



## **FACTUAL HISTORY**

This is the second appeal before the Board in this case. By decision dated October 1, 2001,<sup>1</sup> the Board set aside decisions of the Office of September 25 and October 5, 1999 regarding the approval of an attorney fees in the amount of \$8,100.00 based upon an hourly fee of \$150.00. The Board found that the Office had abused its discretion in determining the reasonableness of the fee in view of a retainer agreement which specified an hourly fee of \$100.00. On remand, the Office was instructed to determine the accuracy of the services in the retainer agreement and the representative's description of the fees.

On March 18, 1996 appellant, then a 45-year-old office automation clerk, filed an occupational disease claim alleging that on December 20, 1995 she first realized that she developed an emotional condition due to factors of her federal employment. On November 10, 1998 the Office accepted her claim for aggravation of major depression. By decision dated February 25, 1999, the Office approved an attorney fee in the amount of \$8,100.00 for the period November 19, 1997 to August 28, 1998. In a decision dated October 5, 1999, the Office hearing representative affirmed the February 25, 1999 decision. The law and the facts of the case as set forth in the Board's prior decision are incorporated by reference.

Following remand, the Office approved payment of attorney's fee in the amount of \$5,400.00 for the period November 19, 1997 to August 28, 1998 and stated that appellant had not contested the fee amount. The Office informed appellant that pursuant to 5 U.S.C. § 8127 and 20 C.F.R. § 10.702 she was responsible for payment of the fee.

Appellant requested an oral hearing before an Office hearing representative by letter dated March 25, 2002. She contended that she should not be responsible for payment of the attorney fees and that she disagreed with the fee approved. She referenced 5 C.F.R. § 14.2430.4(a) regarding her contention that the Office erred in allowing an hourly fee of \$100.00. With regard to her argument that she was not responsible for payment of the attorney fee, she cited to 5 C.F.R. § 14.2430<sup>2</sup> and 5 U.S.C. § 504.<sup>3</sup> A hearing was held on October 29, 2002 at which appellant was represented by her spouse and provided testimony.

By decision dated January 10, 2003, an Office hearing representative found that, pursuant to 5 C.F.R. § 10.702, the Office properly approved an attorney's fee in the amount of \$5,400.00 for the period November 19, 1997 to August 28, 1998.

In a letter dated December 30, 2003, appellant requested reconsideration disputing the fee based on 5 C.F.R. § 2430.2(b), again contending that she was not responsible for payment of the attorney fee. She noted that she had been successful in her claim and, pursuant to 5 C.F.R.

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<sup>1</sup> Docket No. 00-1048 (issued October 1, 2001).

<sup>2</sup> 5 C.F.R. Part 14 concerns the Federal Labor Relations Authority, General Counsel of the Federal Labor Relations Authority and Federal Service Impasses Panel. Section 14.2430 provides the award of attorney fees and other expenses pursuant to an unfair labor practice proceeding against a labor organization before the Federal Labor Relations Authority.

<sup>3</sup> Costs and fees of parties, 5 U.S.C. § 504.

§ 2430.2(b), she was not responsible for payment of the attorney fee. Appellant submitted a copy of 5 C.F.R. § 2430, a December 5, 1995 request for disciplinary action/adverse action, pages 23-24 from a June 17, 1998 hearing transcript and the last page of the September 17, 1998 decision by an Office hearing representative.

By decision dated April 5, 2004, the Office denied appellant's request for reconsideration on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>4</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>6</sup>

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>7</sup> The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>8</sup>

Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.<sup>9</sup>

### **ANALYSIS**

Appellant's December 30, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Appellant contended that the Office failed to consider 5 C.F.R. § 14.2430.2(b) in support of her

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<sup>4</sup> 5 U.S.C. § 8128(a) ("the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

<sup>5</sup> *Raj B. Thackurdeen*, 54 ECAB \_\_\_\_ (Docket No. 02-2392, issued February 13, 2003); *Veletta C. Coleman*, 48 ECAB 367, 368 (1997).

<sup>6</sup> 20 C.F.R. § 10.608(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(1)-(2); see *Sharyn D. Bannick*, 54 ECAB \_\_\_\_ (Docket No. 03-567, issued April 18, 2003).

<sup>8</sup> 20 C.F.R. § 10.608(b).

<sup>9</sup> *Id.*

argument that she was not responsible for payment of the attorney fee in this case. Contrary to appellant's contention, however, the Board notes that section 14.2430.2(b) is not the controlling authority on determining who is responsible for payment of attorney fee approved by the Office. Section 14.2430.2(b) provides for the award of attorney fees and other expenses in unfair labor proceedings against a labor organization before the Federal Labor Relations Authority. The relevant legal authority for payment of attorney fees under the Act is 20 C.F.R. § 10.702, which provides that a claimant is solely responsible for the payment of any attorney fees authorized by the Office. Appellant's argument regarding the application of 5 C.F.R. § 14.2430.2(b) had been previously raised before the Office hearing representative, who found it inapplicable in proceedings under the Act. Section 10.702 states "the claimant is solely responsible for paying the fee and other charges" and the Office will not reimburse appellant for these costs nor is the Office liable for the attorney fees.<sup>10</sup> Appellant has not advanced a relevant legal argument not previously considered by the Office. Consequently, she is not entitled to a review of the merits of the attorney fee decision.

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any new evidence with her request for reconsideration. Appellant submitted a copy of 5 C.F.R. § 2430, a December 5, 1995 request for disciplinary action/adverse action, pages 23-24 from a June 17, 1998 hearing transcript and the last page of the September 17, 1998 decision by an Office hearing representative. This evidence has been previously considered by or produced by the Office, in consideration of her claim. None of this evidence is relevant to the issue of a claimant's responsibility for payment of an attorney fee. The Board finds that this evidence is insufficient to require reopening of appellant's case for further review of the merits of her claim as it is irrelevant to the issue in this case.

### CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of the attorney fee decision.

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<sup>10</sup> 20 C.F.R. § 10.702.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 5, 2004 is affirmed.

Issued: December 8, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member