U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORANN WISE-DENT and U.S. POSTAL SERVICE,
POST OFFICE, Moultrie, GA

Docket No. 02-716; Submitted on the Record;
Issued February 27, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the Office's approval of an attorney's fee under 5 U.S.C. § 8128(a).

On August 28, 1995 appellant, then a 32-year-old rural carrier associate and casual custodian, filed a claim for a traumatic injury for cuts on her right hand and arm and a bump on her head sustained in an August 26, 1995 motor vehicle accident.

Appellant performed limited duty through September 14, 1995. On September 15, 1995 the employing establishment terminated her employment for "failure to work in a safe manner. Specifically, on August 26, 1995, you were involved in an at-fault vehicle accident."

By letter dated October 3, 1995, the Office advised appellant that it had accepted that she sustained a right shoulder strain on August 26, 1995.

On July 8, 1996 appellant filed a claim for a recurrence of disability due to her August 26, 1995 employment injury, listing the date she stopped work as September 15, 1995.

By letter dated October 14, 1996, appellant stated that Herbert Chestnut was representing her concerning her injury claim.

By decision dated December 16, 1996, the Office found that the evidence failed to establish that her claimed condition and disability were causally related to her August 26, 1995 employment injury.

By letter received by the Office on January 21, 1997, appellant requested a hearing.

By decision dated May 27, 1997, an Office hearing representative found that the evidence established that appellant's August 26, 1995 employment injury caused a cervical spine strain in

addition to the accepted shoulder strain, that appellant was entitled to compensation from September 15, 1995 to September 16, 1996 and that appellant should be referred for a second opinion evaluation of any continuing employment-related disability.

After referring appellant for a second opinion evaluation, the Office, by decision dated November 18, 1997, found that appellant had not established that her continuing condition was causally related to her employment injury.

By decision dated April 8, 1998, the Office found that appellant's request for reconsideration was insufficient to warrant review of its prior decision. By decisions dated June 4 and August 26, 1998, the Office found that appellant's requests for reconsideration were insufficient to warrant modification of its prior decisions.

By letter dated September 3, 1998, appellant advised the Office that Mr. Chestnut was no longer her attorney.

On December 15, 1999 Mr. Chestnut, Esquire, submitted an application for attorney's fees in the amount of $989.00. As part of his application, Mr. Chestnut submitted an itemized statement identifying the services he performed on appellant's behalf from September 5, 1996 to September 29, 1997. He indicated that his hourly rate was $150.00, that he had expended 12.6 hours on appellant's claim and that he sought approval of his reduced fee in the amount of $989.00. Mr. Chestnut stated that he had sent his time sheets to appellant on several occasions and that she had not voiced an objection to his fee but had not returned the acknowledgment of fee form. He submitted a certificate of service, certifying that he served appellant with a copy of his application for attorney's fees on November 27, 1999. Mr. Chestnut also submitted copies of November 24, 1998, March 3 and August 31, 1999 letters to appellant requesting that she return his acknowledgment of fee request, which would indicate her agreement to a fee in the amount of $989.00.[1]

By decision dated January 10, 2000, the Office approved Mr. Chestnut's application for a fee in the amount of $989.00 for services rendered from September 5, 1996 to September 29, 1997. The Office found that this fee was reasonable considering the usefulness of the services, the complexity of the claim, the actual time spent on development and presentation of the claim, the amount of charges for similar services and the professional qualifications of the representative. The Office noted that appellant had not contested the reasonableness of the amount of the fee.

By letter dated January 29, 2000, appellant requested a review of the written record on the approval of Mr. Chestnut's application for attorney's fees. Appellant contended that "there was not an official attorney agreement in place," that Mr. Chestnut was "requesting payment of fees for services that he did not provide," that the attorney's fee was approved without her comments and that she had paid the fee before it was approved by the Office.

By decision dated August 15, 2000, an Office hearing representative found that the fee of $989.00 was fair and reasonable, given that the attorney reduced his fee to approximately 50

[1] The November 24, 1998 letter stated that this was the amount she had in escrow.

percent of the amount he reasonably could have charged. The Office hearing representative found appellant's October 14, 1996 statement authorizing Mr. Chestnut's services, sufficient to establish that this attorney was acting on her behalf, that the Office's failure to release a form on receipt of the authorization of the attorney's services did not invalidate the attorney's fee petition, that the attorney's correspondence indicated that he was active in pursuing appellant's claim, and that "the Office was required to contact the claimant prior to approving the fee to determine whether she concurred with the fee. The Office failed to contact the claimant and, therefore, erred in this regard. However, the claimant's arguments in regard to the fee petition are now considered herein. Therefore, the fact that the district office failed to obtain the claimant's comments concerning the petition is remedied by the exercise of her appeal rights."

By letter dated July 16, 2001, appellant requested reconsideration of the Office hearing representative's August 15, 2000 decision. She stated that the Office did not attempt to contact her prior to approving the attorney's fee and contended that the hearing representative's consideration of her arguments was "wrong and against what the federal regulations state."

By decision dated October 15, 2001, the Office found that the issue of whether the Office failed to follow its procedures by failing to contact appellant prior to approving the fee was addressed in the previous decision and that appellant's request for reconsideration was of a repetitious nature and not sufficient to warrant review of its prior decision.

The only Office decision before the Board on this appeal regarding the approval of an attorney's fee is the Office's October 15, 2001 decision finding that appellant's application for review was insufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on this issue on August 15, 2000 and the filing of appellant's appeal on February 11, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.[2]

The Board finds that the Office properly refused to reopen appellant's case for further review of the Office's approval of an attorney's fee under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by

[2] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

advancing a relevant legal argument not previously considered by the Office or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

Appellant did not submit any new evidence with her July 16, 2001 request for reconsideration. Copies of Board decisions and of sections of the Office procedure manual do not constitute "evidence" and the Office memorandum stating that the attorney's fee would be approved without appellant's comments was in the case record at the time of the Office's January 10 and August 15, 2000 decisions. Appellant's argument that the Office did not follow its procedures by failing to obtain her comments before approving the attorney's fee was considered in the Office hearing representative's August 15, 2000 decision.

In her July 16, 2001 request for reconsideration, appellant pointed out that the Office did not call her 30 days after the attorney's application was submitted, as its procedure manual indicates it should[3] and that the Office initially approved the attorney's fee without comments from her. Nonetheless, appellant did not show that the Office erroneously applied or interpreted a specific point of law. The purpose of the provisions cited by appellant is to have a claimant's comments on an attorney's fee considered and appellant's comments were given due consideration in the Office hearing representative's August 15, 2000 decision. Appellant's request for reconsideration was insufficient to require the Office to reopen her case for further review of the merits of its decision approving an attorney's fee.

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fees for Representatives' Services*, Chapter 2.1200.5bh (December 1994) states: "Where the claimant's opinion is not submitted, the representative must report how the claimant was informed that such a statement should be submitted to [the Office]. A copy of the representative's letter to the claimant should accompany the application for fee approval. In this event, the claims examiner should place a 30-day call-up on the case, then contact the claimant by telephone if no statement is received after 30 days."

The October 15, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
February 27, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member