

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

ERIC B. PETERSEN, Appellant and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Yosemite, CA, Employer)))))))))	Docket No. 06-105 Issued: February 8, 2006
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<i>Appearances:</i> <i>Eric B. Petersen, pro se</i> <i>Office of Solicitor, for the Director</i>	<i>Case Submitted on the Record</i>
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DECISION AND ORDER
In re: Representative's Fee

Before:
 DAVID S. GERSON, Judge
 MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 17, 2005 appellant filed a timely appeal of an August 16, 2005 decision of the Office of Workers' Compensation Programs approving a fee for his representative's services before the Office. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's August 16, 2005 decision.

ISSUE

The issue is whether the Office abused its discretion by approving a representative's fee in the amount of \$4,390.31 for services rendered from September 11, 2001 to January 31, 2005.

FACTUAL HISTORY

On August 29, 1995 appellant, a 59-year-old search and rescue volunteer, filed a claim for compensation for a traumatic injury sustained on July 14, 1995 when his right leg gave out and he fell down a hill. He listed the nature of the injury as "left wrist and hand [and] possible collateral damage to the back from previous injury." By decision dated December 26, 1996, the Office found that the July 14, 1995 incident occurred in the performance of duty, but that the

medical evidence was not sufficient to establish that he sustained an injury due to this incident. Appellant requested reconsideration, and submitted additional evidence. By decision dated September 2, 1997, the Office found the additional evidence insufficient to warrant modification of its December 26, 1996 decision. By letter dated October 1, 1997, appellant requested reconsideration.

By letter dated October 16, 2000, Edward L. Daniel, who listed himself as a Federal Employees' Compensation Act Advocate with the Federal Workers' Compensation Law Center, Krehbiel, Bannerman, & Horn, P.A., Albuquerque, New Mexico, requested that the Office provide a complete copy of appellant's case file including any statement of accepted facts. Mr. Daniel again requested appellant's case file by facsimiles dated November 15 and December 11, 2000 and by letters dated January 5 and February 13, 2001. In a February 2, 2001 letter, Mr. Daniel objected to the Office's failure to issue a final decision, and requested information on payment of appellant's maintenance allowance and of his books and supplies for his training.

By decision dated October 15, 2001, the Office found that appellant's September 7, 2001 request for reconsideration was not timely filed and did not demonstrate clear evidence of error. Appellant appealed this decision to the Board, which, by order dated December 19, 2002, granted the Director's motion to remand the case for merit reconsideration of appellant's October 1, 1997 request for reconsideration.¹ By decision dated May 9, 2003, the Office found that the medical evidence did not establish that appellant's back condition was causally related to his July 14, 1995 traumatic incident. Appellant appealed this decision to the Board. By order dated November 15, 2004, the Board, after noting that appellant objected in his brief and on oral argument that the Office had not provided a copy of the May 9, 2003 decision to his representative, Mr. Daniel, found that notification of appellant's authorized representative was required, and remanded the case to the Office for proper issuance of the May 9, 2003 decision.² On December 7, 2004 the Office reissued its May 9, 2003 decision finding that the medical evidence did not establish that appellant's back condition was causally related to his July 14, 1995 traumatic incident. By letter dated January 25, 2005, Mr. Daniel advised the Office that Bannerman & Williams, Federal Workers' Compensation Law Center was no longer authorized to represent appellant.

On June 16, 2005 Gordon Reiselt, Esq., of Bannerman & Williams, P.A. submitted an application for approval of representative's fee, stating that he was a licensed attorney who had been practicing law in federal workers' compensation claims since 1989, and that Mr. Daniel was not an attorney but had over 20 years' experience with federal workers' compensation claims as a retired claims manager for the Office. Mr. Reiselt stated that his application had been submitted to appellant but that no response had been received. The application included an itemized list of 26.40 hours of services Mr. Daniel had provided to appellant from September 11, 2000 to August 28, 2002, consisting of telephone conferences with and letters to appellant and the Office, and review of the file and information received from appellant. Seven-tenths of one hour of Mr. Reiselt's services were listed for a telephone call with appellant on July 27, 2004,

¹ Docket No. 02-1282 (*Order Granting Remand and Canceling Oral Argument*, issued December 19, 2002).

² Docket No. 03-1508 (*Order Remanding Case*, issued November 15, 2004).

and on February 5, 2001 for telephone conferences with appellant and Mr. Daniel and preparation of a memorandum to the file. Mr. Daniel's services were billed at \$150.00 per hour, and Mr. Reiselt's at \$175.00 per hour, for a total of \$4,082.50. The itemized statement also added \$275.57 for sales tax at 6.75 percent, and \$32.24 in costs for long distance telephone calls and photocopies, for a total of \$4,390.31.

On July 28, 2005 the Office sent appellant a copy of the fee approval request, noted that payment of any fee approved was his responsibility, and requested his comments on whether the fee was reasonable and appropriate. In a July 31, 2005 letter, appellant stated that the amount owed to his representative and the amount claimed were different by several hundred dollars, and that the fee requested was an incorrect amount that he would not pay.³

By decision dated August 16, 2005, the Office approved a fee in the amount of \$4,390.31 for services rendered from September 11, 2001 to January 31, 2005. The Office noted that charging appellant for the gross receipts tax appears in accordance with state law, and stated that it had considered the usefulness of the representative's services, nature and complexity of the claim, actual time spent on development and presentation of the claim, amount of charges for similar services, and professional qualification of the representative. The Office stated:

"The attorney aided in a complex claim involving multiple appeals. The attorney's office is claiming 28.6 hours over a 52-month period -- see the breakdown dated February 2, 2005. This does not appear excessive or unusual. Neither is the professional fee of \$150.00 per hour excessive or unusual. The attorney's professional qualifications are satisfactory."

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 the Board decisions. The sole function of the Board on appeal is to determine whether the action of the Office constituted an abuse of discretion.⁴ 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.⁵

Section 10.703 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. 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. After the claimant has been afforded a reasonable time to respond to the request, the Office will then proceed to review

³ Appellant submitted a copy of a June 25, 2005 letter containing the same contentions.

⁴ *Alvin T. Groner, Jr.*, 47 ECAB 588 (1996); *Edward Snider*, 39 ECAB 1268 (1988).

⁵ *Gerald A. Carr*, 55 ECAB ____ (Docket No. 03-2257, issued January 8, 2004).

the fee application to 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.⁶

ANALYSIS

In approving a fee in the amount of \$4,390.91, the Office properly took into account the nature and complexity of the claim, and the actual time spent. The Office, however, abused its discretion in considering the customary local charges for similar services.⁷ The Office also found that \$150.00 per hour was not excessive or unusual for an attorney whose professional qualifications were satisfactory. This finding itself is not manifestly in error, but the vast majority of the services in appellant's case (26.4 of the 27.1 hours) were not performed by an attorney but rather by Mr. Daniel, a FECA Advocate. The Office abused its discretion by not determining the customary local charges for similar services by such a representative, as opposed to an attorney.

The Office also erred in approving costs for long distance telephone calls and photocopying.⁸ According to the Office's regulations, such costs need not be approved by the Office before the representative collects them.⁹ They are thus not properly part of a fee application, and should not have been approved as such.

CONCLUSION

The Office abused its discretion in approving a fee in the amount of \$4,390.31.

⁶ 20 C.F.R. § 10.703.

⁷ See *John E. Harman*, 41 ECAB 169 (1989).

⁸ The Office's decision also erroneously lists the dates of the services as having begun on September 11, 2001 rather than September 11, 2000, but this error had no effect on the fee approval.

⁹ 20 C.F.R. § 10.702.

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for proper consideration of the representative's fee application.¹⁰

Issued: February 8, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ The case record will remain with this Board pending the conclusion of the oral argument on another issue scheduled for April 6, 2006 in Docket No. 05-1932 also in Office File No. 13-1098915.