

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

In the Matter of J.D., Appellant

and

**DEPARTMENT OF THE NAVY, LEMOORE
NAVAL AIR BASE, San Diego, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 13-0627
Issued: April 28, 2016**

Appearances:
Steven E. Brown, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER GRANTING FEE PETITION

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

Counsel for appellant has filed a fee petition in the amount of \$5,225.50.¹ The Board notes that all petitions for approval of fees for representative's services are considered under the Board's statutory authority found at section 8127 of the Federal Employees' Compensation Act,² (FECA) and under its *Rules of Procedure* found at 20 C.F.R. § 501.9(e).³

Pursuant to its regulations, the Board considers fee petitions under the following general criteria:

- (1) The usefulness of the Representative's services;⁴

¹ FECA (5 U.S.C. § 8127(b)) and its implementing regulations (20 C.F.R. § 501.9) clearly require the Board to review each fee petition on its own merits and with regard to the unique facts and issues of each appeal. The recognition that each appeal to the Board has unique aspects is reflected in the Board's orders granting or denying fee petitions.

² 5 U.S.C. § 8127.

³ 20 C.F.R. § 501.9(e).

⁴ The Board's consideration of "usefulness" includes, but is not limited to, the frequency and quality of communication by the representative with the client, the factual evidence and legal argument offered and written pleadings filed in the case. The Board will also consider the usefulness of a representative's work as it aided the Board in its consideration and decision of the issue appealed.

- (2) The nature and complexity of the appeal;⁵
- (3) The capacity in which the Representative has appeared;⁶
- (4) The actual time spent in connection with the Board appeal;⁷ and
- (5) Customary local charges for similar services.⁸

By order dated December 11, 2014, the Board denied counsel's fee petition as it had failed to adequately delineate the services performed and otherwise failed to explain in detail how the claimed fee was justified under the five factors listed above. Counsel was permitted 60 days to resubmit the fee petition.

As required by the Board's regulations, appellant has been afforded written notice of the fee requested and provided an opportunity to comment on the fee petition.⁹ No response was received.¹⁰

The requested fees pertain to services performed before the Board in the above-referenced appeal. By decision dated July 17, 2013, the Board affirmed the OWCP January 9, 2013 denial of appellant's claim, finding that the medical evidence was insufficient. Counsel filed a petition for reconsideration with the Board on July 29, 2013 which was denied on May 16, 2014. The underlying issues were whether appellant had established permanent impairment of a scheduled member, whether the accepted conditions should be expanded to include dementia, and whether appellant had established total disability on or after December 19, 2011 due to accepted work conditions.

On appeal counsel had submitted the Application for Review (AB-1 Form) on which he had noted that the hearing representative had ignored all the evidence presented by counsel that the wage-earning capacity decision had been based on a makeshift position. In the petition for reconsideration, he submitted a four-page brief further arguing the makeshift nature of the wage-earning capacity decision, that the work restrictions provided by appellant's treating physician were not prophylactic in nature and prevented appellant from performing his position, and that the medical reports established disability as of December 19, 2011.

⁵ The Board's evaluation of the "nature and complexity" of an appeal includes, but is not limited to, whether the issue appealed is novel or required extensive or unusual factual evidence or legal argument. The Board recognizes that not all complex issues are cases of first impression. However, the representative must establish the complex or unusual nature of the appeal.

⁶ The Board's consideration of the "capacity" in which a representative appears includes, but is not limited to, whether the representative obtained a written retainer and fee agreement was obtained.

⁷ The Board's evaluation of an itemized statement of work and charges includes, but is not limited to, whether the statement is clear, detailed, and describes those aspects of the appeal which merit the fee claimed and whether the representative has personally affirmed the correctness of the fee. No stipulated or contingent fee will be approved by the Board. 20 C.F.R. § 501.9(e).

⁸ The Board's consideration of customary, local fees recognizes that representatives often have clients in several states and that local custom must be balanced against national practice in the FECA appeals.

⁹ 20 C.F.R. § 501.9(e).

¹⁰ The Board notes that included with the counsel's fee petition was a signed statement from appellant indicating that she found the requested fee to be reasonable and appropriate.

On October 28, 2014 counsel provided a supplemental fee petition addressing the deficiencies previously noted by the Board. He clarified the events listed in the itemized fee petition and the hourly charges for the individuals in the itemized statements. Counsel addressed the usefulness of his services noting that the case had some complexity complex and that, although he was unsuccessful on his argument to the Board, the claim was being pursued again before OWCP based on newly-discovered evidence. He also discussed his communication with appellant during the representation before the Board and addressed the customary local charges for similar services. Counsel specifically addressed the hourly rates charged by the staff of his law firm, noting that they had been found reasonable in other administrative tribunals.

OWCP’s decision on appeal was dated January 9, 2013 and the appeal was filed with the Board on January 22, 2013. The fee petition requests approval of time from January 14, 2013 through May 27, 2014 and documents 13.7 hours spent in connection with this appeal before the Board at \$525.00 per hour for Steven E. Brown, Esquire, \$425.00 per hour for Daniel M. Goodkin, Esquire, and \$195.00 per hour for Paralegal Erika Bauer.

In this regard, however, the Board finds excessive billing while the appeal was pending before the Board. In many cases, counsel included multiple billings by various staff members for “conference with attorneys (or w/attorney and paralegal) re: case status” or “review file for current status.” In each of these meetings, which appear on the average of every six weeks, generally two attorneys and a paralegal are in attendance and bill for their time collectively. Each attendee’s participation is described in the similar fashion. No rationale or justification for this redundant billing practice was offered. Absent a detailed explanation on how each particular conference, and each attendee, assisted appellant in furtherance of this appeal, the billed amounts for these status conferences are disallowed. The Board will disallow these 2.60 hours (May 8, August 14, and October 24, 2013 and January 7 and April 3, 2014) as excessive and redundant.¹¹

Daniel Goodkin	1.50@	\$425.00	\$ 637.50
Steven Brown	.50@	\$525.00	\$ 262.50
Erika Bauer	.60@	\$195.00	\$ <u>117.00</u>
Total:	2.60		\$1,017.00

The Board has carefully reviewed the fee petition and finds it, as modified, otherwise satisfies the requirements of section 501.9(e) of the Board’s implementing regulations.

The Board notes that under 20 C.F.R. § 501.9(e) “[n]o claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board.” Under 18 U.S.C. § 292, collecting a fee without the approval of the Board may constitute a misdemeanor, subject to fine or imprisonment for up to a year or both.

¹¹ While not directly pertaining to claims under FECA, the Board finds instructive the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In any fee petition, counsel must use billing judgment and exclude redundant or unnecessary hours and to confirm that the fee requested is not excessive. Adequate documentation should be submitted to support the hours of work performed with specificity or a reasonably precise description of the work performed on behalf of the client.

IT IS HEREBY ORDERED THAT the fee petition is granted in the amount of \$4,208.50.¹²

Issued: April 28, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹² Michael E. Groom, Alternate Judge, participated in the preparation of the decision, but was no longer a member of the Board effective December 27, 2014 and did not participate in the preparation of this order.