBS 69(CRT); *Devor v. Dept. of the Army*, 41 BRBS 77 (2007); *Davis v. Eller & Co*., 41 BRBS 58 (2007). The administrative law judge's finding to the contrary is reversed. Consequently, the administrative law judge's denial of an attorney's fee is vacated, and the case is remanded to him for the award of a reasonable attorney's fee payable by employer. 20 C.F.R. §702.132; *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

Accordingly, the administrative law judge's Order Denying Attorney Fee is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge