

ISSUE

The issue is whether OWCP abused its discretion in approving a fee in the amount of \$1,813.50 for 5.58 hours of services rendered by her then-counsel from October 16, 2014 through January 25, 2016.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On November 13, 2007 appellant, then a 54-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on November 2, 2007 she aggravated her lower back and left leg when she assisted in restraining a patient who became violent while in the performance of duty. She stopped work on November 5, 2007 and returned to work on November 14, 2007. OWCP accepted appellant's claim for aggravation of lumbosacral radiculitis. Appellant continued to receive medical treatment.

Under OWCP File No. xxxxxx158, appellant filed a Form CA-1 alleging that on July 7, 2012 she strained and aggravated a previous service-connected lower back injury while in the performance of duty. She stopped work on July 26, 2012 and returned to limited-duty work on August 27, 2012. OWCP accepted appellant's claim for lumbar region spinal stenosis. Under OWCP File No. xxxxxx015, appellant filed a Form CA-1 alleging that on September 13, 2012 she injured her right knee and lower back while in the performance of duty. OWCP accepted her claim for right knee internal derangement. It administratively combined OWCP File Nos. xxxxxx158, xxxxxx015, and xxxxxx132, with the latter serving as the master file.

On October 5, 2014 appellant authorized Alan J. Shapiro, Esq., to represent her before OWCP in all matters arising from her workers' compensation claim. Counsel requested a copy of the complete case record. OWCP acknowledged receipt of that attorney authorization on November 13, 2014.

In a February 4, 2015 letter, appellant's then-counsel requested that OWCP review the attached medical documentation. He submitted a January 15, 2015 letter from Dr. Edward Anglin, a Board-certified orthopedic surgeon, who indicated that appellant had reached maximum medical improvement (MMI).

On March 13, 2015 appellant filed a claim for a schedule award (Form CA-7) under OWCP File No. xxxxxx015.

In a May 7, 2015 letter, then-counsel indicated that he was submitting a complete packet regarding appellant's request for a schedule award under OWCP File No. xxxxxx015. He

³ Docket No. 08-2415 (issued July 15, 2009).

submitted an April 16, 2015 impairment rating report by Dr. M. Stephen Wilson, a Board-certified orthopedic surgeon.

In a May 18, 2015 letter to then-counsel, appellant indicated that she was responding to a May 7, 2015 letter regarding her impairment rating for her right knee employment injury. She discussed the medical evidence she had received from April through May 2015 for a flare-up of her right knee, leg, and lower back injuries. Appellant also described the financial and emotional hardships she had experience due to her inability to work. She submitted additional medical evidence and copies of statements from the Social Security Administration (SSA) regarding her SSA benefits.

In a July 27, 2015 letter, then-counsel requested a response from OWCP regarding appellant's schedule award claim filed under File No. xxxxxx015. On November 18, 2015 then-counsel resent a copy of the July 27, 2015 letter to OWCP.

By decision dated January 7, 2016, OWCP granted appellant a schedule award for 12 percent permanent impairment of the right lower extremity under File No. xxxxxx015. The award ran for 34.56 weeks from April 16 to December 13, 2015.

On February 19, 2016 appellant filed schedule award claims (Forms CA-7) under OWCP File Nos. xxxxxx158 and xxxxxx132.

In a letter dated February 19, 2016, then-counsel requested that OWCP review medical documentation he submitted, including a January 25, 2016 letter from Dr. Anglin who opined that appellant had reached MMI.

In an April 21, 2016 letter, then-counsel requested that OWCP authorize a one-time appointment for appellant to see Dr. Wilson for an impairment rating evaluation. He also requested that OWCP change the status of the claim to active so that appellant could again be eligible for access to medical services.

In a June 23, 2016 letter, then-counsel contended that she had sustained permanent impairment of a scheduled member or function of the body and requested a schedule award for appellant. He indicated that he was including a medical report with a rating performed in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴

Appellant submitted a May 5, 2016 report from Dr. Wilson who described the November 2, 2007 work-related injury and the medical treatment that appellant had received. Dr. Wilson provided examination findings and determined that according to the A.M.A., *Guides* and *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition

⁴ A.M.A., *Guides* (6th ed. 2009).

(July/August 2009) (*The Guides Newsletter*) appellant had 11 percent permanent impairment of the left lower extremity due to mild sensory and motor deficits of the L5 spinal nerve.⁵

On August 24, 2016 OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity under File No. xxxxxx158. The award ran for 25.92 weeks from May 5 through November 2, 2016.

In a September 2, 2016 letter, then-counsel requested a follow-up on the progress of appellant's schedule award claim under OWCP File No xxxxxx158.

By decision dated November 18, 2016, OWCP granted appellant a schedule award for an additional two percent permanent impairment of the left lower extremity. The award ran for 5.76 weeks from May 5 through June 14, 2016 and was based on the reports from Dr. Wilson and the DMA.

The record reflects that then-counsel subsequently submitted three letters dated February 1, 2017 and April 4 and May 4, 2018 pertaining to the status of the schedule award claim under OWCP File No. xxxxxx132.

On January 22, 2018 appellant requested authorization for low back disc and spinal fusion surgery. In a February 1, 2018 letter, OWCP advised her that it was unable to authorize the requested procedure because the evidence was insufficient to establish that the need for the requested procedure resulted from her accepted injury. A copy of the letter was also mailed to then-counsel.

In a May 30, 2018 letter, OWCP advised then-counsel that it had issued a schedule award to appellant on November 18, 2016 in the amount of \$8,236.00. It included a copy of the November 18, 2016 decision.

On July 10, 2018 OWCP received a letter from then-counsel informing OWCP that he was enclosing a fee petition in the amount of \$1,813.50. Then-counsel indicated that the fee petition was previously sent to appellant and that appellant had not signed and returned the fee petition. OWCP subsequently received then-counsel's itemized fee application in the amount of \$1,813.50 for 5.58 hours of services rendered from July 15, 2014 through January 25, 2016 in the current claim. An itemized statement listing the services and time spent on each date was provided.⁶ The time spent for each service ranged from 15 minutes to no more than 75 minutes, for a total of 335 minutes, or 5.58 hours. Then-counsel's hourly rate was \$325.00 per hour. The total fee requested

⁵ In a September 7, 2016 report, Dr. Michael Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), noted appellant's history of injury and medical treatment. He referred to *Proposed Table 2: Spinal Nerve Impairment* and determined that appellant had a combined 11 percent permanent impairment of the left lower extremity for mild motor and sensory deficits at L5. In a September 13, 2016 report, Dr. Katz indicated that according to the record appellant had received a prior award of nine percent left lower extremity impairment under OWCP File No. xxxxxx158. He noted a date of MMI of May 5, 2016. Dr. Katz concluded that appellant was entitled to an additional two percent left lower extremity permanent impairment due to her accepted lumbar injury.

⁶ The services provided included writing letters to appellant and to OWCP, telephone conferences, e-mail exchanges, review of OWCP's decisions, and submitting medical evidence to OWCP.

was in the amount of \$1,813.50. At the bottom of the invoice, it noted "AGREED FEE" is \$1,640.00. The fee application also indicated that the fee petition was sent to appellant on June 12, 2018.

In a July 24, 2018 letter, OWCP forwarded a copy of the fee application to appellant. It afforded her 30 days to review the fee petition and advised her to either sign her agreement or provide a detailed explanation regarding why she was in disagreement with the fee application request.

In a letter dated August 12, 2018, appellant alleged that she and then-counsel had experienced continuous conflict of communication and interests. She asserted that then-counsel appeared to file claims for payments that did not apply to her and ignored her request for assistance regarding matters that concerned her. Appellant explained that she authorized then-counsel to assist her in "all matters related to my workers' compensation claim." She provided a copy of OWCP's July 24, 2018 letter. Appellant indicated that in 2015, then-counsel filed "some type of appeal related to a nonpayment of her workers' compensation even though she had informed him that she had already been paid." She noted that she paid then-counsel after she received her schedule award payments. Appellant also related that in June 2016 she contacted then-counsel for assistance in the matter of the loss of her social security disability benefits and overpayment due to an offset from her schedule award payment. She contended that then-counsel never responded to her needs in that matter and her social security benefits were terminated. Appellant indicated that she had also contacted then-counsel after her physician recommended surgery, but she received no response. She reported that she subsequently contacted then-counsel for assistance after she suffered a fall on September 12, 2018, which further injured her lower back. Appellant contended that then-counsel's communication became very confusing and indicated that she was submitting a May 8, 2018 letter as an example.

Appellant submitted a letter dated May 8, 2018 from then-counsel. She noted that in May 2018 she was requesting assistance for her denied lower back surgery. In the letter, then-counsel informed her that, if she wished to file a claim for a recent fall, she would need to obtain a medical report from a physician describing how her injuries caused her leg to give out. He also informed her that he had filed for a schedule award under OWCP File No. xxxxxx132 and followed up on April 4, 2018. Then-counsel also informed appellant of the type of medical evidence that she would need if she wanted an increase for the schedule awards in her other claims.

OWCP also received a statement from appellant, signed on February 21, 2017, acknowledging that she was overpaid \$17,782.40 in social security benefits.

Appellant also provided a signed fee application dated August 12, 2018. She checked a box indicating that she disapproved of the fee.

In an August 15, 2018 letter, OWCP requested that then-counsel review appellant's response regarding his request for approval of attorney fees. No response was received.

OWCP received a letter dated June 12, 2018 addressed to appellant from then-counsel. Then-counsel informed appellant that he was enclosing a fee petition for her signature. He noted that appellant had acknowledged in a June 4, 2018 e-mail that OWCP had failed to send him a

copy of the November 18, 2016 decision. Then-counsel also indicated that appellant had promptly paid him for her two schedule award claims.

In a letter dated August 23, 2018, appellant noted that she was unaware of the situation regarding her social security disability payments and OWCP's schedule award lump-sum payment and trusted that then-counsel would inform her of all matters arising out of her workers' compensation claim. She alleged that from June 2016 to February 2017 she had contacted then-counsel for assistance regarding her social security disability payments and OWCP's lump-sum schedule award payment overpayment situation, but then-counsel failed to provide any assistance and did not contact the SSA regarding this issue. Appellant also asserted that she had asked then-counsel to assist regarding OWCP's denial of authorization for lower back surgery, but the only information that she received in return was the May 8, 2018 letter.

Appellant submitted an undated letter from SSA, which informed her that her SSA benefits would be reduced beginning November 2013 because it had learned that she was receiving FECA benefits.

By decision dated September 27, 2018, OWCP approved then-counsel's fee petition in the amount of \$1,813.50 for services rendered from October 16, 2014 through January 25, 2016.⁷ It noted that appellant's concern regarding her social security disability payments did not involve OWCP.

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.⁸ Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgement, or actions taken which are contrary to both logic and probable deductions from established facts.⁹

Section 10.703 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.¹⁰ While the regulations provide that a fee application is deemed approved when it is accompanied by a signed statement indicating

⁷ Appellant disagreed with the September 27, 2018 decision and on October 3, 2018 subsequently requested a hearing before a representative of OWCP's Branch of Hearings and Review. On April 1, 2019 she informed OWCP that she wanted to withdraw her request for a hearing. By decision dated April 1, 2019, OWCP granted appellant's request for withdrawal of the hearing.

⁸ See *T.S.*, Docket No. 17-1706 (issued July 10, 2018); *L.H.*, Docket No. 11-0900 (issued December 6, 2011); *Eric B. Petersen*, 57 ECAB 680 (2006); *Sharon Edwards*, 56 ECAB 749 (2005).

⁹ See *R.P.*, Docket No. 18-0681 (issued November 1, 2018); *Claudio Vazquez*, 52 ECAB 496 (2001); *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹⁰ 20 C.F.R. § 10.703(a)(2).

the claimant's agreement with the fee,¹¹ the regulations do not specifically provide for approval when a claimant fails to contest a fee application.¹² 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.¹³ 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. 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: (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.¹⁴

It is well established that proceedings under FECA are not adversarial in nature.¹⁵ Once OWCP undertakes development of the record, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁶ It has an obligation to see that justice is done.¹⁷

ANALYSIS

The Board finds that the case is not in posture for decision.

OWCP's procedure manual provides that when a claimant disputes the amount of the fee, OWCP will provide a fee request to the claimant and ask him or her to provide any additional information in support of his or her objection.¹⁸ It will then evaluate any information received according to the factors outlined in 20 C.F.R. § 10.703(c)(1) in order to determine whether the amount of the fee is substantially in excess of the value of services.¹⁹

In an August 12, 2018 letter, appellant explained that she disagreed with then-counsel's fee petition in the amount of \$1,813.50 because she had experienced continuous conflict of communication and interests with then-counsel. She discussed situations where then-counsel failed to assist her regarding her SSA and FECA benefits, denial of authorization for lumbar

¹¹ *Id.* at § 10.703(b).

¹² *See R.P.*, *supra* note 8; *see also Helen J. Cavorley*, Docket No. 02-2325 (issued February 7, 2003).

¹³ 20 C.F.R. § 10.703(c).

¹⁴ *Id.*

¹⁵ *See N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

¹⁶ *See T.K.*, Docket No. 20-0150 (issued July 9, 2020).

¹⁷ *Id.*; *see also N.L.*, *supra* note 15.

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Representatives' Services*, Chapter 2.1200.6(f) (September 2020).

¹⁹ *Id.*

surgery, and about filing a new claim for a September 12, 2018 lower back injury. In a letter dated August 12, 2018, OWCP requested that then-counsel review appellant's response regarding his request for approval of attorney fees, but no response was received. It nonetheless approved then-counsel's fee petition in the amount of \$1,813.50 for services rendered from October 16, 2014 through January 25, 2016. Since prior counsel did not respond to appellant's August 12, 2018 letter objecting to his fee request, the September 27, 2018 decision is set aside and the case is remanded for further development.²⁰

Accordingly, the case is remanded to OWCP to secure the then-counsel's response to the appellant's August 12, 2018 letter objecting to his requested fee as well as a copy of the signed contract for representation since such evidence is not found in the record. Following this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision on the fee petition.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.²¹

Issued: February 23, 2021
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

²⁰ See *E.J.*, Docket No. 19-1909 (issued August 19, 2020).

²¹ Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.