

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YOLANDA R. BENNAGE and DEPARTMENT OF THE ARMY,
U.S. ARMY CORPS OF ENGINEERS, Highland, CA

*Docket No. 00-1048; Submitted on the Record;
Issued October 1, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by approving an attorney's fee in the amount of \$8,100.00.

On March 18, 1996 appellant, then a 45-year-old office automation clerk filed an occupational disease claim alleging that on or about December 20, 1995 she developed a psychiatric condition due to factors of her federal employment.

By decision dated February 28, 1997, the Office denied her claim finding that the evidence of record was insufficient to establish that she sustained the claimed psychiatric condition while in the performance of duty. On March 10, 1997 appellant requested an oral hearing of the February 28, 1997 decision.

A hearing was held on June 17, 1998 and appellant appeared with authorized counsel, Susan Slater, Esquire. Following the hearing, an Office hearing representative from the Branch of Hearings and Review set aside the prior decision and remanded the case to the district office for further development of the medical evidence by decision dated September 17, 1998.

On remand, the Office further developed the claim by referring appellant for a second opinion medical evaluation and on November 10, 1998, the Office accepted the claim for aggravation of major depression.

On October 21, 1998 the Office received a letter from Ms. Slater, who indicated that she had formally resigned as counsel for appellant due to a breakdown in the attorney-client relationship and submitted a bill for \$8,100.00 for service rendered from November 19, 1997 through August 25, 1998. Ms. Slater also submitted a copy of her invoice, which detailed her services from November 19, 1997 through August 25, 1998, the \$150.00 fee assessed for various hourly increments during the above timeframe and the amount due. In a letter dated November 10, 1998, the Office advised appellant of the attorney fee request and provided her an

opportunity to submit comments regarding whether the requested fee was reasonable. Appellant submitted no information.

By decision dated February 25, 1999, the Office approved the fee of \$8,100.00 for services rendered from November 19, 1997 to August 28, 1998. On March 9, 1999 appellant disagreed with the Office decision and requested an oral hearing, which was held on July 14, 1999.

Appellant testified at the hearing that she contracted with counsel to pay \$100.00 per hour, not \$150.00 and that she had been overcharged and on occasion had been charged repetitively for the same services. She attempted to substantiate her claim by stating that her attorney charged two hours of travel to the Office hearing although a computer generated map with driving directions submitted at that time indicated that appellant's counsel could drive from appellant's home to the hearing in 1 hour and 22 minutes.

In a decision dated October 5, 1999, an Office hearing representative determined that the requested attorney's fee was appropriate and affirmed the prior decision. The Office hearing representative found that appellant failed to submit sufficient evidence to establish her claim that she had been charged excessively for legal representation.

The Board has duly reviewed the case record on appeal and finds that this case is not in posture for a determination of whether the Office abused its discretion by approving an attorney's fee in the amount of \$8,100.00.

It is not the 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 the criteria set forth in section 10.703 of Title 20 of the Code of Federal Regulations.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 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 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.⁴

In this case, Ms. Slater, appellant's former counsel advised the Office of the \$8,100.00 in fees accrued by appellant in the workers' compensation claim and submitted her bill for approval. In her October 21, 1998 letter to the Office, Ms. Slater indicated that the customary

¹ 20 C.F.R. § 10.703.

² *William Lee Gargus*, 25 ECAB 187 (1974).

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

⁴ *Daniel J. Perea*, 42 ECAB 214 (1990).

local charge for similar legal service was between \$200.00 and \$220.00 an hour or one-third of appellant's recovery; however, her fee was \$150.00 per hour in this case. To the contrary, appellant alleged in the July 14, 1999 oral hearing that she contracted to pay Ms. Slater \$100.00 per hour and not \$150.00 as alleged by her former counselor. Following the hearing, the Office hearing representative held the record open for 30 days to allow appellant to submit evidence supporting her claim. In the October 5, 1999 decision, the Office hearing representative discussed appellant's allegation of a reduction in fees but noted that no such evidence regarding the hourly rate was received. Nevertheless, the record contains a signed retainer agreement between appellant and Ms. Slater, which indicates that Ms. Slater originally stated that she would charge appellant a fee of \$175.00, however, in a written clause agreed to reduce her fee to \$100.00 per hour for representation of the claim. The Board notes that the retainer agreement contains no Office date stamp and there is no indication from the record whether appellant or Ms. Slater submitted this document. Although it appears from the placement of the case record that the retainer agreement was before the Office hearing representative prior to the October 5, 1999 decision, it does not appear that the hearing representative evaluated this evidence before rendering her decision.

The case record has, however, been examined in accordance with the following criteria set forth in 20 C.F.R. § 10.703 pertaining to fees for representative services, including: the usefulness of the attorney's services; the nature and complexity of the claim; the actual time spent on development and presentation of the claim; and; the customary local charges for similar services. The Office determined that a fee of \$8,100.00 was reasonable.

Notwithstanding, the Board finds that it cannot rule on whether the Office abused its discretion in determining the reasonableness of the fee, in light of the retainer agreement of record outlining an agreed reduction of hourly fees to \$100.00 per hour in this case. While the Office procedure manual indicates that, the Office is not bound by fee agreements,⁵ the Office should evaluate the file to determine the accuracy of the representative's description of her fees and services in the retainer agreement and request clarifying information regarding the fee from Ms. Slater if necessary. After such development of the case record as the Office deems necessary, the Office should issue an appropriate decision.

⁵ See the Federal (FECA) Procedure Manual, Chapter 2.1200, *Fees for Representative's Services*.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated October 5 and February 25, 1999 are hereby set aside and the case remanded for further proceedings consistent with this decision.

Dated, Washington, DC
October 1, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member