

award hearing. Appellant asserted that his attorney retaliated against him by demanding one-third of his compensation after he decided not to appeal OWCP's schedule award decision.

FACTUAL HISTORY

This case has previously been before the Board.² In a June 28, 2010 decision, the Board found that the case was not in posture for decision as further development of the evidence was necessary to determine whether OWCP properly reduced a \$6,842.29 attorney's fee that was requested by Stephen J. Dunn, Esquire, appellant's former attorney, to \$2,500.00. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.³

By letter dated August 26, 2010, OWCP requested that Mr. Dunn submit a written original agreement or retainer and any billing statements regarding legal services to be provided to appellant and his obligation to pay legal fees in excess of \$2,500.00.

In a September 14, 2010 letter, Mr. Dunn again requested approval for an attorney's fee in the amount of \$6,842.29 for the period March 5 to November 14, 2007. He submitted a retainer agreement accepted and signed by appellant on March 5, 2007 which indicated that appellant agreed to pay him \$425.00 per hour for his representational services on appeal before OWCP. Additionally, Dr. Dunn agreed to pay a \$2,500.00 retainer fee. The retainer fee would be applied towards attorney's fees in appellant's case. It also would be applied to the final bill. The total charged would not exceed 30 percent of any recovery from OWCP. Appellant acknowledged that any funds presented to Mr. Dunn may be deposited into an escrow account. At such time as amounts were expended to defray out-of-pocket expenses, those expenses would be billed in addition to any attorney's fee.

In an April 23, 2008 letter, Mr. Dunn congratulated appellant on the issuance of his schedule award compensation in the amount of \$22,807.66. He requested that appellant forward an attorney's fee of \$4,342.29 upon his receipt of the schedule award compensation. The requested fee represented the agreed upon attorney's fees for schedule award benefits obtained on his behalf.

An April 30, 2008 statement of attorney hours and fees indicated that Mr. Dunn spent 24.3 hours on appellant's case from March 5, 2007 to April 29, 2008 which resulted in a total fee of \$10,327.50. Based on the March 5, 2007 retainer agreement, he requested a fee of \$6,842.29

² Docket No. 09-777 (issued June 28, 2010).

³ On June 3, 2004 OWCP accepted that appellant, then a 48-year-old lead automotive technician, sustained a rotator cuff tear of the right shoulder as a result of his repetitive work duties. By decision dated February 23, 2007, it granted a schedule award for six percent impairment of the right shoulder. In a September 26, 2007 decision, an OWCP hearing representative set aside the February 23, 2007 decision and remanded the case for further development of the medical evidence. In an April 23, 2008 decision, OWCP granted a schedule award for an additional 11 percent impairment of the right shoulder. On May 5, 2008 Mr. Dunn requested approval of an attorney's fee in the amount of \$6,842.20 for 16.9 hours of legal services performed from March 5 to November 14, 2007.

which represented no more than 30 percent of the schedule award compensation.⁴ Mr. Dunn subtracted the initial payment of \$2,500.00 from \$6,842.29 to find a balance of \$4,342.29.

In a November 3, 2010 decision, OWCP approved an attorney's fee in the amount of \$6,842.29 for services rendered from March 5 to November 14, 2007.⁵

On November 6, 2010 appellant requested a review of the written record by an OWCP hearing representative. He contended that Mr. Dunn had been paid the full amount they agreed upon.

Appellant submitted a May 5, 2008 letter in which Mr. Dunn requested approval of an attorney's fee in the amount of \$6,842.29. Mr. Dunn indicated that appellant had approved a \$2,500.00 fee.

In a July 6, 2008 letter, appellant advised OWCP 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 in full along with \$750.00 for a reexamination by a physician. Appellant prepaid the requested fees which were to be placed into an escrow account to cover all expenses. After issuance of OWCP's schedule award decision, Mr. Dunn requested that he pay an additional \$450.00 within 30 days to cover the cost of a medical examination if he wished to appeal the decision. Appellant neither appealed the decision nor responded 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. Appellant disputed this bill because he had not agreed to pay any additional fees.

An undated attorney fee approval form signed by appellant revealed that he had reviewed Mr. Dunn's fee for services rendered in representing him at an oral hearing before an OWCP hearing representative. Appellant approved a fee of \$2,500.00. He stated that Mr. Dunn's service was invaluable to him and that the requested fee was reasonable.

By letter dated April 28, 2008, Mr. Dunn advised appellant that he was available to represent him if he wished to appeal an April 23, 2008 OWCP schedule award decision.

In a February 18, 2011 decision, an OWCP hearing representative affirmed the November 3, 2010 decision, granting an attorney's fee of \$6,842.29 for the period March 7 to November 14, 2007.

⁴ The Board notes that, while Mr. Dunn's statement of attorney hours and fees listed 24.3 hours spent on appellant's case from March 5, 2007 to April 29, 2008, totaling \$10,327.50, he was only seeking approval of an attorney's fee of \$6,842.29 for the period March 5 through November 14, 2007.

⁵ It appears that OWCP inadvertently stated that the claimed period for the requested attorney's fee was from March 5 to November 4, 2007 rather than March 5 to November 14, 2007 as it approved the attorney's fee requested for the latter period.

LEGAL PRECEDENT

It is not the Board's function to determine the fee for representative services performed before OWCP. That is a function within the discretion of OWCP 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 OWCP constituted an abuse of discretion.⁶ 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.⁷

Section 10.703(a)(1)(ii) of OWCP'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.⁸ When a fee application has been disputed, OWCP 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.⁹ After the claimant has been afforded a reasonable time to respond to the request, OWCP will then proceed to review the fee application.¹⁰ Pursuant to section 10.703(c), when a fee is in dispute, OWCP 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.¹¹

ANALYSIS

The Board finds that OWCP considered the relevant regulatory criteria in its November 3, 2010 and February 18, 2011 decisions approving the requested fee. In this case, Mr. Dunn, appellant's former attorney, submitted a retainer agreement, an itemized statement of the time allotted on specific tasks, the hourly rate and the total amount charged. The retainer agreement included payment of representational services at \$425.00 per hour and a \$2,500.00 retainer fee that would be applied towards attorney's fees and the final bill. The collected fees would be placed in an escrow account. It stated that the total charged would not exceed 30 percent of any recovery from OWCP. Appellant signed the retainer agreement on March 5, 2007. The Board notes that Mr. Dunn's April 23, 2008 letter advised him that a \$4,342.29 balance was due upon his receipt of his schedule award compensation. This requested fee was in accordance with the retainer fee agreement signed by appellant on March 5, 2007.

⁶ *Alvin T. Groner, Jr.*, 47 ECAB 588 (1996); *Edward Snider*, 39 ECAB 1268 (1988); *Azalee L. McCoy*, 39 ECAB 786 (1988).

⁷ *V.T.*, 58 ECAB 133 (2006).

⁸ 20 C.F.R. § 10.703(a)(1)(ii).

⁹ *See Gerald A. Carr*, 55 ECAB 225 (2004).

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.703(c).

For the stated reasons, the Board finds that OWCP did not abuse its discretion in approving the attorney's fee requested.

Appellant disputed the requested fee, contending that he only agreed to pay \$2,500.00 for Mr. Dunn's legal representation at a schedule award hearing. He asserted that Mr. Dunn advised him that his fee was only \$2,500.00. The Board finds that appellant has failed to establish that OWCP abused its discretion in approving the requested attorney's fee. While appellant signed a form approving an attorney fee of \$2,500.00 for representation by Mr. Dunn at a hearing before an OWCP hearing representative, he entered into a fee agreement, as noted above, in which he agreed to pay Mr. Dunn an hourly fee of \$425.00 and a \$2,500.00 retainer fee that would be applied towards attorney's fees and the final bill. Appellant has not submitted any other evidence in support of his objection to the fee application before OWCP. The Board finds, therefore, that he has failed to establish that OWCP abused its discretion in approving the fee application.

The Boards finds that OWCP carefully weighed appellant's arguments contesting the fee and thoroughly reviewed counsel's statements supporting his fee request. Based on this evaluation, the Board finds that OWCP properly exercised its discretion in approving an attorney's fee of \$6,842.29.

On appeal, appellant contended that OWCP mischaracterized the document he signed as a retainer agreement as the document only required him to pay an attorney's fee of \$2,500.00. However, the document signed by appellant on March 5, 2007 specifically identified the subject matter as a retainer agreement. Further, he agreed to pay the \$2,500.00 retainer fee which would be applied to attorney's fees and the final bill. The Board finds that appellant's contention has not been established and, thus, is insufficient to establish that OWCP abused its discretion by approving the requested attorney's fee.

The Board further finds that appellant did not submit any evidence in support of his contention on appeal that Mr. Dunn retaliated against him because he did not appeal OWCP's schedule award decision. Appellant's unsupported assertion is insufficient to establish that OWCP abused its discretion by approving the requested attorney's fee.

CONCLUSION

The Board finds that OWCP did not abuse its discretion in approving an attorney's fees in the amount of \$6,842.20 for services rendered from March 7 to November 14, 2007.

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2011 and November 3, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 6, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board