

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EVERADO G. PEREZ and U.S. POSTAL SERVICE,
POST OFFICE, Pacoima, CA

*Docket No. 01-1106; Submitted on the Record;
Issued June 3, 2002*

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 in the amount of \$16,695.30.

On April 9, 1997 appellant, then a 65-year-old letter carrier, filed an occupational disease claim alleging that he sustained a left knee injury in the performance of duty.

By letter dated July 18, 1997, the Office advised appellant that it proposed to terminate his compensation on the grounds that the evidence of record established that he had no residuals from his accepted 1987, 1991 and 1993 hernia and lumbar spine injuries and that he had failed to meet his burden of proof to establish that he sustained injuries to his neck and left knee in the performance of duty in 1997.¹

By decision dated April 2, 1998, an Office hearing representative remanded the case for further development.

By decision dated December 8, 1998, the Office accepted that appellant sustained temporary aggravation of preexisting cervical, lumbar and left knee degenerative disease with the first two conditions resolved as of July 29, 1998.

By decision dated January 29, 1999, the Office denied further medical treatment for appellant's cervical, lumbar and left knee conditions.

By decision dated June 3, 1999, the Office hearing representative remanded the case for further development.

¹ This case record is a consolidated record that includes a 1987 and 1993 claim for a hernia, a 1991 claim for a back injury and 1997 claims for a neck and left knee injury.

By letter dated July 19, 2000, the Office accepted as work related appellant's need for a total left knee replacement and permanent aggravation of arthritis of the cervical and lumbar spine. Effective June 12, 2000, he was placed on the periodic compensation rolls to receive compensation for temporary total disability.

On June 28, 2000 appellant's attorney, Max Gest,² submitted to appellant and the Office a request for approval of his fees amounting to \$16,695.30. He noted that appellant had remitted \$7,200.00 of the total due. Mr. Gest submitted an itemized bill for 57.57 hours of services rendered between August 25, 1997 and June 27, 2000 with an hourly rate of \$290.00.

By letter dated October 25, 2000, the Office asked appellant to state whether he felt that the fee requested by Mr. Gest was reasonable and appropriate.

In an undated letter received by the Office on November 9, 2000, appellant noted that his attorney's minimum hourly rate was \$150.00, his maximum hourly rate was \$350.00, and he had charged appellant \$290.00 per hour. He indicated that no hearing had been held in his case and he had not gone "to court."

By letter dated November 17, 2000, Mr. Gest responded to appellant's letter. He stated that he had initially received an escrow deposit of \$2,000.00 from appellant and thereafter he made escrow deposits totaling \$7,200.00 as of June 8, 2000. Mr. Gest noted that he had requested an additional \$5,000.00 escrow deposit from appellant on February 2, 2000 but he deposited only \$1,200.00. He stated that he was attaching a June 28, 2000 letter to appellant in which he advised appellant of the fact that he had prepared his final fee request and provided a copy of the fee request to him. Mr. Gest stated:

"The hourly rate is \$290.00, which, in my opinion, is rather low based upon the fact that when [appellant] initially retained my office he had received a notice of proposed termination of the accepted claim and denial of two claims ... by [Office decision] dated July 19, 1997. I was successful in obtaining acceptance of his claim and authorization for a total knee replacement. [Appellant] may have received, or will be entitled to receive, a significant schedule award once his condition becomes permanent and stationary. [Appellant] has also received disability compensation benefits for the period of his rehabilitation.

"I attempted to obtain minimum escrow deposits from [appellant] due to his significant financial hardship. Attached ... is a copy of the note [from appellant] dated February 22, 2000. That note provides confirmation from [appellant] that he requested ... \$300.00 per month payments on the additional escrow deposit.... [A]fter making \$300.00 a month payments for March, April, May and June 2000, [appellant] abruptly stopped making escrow deposits to my office."

* * *

² Prior to December 21, 1991, appellant's attorney of record was Mr. Gest's late partner Richard P. Fox.

“Due to the efforts of my office [appellant’s] claim, which was denied, was appealed to the [Office’s] Branch of Hearings and Review, and based upon the remand obtained, [appellant] was referred for additional evaluations by your Office. This resulted in a decision ... accepting portions of his claim. A further appeal was taken to the Branch of Hearings and Review and a referee physician evaluation was ordered.... Following that ... evaluation, [appellant] had his claim accepted for permanent aggravation of ... degenerative joint disease of the left knee; permanent aggravation of ... degenerative arthritis of the lumbar spine; permanent aggravation of ... degenerative arthritis of the cervical spine. Additionally, the total knee replacement surgery was authorized by your Office. Therefore, this case had much more than the average difficulty and complexity. The benefits obtained for [appellant] were significant and the benefits to be obtained by [appellant] in the way of disability compensation and schedule award benefits are substantial.”

By decision dated November 28, 2000, the Office approved an attorney’s fee in the amount of \$16,695.30 for services rendered from August 25, 1997 to June 27, 2000.

By letter dated December 7, 2000, appellant requested reconsideration of the Office’s November 28, 2000 decision. He argued that paying the \$9,455.30³ balance owed his attorney would cause financial hardship, that his Congressman and Rosie Villegas helped significantly with his case and he felt that Mr. Gest increased his hourly rate after appellant terminated his services.

By decision dated January 30, 2001, the Office denied modification of its November 28, 2000 decision. The Office stated that the case record had been examined in accordance with the following criteria: usefulness of the representative’s services; nature and complexity of the claim; actual time spent on development and presentation of the claim; amount of charges for similar services; professional qualifications of the representative and all other pertinent factors in the record and had determined that a fee of \$16,695.30 was reasonably commensurate with the actual necessary work performed in representing appellant before the Office.

The Board finds that the office did not abuse its discretion in approving an attorney’s fee in the amount of \$16,695.30.

It is not the function of the Board to determine the fee for services performed by a representative of a claimant before the Office.⁴ That function is within the discretion of the

³ By letter dated November 30, 2000, Mr. Gest advised appellant that he had withdrawn from escrow the \$7,200.00 he had received from appellant and applied it to the approved fee of \$16,695.30. He credited appellant with \$40.00 liquidated interest on the escrow account leaving an unpaid balance of \$9,455.30.

⁴ *Arthur Sims*, 46 ECAB 880 (1995).

Office based on the criteria set forth in section 10.703 of the Office's regulations.⁵ This section provides that the fee approved by the Office will be based on the following factors:

- “(1) Usefulness of the representative's services;
- (2) The nature and complexity of the claim;
- (3) The actual time spent on development and presentation of the claim; and
- (4) Customary local charges for similar services.”

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.⁶ 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. 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.⁷ The Board finds that no such error, unreasonable judgment or contrary actions are evident in the record of this case.

The Office's January 30, 2001 decision recited that the relevant criteria contained in 20 C.F.R. § 10.703 were considered. Appellant was given an opportunity to comment on the reasonableness of the requested fee, as required,⁸ and responded in an undated letter received by the Office on November 9, 2000 that his attorney's minimum hourly rate was \$150.00, his maximum hourly rate was \$350.00 and he had charged appellant \$290.00 per hour. He indicated that no hearing had been held in his case and he had not gone “to court.” Mr. Gest provided the Office with his detailed response to appellant's letter. 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. There is no evidence that the Office abused its discretion in approving an attorney's fee of \$16,695.30.

⁵ 20 C.F.R. § 10.703.

⁶ *Barbara Robertson (Paul Robertson)*, 41 ECAB 393 (1990); *Regina G. Jackson*, 41 ECAB 321 (1989).

⁷ *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁸ *Andrew A. Miller*, 34 ECAB 1002 (1983).

The decisions of the Office Workers' Compensation Programs dated January 30, 2001 and November 28, 2000 are affirmed.

Dated, Washington, DC
June 3, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member