

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUTH L. ASHLEY and DEPARTMENT OF THE ARMY,
FAMILY SUPPORT DIVISION, DCFA, Fort Dix, N.J.

*Docket No. 96-1181; Submitted on the Record;
Issued March 2, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether there was an abuse of discretion by the Office of Workers' Compensation Programs in reducing a requested fee for legal services from \$8,620.00 to \$2,316.50.

On April 17, 1995 Thomas R. Uliase, Esquire, Haddonfield, New Jersey, claimant's representative, requested approval of a fee in the amount of eight thousand six hundred and twenty (\$8,620.00) for 75.5 hours of legal services performed in this case before the Office and \$25.00 in copying expenses.¹ Appellant's submission consisted of two separate fee petitions; the first covering the period from September 4, 1992 through May 6, 1994, and the second covering the period from February 10, 1994 through April 4, 1995. Appellant also submitted a signed statement from the claimant indicating that she had reviewed the application and considered the fee to accurately represent the necessary services performed in the case.

By letter dated June 16, 1995, the Office advised appellant that his fee petition was insufficient to allow approval of the requested fee. Specifically, the Office noted that appellant's fee petition contained substantial itemization in which individual actions taken had been "lumped together," and explained to appellant that pursuant to 20 C.F.R. § 10.145(c)(2), to ensure an accurate review by the Office, each action, and the time required to take each action, must be listed separately. The Office additionally asked appellant to provide a statement as to whether any part of the fee had been paid or placed in escrow, and if applicable, to provide a copy of escrow agreement. Finally, the Office asked, pursuant to 20 C.F.R. § 10.145(c)(5), for appellant to provide a statement explaining the basis for the amount of the fee requested.

On June 28, 1995 appellant responded to the Office's request for additional information. Appellant advised the Office that the fees for services and costs had been placed in escrow and

¹ Mr. Uliase indicated that his complete fee totaled \$9,458.00, but that his fee petition reflected a fee reduction of \$838.00.

provided a narrative statement explaining the basis for the fee requested. Appellant resubmitted his two prior fee petitions which he had amended to reflect the exact amount of time spent for each action. In addition, appellant submitted a third fee petition representing a more detailed version of the fee petition covering the period February 10, 1994 through April 4, 1995, listing additional information such as the initials of the person performing each service and the hourly rate charged by that person.

On July 17, 1995 appellant resubmitted the above mentioned information.

In a letter dated August 25, 1995, the Office again advised appellant that his fee petition was still inadequate to allow for a fee award. The Office specifically stated that the itemization in the fee petition was still incorrect in that each action should be listed on a separate line, with the time computed and the amount charged listed separately. The Office further requested that appellant submit a copy of his escrow agreement and a narrative statement providing the specific basis for the fee request.

On November 21, 1995 in response to the Office's request, appellant resubmitted his prior fee petitions, together with a copy of a letter he had sent to appellant on April 5, 1995, and requested that the Office issue its decision. In the letter, apparently a cover letter for the original fee petition, he asked appellant to review the petition and, if approved, to provide a check for the full amount "made payable to the "Federal Compensation Escrow Agents." In the letter appellant further stated that "if the fee approval has not been obtained from the Department of Labor, the monies will be held in escrow pending approval."

By decision dated November 28, 1995, the Office approved a fee in the amount of \$2,316.50 as reasonable considering the usefulness of the representative's services, the nature and complexity of the claim, the actual time spent on development and presentation of the claim, the amount of compensation accrued and potential future payments, customary and local charges for similar services, professional qualifications of the representative and all other pertinent factors of record. In reducing appellant's fee, the Office specifically found that the two separate fee statements covering from the periods September 4, 1992 through May 6, 1994 and February 10, 1994 through April 4, 1995, overlapped and somewhat contradicted each other for the period February 10 through May 6, 1994. One fee petition requested payment for services rendered on February 25, March 17, April 5, April 11 and May 6, 1994, and the other petition listed services rendered on February 10, February 14, February 25, February 28, March 1, March 18, March 21, March 29, March 30, April 5, April 14, April 29 and May 6, 1994. The Office concluded that, therefore, it was precluded from making an informed decision on the fee application for this period. For the period from September 4, 1992 through May 6, 1994, the Office found that as no hourly charges for this period had been provided by appellant, the Office was precluded from making an informed decision on this portion of the fee petition. The Office further found that for the period February 10, 1994 through April 4, 1995, the combined information contained in the two versions of the fee petition submitted for this period contained sufficient information to allow the Office to calculate appellant's fee, with the exception of the overlapping period from February 10, 1994 through May 6, 1994, which had previously been disallowed. Consequently, the Office examined the fee of \$2,325.00 requested for the period from May 26, 1994 through April 4, 1995, and, finding the fees to be acceptable, with the

exception of a charge of \$8.50 for a November 22, 1994 letter to Congressman Christopher Smith approved the fee for this period in the amount of \$2,316.50.

The Board has held that where the Office proposes to reduce a requested fee for representative services, the representative is entitled to notice of the reasons for the proposed reduction and an opportunity to respond with written comments and by affidavit prior to decision.²

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 20 C.F.R. § 10.145 and mandated by Board decisions. The Board's sole function is to determine whether the action by the Office constituted an abuse of discretion.³

The Board finds that the Office acted improperly in reducing the requested fee to \$2316.50. The case will be remanded for further development.

In this case, the Office reduced the amount of appellant's fee by disallowing the majority of the items listed on the grounds that appellant had not provided, despite two requests, the information necessary for the Office to approve his fee. While the Office did advise appellant that portions of his fee petitions were deficient, the Office did not advise appellant as to all of the deficiencies present, and, contrary to the Office's statement that appellant did not undertake any corrections of the deficiencies delineated, a review of the record reveals that appellant did attempt to provide the majority of the information requested.

Specifically, in its initial letter requesting additional information, the Office advised appellant to itemize each action taken and list the time required for each action, and to provide a statement as to the basis of his fee request, and a copy of the escrow agreement. The Office did not advise appellant that his petition was further deficient in that it lacked, for large portions of the applications, the hourly rates charged, or that the overlapping portions of the two petitions could not be approved without further explanation. Appellant responded by submitting a fee petition in which the time taken for each action was specified, as requested, and by submitting a narrative statement explaining his representation of appellant and the basis for his requested fee.

In its second request for additional information, the Office requested that appellant's fee petition list each item on a separate line, and list the time computed and the amount charged. The Office did not acknowledge that appellant had submitted a statement explaining the basis for his fee, and requested this item again, and again did not request further explanation regarding the overlapping portion of the two fee petitions. Finally, the Office again requested a copy of the escrow agreement.

In response to the second request for information, appellant resubmitted his prior fee petitions together with a copy of his letter to claimant explaining that any fees would be held in

² *Edgar Aikman, et al*, 32 ECAB 1570. The Board notes that the Office's procedure manual in section 2.1208(5) provides for a similar procedure under certain circumstances.

³ *William Lee Gargus*, 25 ECAB 187.

escrow until approved by the Office. While this letter is not the copy of the escrow agreement the Office requested, it does represent an attempt by appellant to comply with the Office' request.

The Board notes that for his fee petition covering the period from September 4, 1992 though May 6, 1994, although appellant amended this petition to reflect, item by item, the time spent on each service, appellant did not list the hourly rate charged for these services. While appellant asserts on appeal that the hourly rate can be easily obtained by dividing the total fee by the total number of hours listed, such calculations result in an hourly rate of \$124.00, which is inconsistent with the hourly rates charged by appellant for the same time period as enumerated in his petition spanning from February 10, 1994 through April 4, 1995. On remand the attorney should provide, in addition to the information already submitted, an item by item accounting of the hourly rate charged for the period September 4, 1992 through May 6, 1994. In addition, for the period February 10, 1994 through May 6, 1994, which is covered by both fee petitions, appellant should reconcile the overlapping portions of these two fee petitions and should explain any discrepancies therein, including the fact that three specific dates appear in both petitions. After the Office obtains clarification from appellant on his fee request with regard to the hourly rates, the hours and the items listed, it should approve an appropriate fee in accordance with the principles set forth above.

That portion of the decision of the Office of Workers' Compensation Programs dated November 28, 1995 allowing an attorneys' fee of \$2,316.50 is hereby affirmed. The portion of the order reducing the fee by an additional \$6,295.00 is also reversed and the case is remanded for further action in accordance with this decision and for a *de novo* determination.

Dated, Washington, D.C.
March 2, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member