

**United States Department of Labor
Employees' Compensation Appeals Board**

MELVIN D. WADDY, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 05-837
Issued: October 17, 2005**

Appearances:
Melvin D. Waddy, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

Appellant filed an appeal on February 28, 2005 of a December 3, 2004 merit decision of the Office of Workers' Compensation Programs, approving an attorney's fee in the amount of \$3,437.50 for services rendered from November 25, 1992 to April 11, 1996. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the attorney fee issue in this case.

ISSUE

The issue is whether the Office abused its discretion by approving an attorney's fee in the amount of \$3,437.50 for services rendered from November 25, 1992 to April 11, 1996.

FACTUAL HISTORY

Appellant, a 47-year-old letter carrier, was injured on June 1, 1990 when an elevator door struck his head. His claim was accepted for contusion of the skull and cervical radiculopathy. His June 25, 1991 claim for a recurrence of disability was denied on November 8, 1991. By decision dated June 4, 1992, an Office hearing representative set aside the November 8, 1991

decision and remanded the case for further development. Following a second opinion examination, the Office again denied appellant's recurrence claim.

Pursuant to a fee agreement dated November 9, 1992, appellant retained Alan C. Rassner, Esquire to represent him at an hourly rate of \$275.00 and provided a retainer in the amount of \$1,375.00 to be held in an escrow account pending approval of the fee by the Office.

Appellant's representative made two requests for reconsideration. By decision dated March 10, 1993, the Office refused to modify its September 29, 1992 decision and by decision dated August 26, 1993, the Office denied appellant's request for reconsideration. On September 10, 1993 appellant's representative appealed the Office's denial to this Board. By decision dated September 15, 1995, the Board set aside the Office's September 29, 1992 and March 10 and August 26, 1993 decisions and remanded them for further development, including a rationalized second opinion on causal relationship.

By letter dated October 5, 1996, appellant advised Mr. Rassner that he no longer required his services.

By decision dated March 12, 1997, the Office accepted appellant's claim for recurrence.

On March 12, 1998 Mr. Rassner submitted a copy of a fee approval application dated August 21, 1996, which he alleged had been submitted to the Office on that date. The application reflected that Mr. Rassner performed 16.45 hours of work at \$275.00 per hour, for a total request of \$4,523.75. He provided an itemization of services performed from November 25, 1992 through April 11, 1996, which reflected that he spent 3.95 hours on work performed before the Board.

By letter dated May 14, 1998, Mr. Rassner asked appellant to review and comment on his fee approval application, which he had enclosed. He also advised appellant that the sum of \$3,125.00 was being held in a third-party escrow account. The record contains no record of a reply from appellant.

By decision dated November 13, 2001, an Office hearing representative approved Mr. Rassner's fee in the amount of \$4,523.75.

Appellant requested a hearing, which was held on December 17, 2002. At the hearing, appellant alleged that Mr. Rassner refused to represent him further after the September 15, 1995 Board decision; performed no useful services; reviewed his file too many times; and improperly charged for telephone calls. Appellant also alleged that the November 13, 2001 decision improperly approved attorney's fees for work performed before the Board.

By decision dated March 10, 2003, an Office hearing representative modified the November 13, 2001 decision and approved a fee in the amount of \$3,437.50. The hearing representative subtracted the hours of services performed in connection with the appeal to the Board (3.95 hours), thereby reducing the fees approved by \$1,086.25. The hearing representative addressed the requirements of the Federal Employees' Compensation Act's implementing regulations with regard to approval of fees for services and determined that Mr. Rassner's services were useful, in that they ultimately led to the acceptance of appellant's

claim and that the complexity of the case supported the services of an attorney. He found that Mr. Rassner's fee was not excessive, in that an hourly fee of \$275.00 for appellate work performed by a New York City attorney was reasonable and that appellant had signed a retainer agreeing to pay the stated hourly rate.

By order dated August 7, 2003, which was reissued on February 26, 2004, the Board approved attorney's fees in the amount of \$1,086.25 for services rendered on behalf of appellant before the Board. The fees represented 3.9 hours of work at the hourly rate of \$275.00.

Appellant filed a timely appeal of the Office's March 10, 2003 decision approving attorney's fees in the amount of \$3,437.50. By decision dated November 28, 2003, the Board set aside the decision and remanded the case for reconstruction of the case record.

In a merit decision dated December 3, 2004, the Office approved attorney's fees in the amount of \$3,437.50.¹

LEGAL PRECEDENT

It is not the function of the Board to determine the fee for services performed by a representative of a claimant before the Office. That function is within the discretion of the Office based on the criteria set forth in Title 20 of the Code of Federal Regulations and mandated by the Board decisions. The sole function of the Board on appeal is to determine whether the action of the Office constituted an abuse of discretion.² Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.³

Section 10.703(a)(1)(ii) of the Code of Federal Regulations provides in pertinent part that a representative must submit a fee application, which includes a statement of agreement or disagreement with the amount charged, signed by the claimant.⁴ While the regulations provide that a fee application is deemed approved when it is accompanied by a signed statement indicating the claimant's agreement with the fee,⁵ they do not specifically provide for approval

¹ The Board notes that appellant appealed the Office's March 10, 2003 decision, finding that he had received an overpayment in the amount of \$1,948.62. On November 14, 2003 the solicitor moved to reverse the Office's overpayment decision. Although the record does not contain a copy of an order reversing the overpayment decision, the record does contain an inter-Office memorandum dated January 8, 2004 reflecting that "there was an erroneous determination that there was an overpayment of compensation and the [Board] issued an order granting our motion to reverse the overpayment decision." The issue of overpayment is not now before the Board.

² *Alvin T. Groner, Jr.*, 47 ECAB 588 (1996); *Edward Snider*, 39 ECAB 1268 (1988); *Azalee L. McCoy*, 39 ECAB 786 (1988).

³ *Gerald A. Carr*, 55 ECAB ____ (Docket No. 03-2257, issued January 8, 2004). See also *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁴ 20 C.F.R. § 10.703(a)(1)(ii) (2003).

⁵ 20 C.F.R. § 10.703(b) (2003).

when a claimant fails to contest a fee application.⁶ When a fee application⁷ has been disputed, the Office is required to provide the claimant with a copy of the fee application and request the submission of further information in support of any objection. After the claimant has been afforded a reasonable time to respond to the request, the Office will then proceed to review the fee application.⁸ Pursuant to section 10.703(c), when a fee is in dispute the Office will determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors: (i) Usefulness of the representative's services; (ii) The nature and complexity of the claim; (iii) The actual time spent on development and presentation of the claim; and (iv) Customary local charges for similar services.⁹

ANALYSIS

The record shows that in approving a fee of \$3,437.50 for Mr. Rassner, the Office took into consideration the criteria set forth in 20 C.F.R. § 10.703 pertaining to fees for representative services, including the services performed by Mr. Rassner, the time devoted to each service as set forth on his itemized statement, the complexity of appellant's case and Mr. Rassner's hourly rate of \$275.00 in comparison to the customary local charges of similar services. The record also indicates that although Mr. Rassner initially requested compensation for 16.45 hours of service rendered from November 25, 1992 through April 11, 1996, the Office properly subtracted the hours of service performed in connection with appeals to the Board. As Board precedent and the regulations governing the approval of representative's fees establishes, the Board and the Office are separate and distinct bodies and a separate application to the Board is required for approval of a fee for legal services performed in connection with an appeal.¹⁰

The Board has frequently stated that it will not interfere with or set aside a determination by the Office of a fee for representative services unless the evidence of record supports that the determination made by the Office represents an abuse of discretion.¹¹ Generally, an abuse of discretion can be shown only through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.¹² Pursuant to these guidelines, the evidence of record does not support that action taken by the Office in approving a fee of \$3,437.50 constituted an abuse of discretion.

⁶ See *Gerald A. Carr*, *supra* note 3.

⁷ *Id.*

⁸ *Id.*

⁹ 20 C.F.R. § 10.703(c) (2003). See also Federal (FECA) Procedure Manual, Part 1 -- Claims, *Fees for Representatives' Services*, Chapter 2.1200 (February 2005).

¹⁰ See *Edna M. Davis*, claiming as widow of *Kenneth L. Davis*, 42 ECAB 728 (1991); see also *Evelyn R. Adams*, 10 ECAB 585 (1959).

¹¹ See *Roy Goldman*, 32 ECAB 1569 (1981).

¹² See *Daniel J. Perea*, *supra* note 3.

The Board finds that appellant has failed to demonstrate that Mr. Rassner's fee was substantially in excess of the value of services received.¹³ Appellant entered into a fee agreement, whereby he agreed to pay Mr. Rassner an hourly fee of \$275.00 and has provided no evidence that said amount exceeded customary local charges for similar services. Although appellant has contended that his representative provided no useful services, Mr. Rassner's skills as an appellate attorney led to the eventual acceptance of appellant's claim for recurrence of disability. Therefore, by definition Mr. Rassner's services were useful. The nature and complexity of the case required Mr. Rassner to spend substantial time in the development and presentation of appellant's claim, as delineated in his itemized statement of the time spent on specific tasks.

On appeal to the Board, appellant argued that Mr. Rassner should not be compensated for time spent on telephone calls associated with his case. The Board has found that time spent on a claimant's case, including telephone calls, must be itemized and must include documentation, such as who was called, the date the call was made and the purpose for the call, in order for the Board to determine whether the services were actually performed.¹⁴ In his itemized statement, Mr. Rassner provided the date, nature of the call and the name of the individual or organization to whom the call was placed. Since appellant has provided no evidence that Mr. Rassner did not make the subject telephone calls, the Board finds that the services were actually performed.

Appellant contended that Mr. Rassner improperly collected his fee prior to approval by the Office. The Board finds appellant's contention without merit. 5 U.S.C. § 8127 provides that a claim for legal services is valid only if approved by the Secretary. However, the Act's implementing regulations further provide that escrow deposit of funds into the hands of a third party until receipt of the Office's approval is not considered receipt or collection of a fee and that under these circumstances, a representative's claim for services would be valid. In this case, Mr. Rassner collected a retainer in the amount of \$1,375.00 which he placed in an escrow account pending approval of the fee by the Office. The Board finds that Mr. Rassner's actions were in conformance with the requirements of the Act and its implementing regulations.

As noted above, the Board's sole function is to determine whether the action taken by the Office on the matter of the attorney's fee constituted an abuse of discretion. Generally, abuse of discretion is 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.¹⁵ The Board finds that no such error, unreasonable judgment or contrary actions are evident in the Office's approval in this case of an attorney's fee of \$3,437.50.

CONCLUSION

The Board finds that the Office did not abuse its discretion in approving the attorney's fee requested.

¹³ 20 C.F.R. § 10.703(c) (2003).

¹⁴ *Charles A. Mikalaynas*, 40 ECAB 1277 (1989).

¹⁵ *See Lottie M. Williams*, 56 ECAB ____ (Docket No. 04-1001, issued February 3, 2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 3, 2004 is affirmed.

Issued: October 17, 2005

Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board