

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

LUCIA REYNOLDS, Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Seattle, WA, Employer**

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**Docket No. 03-898
Issued: February 17, 2004**

Appearances:
Lucia Reynolds, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

Appellant filed an appeal on February 25, 2003 of a December 31, 2002 decision of the Office of Workers' Compensation Programs, approving an attorney's fee in the amount of \$2,362.50 for services rendered from February 22, 2000 to January 23, 2002. 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 on appeal is whether the Office abused its discretion by approving an attorney's fee in the amount of \$2,362.50 for services rendered from February 22, 2000 to January 23, 2002. On appeal, appellant contends that her attorney, Roger Wallingford, stated that he would charge her only \$1,200.00 to prepare a brief for an oral hearing. She alleged that Mr. Wallingford failed to timely mail the brief such that she had to hand-carry it to her hearing.

FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision and order issued October 27, 2000,¹ the Board set aside a decision of the Office dated August 13, 1996 regarding an emotional condition claim. The law and the facts of the case as set forth in the Board's prior decision and order are incorporated by reference. Following remand of the case and further development, the Office accepted on April 18, 2002 that, on or before May 10, 1994, appellant sustained a major depressive disorder, single episode, due to work factors.

The record contains a February 22, 2000 attorney's fee agreement by Mr. Wallingford, signed by appellant, in which she agreed to pay a retainer of \$1,500.00 to be placed in escrow, in addition to Mr. Wallingford's hourly rate of \$150.00 if the retainer was insufficient to pay her final bill.

On December 16, 2002 Mr. Wallingford submitted an application for attorney's fees in the amount of \$2,362.50. As part of his application, Mr. Wallingford submitted an itemized statement identifying the services he performed on appellant's behalf from February 22, 2000 to January 23, 2002. He indicated that his hourly rate was \$150.00; he had expended 15.75 hours on appellant's claim and that he sought approval of this fee. Mr. Wallingford enclosed an unsigned fee acknowledgement form. He also submitted a December 2, 2002 letter from appellant, stating that Mr. Wallingford had agreed to charge \$1,200.00 "to do the appeal paperwork and follow-up correspondence" and that this fee would not include any court appearances.

By decision dated December 31, 2002, the Office approved an attorney's fee in the amount of \$2,362.50 for legal services performed by Mr. Wallingford from February 22, 2000 to January 23, 2002.²

LEGAL PRECEDENT

It is not the Board's function to determine the fee for representative services performed before the Office.³ That is a function within the discretion of the Office based on the criteria set forth in section 10.703(c) of the Federal Employees' Compensation Act's implementing regulation,⁴ and mandated by Board decisions. The Board's sole function is to determine whether the action by the Office constituted an abuse of discretion.⁵ Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment,

¹ Docket No. 97-138 (issued October 27, 2000).

² In a January 6, 2003 letter, appellant again asserted that Mr. Wallingford agreed to charge her only \$1,200.00. In a January 15, 2003 letter, the Office advised appellant that she could exercise one of her appeal rights as set forth in the December 31, 2002 decision. Appellant then filed her appeal with the Board.

³ *Nealy Kimble*, 49 ECAB 482, 485 (1998).

⁴ 20 C.F.R. § 10.703(c).

⁵ *Francesco C. Veneziani*, 48 ECAB 572, 575 (1997), citing *Russell Thomason*, 35 ECAB 781-82 (1984).

or actions taken which are contrary to both logic and probable deductions from established facts.⁶

Section 10.703(a)(1)(ii) of the Office's implementing regulation 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.⁷ When a fee application 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.⁸ After the claimant has been afforded a reasonable time to respond to the request, the Office will then proceed to review the fee application.⁹ 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.¹⁰

ANALYSIS

The fee application submitted by appellant's attorney on December 16, 2002 indicates that appellant disagreed with the proposed fee. Appellant asserted, in a December 2, 2002 letter, that Mr. Wallingford agreed not to charge her more than \$1,200.00. Appellant did not sign the fee approval form that Mr. Wallingford submitted.

As appellant indicated her disagreement with the fee request, the Office should have followed the procedures set forth above at section 10.703 of its regulations to determine if the fee was "substantially in excess of the value of services received."¹¹ Prior to reviewing the fee request, the Office should have provided appellant with a copy of Mr. Wallingford's fee application and afforded her a reasonable period to submit additional evidence supporting her objections.¹² However, the Office considered and approved the fee application without following the applicable regulatory procedures to address appellant's disagreement. Therefore, the Board finds that the Office abused its discretion, and the case must be remanded for the Office to consider appellant's objections to her attorney's fee application.

⁶ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

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

⁸ See *Gerald A. Carr*, 55 ECAB ____ (Docket No. 03-2257, issued January 8, 2004).

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.703(c) (2003).

¹¹ See *Gerald A. Carr*, *supra* note 8 (the Board held that absent the claimant's written agreement to the fee, the Office could not approve a fee application without first following the procedures set forth in 20 C.F.R. § 10.703(c) to determine whether the fee was "substantially in excess of the value of services received.")

¹² *Id.*

CONCLUSION

Accordingly, the Board finds that the Office abused its discretion in approving Mr. Wallingford's fee petition.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 31, 2002 is hereby set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: February 17, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member