

2002, wherein the parties agreed to an hourly fee of \$225.00 and an initial retainer of \$3,000.00 to be held in a third party escrow account pending approval of the fee by the Office.

In a July 21, 2003 letter to the Office, Mr. Kalker's office requested that it approve his December 13, 2002 fee request. In an August 27, 2003 letter to counsel, the Office noted that Mr. Kalker has been informed that, pursuant to 20 C.F.R. § 10.703(a)(2), a statement from the claimant regarding the reasonableness of the fee was required to be submitted with his request for fee approval. The Office noted that if such a statement was not submitted, the request would be reviewed for reasonableness of the fee.

In a September 10, 2003 decision, the Office approved Mr. Kalker's fee request on the basis that the claimant had not contested the reasonableness of the requested amount.¹

LEGAL PRECEDENT

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 function is within the discretion of the Office based on the criteria set forth in Title 20 of the Code of Federal Regulations and mandated by Board decisions. The sole function of the Board on appeal is to determine whether the action of the Office constituted an abuse of discretion.² Generally, an 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 established facts.³

Section 10.703(a)(1)(ii) of the Code of Federal Regulations provides in pertinent part that a representative must submit a fee application which includes a statement of agreement or disagreement with the amount charged, signed by the claimant.⁴ While the regulations provide that a fee application is deemed approved when it is accompanied by a signed statement indicating the claimant's agreement with the fee,⁵ the regulations do not specifically provide for approval when a claimant fails to contest a fee application.⁶ When a fee application has been disputed, the Office is required to provide the claimant with a copy of the fee application and request the submission of further information in support of any objection.⁷ After the claimant

¹ In his appeal to the Board, appellant argued that he received but refused to sign a letter written by Mr. Kalker's office stating that he approved the fee amount because he felt he was misled by Mr. Kalker regarding what his compensation would be if his appeal was successful, that Mr. Kalker advised him to spend \$1,000.00 for a medical report when the Office would provide one for free and because he felt Mr. Kalker's bill included too much time reviewing the file.

² *Alvin T. Groner, Jr.*, 47 ECAB 588 (1996); *Edward Snider*, 39 ECAB 1268 (1988); *Azalee L. McCoy*, 39 ECAB 786 (1988).

³ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁴ 20 C.F.R. § 10.703(a)(1)(ii) (2003).

⁵ 20 C.F.R. § 10.703(b) (2003).

⁶ See *Helen J. Cavorley*, Docket No. 02-2325 (issued February 7, 2003).

⁷ *Id.*

has been afforded a reasonable time to respond to the request, the Office will then proceed to review the fee application.⁸ Pursuant to section 10.703(c), when a fee is in dispute the Office will determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors: (i) Usefulness of the representative's services; (ii) The nature and complexity of the claim; (iii) The actual time spent on development and presentation of the claim; and (iv) Customary local charges for similar services.⁹

ANALYSIS

In the instant case, appellant did not submit a statement either approving or disapproving of Mr. Kalker's fee request. The Office approved the requested fee without hearing from appellant. The Office stated: "This fee has been approved because the claimant has not contested the reasonableness of the fee." In essence, the Office improperly proceeded to consider the fee request as though appellant had actually submitted a statement approving the request. Absent appellant's written agreement to the fee, the regulations do not authorize the Office to approve a fee application without first determining whether the fee "is substantially in excess of the value of services received."¹⁰

CONCLUSION

Accordingly, the Board finds that the Office abused its discretion in approving Mr. Kalker's fee petition.

⁸ *Id.*

⁹ 20 C.F.R. § 10.703(c) (2003).

¹⁰ *See Cavorley, supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2003 decision of the Office is set aside and the case remanded for further consideration consistent with this decision of the Board.

Issued: January 8, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member