

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT RYAN and U.S. POSTAL SERVICE,  
POST OFFICE, Melville, N.Y.

*Docket No. 96-2143; Submitted on the Record;  
Issued July 2, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether appellant established a recurrence of disability on February 4, 1995 causally related to his May 6, 1994 accepted employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in approving an attorney's fee in the amount of \$3,000.00.

In the present case, the Office accepted that appellant sustained a thoracic strain on May 6, 1994 while loading a vehicle in the performance of his federal employment. Appellant returned to his regular duties on June 6, 1994. On February 8, 1995 he filed a notice of recurrence of disability alleging that he suffered a recurrence of disability on February 4, 1995. Appellant indicated that his back had swollen up at least ten times since the injury and he stated he could no longer take the pain.

On February 22, 1995 the Office requested additional information, including a rationalized medical opinion addressing the relationship between appellant's current condition and his accepted injury.

Appellant subsequently submitted a February 8, 1995 report from Dr. Douglas E. Barkin, a Board-certified orthopedic surgeon, indicating that appellant had a soft tissue in his right scapula. On March 13, 1995 Dr. Barkin indicated that appellant could not work due to a right scapula mass from his February 4, 1995 recurrence.

By decision dated March 31, 1995, the Office rejected appellant's claim on the basis that the evidence failed to establish a causal relationship between appellant's current condition and his accepted injury.

Appellant retained Paul Kalker as his representative at \$150.00 per hour on April 17, 1995. Appellant and his representative agreed to a retainer of \$2,000.00 which would

be placed in an escrow account. Appellant's representative entered his appearance on April 19, 1995 and requested a copy of the file on August 16, 1995.

Appellant then submitted brief status reports from Dr. Barkin diagnosing a soft tissue mass or a torn scapula. Dr. Barkin did elaborate on his diagnoses.

Appellant also submitted a March 23, 1996 report from Dr. Carl B. Weiss, a Board-certified orthopedic surgeon, diagnosing a sprain/strain of the thoracic spine. A more complete report from Dr. Weiss dated March 5, 1996 was then provided. Dr. Weiss stated he treated appellant since May 11, 1994 after appellant was injured on May 6, 1994. Dr. Weiss indicated he next saw appellant on February 8, 1996. He diagnosed subcutaneous lipoma in the right parascapular region with chronic thoracic sprain. Dr. Weiss concluded that appellant's condition was causally related to his May 6, 1994 injury because any injury to the cervical, thoracic, or lumbar spine predisposed a patient to future injuries and exacerbation of back pain symptoms.

On March 20, 1996 appellant's representative requested reconsideration. In support, the representative submitted a brief reviewing the medical evidence and urging that Dr. Weiss' March 5, 1996 was sufficient to meet appellant's burden of proof.

By decision dated May 1, 1996, the Office reviewed the merits of the case and found that the evidence submitted was insufficient to warrant modification of its prior decision.

On March 25, 1996 appellant's representative submitted a detailed fee petition indicating that he performed 29.20 hours of legal services at an hourly rate of \$150.00. Appellant's total bill for services was \$3,000.00, or \$4,380.00, minus a discount of \$1,380.00 provided by the representative. This included correspondence with appellant, the Office, and medical providers, and requesting reconsideration on appellant's behalf.

On March 26, 1996 appellant wrote indicating that his representative's fee was reasonable and appropriate.

On May 14, 1996 the representative provided a copy of the escrow agreement pursuant to the Office's request.

By decision dated May 23, 1996, the Office approved the fee of \$3,000.00 pursuant to 5 U.S.C. § 8127 and 20 C.F.R. § 10.145. In its findings of fact, the Office indicated that appellant found the fee to be reasonable and that the representative completed the work he purported to do. It stated that it examined the case record and considered the usefulness of the services, the nature and complexity of the claim, the time expended, the amount of compensation involved, customary local charges, the representative's qualifications, and other factors prior to finding \$3,000.00 to be a reasonable fee.

The Board initially finds that appellant has not established that he sustained a recurrence of disability on February 4, 1995 causally related to his accepted employment injury.

Where appellant claims a recurrence of disability to an accepted employment-related injury, he has the burden of establishing by the weight of the reliable probative evidence that the

recurrence of the condition for which she seeks compensation is causally related to the accepted employment injury.<sup>1</sup> As part of this burden, appellant must submit rationalized medical opinion evidence based on a complete and accurate factual and medical background showing a causal relationship between the current condition and the accepted employment-related injury.

In this case, both Dr. Barkin and Dr. Weiss, Board-certified orthopedic surgeons, indicated that appellant sustained a recurrence of disability on February 4, 1995 causally related to his accepted employment injury. Dr. Barkin stated in his March 13, 1995 report that appellant could not work due to his February 4, 1995 recurrence. He did not, however, provide any explanation for his conclusion.<sup>2</sup> Consequently, his opinion is entitled to little weight.

Dr. Weiss diagnosed subcutaneous lipoma in the right parascapular region with chronic thoracic sprain and concluded that appellant's condition was causally related to his May 6, 1994 injury because any injury to the cervical, thoracic, or lumbar spine predisposed a patient to future injuries and exacerbation of back pain symptoms. Nevertheless, Dr. Weiss' opinion is entitled to little weight as it is not supported by medical rationale and it is not specific to this patient because it failed to explain how the trauma appellant received on May 6, 1994 related to his current condition.<sup>3</sup> Appellant, therefore, failed to meet his burden of establishing a causal relationship between his alleged February 4, 1995 recurrence of disability and his accepted employment injury.

The Board also finds that the Office did not abuse its discretion in approving attorney's fees totaling \$3,000.00.

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. The Board's sole function is to determine whether the action by the Office constituted an abuse of discretion.<sup>4</sup> 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.

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<sup>1</sup> See *Henry L. Kent*, 34 ECAB 361 (1982); *Dennis E. Twadzik*, 34 ECAB 536 (1983).

<sup>2</sup> See *Nicolea Bruso*, 33 ECAB 1138 (1982).

<sup>3</sup> See *Durwood H. Nolin*, 46 ECAB 818 (1995); *Nicolea Bruso*, *supra* note 2.

<sup>4</sup> *Russell Thomason*, 35 ECAB 781 (1984).

‘(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 all the criteria set out at 20 C.F.R. § 10.145(b) and found that appellant’s representative was entitled to a fee of \$3,000.00. 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 is generally shown through manifest error, clearly unreasonable exercise of judgment, or action taken which are contrary to both logic and probable deductions from known facts.<sup>5</sup> There is no evidence in this case that the Office abused its discretion in approving an attorney’s fee of \$3,000.00 in this case.

The decisions of the Office of Workers’ Compensation dated May 23 and May 1, 1996 are affirmed.

Dated, Washington, D.C.  
July 2, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>5</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).