

FACTUAL HISTORY

This case has previously been before the Board. The pertinent facts follow. On February 4, 2009 appellant, then a 37-year-old mail carrier, filed a traumatic injury claim alleging that on January 24, 2009 she sustained left shoulder strain due to casing mail and streeting.² OWCP accepted the claim for left shoulder and upper arm sprain, which was subsequently expanded to include the conditions of left shoulder adhesive capsulitis; cervical degenerative disc disease at C7-T1 and cervical spondylosis without myelopathy and authorized June 4, 2009 surgery for the left shoulder. On March 11, 2009 appellant filed an occupational disease claim (under File No. xxxxxx792) alleging that on November 18, 2004 she first became aware of her right shoulder condition. OWCP accepted the claim for a right shoulder condition not otherwise classified and authorized a June 10, 2010 right shoulder surgery.³

Appellant filed a claim for a schedule award on March 5, 2012. On March 20, 2012 OWCP granted a schedule award for eight percent impairment each for the right and left upper extremities. The period of the award ran from March 11, 2012 to February 23, 2013.

Appellant appealed to the Board, and by decision dated June 14, 2013, the Board set aside the March 20, 2012 schedule award decisions and a July 9, 2012 decision denying a hearing of the March 20, 2012 decision as untimely.⁴ The Board found that an OWCP medical adviser's report was insufficient to form a basis for a schedule award determination as he failed to adequately explain how his calculations had been reached.

On November 21, 2012 Mr. Shapiro requested approval of his attorney fees.⁵ He submitted a fee petition noting an hourly rate of approximately \$325.00 and an itemization of services totaling 9.67 hours for a total of \$3,141.66.

On November 28, 2012 OWCP returned Mr. Shapiro's fee petition to him as he had failed to obtain appellant's signature, pursuant to 20 C.F.R. § 10.703(a)(2).

In a February 12, 2013 letter, OWCP reiterated that it was unable to process Mr. Shapiro's attorney fee petition as it was incomplete due to the lack of appellant's signature. It advised counsel of its regulations at 20 C.F.R. § 10.703(c) which requires counsel to forward the fee request to appellant to afford her the opportunity to respond.

Counsel forwarded the fee request to appellant and by correspondence dated March 6, 2013, appellant refused to agree to the fee petition as she had not retained Mr. Shapiro's services and that no monies were owed to him. Appellant claimed to have only asked for a free

² OWCP assigned File No. xxxxxx745.

³ On April 30, 2009 OWCP combined OWCP File No. xxxxxx792 with OWCP File No. xxxxxx745, with the latter OWCP file number as the Master OWCP file number.

⁴ Docket No. 12-1847 (issued June 14, 2013).

⁵ On March 9, 2009 appellant signed a form authorizing Alan Shapiro, Esq., to represent her in all matters arising out of her claim before OWCP. Although the form was signed by appellant, the case number had been handwritten on the form.

consultation one time in 2004 in a previous claim. Attached to her letter was Mr. Shapiro's fee petition with her signature disapproving the requested fee.

In a decision dated April 4, 2013, OWCP approved attorney fees in the amount of \$2,816.66 for services rendered from March 4, 2009 to March 26, 2012. Counsel had charged 20 minutes for the preparation of three letters dated November 1, 2009, and May 1 and June 2, 2010. As no letters with those dates were contained in the file, OWCP disallowed the time claimed (20 minutes x 3 letters = 1 hour) for the three documents. Thus, the fee of \$3,141.66 was reduced by one hour or \$325.00, which resulted in an approved fee of \$2,816.66.

On April 25, 2013 appellant disagreed with the April 4, 2013 attorney fee decision and requested a review of the written record by an OWCP hearing representative. She alleged that a review of the fee petition showed that Mr. Shapiro did not respond to OWCP in a timely fashion or within the time limits set by OWCP. Appellant related that she agreed to a percentage only if both of her claims were reopened and that she has not received any award of compensation. She stated that she did not agree to the hourly rate and that she felt Mr. Shapiro provided no representation during the period in question. In concluding, appellant noted that, as the case was open and she was still receiving medical treatment for her injuries, she did not believe that he was entitled to attorney fees.

By decision dated May 30, 2014, an OWCP hearing representative affirmed the April 4, 2013 decision.

On June 23, 2014 appellant requested reconsideration of the May 30, 2014 OWCP hearing representative's decision and, in an attached June 18, 2014 letter, reiterated her contentions as to why Mr. Shapiro was not entitled to the requested fee amount.

By decision dated July 18, 2014, OWCP denied appellant's request for reconsideration without reviewing the merits of her claim.

LEGAL PRECEDENT -- ISSUE 1

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 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.⁷

Section 10.703 of the Code of Federal Regulations provide in pertinent part that a representative must submit a fee application, which includes a statement of agreement or

⁶ *L.H.*, Docket No. 11-900 (issued December 6, 2011); *C.H.*, Docket No. 10-987 (issued March 22, 2011); *Eric B. Petersen*, 57 ECAB 680 (2006); *Sharon Edwards*, 56 ECAB 749 (2005).

⁷ *Daniel J. Perea*, 42 ECAB 214, 221 (1990), (Thomas, Alternate Member, dissenting).

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 15 days from the date the request was forwarded to respond to the request, OWCP 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: (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 services for a representative of similar background and experience.¹⁰ Contingency fee arrangements are not recognized under FECA.¹¹

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for a decision regarding OWCP's approval of attorney fees of \$2,816.66. Appellant asserts that she signed a contingency fee agreement based on the reopening of both her claims and that she did not agree to a fee agreement based on an hourly rate. In her June 18, 2014 letter, she further asserted that she requested the attorney to provide her with a copy of the contingency fee agreement, but the attorney never provided her with a copy of the contingency fee agreement despite multiple requests. The Board notes that the record does not contain a copy of the fee agreement between the parties. As the fee agreement is not contained in the record the Board is unable to determine whether appellant agreed to an hourly rate or to a contingency fee agreement, as asserted by appellant. As the record is devoid of any evidence regarding the type of fee agreement made between the parties, on remand OWCP shall obtain a copy of the fee agreement from the attorney in determining whether appellant had signed a contingency fee agreement or an hourly rate fee agreement. Following any necessary further development, OWCP shall issue a *de novo* decision regarding the attorney's fee application according to the applicable regulatory procedures.

CONCLUSION

The Board finds that OWCP finds that this case is not in posture for a decision. In light of the Board's disposition on the first issue, the second issue is moot.

⁸ 20 C.F.R. § 10.703(a)(i).

⁹ *Id.* at § 10.703(c).

¹⁰ *Id.* at § 10.703(c)(1)(i-iv).

¹¹ *Id.* at § 10.703(b); *see also* Angela M. Sanden, Docket No. 04-1632 (issued September 20, 2004); Eric B. Petersen, 57 ECAB 680 (2006); Sharon Edwards, 56 ECAB 749 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 18 and May 30, 2014 are set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: May 22, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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