

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

C.H., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Portland, OR, Employer)

Docket No. 10-987
Issued: March 22, 2011

Appearances:
Steven E. Brown, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 25, 2010 appellant's attorney filed an appeal from a January 27, 2010 decision of the Office of Workers' Compensation Programs regarding an attorney's fee request. Pursuant to the Federal Employees' Compensation Act¹ and 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 \$115.50 for legal services rendered from May 13 to November 24, 2008.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision and order issued February 27, 2001,² the Board affirmed the Office's February 10, 1999 decision denying a recurrence of disability from August 7 to 12, 1997 and set aside a December 30, 1998 decision denying a period of disability beginning April 12, 1996.³ The law and the facts of the case as set forth in the prior decision and order are incorporated by reference.

On October 4, 2007 appellant signed a representation agreement with Steven E. Brown, Esquire, regarding her compensation claim. Pursuant to a schedule award claim, counsel obtained a June 18, 2008 report from Dr. Jeffrey Gerry, a Board-certified physiatrist, offering a whole person rating for lumbar spine impairment according to unspecified portions of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). On August 11, 2008 the Office advised Mr. Brown that Dr. Gerry's report was deficient. Counsel did not respond.

By decision dated October 8, 2008, the Office granted the claimant a schedule award for a six percent impairment of the left lower extremity based on Dr. Gerry's clinical findings of sensory loss in the left leg. On November 5, 2008 counsel submitted a report from an orthopedic surgeon calculating an eight percent impairment of the left lower extremity. Based on this opinion, the Office issued a schedule award for an additional two percent impairment of the left leg.

In a December 5, 2008 letter, counsel asked the claimant to review his fee request in the amount of \$2,594.00 for 11.60 hours of services rendered from May 10 to November 26, 2008. He listed 71 tasks performed on the claimant's behalf. Counsel submitted the fee request to the Office on January 21, 2009 although the claimant had not yet approved the fee.

In a May 19, 2009 letter, appellant contested the fee. She asserted that Dr. Gerry's report was irrelevant as he rated lumbar spine impairment and not lower extremity impairment. Appellant contended that a "good attorney never send that kind of report in because OWCP does not pay for a back injury, he should have known better."

Appellant requested a teleconference that was held June 18, 2009. She asserted that, although counsel billed several telephone calls to her from May 13 to August 7, 2008, no firm personnel spoke with her on those dates. The Office noted that there was no evidence corroborating calls counsel claimed to have made to the Office from August 15 to October 7, 2008. Counsel billed appellant for those calls.

² Docket No. 99-1058 (issued February 27, 2001). The claimed recurrence of disability pertained to a March 23, 1992 lumbar strain and September 2, 1993 L4-5 laminectomy. The claimant was separated from the employing establishment effective August 21, 1998. On March 14, 2003 the Office expanded the claim to accept aggravation of L4-5 discogenic disease. The claimant underwent an L5-S1 laminectomy on August 28, 2006.

³ By decision dated April 9, 2001, the Office affirmed its February 10, 1999 decision denying an August 6, 1997 recurrence of disability and reimbursement for July 1, 1998 surgery. This decision is not before the Board on the present appeal.

In a June 18, 2009 letter, appellant noted paying Dr. Gerry \$300.00 for his report. She submitted a March 5, 2008 letter from a paralegal employed by counsel, emphasizing the need for the specialized schedule award evaluation that Dr. Gerry agreed to provide. The paralegal asked appellant to “forward a check to our office in the sum of \$300.00 so we can pay Dr. Gerry, or pay Dr. Gerry directly and call us to advise that it has been done.”

In a June 30, 2009 letter, the Office directed counsel to expedite the process of a refund of the \$300.00 to appellant from Dr. Gerry’s office. Counsel and his associate Brett Blumstein, Esq., submitted July 6, 2009 letters refusing to obtain a refund as the firm did not direct her to pay Dr. Gerry. In a July 22, 2009 letter, the Office advised counsel that his bill listed a March 5, 2008 telephone call and letter to appellant regarding Dr. Gerry’s fee, demonstrating that he did direct the claimant to pay Dr. Gerry.

In a July 22, 2009 letter, the Office advised counsel of the additional information needed to substantiate his fee request. Due to the inconsistencies in his account of events, it requested a detailed explanation of the necessity of the 71 listed services, including uncorroborated telephone calls and case status meetings. Mr. Blumstein submitted an annotated bill on July 27, 2009, noting that each service was “important to the status of the case.” This included frequent meetings of firm personnel to assure that all employees knew whether or not there were any developments in the case. Counsel added in an August 5, 2009 letter that he billed appellant for telephone calls even if a conversation did not occur, as it took time to prepare for and annotate the call.

By decision dated January 27, 2010, the Office approved an attorney’s fee in the amount of \$115.50 for legal services performed by Mr. Brown from May 13 to November 24, 2008. It allowed \$46.50 for telephone calls to the Office on June 23 and July 16, 2008 and \$66.00 for reviewing the orthopedic surgeon’s report on October 27, 2008. The Office disallowed the remaining \$2,478.50 as counsel did not adequately explain the charges as requested.

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.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 an “itemized statement showing the representative’s hourly rate, the number of hours worked and specifically identifying the work

⁴ V.T., 58 ECAB 133 (2006).

⁵ Daniel J. Perea, 42 ECAB 214 (1990).

performed and a total amount charged for the representation (excluding administrative costs).”⁶ The fee application shall also contain the claimant’s statement of agreement or disagreement with the amount charged, signed by the claimant.⁷ 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.⁸ After the claimant has been afforded 15 days to respond, 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.⁹

ANALYSIS

Counsel requested that the Office approve his December 5, 2008 fee request for \$2,594.00, listing 71 tasks performed from May 10 to November 26, 2008. The Office denied reimbursement of \$2,478.50 out of the \$2,594.00 proposed fee, finding that counsel did not adequately explain the charges as requested. On appeal, counsel asserted that his word regarding services rendered was controlling. He cited the Board’s decision in *V.T.*,¹⁰ holding that a “representative’s word regarding the time spent on each task is entitled to considerable weight” unless the Office demonstrated by clear and convincing evidence that the representative did not spend the time alleged.¹¹ Counsel noted that the Office routinely approved his bills in other compensation cases. While the Office accords an attorney’s word substantial weight, this is not the only criterion for approving a requested legal fee.

The weight given to a claimant’s opinion of a proposed attorney’s fee is codified in the Office’s implementing regulations at 20 C.F.R. § 10.703. In pertinent part, these regulations provide that the Office may not approve an attorney’s fee until the claimant has an opportunity to review and comment on it.¹² Additionally, a claimant’s dispute of the proposed fee must be adjudicated by a formal decision of the Office with full appeal rights.¹³ As the Board held in *Lucia Reynolds*,¹⁴ it is an abuse of discretion for the Office to approve an attorney fee request without first following the regulatory procedures to address the claimant’s disagreement. The

⁶ 20 C.F.R. § 10.703(a)(i).

⁷ *Id.* at § 10.703(a)(ii).

⁸ *Id.* at § 10.703(c).

⁹ *Id.*

¹⁰ 58 ECAB 133 (2006).

¹¹ Counsel also cited to the Board’s decisions in *Edgar Aikman*, 32 ECAB 1570 (1981) and *Mein Horn*, 32 ECAB 1762 (1981) in support of the clear and convincing evidence standard.

¹² 20 C.F.R. § 10.703(a)(ii).

¹³ *Id.* at § 10.703(c)(iv)(2).

¹⁴ 55 ECAB 327 (2004).

Office was within its discretion when it considered appellant's arguments, weighed them against counsel's arguments and found counsel's services to be not useful or effective.

Counsel asserts that the Office improperly denied reimbursement for telephone calls and status meetings, citing to the Board's holding in *Anna Palestro*¹⁵ that the Office should not second guess each action taken by the attorney. He argued that it was unnecessary and excessive for the Office to have evaluated each of the 71 items for which he sought to bill the claimant. However, in *Frank M. Salzano*,¹⁶ the Board emphasized the importance of the Office examining the necessity and propriety of each service billed. The Board finds that the Office properly considered each of the billed items individually.

In the present case, the claimant contended that counsel billed her for services he did not provide, including telephone calls to the Office from August 15 to October 7, 2008 and calls to her from May 13 to August 7, 2008. Counsel confirmed in an August 5, 2009 letter that he billed the claimant for telephone calls even if he did not reach the party in question. He also billed her for status update meetings but did not specify their purpose. Although the Office asked counsel to explain the necessity of each service billed, he did not do so. Instead, Mr. Blumstein, counsel's associate, offered generally that all billed services were important to the status of the case. The Office carefully evaluated the claimant's contentions, finding that counsel provided insufficient explanation as to how numerous unconfirmed telephone calls or status update meetings without clear evidence of relevant action advanced her case. It considered appellant's disagreement with the proposed fee under no criteria of the implementing regulations. The Board finds that the Office did not abuse its discretion by denying these charges.¹⁷

Counsel also argues that the Office's approval of his fee should not depend on the effectiveness of the services provided. However, one of the regulatory criteria for evaluating an attorney's fee requests is the "[u]sefulness of the representative's services to the claimant."¹⁸

The Office advised counsel on August 12, 2008 that Dr. Gerry's report was deficient. However, counsel did not submit additional evidence until November 5, 2008, nearly three months later, despite case status meetings for which he billed the claimant. The Office found that counsel erred by asking appellant to pay for Dr. Gerry's report, as this was a reimbursable medical expense. The Board finds that the Office did not abuse its discretion by denying that portion of the fee request pertaining to Dr. Gerry's report.

Counsel also contends that the claimant contested his fee because she was dissatisfied with the amount of the schedule award. He notes that in *Robert D. Shaw*,¹⁹ the Board rejected the idea that a representative's fee was contingent on the successful outcome of a claim. The

¹⁵ 15 ECAB 241 (1962).

¹⁶ 51 ECAB 119 (1999).

¹⁷ *V.T.*, *supra* note 4.

¹⁸ 20 C.F.R. § 10.703(c)(i).

¹⁹ 30 ECAB 357 (1978).

Office did not deny counsel's fee based solely on the outcome of the claim. It disapproved \$2,478.50 out of the \$2,594.00 proposed fee because counsel did not explain the necessity of services rendered or establish that he provided them. Counsel's failure to provide the requested explanation is unrelated to any dissatisfaction the claimant may have had regarding the outcome of her case.

The Board finds that the Office considered the relevant criteria in its January 27, 2010 decision. The Office carefully weighed the claimant's arguments contesting the fee and thoroughly reviewed counsel's statements supporting his fee request. Based on this evaluation, the Office approved an attorney's fee of \$115.50 out of the \$2,594.00 requested. The Board finds that the Office properly exercised its discretion with regard to this matter.

CONCLUSION

The Board finds that the Office properly approved an attorney's fee in the amount of \$115.50 for legal services rendered from May 13 to November 24, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 27, 2010 is affirmed.

Issued: March 22, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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