

**United States Department of Labor
Employees' Compensation Appeals Board**

ANGELA M. SANDEN, Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Fairview, PA, Employer

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**Docket No. 04-1632
Issued: September 20, 2004**

Appearances:

*Craig A. Markham, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

RE: ATTORNEY'S FEES

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 9, 2004 appellant's attorney filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated May 24, 2004 which approved a fee of \$500.00 for attorney's services rendered in appellant's compensation case during the period November 4, 2002 to March 9, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office abused its discretion in approving a claim for \$500.00 in fees for attorney's services rendered, in appellant's case, for the period November 4, 2002 to March 9, 2004.

FACTUAL HISTORY

By notice dated April 8, 2004, the Office accepted that appellant sustained a herniated disc and a failed back syndrome, of which she became aware on October 21, 2000, causally related to her job duties.

On April 29, 2004 appellant's attorney, Mr. Markham, submitted an application for approval of attorney's fees and costs. He provided a copy of the agreement between his law office and appellant, with a concurrence with these costs and fees signed by appellant on April 26, 2004, wherein she agreed to reimburse Mr. Markham for all litigation expenses and to pay Mr. Markham 20 percent of all past due benefits awarded. Mr. Markham provided an itemized statement of hours spent working on appellant's claim. He did not provide an hourly rate for his services but noted that he had spent 16.00 hours working on appellant's case and reiterated that she had agreed that his office would receive 20 percent of all past due benefits awarded to appellant. Mr. Markham indicated that administrative costs amounted to \$588.64 which was separate and apart from the 20 percent contingency Mr. Markham was to be paid for his legal services. These costs included bills for medical reports, copying charges and travel expenses for appellant's hearing.

The Office, however, by decision dated May 24, 2004, treated the litigation costs as attorney's fees for legal services, reduced them without explanation or notice to the attorney and approved "attorneys fees" of \$500.00.

LEGAL PRECEDENT

In 20 C.F.R. § 10.702 a representative may charge the claimant a fee and other costs associated with the representation before the Office. The claimant is solely responsible for paying the fee and other charges and will not be reimbursed by the Office, nor is the Office in any way liable for the amount of the fee. Administrative costs (mailing, copying, messenger services, travel and the like, but not including secretarial services, paralegal and other activities) need not be approved before the representative collects them. Before any fee for services can be collected, however, it must be approved by the Secretary.

Section 10.703 of Title 20 of the Code of Federal Regulations specifies how the fee applications are approved. In considering whether the amount of money billed for legal services rendered is appropriate, the Office will look at 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.

Additional information needed to help the Office make such determinations includes an itemized statement showing the representative's hourly rate, the number of hours worked and specifically identifying the work performed and the total amount charged for the representation excluding administrative costs. Section 10.703(ii) also requires that a statement from the claimant be included agreeing or disagreeing with the amount charged.

Where the fee application is accompanied by a signed statement indicating the claimant's agreement with the fee as charged, the application will be deemed approved.

It is not the function of the Board to determine the fee for services performed by a representative of a claimant before the Office.¹ That function is within the discretion of the Office based on the criteria set forth in section 10.703 of the Office's regulations.² 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.³ 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.

Moreover, contingency fee arrangements are not recognized under the Federal Employees' Compensation Act.⁴

Further, the Board has held that where the Office proposes to reduce a requested fee for representative's services, including the hourly rate the representative may charge, the representative is entitled to notice of the reasons for the proposed reduction and an opportunity to respond with written comments and by affidavit prior to decision.⁵

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.⁶

ANALYSIS

The Office abused its discretion in this case in several ways:

(1) The Office abused its discretion by improperly considering the attorney's bill for administrative costs of pursuing the case as a bill for legal services rendered. Administrative costs need not be approved by the Office, and the attorney can bill the claimant directly for the entire amount of \$588.64,⁷ particularly when she has concurred with the amount of costs billed.⁸

¹ *Arthur Sims*, 46 ECAB 880 (1995).

² 20 C.F.R. § 10.703.

³ *Barbara Robertson (Paul Robertson)*, 41 ECAB 393 (1990).

⁴ *Russell Thomason*, 35 ECAB 781 (1984); *Duvie R. Ahlerichs*, 33 ECAB 586 (1982).

⁵ *Arthur B. Cole*, 36 ECAB 349 (1984); *Edgar Aikman*, 32 ECAB 1570 (1981).

⁶ *Nealy Kimble*, 49 ECAB 4823 (1998); *Thomas DaGrossa*, 49 ECAB 372 (1998).

⁷ *See* 20 C.F.R. § 10.702.

⁸ *See* 20 C.F.R. § 10.703(2)(b).

(2) The Office abused its discretion by reducing the attorney's "legal fees" without any articulated basis as required by 20 C.F.R. § 10.703(c)(i)-(iv). The Office must consider the above-noted factors and advise the attorney of the rationale behind the reduction.⁹

(3) The Office abused its discretion by failing to provide the attorney notice of the proposed reduction in "legal fees," and providing him with an opportunity to respond in writing with comments or by affidavit prior to decision.¹⁰

As the Office abused its discretion by being arbitrary in reducing the fees in this case, the decision dated May 24, 2004 must be set aside.

The fees for legal services and representation for 16 hours of work have not yet been calculated in this case. Therefore, there is no attorney's fee set forth to which the Office must agree. When they are, however, the Office must apply the above criteria to determine whether the fees charged are appropriate, which it did not do in this case when it improperly reduced the administrative costs.¹¹

However, the Board notes that the attorney's contingency fee arrangement is illegal under the laws applicable in this case. Therefore, he must recalculate the amount of money appellant owes him on an hourly basis and have that total approved by the Office.

CONCLUSION

The Office abused its discretion in this case and therefore the decision dated May 24, 2004 must be set aside and the case remanded for further action. Moreover, Mr. Markham's contingency fee contract is null and void as illegal under the Act.

⁹ See generally *Thomas DaGrossa*, *supra* note 6.

¹⁰ See *Arthur B. Cole*, *supra* note 5 at 350.

¹¹ See *John E. Harman*, 41 ECAB 169 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decision dated May 24, 2004 is hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Issued: September 20, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member