

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NEALY KIMBLE and DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

*Docket No. 96-657; Submitted on the Record;
Issued April 20, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in approving appellant's attorney's fee request.

Appellant, then a 40-year-old metal polisher, stopped work on September 7, 1973 and filed a claim for hearing loss due to his three-year exposure to noise at the employing establishment. The Office accepted appellant's claim and granted him a schedule award for a 47 percent bilateral hearing loss. Thereafter he applied for an additional schedule award and was granted an additional percentage for a total of 53 percent binaural loss of hearing. Appellant felt that he continued to experience additional loss of hearing between 1973 and 1993 and requested a greater schedule award.

On June 1, 1993 appellant appointed Mark Coby, Esq., as his authorized representative, to pursue an additional schedule award in conjunction with his accepted employment-related hearing loss claim. Mr. Coby noted in a request to the Office dated June 7, 1993, that two physicians had opined that appellant's diabetes and aging had nothing to do with his hearing loss between 1973 and 1993. He further noted that Dr. Desy D. Handra, a Board-certified otolaryngologist, opined that appellant had a 67 percent bilateral loss of hearing at that time.

Further development by the Office resulted in a June 25, 1993 report from Dr. Roger Boles, a Board-certified otolaryngologist, which found that appellant's loss of hearing had been stable over the preceding 20 years. The medical record was then referred to an Office medical consultant, who, in a July 21, 1993 report, opined that the 47 percent award for binaural loss of hearing was appropriate, that any further hearing loss from 1988 to 1993 was not the result of employment noise exposure and that no further schedule award was appropriate. Thereafter, the Office determined that a conflict in medical opinion evidence arose between appellant's physicians and the Office second opinion physician and referred appellant to Dr. Barry Camp Baron, a Board-certified otolaryngologist, for resolution.

In a report dated December 7, 1993, Dr. Baron reviewed the complete case record, examined appellant and his test results and opined that any loss of hearing after 1973 was not related to appellant's pre-1973 noise exposure.

By decision dated December 21, 1993, the Office rejected appellant's claim for an additional schedule award. Mr. Coby continued to correspond with the Office on appellant's behalf. A hearing on the denial of an additional schedule award was requested.

However, by letter to the Office's Branch of Hearings and Review dated August 18, 1994, Mr. Coby withdrew appellant's request for a hearing at that time. By letter dated August 18, 1994, Mr. Coby advised appellant that, as per their previous August 8, 1994 conversation, he was withdrawing appellant's request for a hearing because the medical evidence did not demonstrate that appellant had a greater degree of hearing loss than that previously shown. Mr. Coby also enclosed a copy of his billing for professional services rendered to that point and he requested that appellant sign, indicating that such services had been performed. By letter dated August 23, 1994, Mr. Coby again sent appellant a bill for \$768.75 for work performed up until that point.

Shortly thereafter, appellant telephoned the Office and stated that, contrary to Mr. Coby's August 18, 1994 letter, he wished to proceed with the hearing scheduled for August 30, 1994 and would be representing himself at the hearing. A hearing was held on August 30, 1994, at which appellant testified and represented himself.

By decision dated November 9, 1994, the Office hearing representative affirmed the prior Office decision finding that the weight of the medical evidence, represented by the impartial medical specialist, supported that any additional loss of hearing sustained by appellant since 1973 was not causally related to his employment.

Appellant objected to Mr. Coby's bill for services rendered and by letter dated November 14, 1994, Mr. Coby explained that the prepaid \$375.00 was for \$75.00 in fees and \$300.00 for 4 hours of his time at \$75.00 per hour, which would be deducted from the total amount of the bill due, leaving a balance owed Mr. Coby of \$468.75. A copy of the original fee agreement was enclosed.

By letter dated December 7, 1994, appellant complained to the California State Bar claiming that he never saw the signed fee agreement until his relationship with Mr. Coby broke down, that he never signed the fee agreement, that Mr. Coby unilaterally dropped his case, which he never agreed to, and that, under paragraph six of the retainer fee agreement he was entitled to all of his money back.¹ Appellant claimed that Mr. Coby unilaterally quit working for him 12 days before the hearing, that 12 days did not give him adequate time to hire another attorney, that Mr. Coby sent the Office correspondence which hurt his ability to present his own case, that

¹ Paragraph six states: "The attorney may withdraw from client's representation in this claim at any time on reasonable notice to the client provided that in the event of such withdrawal, the attorney shall be entitled to no fees for said representation."

someone forged his name on the fee agreement, that Mr. Coby was not entitled to his fees and that Mr. Coby refused to refund the \$375.00 originally paid.

By letter dated November 21, 1994 to appellant, Mr. Coby acknowledged that on June 4, 1993 he received from appellant the sum of \$375.00.

Appellant complained to the California State Bar about Mr. Coby. He requested fee arbitration. In an answer to the request for binding arbitration, Mr. Coby noted that appellant prepaid \$300.00 for his time and a \$75.00 nonrefundable fee for costs, that appellant proceeded to see a multitude of physicians trying to prove that he had an additional hearing loss related to his employment, that Mr. Coby's office tried to dissuade appellant from going to all of the additional doctors' appointments, that monies sent to his office by appellant were simply to pay any medical costs for preparing reports and that correspondence was sent to appellant indicating that the amount of the reports were billed. Mr. Coby noted that in May 1994 he indicated to appellant that based upon the medical reports sent to his office, he did not believe they should proceed with a hearing because the reports did not support appellant's position. Mr. Coby noted that on August 8, 1994 he reiterated to appellant that he did not believe a hearing was appropriate as the medical evidence did not support appellant's position. Mr. Coby noted that appellant disagreed and at that time indicated that he no longer wanted Mr. Coby to represent him, such that Mr. Coby withdrew and indicated that to the Office. Mr. Coby noted that, therefore, appellant was not "abandoned," but rather disagreed with Mr. Coby's advice. Mr. Coby also denied forging appellant's name on the fee agreement, noted that appellant also signed several statements of representation and noted that the signatures matched. He concluded that appellant's charges were completely without merit.

By decision dated September 19, 1995, the Office approved Mr. Coby's request for \$768.75 in fees for services rendered from April 21, 1993 to August 18, 1994. The Office considered the record with respect to the usefulness of services rendered, nature and complexity of the claim, actual time spent on development and presentation, amount charged for similar services, qualifications of the representative and other pertinent factors, in finding the amount of fees billed reasonable.

Thereafter, Mr. Coby submitted a copy of the arbitrator's findings and award, finding that appellant's case had no basis. The arbitrator found that Mr. Coby was entitled to payment at fair value for all legal services rendered in good faith, amounting to \$768.75. The arbitrator found that Mr. Coby did not abandon appellant or withdraw pursuant to paragraph six in the retainer agreement, but that appellant discharged Mr. Coby after August 18, 1994 due to their differing opinions regarding the viability of appellant's claim, such that he was entitled to payment for services rendered to that point, including costs.

The Board finds that the Office did not abuse its discretion by approving appellant's attorney's fee request.

It is not the function of the Board to determine the fee for services performed by a representative of a claimant before the Office.² That function is within the discretion of the

² *Arthur Sims*, 46 ECAB 880 (1995).

Office based on the criteria set forth in section 10.145 of the Office's regulations.³ The Board's sole function is to determine whether the action taken by the Office on the matter of the attorney's fees constituted an abuse of discretion.⁴ 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. The Board finds that the evidence of record supports no such abuse of discretion here.

The Board finds that, although appellant contends that Mr. Coby abandoned him 12 days before the hearing, the evidence of record supports that Mr. Coby was discharged by appellant, having previously advised appellant that he recommended canceling the hearing and advising him again of that recommendation on August 8, 1994. The evidence of record indicates that appellant disagreed with Mr. Coby on how the case should be pursued and discharged Mr. Coby and at some point after August 18, 1994 reinstated his request for a hearing, which he pursued on his own. The Board finds that, therefore, paragraph five of the retainer agreement applies, which states: "The attorney shall be entitled to his fee, even though client discharges him or obtains a substitution for the attorney before completion of the case, for any work done by attorney." The Board notes that the amount billed was for legal work performed prior to August 18, 1994 and that Mr. Coby is due fair payment for services rendered up until that time.

As the only limitation on the Office's authority is reasonableness, abuse of discretion 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.⁵ The Board finds that no such error, unreasonable judgment or contrary actions are evident in the record of this case.

³ 20 C.F.R. § 10.145.

⁴ *Barbara Robertson (Paul Robertson)*, 41 ECAB 393 (1990).

⁵ *William F. Osborne*, 46 ECAB 198 (1994); *Daniel J. Perea*, 42 ECAB 214 (1990).

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 19, 1995 is hereby affirmed.

Dated, Washington, D.C.
April 20, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member