



BRB No. 22-0200

AGGREY TAREMWA)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
REED INTERNATIONAL,)	
INCORPORATED)	DATE ISSUED: 7/28/2023
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA c/o AIG GLOBAL)	
CLAIMS)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Denying Petition for Attorney’s Fees and Costs and Order Denying Claimant’s Motion to Reconsider Order Denying Petition for Attorney’s Fees of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Andrew Nyombi (KNA Pearl Law, LLC), Silver Spring, Maryland, for Claimant.

Limor Ben Maier (Schouest, Bamdas, Soshea, Ben Maier & Eastham, PLLC), Houston, Texas, for Employer/Carrier.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

ROLFE and JONES, Administrative Appeals Judges:

Claimant’s attorney appeals Administrative Law Judge (ALJ) Stephen R. Henley’s Supplemental Decision and Order Denying Petition for Attorney’s Fees and Costs and Order Denying Claimant’s Motion to Reconsider Order Denying Petition for Attorney’s Fees rendered on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation Act (2020-LDA-00644), as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* We must affirm the ALJ’s findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained left arm and elbow injuries on September 3, 2018, after slipping and falling in the shower while working for Employer at Bagram Air Force Base in Afghanistan.¹ EX 1 at 1; EX 9. Employer began paying temporary total disability (TTD) compensation benefits on September 17, 2018, and continued paying through April 19, 2019. EXs 4-7. Employer also paid compensation from April 20, 2019, until October 2, 2019, but the parties disagreed as to whether this compensation was categorized as “temporary total” or “permanent partial.” Joint Exhibit (JX) 1; Hearing Transcript (HT) at 5.

On November 6, 2020, the ALJ conducted a video hearing; he issued a Decision and Order on June 7, 2021, awarding Claimant permanent partial disability (PPD) benefits.² On August 13, 2021, Claimant’s counsel filed a petition for attorney’s fees and costs, seeking \$154,964.49 for services and costs incurred while representing Claimant before the ALJ.³ *See* Claimant’s Petition for Attorney’s Fees and Costs, Ex. 1, Form LS-4. On

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the district director who filed the ALJ’s decision is in New York. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011). We note the ALJ incorrectly identified the United States Court of Appeals for the Eleventh Circuit – where Claimant filed his original claim – as the controlling circuit. D&O at 3 n.3. The mistake is of no moment.

² The ALJ awarded Claimant PPD compensation for a 20% impairment to his left arm based on an average weekly wage of \$154.35, as well as reimbursement for \$5,642.59 in past medical expenses. He also awarded reasonable and necessary future medical treatment. D&O at 1.

³ Claimant terminated his attorney-client relationship with his counsel following June 2021 decision. Employer received notice of this termination on December 9, 2021. Emp. Brief at 4. We acknowledge counsel as Claimant’s counsel for the purposes of this

November 24, 2021, the ALJ issued a Supplemental Decision and Order Denying Petition for Attorney's Fees and Costs (D&O), determining Claimant's counsel was not entitled to a fee under Section 28(a) or 28(b), 33 U.S.C. §928(a), (b). The ALJ concluded Section 28(a) is inapplicable because Employer began paying TTD compensation on September 17, 2018, and continued to pay through and subsequent to the time it received notice of the claim Claimant filed on August 28, 2019. D&O at 3. The ALJ then determined Claimant's attorney is not entitled to a fee under Section 28(b) because there is no evidence in the record to support a finding that an informal conference occurred, or a written recommendation was made as required by the statute. *Id.* at 3-4.

Claimant's counsel filed a motion for reconsideration on December 4, 2021, citing a letter written by Claims Examiner Joselito Quezada after Claimant withdrew from a settlement agreement on September 9, 2019, stating "perhaps the parties on an effort can find an amicable resolution of any/all outstanding issues. If the parties reach an amicable resolution, please notify this office before September 30, 2019." Claimant's Motion for Reconsideration (Recon. Motion) at 7; Recon. Motion Ex. 6. Claimant's counsel asserted this letter represents sufficient communications in lieu of an informal conference to justify an attorney fee award under Section 28(b). Recon. Motion at 5, 7. The ALJ rejected this argument, determining Claimant's counsel could not introduce this letter as evidence because the letter was neither newly discovered nor previously unavailable. Order Denying Claimant's Motion to Reconsider Order Denying Petition for Attorney's Fees (Recon. D&O) at 4. Further, the ALJ concluded even if the letter were accepted in evidence, it would not constitute the functional equivalent of an informal conference as the letter does not address any of the issues actually in dispute, notably Claimant's impairment rating. Recon D&O at 5.

Claimant's counsel appeals the ALJ's supplemental decisions, contending he is entitled to an attorney's fee under Section 28(a), 28(b), or 28(c), 33 U.S.C. §928(a), (b), (c). He argues he is entitled to a fee under Section 28(a) because while Employer initially compensated Claimant for his injuries, it refused to accept Claimant's PPD claim. Claimant Brief (Cl. Brief) at 27. Counsel argues the ALJ erred in analyzing Section 28(b) to require an informal conference. Cl. Brief at 21-22. Alternatively, Claimant's counsel asserts he should be granted a fee under Section 28(b) because the letter from the claims examiner represents a recommendation on the parties' dispute regarding the length and degree of Claimant's disability. *Id.* at 23. Finally, he contends he is entitled to a fee under Section 28(c) if the Board declines to overturn the ALJ's decision. Employer responds, urging affirmance.

appeal because it relates to work performed before the ALJ when he and Claimant maintained an attorney-client relationship.

Section 28(a)

Claimant's counsel contends he is entitled to a fee under Section 28(a). He argues the ALJ erred because Employer declined to pay the PPD benefits Claimant sought. Cl. Brief at 26. His argument distinguishes earlier payments Employer made as TTD benefits which discontinued once Employer determined Claimant's condition reached maximum medical improvement (MMI). *Id.*

Claimant's counsel's argument is not persuasive. Section 28(a) of the Act, 33 U.S.C. §928(a), provides the employer is responsible for a reasonable attorney's fee in addition to compensation when it "declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director]" and "thereafter" the claimant uses the services of an attorney in the successful prosecution of his claim. *Am. Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976), *aff'g* 2 BRBS 178 (1975); 20 C.F.R. §702.134(a). Generally, Section 28(a) applies when an employer declines to pay any benefits within 30 days of receiving notice of the claim, while Section 28(b) applies where employer begins paying benefits voluntarily, and a controversy then arises regarding claimant's entitlement to additional benefits. *See Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007); *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980).

As both parties acknowledged in their joint exhibits, Employer began paying TTD benefits on September 17, 2018, within two weeks of Claimant's September 3, 2018, injury. It continued paying benefits until October 2, 2019. As Claimant filed his claim on August 27, 2019, payments Employer made after receiving the claim were within the 30-day window. EX 4-7. Therefore, Employer did not decline to pay any compensation within 30 days of receiving the claim, precluding an employer-paid attorney's fee under Section 28(a).⁴ *See Day*, 518 F.3d 411, 42 BRBS 15(CRT); *Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 19 BRBS 50(CRT) (4th Cir. 1986). As such, Section 28(a) is inapplicable, and we look to Section 28(b).⁵

⁴ It is irrelevant that the parties disputed the category of indemnity benefits paid at some time after August 28, 2019. What is relevant is that Employer paid benefits. *Savannah Mach. & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981); *Henley v. Lear Siegler, Inc.*, 14 BRBS 970 (1982).

⁵ Claimant's counsel also attempts to compare this case to the decision in *Gordon*, 41 BRBS 13, wherein the Board reversed a district director's determination that Section 28(a) was inapplicable. The two cases are factually distinguishable. In *Gordon*, the

Section 28(b)

Claimant's counsel argues the ALJ erred in not granting him an employer-paid fee under Section 28(b). His argument can be streamlined to two main contentions: first, he claims the ALJ misinterpreted Section 28(b) inasmuch as he contends there is no statutory requirement for an informal conference in order to be awarded a fee. Cl. Brief at 15, 20-21. Second, he argues the ALJ wrongly concluded his proffered evidence was not the functional equivalent of an informal conference. Cl. Brief at 23-25. We disagree with both arguments.

Section 928(b), in relevant part, provides:

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 deputy commissioner or Board *shall set the matter for an informal conference* and following the conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation ... they shall pay or tender to the employee in writing the additional compensation, if any, 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 if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. If a claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fees for claimant's counsel in accord with the above provisions. In all other cases

employer declined to pay TTD benefits within 30 days of receiving the claim, triggering the application of Section 28(a) upon a successful prosecution. Later, when the claimant sought additional PPD benefits for the same injury, the employer timely paid, and the district director concluded Section 28(b) applied. As the two parts were for the same claim, the Board held Section 28(a) applied and controlled the entire case. *Gordon*, 41 BRBS at 14. In this case, Employer did not "decline to pay" as it paid Claimant compensation within the 30 days after receiving his claim.

any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. § 928(b) (1999). The statute has been interpreted as requiring satisfaction of the stated elements before an ALJ or district director may award an attorney's fee under Section 28(b); this means an employer is liable for a fee under this section only after an informal conference with the district director has occurred. *Staflex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44 (CRT) (5th Cir. 2000). The United States Courts of Appeals for the Fourth, Fifth, and Sixth Circuits have held the following are prerequisites to an employer's liability for a fee under Section 28(b): (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to accept the written recommendation; and (4) the employee's procuring of the services of an attorney to achieve a greater award than what the employer was willing to pay pursuant to the written recommendation. *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005) *cert. denied*, 546 U.S. 960 (2005). Following these holdings, the Board adopted this interpretation of Section 28(b) for use in these circuits as well as all others which have not addressed the issue. *Davis v. Eller & Co.*, 41 BRBS 58 (2007). The United States Court of Appeals for the Ninth Circuit is currently the only circuit which deviates slightly from the more stringent requirement that an informal conference and recommendation must occur for an award of an attorney fee under Section 28(b). *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979).

Claimant's counsel contends the Ninth Circuit's interpretation should apply in this instance, as the United States Court of Appeals for the Eleventh Circuit has not formally addressed whether an informal conference is required before awarding an attorney fee under Section 28(b). Cl. Brief at 20. He argues the ALJ's decision to rely on this strict interpretation requiring an informal conference is "unfair" and "derogates against the spirit and remedial intent" of the Act. *Id.* However, this case arises with the Second Circuit, not the Eleventh, *see* n.1, *supra*, and applying Ninth Circuit law would run counter to the Board's decision in *Davis*. There, the Board considered the plain language of the Act, and the decisions issued by the courts of appeals, and adopted the stricter construction of the section "in all circuits which have not addressed the issue."⁶ Counsel has provided us no

⁶ Moreover, even if Claimant were correct that this claim arises in the Eleventh Circuit, his argument would still fail as *Davis* itself arose in the Eleventh Circuit and was not appealed. *Davis*, 41 BRBS 58.

reason to depart from this holding. *See Devor v. Dep't of the Army*, 41 BRBS 77 (2007). We decline counsel's invitation to revisit or overturn *Davis*.

Alternatively, Claimant's counsel notes the ALJ erred in not accepting the claims examiner's letter from September 9, 2019, as a functional equivalent of an informal conference recommendation. Cl. Brief at 24; Recon. Motion Ex. 6. He argues the letter's comment to attempt to find "an amicable resolution to any/all outstanding issues" amounts to a written recommendation from the OWCP. *Id.* We likewise reject this argument. First, as the ALJ found, Claimant's counsel never demonstrated this letter was previously unavailable or newly discovered. The letter pre-existed Claimant's counsel's August 2021 fee petition, such that counsel had the opportunity to, but did not, submit it in support of his request for an attorney's fee. A party cannot introduce previously unsubmitted evidence in a motion for reconsideration unless the evidence was previously unavailable or newly discovered. *Jacobs v. Temper-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010). As such, the ALJ was correct in his decision to not consider it as evidence. *See McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999), *cert. denied*, 529 U.S. 1082; *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997); *N. River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).

Additionally, the ALJ rationally concluded in the alternative that the letter, if admitted, does not serve as the functional equivalent of an informal conference. While letters between the parties and a district director may serve as such, those letters must include a written recommendation on the disputed issues. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 127, 41 BRBS 1, 4(CRT) (4th Cir. 2007) (the district director responded to the claimant's request for an informal conference with recommendations that the employer should begin payments at the impairment rating not in contention); *see also Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT) (9th Cir. 1998).

The September 2019 letter merely states, "perhaps the parties on an effort can find an amicable resolution of any/all outstanding issues." Recon. Motion Ex. 6. The statement does not identify any issues between the parties, offer the district director's recommended position on a disputed issue, or direct the parties to do anything substantive regarding making payments or resolving issues. The letter amounts to a prompt for both parties to work amicably together to try to resolve the claim. Further, the record contains a letter dated October 29, 2021, signed by a different claims examiner, which states, as the ALJ found on reconsideration, that an informal conference did not occur in this case. *See* Recon. D&O at 3 (citing Emp. Recon. Motion Response Brief, Exh. C). Finally, both parties stipulated jointly that an informal conference had not occurred. JX 1. As an informal conference was not held, and the September 2019 letter is not a functional equivalent of an

informal conference, we affirm the ALJ's decision to deny an attorney's fee under Section 28(b).⁷ *Davis*, 41 BRBS 58.

Accordingly, we affirm the ALJ's Supplemental Decision and Order Denying Petition for Attorney's Fees and Costs and Order Denying Claimant's Motion to Reconsider Order Denying Petition for Attorney's Fees.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

I concur in the majority decision. However, I would not specifically affirm the ALJ's finding that the September 9, 2019 letter from a claims examiner is inadmissible because Claimant's counsel should have submitted it with his initial fee petition. Whether the letter was properly excluded from the record is immaterial given the ALJ's alternate,

⁷ As neither Section 28(a) nor (b) applies, obtaining an attorney's fee is only available by seeking approval from the ALJ pursuant to Section 28(c), 33 U.S.C. §928(c). Under such circumstances, any fee approved must consider the quality of the representation, the complexity of the legal issues involved, the amount of benefits awarded, and the financial circumstances of the claimant. 20 C.F.R. §702.132(a); *see Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 73, 76 (2007), *aff'g on recon.* 41 BRBS 1 (2007), *aff'd*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

permissible finding that the letter is not the functional equivalent of an informal conference and thus does not support fee liability under Section 28(b).

GREG J. BUZZARD
Administrative Appeals Judge