

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

S.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 14-467
Issued: September 26, 2014**

Appearances:
Richard A. Daniels, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

**DECISION AND ORDER
Re: Representative's Fees**

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 26, 2013 the employee's former representative, Richard A. Daniels, filed a timely appeal from a July 18, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying his fee application for services. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this issue.

ISSUE

The issue is whether OWCP abused its discretion by denying the representative's application for approval of \$4,130.00 in fees for services.

On appeal, the representative argued that OWCP did not review the reasonableness of his fees, and did not consider the entire agreement in determining whether this was a contingency fee arrangement.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 21, 2002 the employee, then a 41-year-old clerk, filed a traumatic injury claim alleging that she sustained a displaced fracture of the left knee tripping over a rug. On February 3, 2003 OWCP accepted the claim for fractured left patella. By decision dated March 2, 2010, it denied the employee's claim for a recurrence of disability in March 2009. On April 30, 2010 OWCP denied her claim for a consequential left ankle injury. In a decision dated January 11, 2011, it denied modification of its March 2, 2010 decision.

On January 18, 2011 the employee designated the representative to handle all matters with regard to her claim with OWCP. The representative submitted a letter dated January 21, 2011 advising OWCP of his representation.

By decision dated February 8, 2012, OWCP denied modification of the March 2, 2010 decision, after considering the additional medical evidence submitted on the employee's behalf.

The employee submitted a letter to OWCP dated February 15, 2012 stating that the representative was no longer representing her and that she had retained an attorney. In a letter dated April 9, 2012, the representative submitted a fee application for services rendered to the employee. He noted that he had been unable to contact the employee in order to obtain approval of the fees. The representative submitted an itemized description of services performed from January 21, 2011 through February 20, 2012 for a total of \$4,130.00 at \$295.00 a hour.

In a June 25, 2012 letter, OWCP advised the employee that it had received a fee request. It offered her an opportunity to comment on the request and state her view as to whether the fee charged was reasonable and appropriate. The employee disagreed with the fee of \$4,130.00. She stated that this fee was not reasonable or appropriate. The employee quoted the retainer agreement as stating, "In the event we are unsuccessful in obtaining a recovery on your behalf, no fees will be assessed." She noted that the representative did not obtain a recovery on her behalf and asserted that no fees should be assessed. The employee stated that she was dissatisfied with his services as the correspondence between him and OWCP was not factually correct, she felt that she gathered the necessary information rather than the representative and that he did not inform her regarding her claim. She alleged that the representative was incompetent and negligent in failing to file an appeal of her January 11, 2010 employment injury. The employee stated that he did not discuss filing an appeal on her behalf following the February 8, 2012 denial despite charges to that effect and that he did not communicate with a referring attorney *via* e-mail as listed.

In a letter dated January 13, 2011, the representative stated that fees were based entirely on time committed to the employee's case as well as any costs incurred in the course of providing services. He stated, "Should we be able to achieve a favorable result, you will be billed for the time spent on those endeavors, not to exceed 25 percent, plus costs." The representative provided the agreement to provide advocate services dated January 18, 2011 which provided that he was to be paid at \$295.00 a hour and that the employee did not pay a retainer. The agreement stated, "AFE guarantees that the total bill for the time expended will not exceed 25 percent of any gross amounts recovered for you.... *In the event we are unsuccessful in obtaining a recovery on your behalf, no fees will be assessed.*" (Emphasis in the original.)

The agreement further stated that the employee was responsible for any and all costs and expenses incurred to properly represent her, including mailing costs, travel expenses, medical evaluation and treatment and costs for reproduction of documents. The agreement in paragraph 6 states, "Termination of services by you: you may terminate representation by AFE at any time, for any reason, by notifying AFE in writing. However, unless your reason for terminating this agreement is reasonably justified and due to dissatisfaction with AFE's service, AFE reserves the right to bill you for the time expended in furtherance of your claim."

In a letter dated July 30, 2012, OWCP stated that the representative submitted a fee application in the amount of \$4,130.00 which was accompanied by a signed statement from the employee indicating agreement with the requested fee amount. It stated that where a fee application is accompanied by a signed statement indicating a claimant's agreement with the fee, the fee request application was deemed approved.

On August 2, 2012 OWCP approved a fee in the amount of \$4,130.00 for services rendered from January 21 through July 30, 2011 and provided appeal rights.

The employee requested an oral hearing before an OWCP hearing representative regarding the fee approval on August 22, 2012. In support of her request, she submitted correspondence from the representative to which she had added handwritten corrections as well as resubmitting the fee application, agreement and agreement letter.

On October 11, 2012 OWCP accepted the employee's claim for fracture of the left patella based on a February 16, 2012 claim for recurrence of disability.

By decision dated October 11, 2012, an OWCP hearing representative set aside the August 2, 2012 attorney fee decision and noted that the employee had not approved the representative's fees. He further noted that OWCP had not reviewed the representative's bills to determine whether or not his fees were reasonable. The hearing representative further stated that the representative was not an attorney and was charging an hourly rate of \$295.00 identical to the rate charged by attorneys in the area. Finally the hearing representative directed OWCP to request an explanation from the representative regarding the agreement which "appears to indicate" that there will be no charges in the event of an unsuccessful appeal.

In a letter dated October 17, 2012, OWCP requested a response to the issues raised by the hearing representative. The representative responded on October 24, 2012 and stated that OWCP's hearing representative exceeded its authority as any issue regarding the content of an agreement between him and the employee did not fall under the discretion or review of OWCP. He further stated that the employee did not provide details or explanation for her dissatisfaction with his services. Finally, the representative stated that he was an expert in all matters involving FECA and that his hourly rate should not be compared to that of state workers' compensation attorneys.

In a letter dated October 25, 2012, OWCP found that the fees in the amount of \$4,130.00 were not deemed reasonable. It reviewed the agreement and noted that the representative stated that in the event he was unsuccessful no fees would be assessed. OWCP noted that the employee's claim was denied and that she did not recover any compensation during the time she

retained his services. It directed the representative to review his bill and reconsider the total cost. On July 3, 2013 the representative stated that he would not revise his bill and requested a formal decision from OWCP.

By decision dated July 18, 2013, OWCP disapproved of fees in the amount of \$4,130.00 finding that the explanation provided did not support the fees after the employee received unsuccessful decisions.

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.² 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.

Pursuant to 20 C.F.R. § 10.703(a), a representative must submit a fee application to OWCP, which includes an itemized statement identifying his or her hourly rate, the number of hours worked, the specific work performed and the total amount charged for the representation minus administrative costs. The application shall also contain a signed statement from the claimant either agreeing or disagreeing with the amount charged and acknowledging that he or she, not OWCP, is responsible for paying the fee and other costs.³ 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.⁴ 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: (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 (5) customary local charges for similar services.⁵ Contingency fee arrangements are not recognized under FECA.⁶

ANALYSIS

The Board finds that OWCP did not abuse its discretion by denying any representative fee in this case. OWCP and its hearing representative properly found that the representative and

² *J.P.*, Docket No. 11-953 (issued June 19, 2012); *C.H.*, Docket No. 10-987 (issued March 22, 2011) and *L.H.*, Docket No. 11-900 (issued December 6, 2011).

³ 20 C.F.R. § 10.703(c).

⁴ *Id.*

⁵ *Id.*

⁶ *J.P.*, *supra* note 2; *Angela M. Sanden*, Docket No. 04-1632 (issued September 20, 2004).

the employee had entered into an improper contingency fee agreement.⁷ A contingency fee is defined as a payment in which a client agrees to pay a representative a percentage of any monies paid or recovered as part of an OWCP claim.⁸

The agreement submitted by the representative and the employee specifically stated that the total bill for the time expended will not exceed 25 percent of any gross amounts recovered and that in the event the representative was unsuccessful in obtaining a recovery, no fees would be assessed. As found by OWCP the agreement signed by the employee clearly is a contingency fee agreement which is not allowed under FECA and OWCP procedures. The employee did not agree with the requested fee of \$4,130.00 and provided her reasons for disagreement before OWCP and the hearing representative. OWCP is required by its regulations and procedures to evaluate these objections and issue a formal decision that approves, modifies or denies the fee.⁹ The Board finds that in this case, OWCP followed its regulations and procedures and denied the fee on the basis that it was an improper contingency fee.

CONCLUSION

The Board finds that OWCP did not abuse its discretion in denying approval of the \$4,130.00 fee requested.

⁷ 20 C.F.R. § 10.701(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Representative Services*, Chapter 2.1200.5.b. (June 2012).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Representative's Services*, Chapter 2.1200.5.b (June 2012).

⁹ *Id.* at Chapter 2.1200.6.f; 20 C.F.R. § 10.703(c).

ORDER

IT IS HEREBY ORDERED THAT the July 18, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board