U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHRISTINE B. ELLIOTT and U.S. POSTAL SERVICE,
POST OFFICE, San Bruno, Calif.

Docket No. 96-2108; Submitted on the Record;
Issued September 29, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in approving an attorney's fee of $1,460.00.

On February 25, 1991 appellant, then a 41-year-old Postal Inspector, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she was suffering from work-related stress. By letter dated May 24, 1991, appellant advised the Office that she had elected Wilson Clow, Jr. to be her representative. The Office accepted that appellant sustained an adjustment disorder due to her employment factors. Appellant was compensated for intermittent time lost from work from March 12 through May 17, 1991 and for total wage loss from August 21, 1991 through April 3, 1993.

Appellant transferred from Portland, Oregon to Denver, Colorado effective April 5, 1993. After her transfer to Denver, appellant stopped working and was placed in an administrative leave status effective September 7, 1993. On September 16, 1993 appellant submitted Form CA-7 claiming that she was disabled again due to her work-related psychiatric condition. By letter dated December 14, 1993, the Office advised appellant to either file Form CA-2a (notice of recurrence of disability) under File No. A14-261347 or to file a new claim Form CA-2 as new factors of employment, which occurred while she was working in Denver, were identified as contributing to her psychiatric condition.

In a letter dated December 20, 1993, appellant's representative, Mr. Clow, stated that appellant was asserting that her condition and disability was merely a continuation of the original claim. On January 10, 1994 appellant submitted Form CA-2a, notice of recurrence of disability, claiming that her condition and disability were causally related to the February 1991 injury.

In a decision dated March 9, 1994, the Office rejected the claimed recurrence on the basis that the evidence of record failed to establish a causal relationship of the claimed medical

condition to the injury. In the letter accompanying the decision, the Office stated that further medical treatment was not authorized.

By letter dated March 18, 1994, appellant requested a hearing. By letter dated March 21, 1994, an Office claims examiner advised appellant that the decision dated March 9, 1994 erroneously denied further medical treatment. The claims examiner noted that the decision was intended to provide a formal decision regarding the recurrence of disability claim only.

By letter dated April 2, 1994, appellant advised the Branch of Hearings and Review that she was withdrawing her appeal of the March 9, 1994 decision because the letter from the district Office of March 21, 1994 confirmed that she was still entitled to benefits under the approved claim (A14-261347). By letter dated April 2, 1994, appellant advised the district Office that she intended to file a new claim and was in the process of preparing the CA-2 form. She requested that her record (A14-261347) be returned to the Denver district Office from the Branch of Hearings and Review in Washington, D.C.

By letter dated May 13, 1994, the law firm of Craig W. Donaldson and Associates requested approval of a fee in the amount of $4,905.50 for professional services rendered from March 21 through May 11, 1994. This included 38.1 hours of work performed by Mr. Donaldson at $125.00 per hour, and 2.6 hours of work performed by a legal assistant at $55.00 per hour. An itemization of the services performed on each day and the number of hours spent each day was provided. A statement signed by appellant on March 21, 1994 authorizing the law firm of Craig W. Donaldson and Associates to act on her behalf in connection with File No. A14-261347 was also provided. Also submitted was a copy of a letter signed by appellant on March 22, 1994 setting forth the hourly rates of Mr. Donaldson and his legal assistant and indicating that appellant agreed to pay a retainer fee of $2,500.00 for deposit into the law firm's trust account. The letter also indicated that the law firm would not enter an appearance as claimant's attorney of record and that claimant would represent herself with the firm's assistance until further agreement between the parties. The application for attorney fees noted that appellant had paid $1,600.00 into the escrow account. The application further noted that the law firm of Craig W. Donaldson and Associates was withdrawing as the claimant's representative because of irreconcilable conflicts with appellant and Mr. Clow.

By letter dated June 28, 1994, appellant submitted her comments with regard to Mr. Donaldson's attorney fee request. Appellant stated that she did not believe the amount requested by Mr. Donaldson was reasonable or appropriate and in fact was incredibly excessive. Appellant stated that she contacted Mr. Donaldson because her psychiatrist suggested that she have someone else review her claim and fill out the necessary paperwork. She stated that her principal request was for Mr. Donaldson to review the statements she had already written for the CA-7 and CA-2a and the exhibits she provided, and provide her with a narrative statement for submission with the CA-2 form. She stated that Mr. Donaldson agreed with the Office that the proper form to file was a CA-2 form. Appellant stated that Mr. Donaldson never provided the narrative for her, and she had absolutely nothing to show from Dr. Donaldson in her claim. Appellant provided copies of letters and drafts of letters provided Mr. Donaldson.

In a decision dated September 7, 1994, the Office approved Mr. Donaldson's fee request in the amount of $1,460.00 for legal services rendered through April 1, 1994 which pertained to

File No. A14-261347 only. The Office found that the services rendered through April 1, 1994 were reasonable and necessary in conjunction with File No. A14-261347, and approved a fee of $1,460.00. The Office noted that the remainder of the services rendered were in connection with the new occupational disease claim (File No. A12-146478) were rendered after April 1, 1994 and that Mr. Donaldson should submit a request for approval of services under that file number.

In an October 5, 1994 letter, appellant requested a hearing. At the hearing, which was held on January 22, 1996, appellant was represented by Wilson Chow, Jr.

At the hearing, appellant's husband testified that he accompanied his wife to the initial meeting with Mr. Donaldson on March 21, 1994 and, after 15 to 20 minutes of discussion, Mr. Donaldson agreed that there was no need to pursue the request for hearing in Case No. A14-261347 and that a new claim should be filed. Mr. Donaldson agreed to write a letter for appellant to send to the Office withdrawing the request for a hearing (this was April 2, 1994 letter which appellant sent). Appellant testified that this was the only work Mr. Donaldson performed in connection with Case No. A14-261347. Appellant further testified that they asked Mr. Donaldson for help in completing the paperwork for a new claim, to complete the CA-2 and the narrative statement. Mr. Donaldson told him it would take him two to three weeks to write the narrative and fill out the CA-2 form and that it would cost approximately $2,000.00. Appellant testified that Mr. Donaldson never did this. Mr. Clow contended that Attorney Donaldson never did any work in connection with Case No. A14-261347 other than discuss the case for 25 minutes on March 21, 1994 and draft a letter for appellant to send to the Office withdrawing her request for the hearing. Mr. Clow contended that Attorney Donaldson was not entitled to a fee, noting that he never entered his appearance as appellant's representative. Mr. Clow also requested that appellant's objections to the fee requested for work performed in connection with the second claim (A12-146478) be addressed concurrently. Mr. Clow noted that Attorney Donaldson had submitted a separate fee request in the other case which was still pending with the district Office.

Subsequent to the hearing, Mr. Donaldson was provided with a copy of the transcript of the hearing with exhibits. In a letter dated February 23, 1996, Mr. Donaldson stated that he stood by the facts he had previously alleged regarding the work he performed for appellant. Mr. Donaldson contended that the evidence did not establish that the district Office erred in its previous decision concerning his fee.

In a decision dated March 25, 1996, an Office hearing representative affirmed the Office's September 7, 1994 decision. The hearing representative found that Attorney Donaldson was entitled to a fee in the amount of $1,460.00 for legal services rendered to appellant in connection with File No. A14-261347 during the period from March 21 through April 1, 1994. The hearing representative found that the work performed by Attorney Donaldson between March 21 and April 1, 1994 was properly considered under File No. A14-261347. Work performed after April 1, 1994 was properly considered under the new claim, File No. A12-146478. The hearing representative further found that, although appellant had previously designated Mr. Clow as her representative, the evidence of record established that appellant also voluntarily authorized Mr. Donaldson to represent her simultaneously with Mr. Clow. The hearing representative found that Mr. Donaldson's hourly rate of $125.00 did not exceed the

customary local charges for similar services, the actual time spent on the claim appeared reasonable and necessary, and the nature of claim itself was complex. The hearing representative noted that, although the work performed by Mr. Donaldson in Case No. A14-261347 from March 21 through April 1, 1994 did not result in the payment of any compensation benefits in connection with that claim, he was still entitled to payment of a fee for services rendered as appellant sought out his services and the work performed was necessary. Attorney Donaldson ultimately concluded that appellant should pursue a new claim instead of continuing her claim for recurrent disability under the old claim and appellant was ultimately successful in obtaining compensation benefits under the second claim.

The Board finds that there was no abuse of discretion by the Office in awarding appellant's representative a fee in the amount of $1,460.00.

It is not a 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 criteria set forth in section 10.145 of Title 20 of the Code.[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 made 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, a manifestly unreasonable exercise of judgment, action of the kind that no conscientious person acting intelligently would reasonably have taken, prejudice, partiality, intentional wrong or action against logic.[4]

Pursuant to these guidelines, the evidence of record does not support that the Office's approval of a $1,460.00 fee constituted an abuse of discretion.

The record shows that in approving the $1,460.00 fee, the Office took into consideration the criteria set forth in 20 C.F.R. § 10.145, pertaining to fees for representative services, including the actual time devoted to the services spent on File No. A14-261347 as set forth in Mr. Donaldson's itemized statement, the complexity of appellant's case, and Mr. Donaldson's hourly rate in comparison to the customary local charges for similar services.[5] Appellant raised several complaints regarding Mr. Donaldson's actual representation. The hearing representative found, and the evidence of record supports, that appellant voluntarily authorized Mr. Donaldson to simultaneously represent her with Mr. Clow and that she reaped the benefit of the legal representation. There is no indication that Mr. Donaldson did not actually devote to the case the

[1] 20 C.F.R. § 10.145.

[2] *Regina G. Jackson*, 41 ECAB 321 (1989); *William Lee Gargus*, 25 ECAB 187 (1974).

[3] *See Roy Goldman*, 32 ECAB 1569, 1578 (1981).

[4] *See James W. Croake*, 37 ECAB 219, 223 (1985); *Rosa Lee Jones*, 36 ECAB 679, 683 (1985); *see also Sherwood Brown*, 32 ECAB 1847, 1850 (1981).

[5] 20 C.F.R. § 10.145(b).

hours for which he sought approval in connection with File No. A14-261347,[6] and the amounts of time provided for each listed service were not inordinate.[7] The Office hearing representative properly applied the factors enumerated in 20 C.F.R. § 10.145 in finding that the evidence supported an attorney's fee in the amount of $1,460.00 for File No. A14-261347 during the period from March 21 through April 1, 1994.

In view of the foregoing, the Office's approval of a representative's fee in the amount of $1,460.00 was not unreasonable and did not constitute an abuse of discretion.

The decision of the Office of Workers' Compensation Programs dated March 25, 1996 is hereby affirmed.

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

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] *Rosa M. Thomas-Hunter*, 42 ECAB 500 (1991).

[7] *See Charles A. Mikalaynas*, 40 ECAB 1277 (1989).