

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

In the Matter of L.H.)	
)	
and)	Docket No. 09-777
)	Issued: June 28, 2010
U.S. POSTAL SERVICE, VEHICLE)	
MAINTENANCE FACILITY,)	
Capitol Heights, MD, Employer)	
)	

Appearances:
Stephen J. Dunn, Esq.
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Re: Attorney's Fee

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 27, 2009 the claimant's attorney filed a timely appeal of an October 30, 2008 attorney's fee decision of the Office of Workers' Compensation Programs. 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 an attorney's fee in the amount of \$2,500.00 for services rendered from March 7 to November 14, 2007.

The claimant's attorney appeals the approved fee contending that the Office improperly reduced his fee application from \$6,842.29 to \$2,500.00. He contends that the basis of his decision, that the claimant was satisfied with an April 23, 2008 Office schedule award decision, was erroneous. Counsel further contends that the Office failed to investigate the appropriateness of the requested fee and to determine whether the fee should have been approved based on his hourly rate, number of hours worked, the specific work performed and the total amount charged to appellant. He also contended that it failed to determine whether the requested fee was

customary for his area and the type of claim involved in this case. Lastly, counsel contends that the Office's decision was issued by a claims examiner rather than a senior claims examiner.

FACTUAL HISTORY

On May 5, 2008 Stephen J. Dunn, Esquire, requested approval of an attorney's fee in the amount of \$6,842.29 for 16.9 hours of legal services performed from March 5 to November 14, 2007. As part of his request, he submitted an itemized statement identifying the services he performed on the claimant's behalf during the stated period.¹ Mr. Dunn billed his services at \$425.00 per hour for a total amount of \$7,182.50, but indicated that he was only requesting approval of a fee of \$6,842.29. An undated attorney fee approval form signed by the claimant revealed that he had reviewed Mr. Dunn's fee for services rendered in representing him before an Office hearing representative. He approved a fee of only \$2,500.00. The claimant stated that Mr. Dunn's service was invaluable to him and that the requested fee was reasonable.

By decision dated June 3, 2008, the Office approved an attorney's fee in the amount of \$6,842.29. In a June 10, 2008 decision, it advised Mr. Dunn that this decision superseded the June 3, 2008 decision. It explained that, as the claimant had acquiesced to a fee of \$2,500.00, it was reducing the requested \$6,842.29 to \$2,500.00 based on his agreement to pay \$2,500.00. The Office attached a copy of the claimant's signed statement.

In a June 17, 2008 letter, Mr. Dunn requested that the Office approve his attorney's fee petition for \$6,842.29. He stated that the claimant had not responded to his attempts to obtain approval of the requested fee.

By letter dated June 23, 2008, the Office advised the claimant of Mr. Dunn's request for approval of the \$6,842.29 attorney's fee and that it had also received the claimant's approval of a \$2,500.00 attorney's fee. It requested that he provide comments on the reasonableness and appropriateness of the remaining balance of \$4,342.29. The Office added that, if it did not receive a reply by July 23, 2008, it would approve a fee it deemed fair and reasonable.

In a July 6, 2008 letter, the claimant stated that Mr. Dunn had been released from his case effective April 29, 2008. When he hired Mr. Dunn to represent him at a schedule award hearing, he stated that his fee was \$2,500.00. Counsel requested prepayment of the \$2,500.00 fee in full along with a \$750.00 fee for reexamination by a physician. The money was to be held in an escrow account to cover all expenses incurred. The claimant prepaid the requested fees. Following the Office's schedule award decision, Mr. Dunn requested that the claimant pay an additional amount of \$450.00 within 30 days to cover the cost of a medical examination if he wished to appeal the decision. The claimant decided not to appeal the decision and did not respond to Mr. Dunn's letter. Subsequently, Mr. Dunn sent him a detailed bill for \$4,342.29 and characterized his \$2,500.00 payment as a retainer. The claimant disputed this payment because he had not agreed to pay any additional fees.

¹ By letter dated June 3, 2004, the Office accepted that the claimant, then a 48-year-old lead automotive technician, sustained a rotator cuff tear of the right shoulder. In a February 23, 2007 decision, it granted a schedule award for six percent impairment of the right shoulder. By decision dated September 26, 2007, an Office hearing representative set aside the February 23, 2007 decision and remanded the case for further development. On remand, the Office, in an April 23, 2008 decision, granted a schedule award for an additional 11 percent impairment of the right shoulder.

In letters dated August 25 and October 8, 2008, Mr. Dunn requested approval of the remaining balance of his \$6,842.29 attorney fee in the amount of \$4,342.29.

By decision dated October 30, 2008, the Office approved an attorney's fee in the amount of \$2,500.00 for legal services performed by Mr. Dunn from March 7 to November 14, 2007. It reduced the requested attorney's fee of \$6,842.29 because it found that the claimant was satisfied with the schedule award decision and chose not to appeal it.

LEGAL PRECEDENT

It is not the Board's function to determine the fee for representative services performed before the Office. That is a function 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 Board's sole function is to determine whether the action by the Office constituted an abuse of discretion.² An 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 established facts.³

Section 10.703(a)(1)(ii) of the Office's implementing regulations provide 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.⁵ After the claimant has been afforded a reasonable time to respond to the request, the Office will then proceed to review the fee application.⁶ 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: (1) usefulness of the representative's services; (2) the nature and complexity of the claim; (3) the actual time spent on development of the claim; and (4) customary local charges for similar services.⁷

ANALYSIS

The Board finds that this case is not in posture for decision regarding the Office's reduction of the requested attorney's fee to \$2,500.00. In order to resolve the issue presented in this case, the Office must obtain all available evidence concerning the original agreement between the attorney and the claimant on his obligation to pay legal fees in excess of \$2,500.00. The attorney is not required to provide uncompensated legal service. The claimant is not

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

³ *V.T.*, 58 ECAB 133 (2006).

⁴ 20 C.F.R. § 10.703(a)(1)(ii).

⁵ See *Gerald A. Carr*, 55 ECAB 225 (2004).

⁶ *Id.*

⁷ 20 C.F.R. § 10.703(c).

required to pay for legal services he did not request. The claimant asserts that his obligation was capped at \$2,500.00. The attorney asserts that the claimant obligated himself to pay fees above that amount at a specified hourly rate. Both the attorney and claimant offer only contradictory, after the fact, statements concerning whether an obligation existed for the claimant to pay in excess of \$2,500.00. The record does not contain a written retainer or fee agreement or a written statement of the legal services to be provided. It does not contain any correspondence or billing statements from the attorney to the claimant concerning services performed and costs accrued. The Office should obtain whatever contemporaneous evidence exists from the claimant and the attorney as a necessary first step in the fee evaluation process noted in the following paragraph.

The Office considered the claimant's objection to the \$6,842.29 fee as he alleged that he only agreed to pay \$2,500.00, but the Office did not follow the procedures set forth in section 10.703(c) to determine whether the requested fee was substantially in excess of the value of services he received. The Board has held that absent the claimant'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.⁸ There is no indication in the record that the Office determined the usefulness of Mr. Dunn's legal services, the nature and complexity of the claim, the actual time Mr. Dunn spent on development of the claim and the customary local charges for similar services.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.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether the Office abused its discretion in reducing the attorney's fee to \$2,500.00 for services rendered from March 7 to November 14, 2007.

⁸ See *Gerald A. Carr*, *supra* note 5.

⁹ 20 C.F.R. § 10.703(c).

ORDER

IT IS HEREBY ORDERED THAT the October 30, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: June 28, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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