

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALD FERRETTI and DEPARTMENT OF DEFENSE,
DEFENSE CONTRACT AUDIT AGENCY, Lexington, Mass.

*Docket No. 97-2258; Submitted on the Record;
Issued May 12, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by approving an attorney's fee in the amount of \$2,313.00.

On February 13, 1996 appellant filed a claim for compensation alleging that on February 9, 1996 he felt his left leg "go numb" while moving boxes in the performance of duty.

The Office, in a May 21, 1996 letter decision, accepted appellant's claim for "lumbar radiculopathy work-related aggravation." The Office also stated that "no disability [was] accepted." In a separate decision issued the same day the Office denied appellant's claim for compensation, noting that "[D]isability due to the accepted injury is not supported by the medical evidence of file."

On November 7, 1996 appellant, through counsel, requested reconsideration. In a January 6, 1997 merit decision, the Office denied modification of the May 21, 1996 decision.

On November 8, 1996 Mr. Paul Kalker, appellant's attorney, submitted his application for approval of a fee in the amount of \$3,000.00.¹ Mr. Kalker stated that he expended 31.10 hours of time representing appellant before the Office regarding his compensation claim from April to November 1996. He noted that his representation included correspondence and communication with the Office and medical professionals, various telephone communications and correspondence with appellant and representation before the Office regarding appellant's request for reconsideration. Mr. Kalker stated that his billing rate was \$150.00 per hour.

In a letter dated January 17, 1997, appellant notified the Office that he was in the process of reviewing his attorney's fee application and stated that "his [attorney's] itemized list of

¹ The fee included a gratuitous discount of \$1,665.00 from the total annotated amount of \$4,665.00 to reach the requested amount of \$3,000.00.

expenses is overstated and exaggerated,” and requested that the Office withhold releasing funds until it received appellant’s statement.

In a letter dated April 21, 1997, appellant contested his attorney’s itemized schedule of services provided and included an itemized list of charges with which appellant took exception. Appellant disputed the amount of time the attorney spent in reviewing the file, in communicating with medical professionals and himself, the attorney’s delay in the amount of time it took him to file for reconsideration and the quality of legal services rendered.

In a letter dated April 17, 1997, Mr. Kalker advised the Office that he had a copy of the Office’s April 4, 1997 letter, as well as a copy of appellant’s January 17, 1997 letter. Mr. Kalker requested that the Office provide copies of “any further statements in connection with our application” that appellant had submitted.

In a decision dated April 23, 1997, the Office approved a fee of \$2,313.00. The Office stated that appellant’s attorney requested a fee of \$3,000.00 for services rendered from April 10 to November 6, 1996 for 31 hours of services at a rate of \$150.00 per hour and that appellant contested the reasonableness of the fee. It stated that it examined the case record and considered the usefulness of the attorney’s services, the nature and complexity of the claim, time spent and other factors in determining that \$2,313.00 was a reasonable fee.

The Office considered appellant’s concerns and arrived at its conclusions in the following manner. Regarding fees for two meetings held on April 10 and 19, 1996, the Office stated that “it would not be unfair to ‘split the difference’ between the times as alleged by both appellant’s attorney and appellant for work performed and, therefore, determined that the meetings totaled 1 hour and 29 minutes. Regarding time spent on June 12, 1996 reviewing correspondence, the Office agreed with appellant’s contention that he had not sent correspondence to be reviewed and discounted the attorney’s request for .20 hours of services. Regarding time spent reviewing medical records on July 30, August 20, October 10 and 29, 1996, the Office stated that appellant’s argument that 2.3 hours spent in reviewing less than three pages of medical evidence is excessive and reduced the fee for services for these charges to .75 of an hour. Regarding appellant’s telephone calls to his attorney, the Office determined that fees are approved based on time spent in conversation with counsel and since appellant did speak directly with his attorney on these occasions, such time was approved. Regarding time spent drafting, reviewing and revising appellant’s request for reconsideration, the Office stated that the 15.7 hours of work that appellant disputed “must denote some repetition of effort and, therefore, it would be fair to state, giving the benefit of the doubt to the attorney, that 9 hours would be an appropriate length of time ... for this activity.” The Office noted that difference in the amount of time between what the attorney requested and what the Office approved was 6 hours which amounted to a reduction of \$1,005.00 from the requested fee.

The Office further noted appellant’s additional complaints including that the attorney failed to correct an error by his physician in a timely fashion, that the attorney failed to fact-find or speak directly with any of his physicians, that he failed to follow-up on medical correspondence that the attorney sent to his physicians, that the reconsideration argument was weak, that the attorney delayed returning calls and that he failed to advise the Office that appellant had returned to work. The Office found that considering all the issues appellant raised

including the fact that appellant did not work nor receive income for an eight-month period, the fact that the claim was not awarded, the routine nature of the work performed and appellant's dissatisfaction with the representation provided, a reduction of one third of the remaining fee of \$3,469.50 to arrive at a fee of \$2,313.00, was fair.

In his appeal to the Board, appellant disputes the Office's formula in arriving at its final attorney's fee decision. Essentially, appellant asserts that the Office improperly awarded the attorney the benefit of the doubt in determining the time it took him to review and prepare appellant's claim. Appellant recommend that the Board approve a reduced attorney fee of \$1,054.00.

The Board finds that the Office did not abuse its discretion in approving an attorney's fee totaling \$2,313.00.

It is not the Board's function to determine the fee for representative services performed before the Office. That is a function within the discretion of the Office based on the criteria set forth in 20 C.F.R. § 10.145 and mandated by Board decisions. The Board's sole function is to determine whether the action by the Office constituted an abuse of discretion.² The criteria governing the approval of fees for a representative's services are provided in 20 C.F.R. § 10.145(b) which states:

“(b) The fee approved by the Office will be determined on the basis of the actual necessary work performed and will generally include but are not limited to the following factors:

- (1) Usefulness of the representative's services to the claimant.
- (2) The nature and complexity of the claim.
- (3) The actual time spent on development and presentation of the claim.
- (4) The amount of compensation accrued and potential future payments.
- (5) Customary local charges for similar services.
- (6) Professional qualifications of the representative.”

The Office properly considered the criteria set at 20 C.F.R. § 10.145(b). It found that given the routine nature of the services provided, the amount of time spent on the claim, the eight-month period that appellant lost from work, the fact that the attorney's services did not result in an award of compensation and that appellant was dissatisfied with the attorney's services, Mr. Kalker was only entitled to a reduced fee from \$2,313.00.

As noted above, the Board's sole function is to determine whether the action taken by the Office in the matter of the attorney's fee constituted an abuse of discretion. Abuse of discretion

² *Daniel J. Perea*, 42 ECAB 214 (1990).

is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.³ There is no evidence in this case, that the Office abused its discretion in approving an attorney's fee of \$2,313.00 in this case. Although appellant strongly disagreed with his attorney's handling of the claim, the Office, in its detailed review of appellant's itemized list of charges, supported appellant's concerns in most instances, reducing not only specific line charges submitted by the attorney by splitting the differences between the request and appellant's recommendation, but it also reduced the amended fee result by an additional one-third based on appellant's qualitative concerns regarding the attorney's attention and legal expertise that he brought to represent appellant's interests in this claim. The Board finds that, absent a showing that the Office's decision was clearly a manifest error, an unreasonable exercise of judgment, or an action which was contrary to both logic and probable deductions from known facts, the decision was proper.

The decision of the Office of Workers' Compensation Programs dated April 23, 1997 is hereby affirmed.

Dated, Washington, D.C.
May 12, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

³ *Id.*