



## **FACTUAL HISTORY**

On September 21, 2000 appellant, then a 54-year-old real estate staff appraiser, filed an occupational disease claim alleging an emotional condition due to factors of her federal employment. OWCP denied her claim on March 26, 2001. The Branch of Hearings and Review affirmed the denial on November 29, 2001. Appellant appointed C.B. Weiser as her counsel before OWCP on September 4, 2002. Mr. Weiser requested reconsideration on her behalf on November 16, 2002. By decision dated February 2, 2006, OWCP denied modification of its prior decisions. Mr. Weiser requested reconsideration on January 29, 2007 and by decision dated January 4, 2008, OWCP accepted appellant's claim for depressive disorder and generalized anxiety disorder. On April 24, 2008 appellant elected FECA benefits effective January 5, 2001.

Mr. Weiser submitted to OWCP a February 7, 2010 request for approval of counsel fees in the amount of \$14,490.00 for 41.4 hours at \$350.00 per hour, plus expenses (postage and copy charges) of \$118.61, for a total amount of \$14,608.61. He submitted a statement from appellant wherein she disagreed that the fees were reasonable or appropriate. Mr. Weiser stated that his customary hourly rate for work before OWCP was \$350.00. His fee covered work from November 7, 2000 through September 6, 2008.

On February 22, 2011 OWCP informed appellant that it had received a request for counsel fees in the amount of \$14,608.61 for the period November 7, 2000 through September 6, 2008. It advised, however, that as counsel had not been appointed to represent her before OWCP until September 4, 2002, it would only consider fees charged after that date. OWCP further noted that it was not responsible for approving fees charged for expenses, such as copy charges or postage. It allowed appellant an opportunity to comment on the fee request and address why she did not believe that the fees were reasonable or appropriate.

Appellant submitted a letter dated March 4, 2011 disagreeing with the fee in the amount of \$14,608.61. She stated that the fee was not reasonable or appropriate, that Mr. Weiser's hourly rate of \$350.00 was excessive as her claim was not complex, and that he performed the work on her claim in his office. Appellant stated that he did not follow up on reconsideration requests on her behalf and that she was required to contact her senator in order to get action on her claim. She alleged that Mr. Weiser performed more activities after her claim was approved than he did in an effort to get her claim approved. Appellant also claimed that he spent four hours reviewing her claim after it had been accepted.

By decision dated March 10, 2011, OWCP approved counsel fees in the amount of \$11,830.00 for services rendered from September 5, 2002 to September 6, 2008.<sup>2</sup> It noted that appellant had disagreed with the fee amount and had argued that the hourly fee was excessive because her claim was not complex. OWCP found, however, that the hourly rate was not excessive, that it was her responsibility to monitor fees being charged to review actions taken by

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<sup>2</sup> The number of hours charged prior to September 5, 2002 was 7.6 hours. OWCP deducted those hours from the total of 41.4 hours. This resulted in a total of 33.8 hours x \$350.00 per hour to equal an amount of \$11,830.00. In its decision it refers to the total number of hours as 17.3 x \$350.00. The reference to 17.3 hours is clearly a typographical error.

her counsel, and that she should have terminated his services if she had been dissatisfied. It noted that payment of the approved fee was appellant's responsibility.

Appellant requested reconsideration of this decision on February 15, 2012. She resubmitted her March 2, 2011 letter disagreeing with the fee and noted the error in the March 10, 2011 decision, which noted that 17.3 hours multiplied by Mr. Weiser's fee of \$350.00 was \$6,055.00 rather than the \$11,830.00. Appellant again alleged that, the hourly rate was excessive as he had performed the work on her claim in his office, that the claim was routine, that the issues were not complex, and that it did not require special expertise. She alleged that the hours included in the fee request were excessive, redundant, or otherwise unnecessary.

In a decision dated September 25, 2012, OWCP denied modification of the March 10, 2011 decision. It reviewed the request for counsel fees in the amount of \$11,830.00 under the procedural requirements and found the fees appropriate.<sup>3</sup> OWCP noted that appellant had not dismissed him as her counsel.

Appellant requested reconsideration by letter dated September 20, 2013, postmarked on September 23, 2013, and received by OWCP on October 1, 2013. She alleged that the claims examiner erred when it disregarded, dismissed, and gave no weight to her arguments. Appellant further noted that OWCP erred as to the time Mr. Weiser spent on her claim and noted that he spent 4.2 hours reviewing the updated OWCP claim from July 7, 2003 to March 3, 2008 after her claim had already been approved which was unnecessary.

With her request for reconsideration, appellant provided an earlier September 8, 2008 bill that the counsel had provided to her in the amount of \$47,838.20, which the counsel claimed was for a 25 percent contingency fee. The fee statement calculated all the payments she had received from OWCP ("Net Payment on Benefit Statement") to be \$191,352.81 and demanded payment for 25 percent of that amount to equal \$47,838.20. Appellant also provided to OWCP her response to the counsel, dated September 11, 2008, wherein she refused to pay this fee and informed him that a contingency fee was prohibited under FECA. Mr. Weiser then provided an accounting of the actual time he spent on the case and his billable rate of \$350.00 an hour.

Mr. Weiser informed OWCP by letter dated November 14, 2013 that appellant had cancelled his representation effective September 19, 2013.

By decision dated December 20, 2013, OWCP denied appellant's request for reconsideration finding that it had not been timely filed and had not established clear evidence of error on the part of OWCP.

### **LEGAL PRECEDENT**

Under section 8128(a) of FECA<sup>4</sup> OWCP has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in

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<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1600.6(f) (June 2012).

<sup>4</sup> 5 U.S.C. § 8128(a).

accordance with section 10.607 of the implementing federal regulations.<sup>5</sup> Section 10.607 provides that “An application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought.”<sup>6</sup> In *Leon D. Faidley, Jr.*,<sup>7</sup> the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict OWCP from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. OWCP is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of OWCP thereby requiring merit review of the claimant’s case.

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates “clear evidence of error” on the part of OWCP.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>13</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of OWCP’s decision.<sup>14</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part

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<sup>5</sup> 20 C.F.R. § 10.607.

<sup>6</sup> *Id.*

<sup>7</sup> 41 ECAB 104, 111 (1989).

<sup>8</sup> *Supra* note 5; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>9</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>10</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> *See Jesus D. Sanchez*, *supra* note 8.

<sup>12</sup> *See supra* note 10.

<sup>13</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>14</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> 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 (4) customary local charges for similar services.<sup>18</sup> Contingency fee arrangements are not recognized under FECA.<sup>19</sup>

### ANALYSIS

The last merit decision of OWCP in this case was dated September 25, 2012. Appellant submitted a request for reconsideration received by OWCP on October 1, 2013 more than one year after the September 25, 2012 merit decision. The Board notes that this request was not received by OWCP within one year and therefore her request for reconsideration was untimely.<sup>20</sup> The Board further finds that appellant's request for reconsideration failed to establish clear evidence of error on the part of OWCP.

Appellant requested reconsideration and noted the mathematical errors in OWCP's initial merit decision. She reiterated that her case was not complex and that Mr. Weiser had not provided any services such that his hourly rate was appropriate. Appellant reiterated that OWCP had not properly weighed the services and the fees charged by him in approving a counsel's fee in the amount of \$11,830.00. On reconsideration, she also provided documents which establish that on September 8, 2008 Mr. Weiser had initially attempted to obtain payment from her in the amount of \$47,838.20 based on a 25 percent contingency of \$191,352.81, all the payments she

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<sup>15</sup> *Gregory Griffin*, 41 ECAB 458, 466 (1990).

<sup>16</sup> 20 C.F.R. § 10.703(c).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *J.P.*, Docket No. 11-963 (issued June 19, 2012); *Angela M. Sanden*, Docket No. 04-1632 (issued September 20, 2004).

<sup>20</sup> 20 C.F.R. § 10.607(a). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees Compensation System. *Supra* note 3 at Chapter 2.1602.4b (October 2011).

had received from OWCP or, as he termed it, “Net Payment on Benefit Statement.” Appellant properly refused to pay this fee and correctly informed him that a contingency fee was prohibited under FECA. Mr. Weiser then revised his bill to provide an accounting of the actual time he spent on the case at his billable rate of \$350.00 an hour. Appellant again objected to the rate and the number of hours expended, particularly those hours spent reviewing her claim after it was accepted. OWCP reviewed these statements and found that no evidence of clear evidence or error or abuse of discretion had been established in its approval of the counsel fee in the amount of \$11,830.00 for 33.8 hours of work.

The Board finds that appellant’s documents and arguments on reconsideration are not sufficient to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of OWCP’s decision. OWCP considered the services rendered and found that the hourly rate charged was typical for the area. Appellant has not submitted any evidence establishing that OWCP made a clear error in reaching its conclusions regarding the reasonableness of the counsel fees in this case.

The fact that appellant’s counsel had previously attempted to collect on a contingency fee agreement is not the question before the Board. The Board must determine whether clear evidence of error was established in OWCP’s approval of a request for counsel fees for a specific amount of hours at a specific fee rate. The Board finds that appellant has provided no evidence to establish error in the handling of this matter. Although not before the Board, however, as an ancillary matter the Board finds that the usage of contingency fees between representatives and clients is specifically prohibited both for cases before OWCP and before the Board.<sup>21</sup>

### CONCLUSION

The Board finds that appellant’s request for reconsideration was untimely and that she has failed to establish clear evidence of error by OWCP in approving counsel fees in the amount of \$11,830.00.

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<sup>21</sup> 20 C.F.R. § 10.702(a); and 20 C.F.R. § 501.9(e); and FECA Circular 09-03 (June 1, 2009).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed.<sup>22</sup>

Issued: November 19, 2015  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>22</sup> Michel E. Groom, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective December 27, 2014.