

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

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<b>In the Matter of J.A., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket Nos. 11-2061, 12-1793</b>
	)	<b>and 14-1863</b>
<b>DEPARTMENT OF THE AIR FORCE,</b>	)	<b>Issued: December 28, 2016</b>
<b>AIR EDUCATION &amp; TRAINING COMMAND,</b>	)	
<b>Denver, CO, Employer</b>	)	
	)	

*Appearances:*  
John S. Evangelisti, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**ORDER DENYING FEE PETITION**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

Counsel for appellant has filed a fee petition in the amount of \$12,857.50.<sup>1</sup> 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,<sup>2</sup> (FECA) and under its *Rules of Procedure* found at 20 C.F.R. § 501.9(e).<sup>3</sup>

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<sup>1</sup> FECA (5 U.S.C. § 8127(b)) and its implementing regulation (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.

<sup>2</sup> 5 U.S.C. § 8127.

<sup>3</sup> 20 C.F.R. § 501.9(e).

Under these regulations, the Board must consider the petition under the following general criteria:

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

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.<sup>9</sup> No response was received.

The requested fees pertain to services performed before the Board in the three above-referenced appeals.<sup>10</sup>

In a March 24, 2011 decision, the Office of Workers' Compensation Programs (OWCP) determined that appellant forfeited all wage-loss compensation received between March 1, 1992 and June 15, 2006 due to his failure to report his self-employment activities on various EN-1032 forms. On September 15, 2011 counsel filed a timely application for review of OWCP's

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<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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).

<sup>8</sup> 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 FECA appeals.

<sup>9</sup> 20 C.F.R. § 501.9(e).

<sup>10</sup> The fee petition references docket number 14-1863 but, as discussed *infra*, it appears to seek approval of fees for three separate appeals involving appellant.

March 24, 2011 decision. By order dated July 16, 2012,<sup>11</sup> the Board dismissed appellant's appeal because the forfeiture issue appealed to the Board was in an interlocutory posture. It noted that, on August 4, 2011, an OWCP hearing representative directed that the case be remanded to OWCP for further development regarding the matters of forfeiture and overpayment, to be followed by a new decision.<sup>12</sup>

In a June 12, 2012 decision, an OWCP hearing representative found that appellant received a \$382,003.56 overpayment of compensation and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. On August 24, 2012 counsel filed a timely application for review of OWCP's June 12, 2012 decision. By decision dated May 7, 2013,<sup>13</sup> the Board set aside OWCP's June 12, 2012 and remanded the case to OWCP for further development. The Board found that OWCP's June 12, 2012 decision did not contain detailed facts and findings regarding the forfeiture matter, *i.e.*, the presumed basis for the overpayment, and that therefore it was premature to consider whether OWCP properly found an overpayment of compensation and whether appellant was at fault in the creation of such an overpayment. The Board directed OWCP to issue an appropriate decision on the forfeiture and overpayment matters.

In a June 4, 2014 decision, OWCP found that appellant forfeited his entitlement to compensation for the periods March 1, 1992 to July 19, 1995, May 16, 1996 to July 16, 1997, and May 1, 1998 to June 15, 2006. It also found that appellant received a \$382,003.56 overpayment of compensation and that appellant was at fault in the creation of the overpayment, thereby precluding recovery of waiver of the overpayment. On August 21, 2014 appellant, through counsel, filed a timely application for review of OWCP's June 4, 2014 decision. By decision dated July 7, 2015,<sup>14</sup> the Board modified the June 4, 2014 decision of OWCP to reflect that appellant forfeited his entitlement to compensation for a shorter total period than determined by OWCP. The Board remanded the case to OWCP for further action.<sup>15</sup>

In Docket No. 2014-1863, counsel submitted a 17-page brief which presented the factual history of the case and provided Board precedent regarding the forfeiture and overpayment issues. He argued that OWCP's forfeiture determination was not warranted because appellant did not knowingly fail to report income or employment activities.

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<sup>11</sup> Docket No. 11-2061 (issued July 16, 2012).

<sup>12</sup> In an April 20, 2011 letter, OWCP advised appellant of its preliminary determination that he had received a \$429,961.37 overpayment of compensation for the period March 1, 1992 to June 15, 2006 which was caused by the forfeiture of compensation for that period.

<sup>13</sup> Docket No. 12-1793 (issued May 7, 2013).

<sup>14</sup> Docket No. 14-1863 (issued July 7, 2015).

<sup>15</sup> The Board found in its July 7, 2015 decision that the evidence supported a finding that appellant forfeited his entitlement to compensation for the periods May 1, 1993 to July 19, 1995, April 16, 1996 to July 16, 1997, and April 1, 1998 to June 9, 2005. The case was remanded to OWCP for further development, including recalculation of the amount of the overpayment resulting from the forfeiture of compensation, and issuance of an appropriate decision.

On September 18, 2015 counsel filed a fee petition and a statement of service requesting approval of fees totaling \$12,857.50. He addressed the usefulness of his services by noting that his efforts before the Board brought relief for appellant. Counsel addressed the hourly rates charged by himself, his associate, and his paralegal, noting that they had been found reasonable in other administrative tribunals.

The fee petition requests approval of services from September 12, 2011 through December 17, 2014. The Board has carefully reviewed the fee petition, and finds that it does not currently satisfy the requirements of section 501.9(e) of the Board's implementing regulations. The fee petition covers services provided in three separate appeals before the Board, but the fee petition does not provide an entirely clear picture of the particular services which are associated with each appeal. The fee petition also appears to be comprised of billing records relating to both Board and OWCP matters which have been marked through by counsel to constitute a fee petition. The Board also notes that it is difficult to ascertain the services for which fees are being charged when the document presented for approval includes fees for services before both OWCP and the Board.<sup>16</sup> It is requested that only the fees charged for work before the Board be included in the request to be approved by the Board.

The Board strongly discourages counsel from submitting petitions with redactions, corrections, or additions because the Board is without knowledge of who made the changes or why they were made.

Due to these ambiguities, the Board cannot currently approve the fee petition. Therefore, the Board will provide counsel an opportunity to submit a fee petition that allows the Board to make a reasoned determination regarding the services provided to appellant before the Board.<sup>17</sup>

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 up to a year or both.

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<sup>16</sup> For example, services listed for August 2, 2012 and for the period July 23 to 28, 2014 may fall within this category.

<sup>17</sup> The Board notes that any updated fee petition produced by counsel should be filed separately under each of the three docket files and designate for each appeal the particular fees requested, *i.e.*, Docket Nos. 11-2061, 12-1793, and 14-1863.

**IT IS HEREBY ORDERED THAT** the fee petition is denied and may be resubmitted to the Board within 60 days of the date of this order.

Issued: December 28, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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