

FACTUAL HISTORY

On October 18, 1984 appellant, then a 37-year-old clerk, filed a traumatic injury claim alleging that on October 16, 1984 she strained a muscle in the middle of her back while lifting a flat tray from a hamper onto the top shelf of a cage at work. The Office accepted her claim for thoracic and lumbar strains. It later accepted appellant's claim for herniated nucleus pulposus at C6-7 and authorized anterior cervical fusion. In a letter dated November 14, 2000, James A. Birt, Esq., made a Freedom of Information Act (FOIA)/Privacy Act request to the Office for the production of documents related to appellant's claim as her attorney of record. He was located in Sacramento, California.

On May 22, 2006 the Office received a notice dated August 14, 2001 from Mr. Birt advising that he was withdrawing as appellant's attorney effective August 14, 2001. By letter dated May 30, 2006, the Office advised him that his name had been removed from its records as appellant's representative based on his August 14, 2001 notice.

On March 29, 2001 Mr. Birt submitted a "work in progress report" (invoice) for approval of attorney's fees and costs dated March 26, 2001. He provided a copy of the agreement between his law office and a concurrence with these costs and fees signed by appellant on March 10, 2001, wherein she authorized the release of her advanced retainer fee trust funds to Mr. Birt in an amount equal to that contained in an accompanying "work in progress report" and to the Office. In the application for attorney's fees, Mr. Birt provided an itemized statement of hours spent working on appellant's claim. He indicated an hourly rate of \$200.00 for his services. Mr. Birt stated that he spent 2.00 hours on August 27, 2000 in an initial intake session with appellant; .15 hour on November 15, 2000 on a telephone call regarding her appeal and nonreceipt of a fax; 1.00 hour on December 13, 2000 preparing and drafting FOIA requests to the employing establishment and Office; .50 hour preparing and drafting a letter to an Office senior claims examiner regarding nonreceipt of correspondence related to appellant's claim; and .30 hour each on December 14 and 19, 2000 reviewing a letter from the Office's director and claims examiner, totaling 5.25 hours which constituted \$1,050.00 for professional services. Additional charges included \$3.20 each for the purchase of certified postage for the FOIA request to the employing establishment and Office on December 20 and 22, 2000, respectively, totaling \$6.40. Mr. Birt indicated that the total amount owed was \$1,056.40. He stated that appellant had a retainer fee of \$5,000.00 and subtracted \$1,056.40 from this figure for a total credit balance of \$3,943.60.

By letter dated July 10, 2001, the Office advised Mr. Birt that his request for fee approval for interim work could not be approved at that time. It stated that he should request approval of his fee when the final piece of evidence believed necessary to support appellant's case had been submitted.

In a letter dated July 13, 2001, Mr. Birt stated that he had received prior approval for his "work in progress" fee as a routine matter. He contended that, pursuant to 5 U.S.C. § 8127 and 20 C.F.R. § 10.702, his request was presumed to be valid and acceptable as long as there was client approval accompanying the fee request.

By letter dated July 16, 2001, the Office informed Mr. Birt that interim billings could be considered if substantial work had been performed to further the case. It again reviewed his March 26, 2001 fee request and stated that the only substantial work performed was his request for a copy of appellant's case file. The Office asked Mr. Birt if he intended to provide evidence to further the case along. It noted the time that he spent preparing, reviewing and communicating with the Office and requesting a copy of the case file. The Office stated that the time spent on certain claimed activities was excessive. It advised Mr. Birt that a decision was forthcoming regarding his attorney fee application.

In a July 17, 2001 letter, Mr. Birt requested that a senior claims examiner resolve the matter regarding his request for attorney's fees.

On July 24, 2001 Mr. Birt submitted another fee application dated June 28, 2001 along with an itemized statement, indicating that he spent 1.00 hour on February 14, 2001 reviewing appellant's personnel file; 3.00 hours on April 21, 2001 reviewing a voluminous amount of records regarding her FOIA request; and .17 hour each on June 8 and 11, 2001 on a telephone call with appellant and her husband regarding discovery received, totaling 4.34 hours which constituted \$866.66 for professional services. Mr. Birt subtracted \$866.66 from appellant's previous balance of \$3,943.60 which left a total credit balance of \$3,076.94.

In a July 23, 2001 letter, received by the Office on August 3, 2001, appellant disagreed with two items listed by Mr. Birt on his June 28, 2001 application for attorney's fees. She stated that, after receiving the first bill for over \$1,000.00 for writing one letter, she told Mr. Birt not to do anything further on her case until she provided him with more information. Shortly after March 10, 2001, the date she signed the release of funds to pay the first bill submitted by Mr. Birt, appellant agreed to write her case history and send it to him as requested. She contended that the charge for reviewing her personnel file on February 14, 2001 seemed excessive. Appellant believed that she had already been charged for this work on the first bill. She further contended that the charge for reviewing voluminous amounts of records pertaining to her FOIA request was not justified. Appellant stated that Mr. Birt's secretary called her to find out if she wanted to pick up the records and put them in order to save her the expense of his staff doing it. The secretary told appellant that her attorney had not reviewed the records as they had just arrived. Appellant advised the secretary that her husband would pick up the records but it would be at least a few weeks before he did so. She stated that on May 30, 2001 her husband tried to contact Mr. Birt's office but there was trouble with his telephone service and her husband could not leave a message. On June 5, 2001 appellant's husband left a message on the answering machine asking the attorney to call him to arrange for pick up of the records. Appellant stated that an attorney returned the call and she relayed the conversation that she had with the secretary and requested that he not review the records. The attorney did not mention that he had already reviewed the records. Appellant stated that she assumed the \$1,000.00 fee was for a letter, a copy of which she did not receive, that Mr. Birt wrote to the Office regarding her refusal to attend a second opinion medical examination. She described the 9 or 10 telephone conversations she and her husband had with Mr. Birt or one of his staff members. Appellant indicated that since the \$1,000.00 letter, there had been no activity on her case that she initiated or that she was aware of at that time. She stated that Mr. Birt told her that he would only charge her for actual work that moved the case forward. Mr. Birt assured her that he would keep her informed and

discuss his charges with her prior to submitting a bill which he failed to do according to appellant. Appellant concluded that Mr. Birt's charges were excessive and inaccurate.

In a July 20, 2001 letter, Mr. Birt stated that he intended to submit evidence to further appellant's case along and establish her entitlement to compensation. He requested approval of his March 26, 2001 fee application based on FECA Bulletin No. 99-14 and 20 C.F.R. §§ 10.700 through 10.703.

On August 28, 2001 Mr. Birt submitted a fee application dated August 14, 2001. In an itemized statement, he reiterated the charges for work performed on February 14 and June 8 and 11, 2001. Mr. Birt indicated that he spent .17 hours on July 6, 2001 in an office visit with appellant's husband to pick up all the FOIA discovery to separate, organize and return; .50 hours on July 17, 2001 preparing and drafting a letter to appellant regarding the facts relating to Dr. Douglas E. Ridey, a Board-certified orthopedic surgeon; .17 hours on July 25, 2001 reviewing a July 24, 2001 letter about putting the case on hold until further notice from appellant; .33 hours on August 9, 2001 reviewing 11 pages of facts appellant was submitting with a request for reconsideration and telephone conversations with appellant regarding this matter; and 1.00 hours on August 10, 2001 drafting two pages of a cover letter to accompany appellant's reconsideration statement of facts, faxing the cover letter to her and talking to her on three occasions regarding this action, totaling 3.51 hours which constituted \$699.99 for professional services. He indicated an additional charge of \$6.00 for sending and receiving faxes on August 9, 2001. Mr. Birt added \$699.99 and \$6.00 for a total of \$705.99 which he reduced from appellant's balance of \$3,943.60 for a total credit balance of \$3,237.61.

By decision dated June 20, 2006, the Office approved attorney's fees in the amount of \$1,201.50 for the period August 27, 2000 to August 10, 2001. The requested attorney's fees in the amount of \$1,762.30 were reduced by the Office because it found that the itemized charges for the stated period were excessive and included fees not related to the development and management of appellant's compensation claim. The Office reduced the hourly rate of \$200.00 for professional services rendered from 2000 to 2001 to \$150.00 which it found to be reasonable for the stated time period. Charges for sending and receiving faxes and certified postages were not approved. The Office reduced the total hours claimed from 8.76 to 8.01 hours. It also reduced the total hours claimed on December 13, 2000. One hour each for preparing a FOIA request to the employing establishment and a senior claims examiner and .50 hour for preparing a letter to a senior claims examiner were reduced to .25 hour each. The Office found that the reduction of Mr. Birt's fee request from \$1,762.30 to \$1,201.50 was reasonable and commensurate with the actual necessary work he performed while representing appellant before the Office.

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.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 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 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.⁵

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.⁶

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.⁷

ANALYSIS

The Board finds that this case is not in posture for decision regarding the Office's approval of an attorney's fee of \$1,201.50. Appellant's attorney, Mr. Birt, requested approval of a fee of \$1,762.30 at the rate of \$200.00 per hour, while the Office approved a rate of \$150.00 per hour at a fee of \$1,201.50. The Office found that the \$150.00 hourly rate was "reasonable for that time," but it did not follow the procedures set forth above at section 10.703 of its

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

³ *Gerald A. Carr*, 55 ECAB 225 (2004).

⁴ 20 C.F.R. § 10.703(a)(1)(ii).

⁵ 20 C.F.R. § 10.703(c).

⁶ 20 C.F.R. § 10.703(b).

⁷ *Arthur B. Cole*, 36 ECAB 349 (1984); *Edgar Aikman, et al.*, 32 ECAB 1570 (1981).

regulations with respect to the “customary local charges for similar services” by such a representative. Mr. Birt is located in Sacramento and therefore the appropriate locality for determining customary charges is the Sacramento area. There is no indication that the local Bar Association in the Sacramento area was contacted or other appropriate sources were consulted to determine the customary local charges for similar services in workers’ compensation cases.⁸ The record contains no probative and relevant evidence with regard to the issue of customary local charges in this case.

Further, the Office failed to provide Mr. Birt with notice of the proposed reduction in legal fees, and provide him with an opportunity to respond in writing with comments or by affidavit prior to the issuance of its June 20, 2006 decision.⁹ In light of the foregoing, the Board finds that the case must be remanded to the Office to consider the attorney’s fee application according to the applicable regulatory procedures.¹⁰

CONCLUSION

The Board finds that this case is not in posture for decision as to whether the Office abused its discretion by approving an application for attorney’s fees in the amount of \$1,201.50 for the period August 27, 2000 to August 10, 2001.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fees for Representatives’ Services*, Chapter 2.1200.6(8) (December 1994), provides that the claims examiner should request information as to customary local charges from the local bar association, state compensation boards and commissions, or other appropriate source.

⁹ See cases cited *supra* note 7.

¹⁰ The Board finds that the Office properly disallowed expenses for sending and receiving faxes and mailing certified packages during the period August 27, 2000 to August 10, 2001. The regulations specifically provide and counsel concedes that expenses are not to be considered by the Office in the approval of representative’s fees. 20 C.F.R. § 10.702.

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: July 24, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board