

payment. He suggested that the number of hours should be based on his estimation of the work done by Mr. Vega.

FACTUAL HISTORY

This case has previously been before the Board. Appellant, a 45-year-old postal inspector filed an emotional condition claim. The Board found that he established compensable factors of employment and remanded the case for development of the medical evidence.² OWCP developed the evidence and denied appellant's claim by decision dated November 10, 2004. Appellant appealed to the Board and by decision and order dated May 16, 2005,³ the Board again remanded the case for additional development of the medical evidence. The facts of the case as set out in the Board's prior decision are incorporated herein by reference.

OWCP accepted appellant's claim for depressive disorder on September 15, 2004. On April 16, 2007 it determined that he was entitled to compensation in the amount of \$817,113.20. OWCP entered appellant on the periodic rolls on May 2, 2007. It paid the Office of Personnel Management \$428,848.33. Appellant ended his association with his attorney, Mr. Vega, on May 4, 2007.

By letter dated April 10, 2008, Mr. Vega requested approval of attorney's fees from January 1995 through May 2007 under section 10.703 of OWCP's regulations.⁴ He stated that he was unable to provide a statement of agreement or disagreement from appellant, who had pursued steps to prevent from being contacted. Mr. Vega had agreed to represent appellant before OWCP in 1995. He listed his services as an initial interview, subsequent meetings, reading, studying and analyzing hundreds of documents, telephone conferences, visits with federal employees and to law libraries, preparation of legal briefs memoranda and letters and preparation of appeals and written appearances including 42 scheduled meetings with appellant. Mr. Vega noted that appellant was willing to pay \$100.00 per hour for services rendered, but that he had paid his previous attorney \$150.00. He stated, "[L]egal fees were negotiated in a contingency basis." Mr. Vega stated that appellant had initiated an unsubstantiated complaint against him. He suggested that a reasonable hourly rate was \$250.00 and that he had worked 1,064 hours during 13 years of legal service.

Mr. Vega listed his legal services and stated that he spent 250 hours reading documents and listed 34 documents. He alleged that he wrote 7 legal briefs, 20 formal letters, 4 motions and 3 appeals and obtained multiple sworn statements. Mr. Vega asserted that he spent 342 hours in analyzing and drafting 36 documents. He indicated that he spent 300 hours of legal research including reading 58 legal cases. Mr. Vega stated that he spent 4 hours in the initial conference with appellant, 6 hours in follow-up conferences and 16 hours in initial research activities. He also detailed 70 hours of meetings with appellant discussing documents. Mr. Vega stated that he spent eight hours each with appellant at the Equal Employment Opportunity and National Labor

² Docket No.03-720 (issued May 20, 2004).

³ Docket No. 05-457 (issued May 16, 2005).

⁴ 20 C.F.R. § 10.703.

Relations Board to gather information. He spent four hours in completing sworn statements and four hours meeting with appellant on April 27, 2007. Mr. Vega mentioned 44 recorded dates of meeting with appellant to discuss legal strategy. He made 26 telephone calls on behalf of appellant and one telephone conference per month for 156 months. Mr. Vega estimated that he spent 40 hours in telephone calls. He listed the dates of 25 telephone calls. Mr. Vega requested compensation for his official travel time of eight hours to New York and eight hours for travel to Washington, DC.

By letter dated May 14, 2008, OWCP requested that appellant comment on the fee request and state his view of whether the fee charged was reasonable and appropriate. It provided a copy of Mr. Vega's fee request and noted that Mr. Vega had not specified the exact amount of the fee requested. OWCP allowed appellant 30 days to submit comments.

In a letter dated May 19, 2008, OWCP requested that Mr. Vega provide the exact amount of attorney's fees requested and the exact number of total hours spent on appellant's case from January 1995 through May 2007. It stated that it would issue a decision within 30 days. Mr. Vega responded on May 25, 2008 that he believed he was entitled to a rate of \$250.00 per hour and had worked 1,064 hours. He stated that he entered a contingency fee agreement with appellant with an initial retainer of \$1,000.00. Mr. Vega agreed to accept \$100,000.00 from appellant based on 33 percent contingency fee as appellant had received more than \$300,000.00 from OWCP.

On June 4, 2008 appellant disagreed with the approval of any attorney's fees. He stated that Mr. Vega's application was based on an estimate of the number of hours worked or on an average of documents. Appellant noted that Mr. Vega did not submit an itemized statement or record of time or provide an application of legal fees to the Board. He alleged that Mr. Vega agreed to take his case for a retainer of \$1,000.00 and ongoing fees of \$100.00 per hour. Once appellant's claim was accepted, Mr. Vega demanded a third of the payment received from OWCP. He alleged that Mr. Vega did not visit the government offices in Puerto Rico and appellant further disputed Mr. Vega's estimates of time spent on research and drafting of documents. Appellant alleged that Mr. Vega spent no more than a total of 253.75 hours working on his claim. He also disputed the travel expenses to New York and Washington, DC to visit OWCP and the Secretary of Labor. Appellant submitted a January 4, 1995 sworn statement from Mr. Vega in regard to his fees in a claim before the Merit Systems Protection Board. He stated that the prevailing hourly billing rate in the community was \$100.00 for similar work by attorneys of comparable qualifications.

In a letter dated June 26, 2008, OWCP again requested additional information from Mr. Vega including an itemized statement of his definitive hourly rate, the exact number of hours worked and a description of the specific work performed. It asked that Mr. Vega provide the total amount charged for representation excluding administrative costs.

On July 28, 2008 Mr. Vega responded that he had provided the information requested. He noted that he was 86 years old and had worked for appellant for 13 years, receiving no remuneration other than the initial \$1,000.00 retainer. Mr. Vega stated that the initial agreement was that he would work on a contingency agreement. He claimed payment for 1,064 hours from January 1995 through May 2007. Mr. Vega stated that he did not keep a log book and had been

conservative in his estimation of services rendered. He again listed his services and estimates of the hours spent, requesting payment for 1,064 hours based on a rate of \$250.00 an hour, or total fees of \$266,000.00. Mr. Vega noted that appellant had received \$828,000.00 in accrued wages and continuing compensation payments of \$5,000.00 per month. He noted that appellant also recovered all medical expenses and would receive continuing medical benefits.

In a decision dated August 14, 2008, OWCP granted attorney's fees in the amount of \$106,400.00 but vacated that decision on August 19, 2008.

Through a letter dated August 20, 2008, OWCP noted that appellant disagreed with the amount of attorney's fees requested by Mr. Vega and provided him with a copy of the fee request and Mr. Vega's July 28, 2008 letter. Appellant had 15 days to provide any additional argument in support of his disagreement. By response dated August 28, 2008, appellant stated the hourly rate was not accepted in the locality. He reiterated that Mr. Vega had worked only 253.75 hours and had vacationed in New York and Washington, DC rather than pursuing his claim. Of the cases listed by Mr. Vega, 18 were improperly identified, 33 were "burden of proof" and 11 addressed traumatic injury and medical conditions. Appellant argued that Mr. Vega should be compensated for 30 hours of legal research. He noted that Mr. Vega had initially requested payment based on a contingency fee of 33 percent of \$395,982.91.

OWCP forwarded appellant's responses to Mr. Vega on September 9, 2008. On September 19, 2008 Mr. Vega disputed appellant's allegations noting that he read thousands of pages on appellant's behalf. He requested a final determination related to his request for legal fees. On November 10, 2008 appellant requested a copy of Mr. Vega's September 19, 2008 letter.

On January 5, 2009 Mr. Vega requested that OWCP approve his claim for attorney's fees from January 1995 through May 2007. A telephone memorandum indicated that the claims examiner contacted the Puerto Rico Federal Bar Association regarding the general hourly attorney fee rate.

On February 11, 2009 OWCP documented a conference call on February 20, 2009 with Veronica Ferraiuoli of the Puerto Rico Bar Association to determine the approximate hourly rate for an attorney's fees in Puerto Rico between 1995 and 2007. Ms. Ferraiuoli stated that the approximate hourly rate ranged from \$125.00 to an excess of \$350.00 per hour. She stated that in government cases the usual fee was \$125.00 per hour.

On February 19, 2009 appellant requested an itemized statement from Mr. Vega. In a separate letter of the same date, he stated that Mr. Vega's hourly rate should be based on the rate he charged to appear before the Merit System Protection Board. He again asserted Mr. Vega charged \$100.00 per hour in such a case.

In a letter dated March 17, 2009, OWCP informed Mr. Vega that appellant did not agree with the hourly rate or the number of hours requested. The claims examiner noted that contingency fees were not recognized and would not be considered in determining a reasonable fee. OWCP proposed to reduce the fee to \$100,000.00 based on an hourly rate of \$100.00 for 1000 hours. It stated that a telephone call to the local bar association indicated that in 1995 fees

ranged from \$125.00 per hour and that in January 1995 Mr. Vega had agreed to an hourly rate of \$100.00 stating that it was the regional rate for similar work by attorneys of comparable qualifications. OWCP determined that \$100.00 was the appropriate hourly rate. The claims examiner stated that he took into consideration the usefulness of Mr. Vega's services, the nature and complexity of the claim, the time spent on development and presentation of the claim, the amount of compensation accrued and potential future payments, Mr. Vega's professional qualifications and the customary local charges for similar services in his locale.

OWCP reduced the number of hours for preparing legal briefs by 100 hours as Board appeals were not within its jurisdiction. It also reduced the number of hours for travel from eight to four as "the nature of such visits does not appear to warrant eight hours each." The claims examiner stated:

"The record establishes that the claim was previously denied, several times and subsequently approved because of your diligent efforts. You succeeded in presenting persuasive evidence to support the claim, where another representative failed. Due to your diligence and repeated skillful appeals, you succeeded in providing evidence to establish the claimant's right to compensation retroactive for a period of 14 years. The claimant was awarded accrued compensation in excess of \$750,000.00 as a result of this effort."

OWCP found that Mr. Vega was entitled to compensation for attorney's fees in the amount of \$100,000.00 for 1000 hours of work, including 250 hours of reading and analyzing documents, 242 hours of preparing legal briefs, 20 hours of preparing letters, 300 hours of research, 70 hours of meetings, 50 hours of document analysis, 8 hours to cosign documents and 40 hours for telephone calls. It stated that payment of the fee was appellant's responsibility. OWCP allowed 30 days for a response from Mr. Vega. In a letter dated March 23, 2009, Mr. Vega accepted the reduction to fees of \$100,000.00.

By decision dated April 20, 2009, OWCP approved attorney's fees in the amount of \$100,000.00.

Appellant requested reconsideration on April 11, 2010. He contended that the amount approved by OWCP was based on a contingency fee contract. Appellant stated that Mr. Vega failed to provide a log of services provided. He noted that OWCP's decision was based on a mathematical error as OWCP failed to deduct 108 hours from the 1064 hours claimed by Mr. Vega as stated in the opinion, instead deducting only 64 hours.

By decision dated October 26, 2010, OWCP reviewed the April 20, 2009 decision and denied modification.

LEGAL PRECEDENT

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.⁵ 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.⁶

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.⁷ 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.⁸ 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: (i) usefulness of the representative's services; (ii) the nature and complexity of the claim; (iii) the actual time spent on development and presentation of the claim; and (iv) customary local charges for similar services.⁹ Contingency fee arrangements are not recognized under FECA.¹⁰

ANALYSIS

The Board finds that OWCP properly considered the relevant criteria in approving an attorney's fee of \$100,000.00. While Mr. Vega initially stated he and appellant had agreed to a contingency fee arrangement, he provided OWCP with a detailed list of the services provided to appellant and his best estimate of the time he spent on each.

Appellant argued on appeal that Mr. Vega did not provide adequate documentation of the hours claimed, that OWCP approved the fee as a contingency fee and that there was a mathematical error in calculating the amount of the fee.

The Board finds that OWCP properly exercised its discretion by researching what would have been a reasonable hourly rate of \$100.00. Further, Mr. Vega submitted sufficient documentation of time spent on the case and OWCP properly determined, based on a review of Mr. Vega's actual successful participation in the presentation of appellant's case before OWCP, that a fee of \$100,000.00 was reasonable.

While Mr. Vega can be faulted for not providing sufficient documentation of his services and for failing to obtain a proper fee agreement for services, he did provide documentation of services performed and the results he achieved in support of his client's emotional condition

⁵ *C.H.*, Docket No. 10-987 (issued March 22, 2011) and *L.H.*, Docket No. 11-900 (issued December 6, 2011).

⁶ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁷ 20 C.F.R. § 10.703(a)(i).

⁸ *Id.* at § 10.703(c).

⁹ *Id.*

¹⁰ *Angela M. Sanden*, Docket No. 04-1632 (issued September 20, 2004).

claim were not insignificant -- over \$800,000.00 in accrued wages and continuing compensation payments of \$5,000.00 a month.

As OWCP properly provided appellant an opportunity to comment on the fee request and as OWCP properly considered the factors necessary in evaluating fee requests, (*i.e.*, 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 and customary local charges for similar services),¹¹ the Board finds OWCP properly exercised its discretion in approving a fee of \$100,000.00.¹²

CONCLUSION

The Board finds that OWCP did not abuse its discretion in approving an application for attorney's fee in the hourly rate of \$100.00 for 956 hours or a corrected amount of \$95,600.00.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2010 decision of Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹¹ *Supra* note 8.

¹² Although there may be a mathematical miscalculation in reducing the number of hours to reach 1,000 hours, the Board finds that OWCP clearly determined the fee amount should be \$100,000.00 and any mathematical error in reaching that determined amount is harmless.

James A. Haynes, Alternate Judge concurring:

I concur with the holding of the Board affirming, as modified, the decision of OWCP which approves an attorney's fee for appellant's former counsel. However, I would also have affirmed a further reduction in the already reduced fee authorized by OWCP which is further reduced by the Board. I adopt this position because of lapses in the attorney's recordkeeping, client communication and his failure to obtain a written, executed retainer and fee agreement from his client.

Appellant filed an appeal to dispute an attorney's fee approved by OWCP. The standard of review for the Board is whether OWCP abused its discretion in approving the fee.

I rely on the factual history found in the majority opinion. The record contains no dispositive evidence of an agreed hourly rate for legal services. Appellant claimed that his attorney was entitled to \$100.00 an hour. The attorney claimed \$250.00 an hour. The record contains no dispositive evidence of the number of hours counsel worked. Appellant asserted that his attorney should be compensated for only 253.75 hours. The attorney claimed 1,064 hours.

The record is clear that appellant retained counsel to represent him in his claim in early 1995 and that counsel continued to do so until May 2007. Both parties agree that some fee is owed. Objectively, it is clear that some fee has been earned. Appellant and counsel agree that they originally attempted to create a contingent fee relationship and acted for some period of time on the assumption that they had one. They never altered that understanding with any written agreement although contingent fees are forbidden in claims brought under FECA.¹ While represented by counsel, appellant prevailed in his claim and received a substantial retroactive award of benefits.

In support of his fee petition, counsel was unable to establish an agreed hourly rate for his services. Counsel was also unable to present an accurate, contemporaneous account of his work for the 13 years he represented appellant. The record does not appear to contain any regularly provided, periodic billing statements or progress reports from the attorney to his client. The attorney presented only estimated hours for his work over a multi-year period.

OWCP determined a reasonable fee by obtaining the opinion of a representative of the Puerto Rico chapter of the Federal Bar Association. It determined that the actual hours to be compensated by an analysis of the assertions of appellant and his attorney and the incomplete records which were available and appeared most accurate. OWCP also decided that a case which was litigated more than 13 years was probably more complex than most.

¹ The record indicates that appellant and his attorney agreed that appellant would provide a \$1000.00 retainer. It is a misdemeanor violation for an attorney to collect a fee which has not been submitted as a fee petition to OWCP or ECAB and approved. 20 C.F.R. 10.702 (2011). The Board has constantly maintained a rule that requires an independent evaluation of fee petitions before an attorney may to collect any fee. This rule is discussed and explained in the various opinions. See: *Keith L. Beaver*, 30 ECAB 216 (1978).

It is reasonable to conclude that the fee approved by OWCP might, on this thin and conflicted record, have been more or less.² But the Board has held that, while it might set a fee higher or lower, its review is limited to whether OWCP properly exercised its discretion.³ Only if an abuse of discretion is found can the Board revise an attorney's fee award or remand the case to OWCP for further development.⁴

The applicable regulations list criteria for OWCP to apply in its consideration of the value of legal representation and the appropriate attorney fee.⁵ That list is found in the legal precedent of the majority and is reproduced here:

- (1) The 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.
- (4) The customary local charges for similar services.

The regulations share and adopt the substance of standards found in Board decisions.⁶ Because of the similarity between Board case law and the text of the regulations, Board opinions which predate the current regulations may be cited with confidence on the issue of attorney fees.

This opinion is most concerned with the first and most important regulatory criterion. An attorney in active practice has professional obligations which are explicitly established in every jurisdiction which licenses lawyers. Where an attorney fails to keep records of time and cost and also fails to communicate with his or her client, the usefulness of the representation should be questioned. Where an attorney has failed to secure evidence of an agreement with his or her client for the scope cost of the legal work, the attorney places his or her right to compensation at risk.⁷

² The Board has reduced the fee from \$100,000.00 to \$95,600.00 because of a mathematical error by OWCP.

³ *Lucy A. Ponder*, 31 ECAB 560 (1980); *Sander Jacob Burstein*, 27 ECAB 117 (1975).

⁴ *K.F.*, Docket No. 09-2244 (issued June 14, 2010).

⁵ 20 C.F.R. § 10.703(c).

⁶ Compare: *Sander Jacob Burstein*, *supra* note 3; and *John E. Harman*, 41 ECAB 169 (1989). The criteria for evaluating legal services listed in the earlier opinion are repeated with minor changes of wording in the later opinion issued after those criteria were included in the Code of Federal Regulations.

⁷ In a factual situation not unlike this case, the Board found that OWCP had abused its discretion by failing to require an attorney to support the allegations of time and billing rates. The attorney and client had attempted to establish a contingent fee. The lengthy representation lasted from July 1980 to June 1987. The claimant eventually received a substantial retroactive award of benefits and first accepted the fee as stated in the petition but later objected to the amount in an appeal to the Board. *Charles A. Mikalaynas*, 40 ECAB 1277 (1989).

The Board has held that, where the claimant disagrees with the requested fee, OWCP must try to obtain a complete record from the attorney and claimant including a signed retainer or fee agreement, correspondence and billing statements. This information is essential to the evaluation of fee petitions and failure to obtain it may result in remand to OWCP for further development.⁸ The Board has remanded where OWCP has failed to gather and use information regarding fees charged in the local area for similar services.⁹ In other situations the Board has emphasized the importance of a retainer agreement by remanding where OWCP failed to consider it before rendering its decision.¹⁰ This precedent, in particular, should encourage attorneys to obtain agreements which prove their client's consent with regard to client expenses and with regard to the scope of the representation and then to communicate regularly the status of the client's claim and the expenses the client has incurred.

While not cited in the majority opinion, attorneys occasionally refer to the opinion in *V.T.*¹¹ for the proposition that, where an attorney presents a fee petition listing time devoted to various activities, OWCP must provide "clear and convincing evidence" that the assertions of the fee petition are incorrect. This opinion requires some context. Taken at face value, the case might appear to create a presumption of correctness for lawyer's seeking fees and require OWCP to disprove the attorney's assertions. Such a reading would clearly violate the statute and rob OWCP of its discretion to approve petitions. The better reading of this case and others with similar language is that where an attorney provides contemporaneous records that are accurate, detailed and consistent, a fee petition based on those records is more credible than unsubstantiated complaints of an unhappy client. No special presumption is created. The attorney is merely required to support a fee petition and to respond to questions from OWCP if the client challenges the amount requested in the petition. An unsupported fee petition should, under proper circumstances, be reduced or denied.

The petition disputed in this appeal is unsupported by a retainer or fee agreement or periodic communication by counsel with the client. There is other evidence in the record which justifies the fee awarded by the Board but the standards of record-keeping and client contact revealed in this record must raise serious questions about the quality of the professional services provided to appellant. The Board's reduction in the amount requested by counsel in his fee petition is fully justified.

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁸ *L.H.*, Docket No. 09-777 (issued June 28, 2010).

⁹ *Nancy L. Smith*, Docket No. 95-1428 (issued August 15, 1997).

¹⁰ *Yolanda R. Bennage*, Docket No. 00-1048 (issued October 1, 2001).

¹¹ 58 ECAB 133 (2006).