

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

_____)	
T.S., Appellant)	
)	
and)	Docket No. 17-1706
)	Issued: July 10, 2018
U.S. POSTAL SERVICE, CINCINNATI)	
PERFORMANCE & DISTRIBUTION CENTER,)	
Cincinnati, OH, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 1, 2017 appellant filed a timely appeal from a July 14, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether OWCP abused its discretion in approving an attorney's fee in the amount of \$4,745.00 for services rendered from November 23, 2011 through December 29, 2014.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 28, 2011 appellant, then a 51-year-old dock clerk, filed a traumatic injury claim (Form CA-1) alleging that, on April 26, 2011, she sustained a right shoulder injury while opening a track door. She stopped work on that date and returned to limited duty on May 11, 2011.

By decision dated November 17, 2011, OWCP accepted that appellant sustained a right shoulder strain and aggravation of her right shoulder osteoarthritis.

Appellant thereafter filed a series of claims for compensation (Form CA-7) alleging intermittent disability commencing October 22, 2011.

The record indicates that on November 27, 2011 appellant authorized counsel, Alan J. Shapiro, Esq. to represent her in all matters arising out of her workers' compensation claim.

On December 20, 2011 OWCP denied appellant's claims for compensation for wage loss subsequent to October 22, 2011. It found that the medical evidence of record was insufficient to support a worsening of her accepted work-related right shoulder condition to support increased disability from work. Counsel disagreed with OWCP's decision and requested a telephonic hearing before an OWCP hearing representative. The record reflects that he presented several arguments during the telephonic hearing.

Appellant underwent OWCP-approved right shoulder surgery on April 10, 2012. She returned to part-time limited-duty work on September 11, 2012 and resumed full-time, full-duty work on October 1, 2012.

By decision dated May 17, 2012, an OWCP hearing representative affirmed OWCP's December 20, 2011 decision. She found that the evidence of record did not support that appellant's increased disability subsequent to October 2011 was causally related to and necessitated by the April 26, 2011 work injury without intervening new work factors. The hearing representative further found appellant's disability subsequent to April 10, 2012 was payable as OWCP had authorized surgery.

Appellant also filed a claim for a schedule award (Form CA-7). By decision dated December 19, 2014, OWCP awarded appellant a schedule award for nine percent permanent impairment of the right upper extremity. The period of the award ran for 28.08 weeks for the period November 7 to December 13, 2014. The record reflects that counsel filed several letters pertaining to the status of the schedule award claim prior to its issuance.

On April 22, 2016 OWCP received counsel's fee application in the amount of \$4,745.00 for services rendered from November 23, 2011 through December 29, 2014 in the current claim number. An itemized statement listing the services and time spent on each date was provided.² The time spent on each service ranged from 15 to no more than 60 minutes, for a total of 875 minutes, or 14.6 hours. Counsel's hourly rate was \$325.00 per hour. The total fee requested was in the amount of \$4,745.00. In his April 19, 2016 cover letter, counsel requested that OWCP assist

² The services provided included writing letters to appellant, appellant's doctors, and to OWCP, telephone conferences, and review of OWCP's decisions.

in processing the fee request for OWCP file number xxxxx565. He explained that the fee petition had been sent to appellant, but she had not signed or returned the fee petition with payment.

In a September 12, 2016 letter, counsel clarified that the fee petition was requested under the current case file, case number xxxxx721, noting that an incorrect file number had been listed on his April 19, 2016 letter. He indicated that appellant had reimbursed him for a medical advance, which was listed as \$500.00 on the initial fee petition and he, therefore, did not need authorization for reimbursement of that expense. Counsel noted that he could not find any notes or letters that the fee was reduced to \$2,600.00 and, if appellant had such records, then he stood corrected. He also indicated that appellant had agreed to pay the fee and referred to an e-mail in which she had agreed to make installment payments. However, no e-mail was provided with his letter of correspondence.

In a November 4, 2016 letter, counsel requested the status of his fee petition.

In a November 7, 2016 letter, OWCP forwarded to appellant a copy of counsel's fee application in the amount of \$4,745.00 for services rendered from November 23, 2011 through December 29, 2014. It provided her 30 days to comment on the fee application request and to denote whether the fee charged was reasonable and appropriate. No response was received from appellant.

OWCP sent appellant another letter dated November 28, 2016, again providing her the opportunity to comment on counsel's fee request for \$4,745.00 for services rendered from November 23, 2011 through December 29, 2014. Appellant was advised that, if she did not provide comments by December 8, 2016, it would consider counsel's fee request and approve a fee, which was determined to be fair and reasonable.

On February 10, 2017 counsel inquired as to the status of the fee petition.

By decision dated March 8, 2017, OWCP approved counsel's fee petition in the amount of \$4,745.00 for services rendered from November 23, 2011 through December 29, 2014. It noted that appellant had not contested the reasonableness of the fee amount.

On April 19, 2017 appellant requested reconsideration of its March 8, 2017 decision. In a handwritten statement dated "April 2017," appellant indicated that she had talked with counsel on the telephone and that they had agreed to \$2,700.00, not \$4,745.00. She indicated that she had paid \$500.00 and only owed the remaining \$2,200.00. Appellant explained that she could not find the original bill.

By decision dated July 14, 2017, OWCP denied modification of its March 8, 2017 decision. It noted that an agreement to a flat rate, in this case \$2,700.00, was inconsistent with FECA regulations. OWCP further found that counsel provided active assistance to appellant with regard to her schedule award claim and she had not contested either the time spent or the hourly rate or submitted evidence to document that an alternative charge for legal services had been agreed upon.

LEGAL PRECEDENT

It is not the function of the Board to determine the fee for services performed by a representative of a claimant before OWCP. That function is 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 sole function of the Board on appeal is to determine whether the action of OWCP constituted an abuse of discretion.³ 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.⁴

Section 10.703(a)(2) of the Code of Federal Regulations provides 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.⁵ While the regulations provide that a fee application is deemed approved when it is accompanied by a signed statement indicating the claimant's agreement with the fee,⁶ the regulations do not specifically provide for approval when a claimant fails to contest a fee application.⁷ 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.⁸ After the claimant has been afforded a reasonable time to respond to the request, OWCP will then proceed to review the fee application. 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: (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

The Board finds that OWCP did not abuse its discretion in approving the requested attorney fee in the amount of \$4,745.00.

OWCP considered the relevant regulatory criteria in its decisions approving the requested fee. In this case, appellant's former counsel submitted an attorney authorization, as well as an itemized statement of the time allotted on specific tasks, the hourly rate, and the total amount charged.¹⁰ On April 19, 2016 counsel submitted a fee application in the amount of \$4,745.00 for services rendered from December 9, 2011 through December 29, 2014. While OWCP provided appellant two opportunities to comment on the fee application request and to denote whether the fee charged was reasonable and appropriate, she failed to respond. By decision dated March 8, 2017, OWCP approved the fee petition in the amount of \$4,745.00 as requested.

³ *Alvin T. Groner, Jr.*, 47 ECAB 588 (1996); *Edward Snider*, 39 ECAB 1268 (1988).

⁴ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁵ 20 C.F.R. § 10.703(a)(2).

⁶ *Id.* at § 10.703(b).

⁷ See *Helen J. Cavorley*, Docket No. 02-2325 (issued February 7, 2003).

⁸ 20 C.F.R. § 10.703(c).

⁹ *Id.*

¹⁰ See *L.H.*, Docket No. 11-0900 (issued December 9, 2011).

Appellant requested reconsideration and asserted, without supporting documentation, that she and counsel had agreed upon a fee of \$2,700.00. She explained that she had already paid \$500.00 and, therefore, owed only \$2,200.00. Appellant indicated that she did not have the original bill. By decision dated July 14, 2017, OWCP denied modification of its prior decision approving the requested fee. Appellant disputed the requested fee, contending only that she and counsel had agreed upon a fee of \$2,700.00 of which she paid \$500.00. However, there is no evidence to support that counsel and appellant had agreed to a reduced fee in any amount. In his September 12, 2015 letter, counsel indicated that appellant had reimbursed him for the medical advance, which was listed as \$500.00 on the initial fee petition. However, he indicated that he could not find any notes or letters relative to the case that the fee was reduced to \$2,600.00. 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.¹¹

CONCLUSION

The Board finds that OWCP did not abuse its discretion in approving an attorney's fee in the amount of \$4,745.00 for services rendered from November 23, 2011 through December 29, 2014.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 10, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

¹¹ *Id.*