

In the Matter of the Compensation of
VERNON L. BOWMAN, Claimant

WCB Case No. 13-01130

ORDER ON REVIEW

Robert J Guarrasi, Claimant Attorneys

James B Northrop, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Marshall's order that awarded a \$6,000 carrier-paid attorney fee for the SAIF Corporation's "pre-hearing" rescission of its denial of claimant's injury claim for right forearm cellulitis. On review, the issue is attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

The ALJ held that claimant's attorney was entitled to a \$6,000 attorney fee for services rendered in prompting the pre-hearing rescission of SAIF's denial.¹ On review, claimant requests that the ALJ's attorney fee award be increased to \$25,000. In response, SAIF objects to that amount, but does not dispute the ALJ's \$6,000 fee award. For the following reasons, we affirm.

We review the attorney fee issue *de novo*, considering the specific contentions raised on review, in light of the factors set forth in OAR 438-015-0010(4) as applied to the particular circumstances of this case. Those factors are: (1) the time devoted to the case; (2) the complexity of the issue(s) involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the risk in a particular case that an attorney's efforts may go uncompensated; and (8) the assertion of frivolous issues or defenses.

¹ Under ORS 656.386(1), in all cases involving denied claims where a claimant finally prevails in a hearing before an ALJ or a review by the Board, a reasonable attorney fee shall be allowed. Where an attorney is instrumental in obtaining a rescission of a denial prior to a decision by an ALJ, a reasonable attorney fee shall be allowed. *Peggy L. Segur*, 62 Van Natta 1406, 1407 (2010).

We first address “the time devoted to the case” factor. In doing so, we emphasize that this “time devoted” factor is but one factor that we consider in determining a reasonable assessed attorney fee. *Anthony Lopez*, 65 Van Natta 2065, 2066 (2013); *Brenda J. Dillard*, 62 Van Natta 3052 (2010).

Here, claimant agrees with the ALJ’s finding that his counsel spent over 36 hours on the case. However, based on counsel’s “Statement of Services” submitted to the ALJ, some 14 hours of that time was performed *after* SAIF’s rescission of the denial. Moreover, much of those 14 hours was devoted to research and preparation for the hearing concerning the attorney fee issue, as well as for counsel’s travel and attendance at the hearing.

Yet, when a denial is rescinded voluntarily by a carrier before a hearing, a claimant’s counsel is entitled to a reasonable attorney fee for being “instrumental in obtaining a rescission of the denial prior to a decision.” See ORS 656.386(1). Consistent with this statutory mandate, in determining the amount of an attorney fee for services regarding a “pre-hearing” rescinded denial, our review is confined to a claimant’s counsel’s services rendered *before* the rescission. *Amador Mendez*, 44 Van Natta 736, 737 (1992); *Ernest C. Richter*, 44 Van Natta 101, *recons*, 44 Van Natta 118 (1992). Thus, claimant’s counsel’s services pertaining to “post-rescission” preparation for, and attendance at, the hearing are not considered in determining a reasonable attorney fee award. See *Steven P. Stewart*, 52 Van Natta 1326 (2000), *aff’d*, 178 Or App 145 (2001) (in determining the amount of an attorney fee for services provided regarding a rescinded denial, only services before the rescission may be considered); *Jewell F. Ramirez*, 52 Van Natta 854 n 1 (2000) (time spent preparing affidavit and log in support of attorney fee request not considered in determining attorney fee award).

Concerning the “nature of the proceedings” factor, we note that no hearing regarding the compensability of the previously disputed claim was necessary. Thus, in the absence of a “compensability” hearing, an attorney fee award in a case involving a “pre-hearing” rescinded denial would generally be less than that granted by the ALJ’s order.

Nevertheless, notwithstanding the lack of a “compensability” hearing and despite our restricted view of claimant’s counsel’s “Statement of Services,” we ultimately agree with the ALJ’s determination of a reasonable attorney fee award. In reaching this conclusion, for the following reasons, we consider the value of the interest and the benefit secured for claimant to be significantly more than that calculated by the ALJ.

The ALJ stated that the claim's value and benefits secured included medical services of "approximately \$40,000 in audited medical bills[.]" (O & O, p. 2). That amount reflects the audited adjusted amount of medical costs SAIF ultimately negotiated to pay. (Tr. 17-18). However, claimant presented un rebutted evidence of actual medical bills totaling almost \$124,000. (Ex. 18). Furthermore, his wife testified that responsibility for payment of such medical bills would have led them to bankruptcy, the loss of their home, and the selling of a valuable family heirloom. (Tr. 11-12). Thus, under these particular circumstances, we consider the value of the interest involved/benefit secured to claimant to be more significant than the ALJ determined.

Furthermore, based on cases generally litigated before the Hearings Division, we consider the compensability issue (a causation dispute regarding the infectious disease of "cellultis") to be of above average complexity. Likewise, before the "pre-hearing" rescission of the denial, there was a decided risk that claimant's counsel might go uncompensated for his services. Finally, the attorneys involved in this proceeding are skilled and experienced practitioners, well acquainted with this forum.

In conclusion, after considering the aforementioned factors and applying them to this case, we agree with the ALJ's ultimate determination that a reasonable fee for claimant's attorney's "pre-hearing" services in obtaining rescission of the denial (four days before the originally scheduled hearing) is \$6,000, payable by SAIF. However, we base our determination on the reasoning expressed above.

ORDER

The ALJ's order dated November 12, 2013 is affirmed.

Entered at Salem, Oregon on April 22, 2014