

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

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<b>R.P., Appellant</b>	)	
	)	<b>Docket No. 18-0681</b>
<b>and</b>	)	<b>Issued: November 1, 2018</b>
	)	
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>CUSTOMS &amp; BORDER PATROL, Newark, NJ,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 9, 2018 appellant filed a timely appeal from an August 16, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether OWCP properly approved attorney fees in the amount of \$5,117.00 for services rendered from May 3, 2013 to July 10, 2015.

**FACTUAL HISTORY**

On November 14, 2011 appellant, then a 59-year-old officer, filed a traumatic injury claim (Form CA-1) alleging that earlier that day, while at work, he lost his grip on a ship's ladder and

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

fell approximately six feet onto a metal deck. OWCP accepted the claim for a torn right rotator cuff and right shoulder contusion. On January 25, 2012 appellant underwent authorized arthroscopic right rotator cuff repair with biceps tenodesis, subacromial decompression, and debridement. He remained off work following the January 25, 2012 surgery. OWCP paid appellant compensation for total disability commencing January 12, 2013 on the supplemental compensation rolls. It later expanded acceptance of the claim to include bilateral shoulder and rotator cuff sprains.

On May 6, 2013 appellant authorized Thomas R. Uliase, Esq., of Uliase & Uliase, to represent him before OWCP. Counsel requested a copy of the complete case record.

On May 7, 2013 counsel requested that OWCP place appellant on the periodic compensation rolls due to the seriousness of the accepted injury.

In late May 2013, OWCP determined that it was necessary to obtain a second opinion in the case and scheduled an appointment with a medical specialist. In a May 31, 2013 letter, counsel requested that OWCP provide proof that it had selected the second opinion specialist according to applicable OWCP procedures and Board precedent. He also requested a list of three qualified specialists in appellant's commuting area from which appellant could choose an examining physician.

In a letter dated June 4, 2013, counsel requested that OWCP expand acceptance of the claim to include a left rotator cuff tear and full-thickness tears of the right supraspinatus and biceps tendons. He included recent medical reports and a summary of the relevant findings.

In a letter dated December 18, 2013, counsel notified OWCP that it had paid appellant compensation at an incorrect rate from January 12 to March 8, 2013. He requested that OWCP issue appropriate retroactive compensation. Counsel again requested that OWCP place appellant's case on the periodic compensation rolls due to the seriousness of the accepted injuries and ongoing difficulties with the employing establishment's processing of appellant's claims for compensation (Form CA-7). He reiterated this request in a letter dated April 25, 2014.

In a letter dated June 13, 2014, counsel requested that OWCP pay appellant compensation for the period December 29, 2013 to April 19, 2014 as he had been found entitled, but had not yet been paid for the entire period.

In a letter dated June 26, 2014, counsel requested that OWCP authorize appellant's physician's request for Synvisc injections to the right shoulder. He attached the physician's letter of necessity.

On February 3, 2015 OWCP issued retroactive compensation for the periods December 29, 2013 to March 22, 2014 and April 6 to 19, 2014.

On February 27, 2015 the employing establishment offered appellant a modified position, but did not include information regarding the work schedule or rate of pay. Counsel responded by letter dated March 9, 2015, which asserted that the job offer failed to conform to specific sections of OWCP's procedures.

In a letter dated May 4, 2015, counsel requested that OWCP authorize appellant's physician's request for Orthovisc injections to the left shoulder. He attached the physician's letter of medical necessity.

In letters dated May 12, 2015, counsel advised OWCP that it had failed to notify him of a second opinion examination scheduled for May 19, 2015. He requested that it provide him with copies of all correspondence to appellant and the selected specialist. Counsel also requested that OWCP provide a list of three qualified physicians in appellant's commuting area so that he could choose one to conduct the examination.

In a letter dated June 11, 2015, counsel requested that OWCP pay appellant compensation for intermittent periods from May 26, 2014 through May 31, 2015 which had not yet been paid.

In a letter dated June 18, 2015, counsel requested that OWCP approve appellant's physician's request to authorize Synvisc injections to the left shoulder. He reviewed a May 19, 2015 second opinion report and noted that the specialist had also recommended viscosupplementation injections. Counsel again requested that OWCP expand acceptance of the claim to include bilateral rotator cuff arthropathy as recommended by the second opinion specialist.

In a letter dated June 26, 2015, counsel again requested that OWCP pay appellant all compensation due and owing from June 20, 2014 onward. He noted that OWCP's compensation tracking function listed several periods as paid whereas no compensation payments had been issued.

On July 7 and 10, 2015 OWCP issued retroactive compensation for the period December 29, 2012 to June 13, 2015.

In a letter dated July 20, 2015, counsel requested that OWCP issue a formal decision regarding its denial of requested viscosupplementation injections.

In letters dated July 28 and August 7, 2015, appellant stated that he no longer retained his legal counsel. He contended that counsel's July 21, 2015 billing statement for \$5,692.50 was unreasonable and that he was generally dissatisfied with counsel's representation.

OWCP placed appellant's case on the periodic rolls effective September 20, 2015.

On September 14, 2015 counsel submitted a fee petition in the amount of \$5,692.50 for services rendered from May 3, 2013 to July 10, 2015. The fee petition noted separate categories for attorney, paralegal, secretarial, and law clerk time, with the hours worked and the hourly rate for each individual's services, as follows: 15.81 hours of attorney time at rates from \$200.00 to \$300.00 an hour; 5.29 hours of paralegal time at \$150.00 an hour; 7.52 hours of secretarial time at \$75.00 an hour, and 1.25 hours of law clerk time at \$200.00 an hour. The fee petition listed the specific services provided and the time spent on each activity. Many of the itemized services were for correspondence to OWCP and review of communications from OWCP.

OWCP sent appellant an October 30, 2015 letter, noting that counsel had submitted a request for authorization of \$5,692.50 in attorney fees. Appellant was provided an opportunity to

review the fee request, and was informed that if he did not respond within 30 days, it would be assumed he did not wish to comment. OWCP indicated it would then approve a fee which it determined to be fair and reasonable.

In a letter dated November 24, 2015, appellant asserted that he was opposed to the attorney fee request as counsel did nothing to further his claim. He contended specifically that he should not be billed for file reviews. Appellant noted that he periodically prohibited counsel from working on various issues in his compensation claim as he wished to advocate on his own behalf or request assistance from his elected representatives.

In response, counsel submitted his August 12, 2015 letter to appellant, explaining that had appellant not prohibited him from pursuing retroactive compensation, counsel could have obtained payment in a more timely manner.

By decision dated February 1, 2016, OWCP approved the fee petition in the amount of \$5,117.00, out of the requested \$5,692.50 as reasonable, as counsel had performed the work for which he had been retained. It excluded fees for counsel's letters to OWCP on the following dates as the correspondence had not been imaged into the electronic case record: May 3, 2013 (three letters); May 6, 2013; May 31, 2013 (duplicate); June 3, 2013; July 11, 2013; February 14, 2014; February 20, 2014; April 21, 2014; June 10, 2014; May 7, 2015.

On March 2, 2016 appellant requested a telephonic oral hearing before an OWCP hearing representative. The hearing was held on October 3, 2016. At the hearing, appellant contended that OWCP did not respond to any of counsel's correspondence and that the services provided were generally of no effect. He also asserted that counsel did not completely obey his directives to cease pursuing issues in his claim. Appellant also argued that the retroactive compensation he was paid was not in fact retroactive compensation because it was owed to him. He submitted June 4 and 21, 2013 letters from counsel regarding how to request medical records from his treating physicians and advising him that the firm did not pursue issues of medical malpractice.

Following the hearing, appellant submitted an October 15, 2016 statement generally asserting that counsel's services were of no effect and that the fees charged were excessive or unreasonable. He submitted copies of letters to and from counsel regarding the January 25, 2012 surgical procedure and his allegations of medical malpractice. Appellant also provided copies of numerous letters from counsel in May and June 2013 instructing him how to obtain the medical reports necessary for OWCP to authorize requested treatment.

By decision dated December 13, 2016, an OWCP hearing representative affirmed OWCP's February 1, 2016 decision which approved counsel's fee petition in the amount of \$5,117.00. The hearing representative found that the charges were reasonable and appropriate given the nature and complexity of the case, and the customary charges for a representative of similar background and experience.

In a letter dated February 14, 2017, counsel notified appellant of his intention to submit the attorney fee to a collection process under applicable state law.

On March 21, 2017 appellant requested reconsideration. He alleged that counsel wrote voluminous correspondence to inflate the bill and that his services were of no effect in his claim.

Appellant provided a copy of an informational booklet from counsel with suggestions on how to draft effective correspondence to OWCP and medical providers. He also submitted copies of correspondence from counsel previously of record.

By decision dated August 16, 2017, OWCP affirmed its prior approval of counsel's fee request in the amount of \$5,117.00. It found that appellant's March 21, 2017 statement and copies of counsel's correspondence did not establish that the fee had been approved in error.

### **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.<sup>2</sup> 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.<sup>3</sup>

Section 10.703 of the Code of Federal Regulations provides in pertinent part that a representative must submit a fee application, which includes an itemized statement showing the hourly rate, number of hours worked, and the work performed.<sup>4</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>5</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 services for a representative of similar background and experience.<sup>6</sup>

### **ANALYSIS**

The Board finds that OWCP did not abuse its discretion by approving attorney fees in the amount of \$5,117.00 for services rendered from May 3, 2013 to July 10, 2015.

As discussed above, the Board does not determine the fee for representative services before OWCP. The Board reviews the issue to determine whether there was an abuse of discretion by

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<sup>2</sup> *C.H.*, Docket No. 17-0623 (issued June 27, 2017); *W.H.*, Docket No. 16-1297 (issued May 9, 2017); *L.H.*, Docket No. 11-900 (issued December 6, 2011); *C.H.*, Docket No. 10-987 (issued March 22, 2011); *Eric B. Petersen*, 57 ECAB 680 (2006); *Sharon Edwards*, 56 ECAB 749 (2005).

<sup>3</sup> *Claudio Vazquez*, 52 ECAB 496 (2001).

<sup>4</sup> 20 C.F.R. § 10.703(a)(1).

<sup>5</sup> *Id.* at § 10.703(c).

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

OWCP. In this case OWCP approved \$5,117.00 of the requested fee of \$5,692.50, noting that appellant had provided general allegations that he felt counsel's services were ineffective. Having reviewed the evidence, the Board does not find an abuse of discretion by OWCP.

OWCP reviewed the four factors under 20 C.F.R. § 10.703(c). As to usefulness of services, the Board notes that, on May 6, 2013, appellant authorized counsel to represent him before OWCP. Following his review of the case record, counsel requested on May 9, 2013 that appellant's case be placed on the periodic compensation rolls. He requested on May 31, 2013 that OWCP follow its procedures in selecting a second opinion physician and requested on June 4, 2013 that OWCP expand acceptance of the claim to include additional conditions. Counsel provided updated medical reports from appellant's physician in justification of the request for expansion.

Counsel also sent OWCP six letters dated from December 18, 2013 to June 26, 2015 requesting payment of retroactive compensation, with detailed explanations of the periods owed. OWCP issued the retroactive compensation on February 3, July 7, and July 10, 2015.

Additionally, counsel submitted a May 4, 2015 letter which detailed the deficiencies of a modified-duty job offer. OWCP took no additional action on the job offer.

Counsel also wrote letters from May 12 to July 12, 2015 regarding selection of second opinion physicians and requesting authorization for viscosupplementation injections.

As to the nature and complexity of the case, the issues involved included medical evidence, pay rate, periods of eligibility for compensation, and a modified-duty job offer. Appellant alleged that counsel's services did not obtain any favorable results and that he inflated his bill by writing numerous useless letters. He did not provide evidence to establish that counsel failed to perform the itemized services as authorized. OWCP found the time spent on activities, with the exception of the letters which were not imaged into the electronic case record, was not unreasonable, and the Board finds no abuse of discretion in this regard. It found that the hourly rates listed for attorneys, secretaries, paralegals, and a law clerk were customary and no contrary evidence was presented. The Board thus finds no abuse of discretion in this regard.

The Board has frequently held that it will not interfere with or set aside a determination by OWCP of a fee for legal services unless the determination is clearly in error.<sup>7</sup> OWCP has the discretion to approve attorney fees, and in this case, the Board finds no abuse of discretion.<sup>8</sup>

### **CONCLUSION**

The Board finds that OWCP did not abuse its discretion in approving attorney fees of \$5,117.00.

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<sup>7</sup> *William Arthur Burney*, 29 ECAB 253 (1978).

<sup>8</sup> *See C.H., supra* note 2; *R.H.*, Docket No. 14-0429 (issued July 28, 2014).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 16, 2017 is affirmed.

Issued: November 1, 2018  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board