

FACTUAL HISTORY

On June 2, 2010 appellant, then a 48-year-old city carrier, filed a Form CA-2 alleging that she sustained an occupational disease.² OWCP denied her claim by merit decisions dated July 16, 2010 and January 20, April 25 and July 28, 2011.

Appellant appointed Richard A. Daniels as her representative in an April 29, 2011 authorization form, received by OWCP on May 3, 2011. On that same date, Mr. Daniels requested a copy of her case file. On May 27, 2011 OWCP furnished him with a copy of the case record. Appellant later informed OWCP *via* telephone messages on June 1 and 2, 2011 that she no longer wanted Mr. Daniels to serve as her representative.

Mr. Daniels submitted a June 17, 2011 fee application to OWCP asking for approval of a fee in the amount of \$1,445.50 for 4.9 hours of service performed for appellant in File No. xxxxxx021.³ He indicated that he charged an additional \$855.50 for matters related to File No. xxxxxx476. With his fee request, Mr. Daniels attached an itemized statement only for File No. xxxxxx021.

OWCP requested further information concerning the dates of service, the specific tasks performed and the amount of time expended for each task related to File No. xxxxxx476. A copy of that letter was sent to appellant. By form received on September 6, 2011 appellant responded to the fee request. Although not clear as to which case she was referring, in a partially legible form she contested the fees for some services.

On August 25, 2011 Mr. Daniels submitted the correct itemized statement noting that a copy of the statement had been provided to appellant. Mr. Daniels noted that he had not heard from appellant regarding the fee.

In an undated letter to OWCP, appellant reiterated that she had notified OWCP on May 31, 2011 that she was no longer represented by Mr. Daniels.

The itemized statement reflected an amount of \$855.50 for 2.9 hours of service performed for appellant's occupational disease claim from May 3 to 31, 2011.⁴ On May 3, 2011 he expended 1.5 hours opening a case file, drafting a memorandum to file and drafting correspondences to both appellant and OWCP. On May 13, 2011 Mr. Daniels spoke with appellant on the telephone for 0.2 hours. Finally, he received and reviewed the case record furnished by OWCP and drafted a memorandum to file on May 31, 2011, which amounted to 1.2 hours of work.⁵

² Appellant retired sometime in October 2010.

³ Mr. Daniels had also been retained as appellant's representative for a separate claim. *See* OWCP File No. xxxxxx021. Issues pertaining to that claim or fee request are not presently before the Board.

⁴ The hourly rate was \$295.00.

⁵ Mr. Daniels also provided an itemized statement for services performed for appellant's other claim. *See supra* note 3.

By decision dated September 13, 2011, OWCP approved Mr. Daniels' fee in the amount of \$855.50 for services rendered from May 3 to 31, 2011.

LEGAL PRECEDENT

Pursuant to 20 C.F.R. § 10.703(a), a representative must submit a fee application to OWCP, which includes an itemized statement identifying his or her hourly rate, the number of hours worked, the specific work performed and the total amount charged for the representation minus administrative costs. The application shall also contain a signed statement from the claimant either agreeing or disagreeing with the amount charged and acknowledging that he or she, not OWCP, is responsible for paying the fee and other costs.⁶

When a fee amount has been disputed, OWCP will provide the claimant with a copy of the fee application and request the submission of any additional information in support of the objection. After the claimant has been afforded 15 days to respond, OWCP will evaluate the information received to determine whether the amount of the fee is substantially in excess of the value of services rendered in view of 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 and presentation of the claim; and (4) customary local charges for similar services.⁷

The sole function of the Board on appeal is to determine whether the action taken by OWCP constituted an abuse of discretion. 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.⁸ Mere dissatisfaction with a representative's exercise of professional judgment does not constitute a sufficient basis for finding that OWCP abused its discretion by approving the fee application.⁹

ANALYSIS

The Board finds that OWCP abused its discretion by approving a representative's fee in the amount of \$855.50 for services rendered from May 3 to 31, 2011.

The case record shows that Mr. Daniels submitted a September 9, 2011 fee application, which included an itemized statement identifying his hourly rate, the number of hours worked, the specific work performed and the total amount charged for the representation minus administrative costs. The application, however, did not contain a signed statement from appellant either agreeing or disagreeing with the requested fee of \$855.50. Moreover, the case record does not indicate that OWCP provided her with a copy of the application and afforded her

⁶ 20 C.F.R. § 10.703(c).

⁷ *Id.*

⁸ *W.H.*, Docket No. 10-683 (issued April 22, 2011); *C.H.*, Docket No. 10-987 (issued March 22, 2011).

⁹ *Alvin T. Groner, Jr.*, 47 ECAB 588 (1996).

15 days to offer objections.¹⁰ The Board has held that an abuse of discretion arises when OWCP approves a representative's fee request without initially following the regulatory procedures to address a claimant's disagreement.¹¹ While 20 C.F.R. § 10.703(b) states that, a fee application is deemed approved when it is accompanied by a signed statement indicating a claimant's agreement with the fee, the regulations do not specifically provide for approval when a claimant fails to contest a fee application.¹² The Board elaborated in *Gerald A. Carr* that, absent this signed statement, the regulations do not authorize OWCP to approve a fee application without first determining whether the fee is substantially in excess of the value of services received.¹³ In view of *Carr*, prior to evaluating Mr. Daniels' fee application, OWCP should have given appellant a copy of his request and a reasonable opportunity to submit additional information in support of any objections.¹⁴ Because OWCP prematurely approved the request, it abused its discretion.¹⁵

On remand, OWCP must properly consider Mr. Daniels' fee application in accordance with the applicable regulatory procedures.

CONCLUSION

The Board finds that OWCP abused its discretion by approving a representative's fee in the amount of \$855.50 for services rendered from May 3 to 31, 2011.

¹⁰ The Board notes that OWCP issued its September 13, 2011 decision a mere four days after Mr. Daniels submitted his fee request.

¹¹ *C.H.*, *supra* note 8; *Lucia Reynolds*, 55 ECAB 327 (2004).

¹² *Sharon Edwards*, Docket No. 05-1188 (issued September 16, 2005); *Helen J. Cavorley*, Docket No. 02-2325 (issued February 7, 2003). *See also Carr*, *infra* note 14 at 227.

¹³ 55 ECAB 225 (2004).

¹⁴ *Reynolds*, *supra* note 11.

¹⁵ The Board points out that appellant submitted new evidence after issuance of the September 13, 2011 decision. However, the Board lacks jurisdiction to review evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the September 13, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: March 12, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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