

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

DIANNA L. SMITH, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hardinsburg, IN, Employer**

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**Docket No. 04-2256
Issued: May 6, 2005**

Appearances:
Matt Housh, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On September 15, 2004 appellant, through her representative, filed an appeal of a decision of the Office of Workers' Compensation Programs dated June 25, 2004 in which the Office advised appellant that it does not pay attorney's fees. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this issue.¹

ISSUE

The issue is whether the Office is responsible for paying attorney's fees. On appeal, appellant's representative, Matt Housh, asks that the Office reimburse appellant for attorney's fees totaling \$38,665.00, contending that the provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA) and 20 C.F.R. § 725.367 which requires reimbursement for

¹ The Board notes that it also has jurisdiction over a December 18, 2003 decision in which the Office found that appellant was not entitled to compensation after September 4, 2003 and a schedule award dated June 16, 2004, awarding appellant a 37 percent left lower extremity impairment. Appellant, however, did not appeal these decisions to the Board. The Board also has jurisdiction over decisions dated September 15, October 14, November 6, December 3 and 30, 2003, February 11, March 16, April 21, May 13 and June 16, 2004 in which the Office approved attorney's fees totaling \$33,219.50. Appellant also did not appeal any of these decisions.

attorney's fees under the Federal Mine Safety and Health Act (FMSHA) should be applicable in proceedings under the Federal Employees' Compensation Act. Mr. Housh further argues that the Equal Access to Justice Act is applicable to proceedings under the Federal Employees' Compensation Act and that the Federal Employees' Compensation Act is unconstitutional because, in the interest of justice, injured federal employees should have their attorney's fees reimbursed.

FACTUAL HISTORY

On April 3, 2002 appellant, then a 54-year-old rural carrier, sustained multiple injuries when she was involved in an accident in her postal vehicle. She underwent several surgical procedures to her left lower extremity and returned to limited duty on September 2, 2002. On April 15, 2003 appellant authorized Brad Harris, an attorney, to represent her, and on May 27, 2003 underwent left total knee arthroplasty. In decisions dated June 16 and 24 and July 22, 2003, the Office approved attorney's fees in the amounts of \$1,533.75, \$1,140.00 and \$2,394.75 respectively. Appellant returned to sedentary duty on August 8, 2003. She stopped work on September 4, 2003 and has not returned.

By decisions dated September 15 and October 14, 2003, the Office approved attorney's fees in the amounts of \$2,772.25 and \$1,458.00. On October 21, 2003 appellant filed a schedule award claim, and on November 3, 2003 received a third-party settlement. By decisions dated November 6 and December 3, 2003, the Office approved attorney's fees in the amounts of \$5,128.00 and \$3,093.25. In a decision dated December 18, 2003, the Office found that appellant was not entitled to wage-loss compensation after September 4, 2003. By decisions dated December 30, 2003, February 11, March 16, April 21 and May 13, 2004, the Office approved attorney's fees in the amounts of \$6,081.50, \$3,873.50, \$3,760.50, \$4,485.75 and \$1,174.25, respectively. On April 23, 2004 appellant elected to retire under the Civil Service Retirement System.

On May 24, 2004 Mr. Harris submitted a request, asking that attorney's fees in the amount of \$44,965.00 be paid to him. Citing 20 C.F.R. § 725.367, he stated that "the facts and law are clear that [appellant] as the prevailing party, is entitled to have her attorney fees paid in their entirety." That same day Mr. Housh² requested additional fees in the amount of \$6,300.00. On June 16, 2004 appellant was granted a schedule award for a 37 percent impairment to her left lower extremity, and in a separate decision that day, the Office approved a fee request in the amount of \$1,392.50.³ In a letter decision dated June 25, 2004, the Office informed Mr. Harris that attorney's fees were strictly the personal obligation of the claimant.

² Mr. Housh, who characterizes himself as a federal claims representative, is an associate of Mr. Harris.

³ With the exception of the June 16, 2004 decision, the fee requests, each of which was signed by appellant, were approved by the Office as submitted.

LEGAL PRECEDENT

There is no provision in the Federal Employees' Compensation Act⁴ or its implementing regulations for payment of a claimant's attorney's fees. Section 8127 of the Federal Employees' Compensation Act pertains to representative fees and provides that a claim for legal or other services is valid only if approved by the Secretary,⁵ and section 10.702 of the Office regulations promulgated pursuant to section 8127⁶ specifically provides that "[t]he claimant is solely responsible for paying the fee and other charges. The claimant will not be reimbursed by [the Office], nor is [the Office] in any way liable for the amount of the fee."⁷ Thus, regardless of the reasons which may have necessitated an attorney's services, an attorney's fee is the personal obligation of the claimant, subject to prior approval by the Office, for legal services performed before it.⁸

ANALYSIS

On appeal appellant's representative contends that the attorney's fees that were approved by the Office should be paid by the Office under the Equal Access to Justice Act or as authorized in the provisions of the LHWCA and the FMSHA or in the constitutional interest of fundamental fairness.

The Board has long held that attorney's fees are not payable by the Office and that the Equal Access to Justice Act does not apply to proceedings under the Federal Employees' Compensation Act.⁹ In the case *Andrew A. Miller*,¹⁰ the Board noted that the Equal Access to Justice Act pertains to adversary proceedings and that, as adjudications under the Federal Employees' Compensation Act are not adversarial in nature, the provisions of the Equal Access to Justice Act do not apply to proceedings under the Federal Employees' Compensation Act.¹¹

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8127.

⁶ 20 C.F.R. §§ 10.700-10.703.

⁷ 20 C.F.R. § 10.702.

⁸ *Howard L. Miller*, 50 ECAB 239 (1999); *John E. Watson*, 44 ECAB 612 (1993).

⁹ *Id.*

¹⁰ 34 ECAB 1002 (1983).

¹¹ *Id.*

The Board likewise finds that the provisions of the LHWCA and the FMSHA¹² are not applicable to a claim filed under the Federal Employees' Compensation Act. The determination of an employee's rights or remedies under other statutory authority does not establish entitlement to benefits under the Federal Employees' Compensation Act.¹³ Office regulations specifically state that a claimant is solely responsible for paying fees for legal representation.¹⁴

Finally, counsel argues that the Federal Employees' Compensation Act is unconstitutional with respect to not reimbursing attorney's fees. The Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures.¹⁵ Thus, as the Board is an administrative body, it does not have jurisdiction to review a constitutional claim such as that made by appellant.¹⁶

CONCLUSION

The Board finds that the Office properly found that the payment of attorney's fees is solely the obligation of the claimant.

¹² The LHWCA offers compensation and medical care to employees disabled from injuries that occur on the navigable waters of the United States, or in adjoining areas customarily used in loading, unloading, repairing, or building a vessel. It also offers benefits to dependents if the injury causes the employee's death. 33 U.S.C. §§ 901-950. The FMSHA, as amended, provides for the payment of benefits to a coal miner who is totally disabled due to pneumoconiosis and to certain survivors of a miner who dies due to pneumoconiosis. 30 U.S.C. §§ 901-945. The Federal Employees' Compensation Act provides workers' compensation coverage to federal workers for employment-related injuries and occupational diseases. 5 U.S.C. §§ 8101-8193.

¹³ See generally *Michael A. Deas*, 53 ECAB 208 (2001).

¹⁴ *Supra* note 7.

¹⁵ See *Johnson v. Robinson*, 415 U.S. 361 (1974) and cases cited therein.

¹⁶ See *Vittorio Pittelli*, 49 ECAB 181 (1997).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 25, 2004 be affirmed.

Issued: May 6, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member