U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY E. HARVEY and DEPARTMENT OF VETERANS AFFAIRS, LONG BEACH MEDICAL CENTER, Long Beach, Calif.

Docket No. 97-911; Submitted on the Record;
Issued June 3, 1999

DECISION and ORDER

RE: ATTORNEY'S FEE

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by approving attorney fee petitions in the amounts of $3,872.75 and $1,869.00.

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

In the present case, the Office has accepted that appellant, a nursing assistant, sustained a left wrist tendinitis on December 6, 1994 in the performance of her federal employment. The Office assigned case number A13-1069117 to this claim. The Office also accepted that appellant sustained bilateral carpal tunnel syndrome on or about March 8, 1995 in the performance of her federal employment. The Office assigned case number A13-1078248 to this second claim.

By letter dated May 30, 1996, appellant's representative Max Gest, submitted an application for approval of a fee in the amount of $1,869.00 for 10.68 hours of work performed in appellant's case number A13-1069117, from May 5, 1995 to January 19, 1996. On June 5, 1996 Mr. Gest submitted an application for approval of a fee in the amount of $3,872.75 for work pertaining to claim number A13-1078248, from June 24, 1995 to June 5, 1996. On June 16, 1996 appellant wrote to the Office indicating that the requested attorney's fee of $3,872.75 was very excessive and unreasonable; that the billing statement did not demonstrate who actually performed the work in her case; that the dates on the billing did not correlate with the case file; and that the billing did not reflect key codes and the description of billing.

By decision dated December 4, 1996, the Office approved the attorney fee request in the amount of $1,869.00. By decision dated December 4, 1996, the Office also approved the requested attorney fee in the amount of $3,872.75.

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 is a function within the discretion of the Office based on the criteria set forth in section 10.145 of Title 20 of the Code of Federal Regulations.[1] 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.[2] 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.[3]

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.[4]

The criteria governing the approval of fees for representative's services are set forth in 20 C.F.R. § 10.145(b), which provides as follows:

> "(b) The fee approved by the Office will be determined on the basis for 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. The amount of compensation accrued and potential future payments.
>
> (4) Customary local charges for similar services.
>
> (5) Professional qualifications of the representative."

The record shows that in approving the fees of $1,869.00 and $3,872.75, the Office took into consideration the criteria set forth in 20 C.F.R. § 10.145 pertaining to fees for representative's services; including the usefulness of the services to appellant, the nature and complexity of the claim, the time spent on the claim, the financial condition of the claimant, the claimant's comments, the customary charges for similar services, and the professional qualifications of the representative. The Office therefore did not abuse its discretion in this case.

[1] *Edna M. Davis (Kenneth L. Davis),* 42 ECAB 728 (1991).

[2] *William Lee Gargus,* 25 ECAB 187 (1974).

[3] *See Roy Goldman,* 32 ECAB 1569 (1981).

[4] *William F. Osborne,* 46 ECAB 198 (1994).

The Board also notes that review of the individual fee petitions indicates that the fee petitions reflect separate work done on each case file and do not reflect double billing on either case file.

The decisions of the Office of Workers' Compensation Programs dated December 4, 1996 are hereby affirmed.

Dated, Washington, D.C.
June 3, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski, Alternate Member, dissenting:

This appeal involves a contested attorney's fee alleged to be excessive and unreasonable. The determination of the reasonableness of a fee for representative's services relative to a claim for matters before the Office of Workers' Compensation Programs is a discretionary matter of that office. Nevertheless, the Board has an appellate obligation to determine whether the Office has properly exercised its discretion without abusing it. The majority in its decision states:

> "The record shows that in approving the fees of $1,869.00 and $3,872.75, the Office took into consideration the criteria set forth in 20 C.F.R. § 10.145 pertaining to fees for representative's services; including the usefulness of the services to appellant, the nature and complexity of the claim, the time spent on the claim, and financial condition of the claimant, the claimant's comments, the customary charges for similar services and the professional qualifications of the representative. The Office therefore did not abuse its discretion in this case."

The record "shows" nothing of the kind. The record shows that the claims examiner made the following findings of fact and conclusions:

> "Findings of Fact:
>
> "1. M[r.] Gest has requested approval of a fee of $3,872.75 for services rendered June 24, 1995 to June 5, 1996.
>
> "2. The claimant has contested the reasonableness of the amount of the fee.
>
> "3. The case record has been examined in accordance with the following criteria: usefulness of the representative's services, nature and complexity of the claim, actual time spent on development and presentation of the claim, amount of charges for similar services, professional qualifications of the representative and all other pertinent factors in the record. It has been determined that a fee of $3,872.75 is reasonable.
>
> "Upon the foregoing [f]indings of [f]act, it has been determined that a fee of $3,872.75 is reasonably commensurate with the actual necessary work performed in representing the claimant before this Office. A fee of this amount is approved. The payment of this fee is the responsibility of the claimant."

The blank statement that the Office applied the criteria, the law, to the record without more, deprives this Board of fulfilling its obligation to determine whether the Office has, in fact, abused its discretion in determining the reasonableness of the fee. In this case, the claimant in a series of letters made specific objections to certain billings and fees. The claims examiner did not clearly consider and pass upon these.

The Office clearly recognized the inadequacy of findings of fact such as those in this case and the need for the application of the criteria set forth in 20 C.F.R. § 10.145 to the facts of the individual case when it required in its procedural manual that the claims examiner prepare a memorandum for the file which includes a discussion of pertinent factors. The Federal (FECA) Procedure Manual, Chapter 2.1200 subsection 6(b) provides as follows:

> "*Evaluating Fee Requests.*
>
> "b. *Determining the reasonableness of a fee* is a discretionary matter. In making this determination, the CE [claims examiner] will prepare a memorandum for the file which includes a discussion of the following pertinent factors:
>
> > (1) *The Usefulness of the Representative's Services to the Claimant*. This should take into account the advantage which the claimant received by having a representative. What was at issue? Was the representative, by reason of knowledge, experience, etc., able to accomplish that which would have been difficult or unlikely for the claimant to accomplish without such aid? The impediments to the claim and the evidence

submitted to overcome them should be discussed briefly, as well as any other pertinent facts about the worth of the representative's services.

(2) *The Nature of the Claim*. Representatives appear in all types of cases from the routine and simple to the unusual and complicated. The memorandum should show whether any unusual or complex questions of law or medicine were involved, discuss the issues in general, and describe what the representative did to overcome the defects in the claim. Any unusual measures needed to obtain factual or medical evidence should be noted.

(3) *The Time Spent*. The accuracy of the representative's description of letters written to OWCP [the Office] and other evidence submitted, and the statement of the time required for this work, should be checked by studying the file to see what was actually submitted. The CE must consider time spent in conferences with the claimant and others which had a bearing on the claim, and time spent on investigations, travel, study of the file, and appearances at hearings must be considered."

* * *

(6) *Financial Condition of the Claimant*. This includes consideration of the points under subparagraph (5) above, whether the compensation payments are the claimant's only source of income, and any other factors pertinent to the case under consideration.

(7) *The Claimant's Comments*. Any comments made by the claimant regarding the reasonableness of the fee should be considered carefully. If the claimant agrees that the fee is reasonable, this should be given considerable weight in favor of approving the fee in the amount requested. However, because a claimant is not expected to be knowledgeable on the subject of representatives' fees in compensation cases, a fee should not be approved merely because the claimant considers it acceptable. The claimant's agreement should be considered with all other pertinent factors in reaching a decision."

There is no memorandum which includes a discussion as required by the Office in this file. The findings of fact are too sparse and inadequate in a contested attorney's fee matter to allow this Board to properly fulfill its appellate obligations of review.

In addition, there exists in this case a fee agreement between the attorney and his client. Paragraph 8 of said agreement states:

> "8. Hourly rate requested will be determined principally upon results obtained by [a]ttorney, and complexity of the case. Minimum hourly rate will be $125.00 per hour. In the event substantial retroactive pay is obtained for [c]lient, legal fees amounting to 20 percent to 33.33 percent of such retroactive pay may be requested. Client acknowledges this is reasonable compensation for [a]ttorney's services."

In his fee billing, the attorney has not alleged any complexity which would warrant an increase over the minimum rate agreed to by the employment contract, nor has the Office specifically found such unusual complexity which would justify the imposition of a fee greater than the minimum agreed to. While the Office procedure manual indicates that the Office is not bound by fee agreements, certainly the Office should not award a greater amount than agreed to without good reason.

This writer must conclude that it is the intention of the Office not to recognize an agreement granting an attorney a fee larger than reasonable. It cannot be the intention of the Office to preclude a client and his attorney from agreeing (for whatever reason) to a fee smaller than the Office might normally approve. It is not in my opinion the Office's prerogative to interfere with a fee agreement which reduces the fee which the Office might ordinarily approve.

The Office certainly had the obligation here to award the minimum hourly fee agreed to by the parties to this contract or to at least make findings of fact justifying a greater fee based upon the complexity of his case. This, the Office did not do.

For the forgoing reasons, this writer is constrained to conclude and would so find that the Office in this case abused its discretion in granting and approving the requested attorney's fee.

A. Peter Kanjorski
Alternate Member