U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN J. HAMILTON and U.S. POSTAL SERVICE,
MANZANO POST OFFICE, Albuquerque, N.M.

Docket No. 96-2652; Submitted on the Record;
Issued December 29, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for a merit review; and (2) whether the Office abused its discretion by approving an attorney's fee in the amount of $1,138.84.

On May 26, 1994 appellant, then a 51-year-old window clerk, file a claim for major depression which she attributed to factors of her federal employment prior to April 30, 1994. In a June 20, 1994 factual statement, appellant alleged that an employing establishment[1] manager, Mr. Al Chavez, gave certain employees preferential treatment even though they took unauthorized leave, and did not perform their assigned duties. Appellant asserted that Mr. Chavez denied her opportunities to perform certain tasks as her husband was also an employing establishment supervisor, that her husband was reassigned to another post office by Mr. Chavez to allow substandard practices to continue unhindered, that Mr. Chavez did not properly staff the station, that on March 17, 1994 she was denied overtime, that she fell ill while on duty on April 7, 1994 and was afraid to ask for assistance, that her schedule was changed on April 12, 1994 in retaliation for filing a union grievance regarding improper rotation of overtime, that she was falsely accused and investigated for allegedly leaving registered mail unsecured on a counter the night of April 18, 1994,[2] and that Mr. Chavez did not inform her of the requirement to undergo a fitness-for-duty examination before attempting to return to work on June 13, 1994.[3] Appellant stopped work from May 2, 1994 to approximately July 12, 1994.

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[1] As the two issues in the case concern divergent subject matter, the facts of the case regarding the denial of merit review will be set forth first. Then, the facts pertinent to the attorney's fee issue will be set forth and analyzed.

[2] In a November 28, 1994 letter, appellant asserted that the investigation into registered mail being left unsecured on a counter was discontinued when it became clear she could not be the responsible party.

[3] The employing establishment submitted statements generally controverting appellant's claim.

In support of her claim, appellant submitted a May 31, 1994 report from Dr. Melui Goff, an attending family practitioner, who diagnosed major depression due to "recurrent difficulties at work." In an August 21, 1994 note, Dr. Goff stated that appellant had a "work-caused depression" successfully treated with therapy and medications.[4]

In a July 7, 1994 fitness-for-duty evaluation, Dr. Theodore Scharf, a psychiatric consultant to the employing establishment, related appellant's account of events, and diagnosed mild depression with stress and anxiety, generally related to the work events appellant described. He released her to work without restrictions as of July 11, 1994.

By decision dated January 18, 1995, the Office denied appellant's claim on the grounds she had not established that the claimed condition was sustained in the performance of duty. The Office found that appellant failed to establish any compensable factors of employment.

Appellant disagreed with this decision, and in a December 4, 1995 letter requested reconsideration. She enclosed copies of witness statements obtained pursuant to a 1994 investigation regarding the registered mail being left unattended, and Dr. Goff's May 31, 1994 report, previously of record.

By decision dated December 15, 1995, the Office denied appellant's request for a merit review on the grounds that the evidence submitted in support thereof was immaterial in nature. The Office noted conducting a limited examination of the evidence submitted, noting that the May 31, 1994 medical report had been previously considered prior to the January 18, 1995 decision. The Office then reviewed the investigative affidavits, finding that "[w]ithout the results of the … investigation or a statement supporting the validity of the affidavits the material submitted is of no value and … immaterial to the matter at hand."

Regarding the first issue, the Board finds that the Office did not abuse its discretion by denying appellant's request for a merit review.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office, identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed, by showing that the Office erroneously applied or interpreted a point of law, or advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office.[5] Section 10.138(b)(2) provides that any application for review of the merits of the claim which

[4] Appellant also submitted reports from Kathryn Long, a therapist. The Board notes the Office's finding that Ms. Long does not qualify as a physician under section 8101(2) of the Federal Employees' Compensation Act, as she is not a licensed clinical psychologist, medical doctor of psychiatry, or other qualifying physician. 5 U.S.C. § 8101(2).

[5] 20 C.F.R. § 10.138(b)(1).

does not meet at least one of the three requirements will be denied by the Office without review of the merits of the claim.[6]

Appellant's December 4, 1995 letter and the investigative affidavits did not demonstrate that the Office committed legal error, advance a new point of law or fact, or contain relevant, pertinent evidence not previously considered by the Office. Therefore, these documents do not constitute a basis for reopening appellant's case for merit review under 20 C.F.R. § 10.138,[7] and the Office's December 15, 1995 decision is proper.

The facts of the case relating to the attorney's fee issue are set forth below.

By May 18, 1995 notice of appointment of representative, appellant retained Mr. Gordon Reiselt, an attorney, practicing in Albuquerque, New Mexico. The application included copies of 20 C.F.R. §§10.142-145, governing the approval of attorney's fees under the Act's implementing regulations. The record contains a copy of a check from appellant to Mr. Reiselt, dated May 18, 1995, in the amount of $175.00 as a retainer.[8] Mr. Reiselt requested appellant's file from the Office on May 19, 1995.

In a June 1, 1995 letter to appellant, Mr. Reiselt noted receiving appellant's file from the Office on May 30, 1995 and reviewing it on May 31, 1995. He enclosed copies of documents for appellant to review, and requested that she make an appointment to meet with him to discuss the case. In a June 15, 1995 letter to appellant, Mr. Reiselt noted receiving additional information from appellant on June 14, 1995, and requested that she contact him with the incidents, "dates and names" regarding her accusations. Appellant submitted a June 27, 1995 letter to Mr. Reiselt recounting workplace events beginning in 1994.

In a July 17, 1995 letter, Mr. Reiselt referred appellant to Dr. Gerald Freedman for the purpose of ascertaining if her sarcoidosis was related to stress in the workplace or other factors of her federal employment. In a July 24, 1995 letter to appellant, Mr. Reiselt stated that Dr. Freedman was consulting with another physician regarding any connection between sarcoidosis and stress. Accompanying an August 7, 1995 letter, Mr. Reiselt sent Dr. Freedman copies of appellant's medical records.

In a September 14, 1995 letter to Mr. Reiselt, appellant stated that she wished to suspend the retainer agreement due to her difficult financial situation. She expressed her desire to a file a second compensation claim based on psychiatric evidence.

In a September 15, 1995 letter, Mr. Reiselt noted speaking with appellant on September 13, 1995, and requested that she forward pertinent psychiatric evidence to him for review, and to apply for Social Security benefits. In a second September 15, 1995 letter,

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Gaetan F. Valenza*, 35 ECAB 763 (1984).

[8] The Office acknowledged receipt of the May 18, 1995 retainer agreement by May 23, 1995 letter, which included detailed instructions relating to representative fee applications.

Mr. Reiselt acknowledged appellant's September 14, 1995 letter, and stated that he would do no further work on her case, and would submit an approval of attorney fees application to her. He returned appellant's original documents on September 28, 1995.

Accompanying a September 29, 1995 letter, Mr. Reiselt submitted an Application of Approval of Attorney Fees for appellant's review. Mr. Reiselt noted performing 8.50 hours of work from May 4 to September 18, 1995, at an hourly rate of $125.00, equaling $1,062.50. Adding a gross receipts tax of 5.8125 percent, equaling $61.76, $13.78 in expenses, and 80 cents gross receipts tax on the expenses, Mr. Reiselt requested approval of a total fee of $1,138.84. He noted receiving $700.00 from appellant in four monthly installments of $175.00, placed in an escrow account.[9]

In an October 5, 1995 letter to the Office, appellant disputed Mr. Reiselt's charges on the grounds that his fees were excessive for the type of services rendered, and he did not file a reconsideration request as she had allegedly instructed him on June 9, 1995.

In a November 29, 1995 letter, the Office noted receiving Mr. Reiselt's November 15, 1995 request for approval of $1,138.84 in attorney fees. The Office stated that before "considering this request," appellant had the "opportunity to comment on the request and state [her] view as to whether the fee charged is reasonable and appropriate." The Office enclosed a copy of Mr. Reiselt's fee application. The Office advised appellant that if she did not respond by December 29, 1995, the Office would "assume that [she did] not wish to comment on the fee, and [would] consider the request and approve a fee which is determined to be fair and reasonable."

In a December 3, 1995 letter, appellant stated that Mr. Reiselt's fee was not "reasonable or appropriate," and enclosed copies of her correspondence to an Office claims examiner regarding her contentions.

By decision dated February 12, 1996, the Office approved Mr. Reiselt's requested fee of $1,138.84 for services rendered from May 4 to September 18, 1995, based on his qualifications, usefulness of his services, nature of the work performed, and usual and customary charges for such services. The Office found that appellant had submitted insufficient evidence contesting "the reasonableness of the amount of the fee."

Appellant disagreed with this decision, and in March 1996 submitted copies of her correspondence to Mr. Reiselt, including a May 18, 1995 letter describing her symptoms of sarcoidosis and depression, and various incidents at the employing establishment during February 1995.

By decision dated June 28, 1996, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification. The Office found that there was no "substantive discrepancy between" appellant's explanation of Mr. Reiselt's services and the fee

[9] Mr. Reiselt mailed a second copy of the fee approval request and supporting documentation accompanying an October 30, 1995 letter.

approval application, and that the $1,138.84 fee was commensurate with the work performed and customary local charges, and did not include any unallowable expenses.

Regarding the second issue, the Board finds that the Office did not abuse its discretion in approving an attorney's fee in the amount of $1,138.84.

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 and mandated by Board decisions. The Board's sole function is to determine whether the action by the Office constituted an abuse of discretion.[10] 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 perfomed 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.
>
> (4) The amount of compensation accured and potential future payjments.
>
> (5) Customary local charges for similar services.
>
> (6) Professional qualifications of the representative."

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.[11] 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.[12] The Office's February 12, 1996 decision recited that the relevant criteria contained in 20 C.F.R. § 10.145 were considered. The Office's June 28, 1996 denial of modification also discussed these criteria. There is no indication that the attorney did not actually devote to the case the hours for which he sought approval,[13] and the amounts of time listed for each service were not inordinate.[14] An attorney has broad latitude in exercising his or her professional judgment in connection with the preparation of a client's case. He had the responsibility to study and

[10] *Arthur Sims*, 46 ECAB 880 (1995).

[11] *Regina G. Jackson*, 41 ECAB 321, 325 (1989); *Charles A. Mikalaynas*, 40 ECAB 1277, 1279-80 (1989).

[12] *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[13] *See Andrew D. Finch*, 25 ECAB 24 (1973).

[14] *See Charles A. Mikalaynas*, *supra* note 11.

research those matters which, in his professional opinion, might further his client's case. Such work, insofar as it is within reasonable bounds, is entitled to consideration in fixing the fee, even though all the work may not prove helpful in producing relevant evidence or legal precedent.[15]

Appellant was given an opportunity to comment on the reasonableness of the requested fee, as required,[16] and responded with general complaints regarding the amount of Mr. Reiselt's fee, and the unsubstantiated allegation that he failed to file a request for reconsideration as she allegedly instructed him on June 9, 1995. Mr. Reiselt submitted an application for approval of attorney's fee to the Office on November 15, 1995. 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.[17] There is no evidence that the Office abused its discretion in considering the objections raised by appellant regarding the attorney's fees. The Board therefore finds that the Office did not abuse its discretion in approving the attorney's fee in the amount of $1,138.34.

The decisions of the Office of Workers' Compensation Programs dated June 28 and February 12, 1996, and December 15, 1995 are hereby affirmed.

Dated, Washington, D.C.
December 29, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[15] *Edgar Aikman*, 32 ECAB 1570 (1981).

[16] *Andrew A. Miller*, 34 ECAB 1002 (1983); *George W. Schumacher*, 29 ECAB 84 (1977).

[17] *Regina Jackson*, *supra* note 11.