

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

E.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Winchester, KY, Employer**

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Docket No. 22-1154

Issued: January 11, 2023

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 28, 2022 appellant filed a timely appeal from a February 17, 2022 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 this case.

ISSUES

The issues are: (1) whether OWCP abused its discretion in approving a fee in the amount of \$20,718.75 for services rendered by appellant's former counsel from December 12, 2013 to January 27, 2020; and (2) whether OWCP's hearing representative properly denied appellant's request for the issuance of subpoenas.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 20, 2009 appellant, then a 38-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed conditions due to factors of her federal employment. She noted that she first became aware of her conditions on September 23, 2009 and realized their relationship to her federal employment on October 13, 2009. OWCP accepted the claim for right tarsal tunnel syndrome, right plantar fibromatosis, right foot sprain, right plantar nerve lesion, right lower limb reflex sympathetic dystrophy, right plantar fasciitis, right and left index finger trigger finger, left plantar fascial fibromatosis, right and left middle finger trigger finger, right and left shoulder tendinitis, right and left shoulder impingement syndrome, right and left shoulder lesions, other lumbar intervertebral disc displacement at L5-S1, and bilateral lower limb complex regional pain syndrome. It paid appellant wage-loss compensation for disability on the supplemental and periodic rolls, effective October 14, 2009, until she retired from the employing establishment, effective December 9, 2018.

On December 30, 2013 appellant authorized Alan J. Shapiro, Esq. to represent her before OWCP in all matters arising from her workers' compensation claim. OWCP acknowledged receipt of that attorney authorization on January 24, 2014. On July 16, 2014 counsel requested a copy of the complete case record.

In a July 1, 2019 decision, OWCP agreed to pay for modifications to appellant's property in the amount of \$76,770.00. Following a November 7, 2019 telephonic hearing, by decision dated February 18, 2020, OWCP's hearing representative affirmed the July 1, 2019 decision.

On December 24, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award. By decision dated January 22, 2020, OWCP granted her a schedule award for 14 percent permanent impairment of the left arm, 15 percent permanent impairment of the right arm, and 20 percent permanent impairment of the right leg. The period of the award ran for 148.08 weeks from June 12, 2019 through April 13, 2022.

In a letter dated February 1, 2020, then-counsel submitted a fee petition in the amount of \$25,380.00 for 88.38 hours of services he rendered from December 12, 2013 through January 27, 2020 at a rate of \$325.00 per hour.

On February 4, 2020 then-counsel submitted an amended fee petition in the amount of \$20,718.75 for 63.75 hours of services he rendered from December 12, 2013 through January 27, 2020 at the rate of \$325.00 per hour. He noted that appellant had not signed the previous fee petition or returned the petition with payment. Counsel submitted a separate letter of even date wherein he informed appellant that there was an error on two entries, which reduced his fee from \$25,380.00 to \$20,718.75. He provided her with the amended fee petition for 63.75 hours of services rendered from December 12, 2013 through January 27, 2020 at the rate of \$325.00 per hour.

By letter dated February 27, 2020, OWCP informed appellant of then-counsel's request for authorization for payment of \$20,718.75 in attorney fees and provided her an opportunity to review the fee request. It informed her that, if she did not respond by March 27, 2020, it would be assumed

she did not wish to comment, and the fee would be approved as fair and reasonable. A copy of the amended February 4, 2020 fee petition was attached.

In a letter dated March 9, 2020, appellant objected to the fee petition. She asserted that then-counsel should not be paid until her case was settled. Appellant further asserted that he told her that his fee would not exceed 20 percent of the amount of her award. Additionally, she contended that counsel advised her that he would not submit a claim for compensation for a schedule award without her consent. Appellant noted that he submitted a direct deposit slip with an incorrect bank account number. She told counsel that she wanted a lump-sum schedule award payment. Appellant related that counsel withdrew his representation when she did not pay him.

By decision dated April 23, 2020, OWCP approved then-counsel's amended fee petition in the amount of \$20,718.75 for services rendered from December 12, 2013 through January 27, 2020.

On May 7, 2020 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. She submitted a May 1, 2020 letter in which she reiterated her prior objections to counsel's fee petition.

In a May 18, 2020 letter, then-counsel informed OWCP that his office no longer represented appellant.

During a telephonic hearing held on September 3, 2020, appellant contested fees for services rendered on two dates in the February 4, 2020 fee petition: (1) March 28, 2019 (880 minutes or 14.67 hours); and (2) August 12, 2019 (753 minutes or 12.55 hours). She reiterated that she had agreed to a fee not to exceed 20 percent of her schedule award compensation, that no payment would be made until her case was settled, and that then-counsel sent her a letter reducing his fee and agreeing that he would not file a schedule award claim without her consent. Appellant maintained, however, that counsel filed the schedule award claim and denied her due process. She noted that his representation ended on February 3, 2020.

In response to the hearing transcript, appellant, in a September 28, 2020 letter, alleged that the transcript was incomplete and restated her prior objections to then-counsel's fee petition.

Appellant also submitted an August 15, 2016 letter in which then-counsel informed her that he was going to charge additional fees since it appeared that she was not going to return to work. Then-counsel advised appellant that she would owe him approximately \$750.00 to \$1,000.00 for services rendered to obtain a ramp chair and vehicle. He advised that, based on his long relationship with her, he would reduce his usual fee of \$350.00 per hour to \$275.00 per hour for work performed to obtain the ramp chair and vehicle. Alternatively, then-counsel advised appellant that the old fee agreement would remain in effect if she no longer received workers' compensation.

By decision dated October 23, 2020, an OWCP hearing representative set aside the April 23, 2020 fee petition decision and remanded the case for further development based on then-counsel's August 15, 2016 letter. On remand the hearing representative instructed OWCP to forward the August 15, 2016 letter to counsel for review and comment.

On remand OWCP, by letter dated October 26, 2020, requested that then-counsel review his August 15, 2016 letter and provide whether the original fee petition should be modified.

In a letter dated November 5, 2020, then-counsel submitted an undated letter from appellant in response to his August 15, 2016 letter. In this response, appellant informed then-counsel that she did not need help with obtaining a ramp lift chair or wheelchair as she would work with OWCP. She also informed him that she would adhere to their original agreement. Appellant noted her intent to pursue a claim for a schedule award because she was permanently disabled. She claimed that she did not owe any fee at that time, and she would pay counsel following the settlement of her claim.

OWCP subsequently received a retainer/fee agreement signed by appellant on December 30, 2013, indicating that then-counsel's office would bill her in 30-minute increments at the rate of \$325.00 per hour and no payment fee or expense would be charged if no recovery was obtained.

By decision dated January 27, 2021, OWCP again approved then-counsel's amended fee petition in the amount of \$20,718.75 for services rendered from December 12, 2013 through January 27, 2020. It found that appellant had agreed to the original fee agreement, and she failed to submit any evidence to alter the approved amended fee petition.

On February 23, 2021 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated May 3, 2021, a second OWCP hearing representative vacated the January 27, 2021 decision and remanded the case for further development. The hearing representative explained that then-counsel did not respond to OWCP's October 26, 2020 letter regarding his August 15, 2016 letter. On remand OWCP was instructed to again request that he review and comment on that letter.

OWCP, by letter dated May 12, 2021, requested that then-counsel comment on his August 15, 2016 letter and appellant's August 19, 2016 response letter.

In response, then-counsel submitted a May 20, 2021 letter in which he explained that his August 15, 2016 letter offered appellant two choices based on the premise that she would not return to work. The first choice was that he would render services at \$275.00 per hour. The second choice was that the original \$325.00 per hour agreement would remain in force until a schedule award had been granted by OWCP. Then-counsel noted that he and appellant had agreed that certain items would no longer be litigated. He indicated that on August 19, 2016 appellant agreed to continue with the original fee agreement. Then-counsel denied appellant's allegation that her Form CA-7 claim would not be submitted to OWCP without her consent. He related that his son, Daniel Shapiro, Esq., had informed appellant that if the Form CA-7 claim was not submitted soon, then a medical report obtained on her behalf would be deemed stale.

By letter dated June 25, 2021, OWCP requested that appellant review and comment on then-counsel's May 20, 2021 letter.

In response, appellant submitted a July 23, 2021 letter relating that her former counsel had agreed that he would not charge her more than 20 percent of her schedule award, and that he agreed he would not submit her schedule award claim without her consent. She also indicated that counsel illegally worked on December 24, 2020, a federal holiday. Appellant further alleged that she asked then-counsel not to withdraw representation as she could not pursue her claim on her own. She also noted that she had requested that then-counsel subpoena her orthopedic surgeon in support of her schedule award claim.

OWCP, by decision dated August 31, 2021, issued a *de novo* decision approving then-counsel's amended fee petition in the amount of \$20,718.75 for services rendered from December 12, 2013 through January 27, 2020.

On September 28, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review and also requested subpoenas for evidence and witnesses. She requested an audio version of her November 2019 hearing, and that the subpoenas be issued for the hearing representative, stenographer, and witnesses M.V. and T.V. A telephonic hearing was held on January 5, 2022.

By decision dated February 17, 2022, a third OWCP hearing representative affirmed the August 31, 2021 attorney fee decision. The hearing representative also denied appellant's request for the issuance of subpoenas. The hearing representative noted that OWCP's procedures provide that the transcript of the hearing is the official record of the hearing, and that the actual recording is the property of the reporting contractor and cannot be made available to the parties. The hearing representative further found that appellant did not establish that the requested testimony could provide relevant information that could not be obtained by any other means to ascertain facts which are relevant to the issues on appeal.

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.² 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.³

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

² *E.J.*, Docket No. 19-1909 (issued August 19, 2020); *R.P.*, Docket No. 18-0861 (issued November 1, 2018); *C.H.*, Docket No. 17-0623 (issued June 27, 2017); *W.H.*, Docket No. 16-1297 (issued May 9, 2017); *L.H.*, Docket No. 11-0900 (issued December 6, 2011); *C.H.*, Docket No. 10-0987 (issued March 22, 2011); *Eric B. Petersen*, 57 ECAB 680 (2006); *Sharon Edwards*, 56 ECAB 749 (2005).

³ *E.J.*, *id.*; *R.P.*, *id.*; *Claudio Vazquez*, 52 ECAB 496 (2001).

hourly rate, number of hours worked, and the work performed.⁴ 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.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not abuse its discretion in approving a fee in the amount of \$20,718.75 for services rendered by appellant's former counsel from December 12, 2013 through January 27, 2020.

OWCP's hearing representative approved the former counsel's fee request of \$20,718.75 for services rendered from December 12, 2013 to January 27, 2020.

OWCP's hearing representative reviewed the four factors under 20 C.F.R. § 10.703(c) and noted that appellant merely submitted unsubstantiated assertions that her former counsel had not been effective in his representation. The hearing representative also noted that she had not submitted evidence to support her contention that the fees charged were unreasonable. The hearing representative indicated that her former counsel had voluntarily reduced his fees, based upon the schedule award recovery, to ensure reasonableness. The Board notes that appellant's former counsel was involved in filing appellant's schedule award claim, and he submitted supportive medical evidence. Appellant also had regular communications with her former counsel for which he was entitled to compensation. Having reviewed the evidence, the Board does not find an abuse of discretion by OWCP.

The Board has frequently held that it will not interfere with or set aside a determination by OWCP of a fee for legal services unless the determination is clearly in error.⁷ OWCP has the

⁴ 20 C.F.R. § 10.703(a)(1).

⁵ *Id.* at § 10.703(c).

⁶ *Id.*

⁷ *J.K.*, Docket Nos. 19-1420 and 19-1422 (issue August 12, 2020); *R.P.*, Docket No. 18-0681 (issued November 1, 2018); *William Arthur Burney*, 29 ECAB 253 (1978).

discretion to approve attorney fees and, in this case, the Board finds no abuse of discretion.⁸ Therefore, the February 17, 2022 decision approving the attorney fee of \$20,718.75 is affirmed.

LEGAL PRECEDENT -- ISSUE 2

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.⁹ The hearing representative of OWCP's Branch of Hearings and Review has discretion to approve or deny a subpoena request.¹⁰ Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are clearly contrary to logic and probable deductions from established facts.¹¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP's hearing representative properly denied appellant's request for issuance of subpoenas.

Appellant requested that OWCP's hearing representative issue subpoenas for an audio version of her November 2019 hearing transcript, to a stenographer and witnesses M.V. and T.V. The hearing representative denied her request, noting that the testimony of these individuals could be obtained through affidavits or statements. He further found that the transcript of the hearing is the official record of the hearing, and that the actual recording is the property of the reporting contractor and cannot be made available to the parties. Appellant has insufficiently explained why a subpoena was the best method to obtain this evidence or shown that there was no other method to obtain the information. The Board finds that OWCP's hearing representative's denial of appellant's request for subpoenas was reasonable and did not constitute an abuse of discretion.¹²

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

⁸ *J.K., id.*; *C.H.*, Docket No. 17-0623 (issued June 27, 2017); *W.H.*, Docket No. 16-1297 (issued May 9, 2017); *L.H.*, Docket No. 11-0900 (issued December 6, 2011); *C.H.*, Docket No. 10-0987 (issued March 22, 2011); *Eric B. Petersen*, 57 ECAB 680 (2006); *Sharon Edwards*, 56 ECAB 749 (2005).

⁹ *See* 20 C.F.R. § 10.619; *R.H.*, Docket No. 19-1503 (issued February 2, 2022); *P.F.*, Docket No. 19-0547 (issued December 20, 2019); *E.C.*, Docket No. 18-1808 (issued May 16, 2019).

¹⁰ *See id.*

¹¹ *B.M.*, Docket No. 17-1157 (issued May 22, 2018); *Gerald A. Carr*, 55 ECAB 225 (2004).

¹² *See R.H., supra* note 9; *P.F., supra* note 9; *E.C., supra* note 9; *L.M.*, Docket No. 17-0159 (issued September 27, 2017).

CONCLUSION

The Board finds that OWCP did not abuse its discretion in approving a fee in the amount of \$20,718.75 for services rendered by appellant's former counsel from December 12, 2013 through January 27, 2020. The Board further finds that OWCP's hearing representative properly denied appellant's request for issuance of subpoenas.

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board