

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK M. SALZANO and U.S. POSTAL SERVICE,
POST OFFICE, Glen Cove, NY

*Docket No. 98-644; Submitted on the Record;
Issued October 6, 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 properly denied the attorney's application for approval of \$2,500.00 in fees for representative services.

In a decision dated September 17, 1997, the Office denied the request of the claimant's authorized attorney for approval of \$2,500.00 in fees for 21 hours of representative services. The Office found that there was no basis for the approval of any fee in the absence of any evidence whatsoever to substantiate that any of the work for which the fee was requested was actually performed. The Office found that none of the attorney's letters were available for review, thereby precluding the Office from giving careful consideration to the content of the letters when weighing it against the reasonableness of the time requested. "This information is especially crucial," the Office explained, "in light of the fact that you [the attorney] are requesting a fee of \$2,500.00 for 21 hours of service to obtain a schedule award in an uncomplicated case that netted the claimant \$2,887.00"

The Board finds that the Office abused its discretion in denying the attorney's application for approval of \$2,500.00 in fees for representative services.

It is not the Board's function 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(b) of Title 20 of the Code of Federal Regulations.¹ This section provides in pertinent part:

“(b) The fee approved by the Office will be determined on the basis of 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.
- (4) The amount of compensation accrued and potential future payments.
- (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.² 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.³

In its September 17, 1997 decision, the Office recited the relevant criteria contained in 20 C.F.R. § 10.145(b) and found that the case record was devoid of any evidence substantiating the work for which the fee was requested. The record shows, however, that the attorney submitted an application substantially conforming to the requirements of 20 C.F.R. § 10.145(c). He provided a complete, itemized statement containing the dates of the services rendered, the time spent on each type of service and a brief description of each service. He also provided an invoice that explained the basis for the amount of the fee requested. Although the Office reasonably denied approval of fees charged for time spent on correspondence on the grounds that none of the attorney’s letters were available for review, thereby precluding the Office from giving careful consideration to the content of the letters when weighing it against the reasonableness of the time requested,⁴ there is no indication that the attorney did not actually devote to the case the hours spent in rendering the other services itemized in his application⁵ and

¹ 20 C.F.R. § 10.145(b).

² *Regina G. Jackson*, 41 ECAB 321, 325 (1989); *Charles A. Mikalaynas*, 40 ECAB 1277, 1279-80 (1989).

³ *Wilson L. Clow*, 44 ECAB 157 (1992).

⁴ *Charles A. Mikalaynas*, *supra* note 2 (finding that the Office exhibited a manifestly unreasonable exercise in judgment in approving the half-hour the attorney claimed for reviewing a two-sentence letter from the Office and in approving the one hour claimed for drafting his own two-sentence letter).

⁵ *See Andrew D. Finch*, 25 ECAB 24 (1973).

no explanation or evidence to support that the amounts of time recorded for the other services were inordinate.⁶

For example, the attorney indicated in his itemization of services that on February 2, 1995 he first met with his client for six-tenths of an hour. The itemization also indicates that on February 10, 1995 he spent nine-tenths of an hour researching the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. There is no evidence that the attorney did not actually spend this time meeting with the claimant or researching the A.M.A., *Guides*, and there is no evidence or argument by the Office that the time spent was inordinate. Indeed, the Board has held that where the representative lists the time he devoted to each task, his word is entitled to considerable weight. Unless the Office can demonstrate by clear and convincing evidence that the representative did not, in fact, spend the time alleged, it must accept as given the figure he reports.⁷ An attorney has broad latitude in exercising his professional judgment in connection with the preparation of his client's case. He has the responsibility to study and research those matters that, 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.⁸ Further, the claimant in this case was given an opportunity to comment on the reasonableness of the requested fee, as required.⁹ Having reviewed his attorney's invoice and the supporting detail of the work performed, the claimant stated that the fee requested was reasonable and appropriate and should be approved. This should be given considerable weight in favor of approving the fee in the amount requested.¹⁰

That the Office was justified in denying approval of fees for certain services constitutes no reasonable basis for denying approval of all the fees requested, particularly when there is no evidence that the attorney did not devote the time in rendering such other services, when there is no evidence or argument that the time spent was inordinate and when the client has reviewed the time and description of such other services and has judged them reasonable and appropriate. Accordingly, the Board finds that the Office abused its discretion in denying approval of all the fees requested and will remand the case for a proper exercise of discretion. After such further development as may be necessary, the Office shall issue an appropriate final decision on the attorney's application.

The September 17, 1997 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

⁶ See *Charles A. Mikalaynas*, *supra* note 2.

⁷ *Edgar Aikman, et al.*, 32 ECAB 1570 (1981).

⁸ *Id.*

⁹ *Andrew A. Miller*, 34 ECAB 1002 (1983); *George W. Schumacher*, 29 ECAB 84 (1977).

¹⁰ 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fees for Representatives' Services*, Chapter 2.1200.6.b(7) (December 1994).

Dated, Washington, D.C.
October 6, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member