

ISSUE

The issue is whether OWCP abused its discretion in approving a fee in the amount of \$4,514.75 for services rendered by appellant's prior counsel from March 8, 2012 through May 8, 2014.

FACTUAL HISTORY

On September 12, 2011 appellant, then a 53-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that on September 10, 2011 he sustained a left Achilles tendon tear while assisting in an arrest. He stopped work on September 12, 2011. OWCP accepted the claim for left Achilles tendon rupture. Appellant returned to full-time, light-duty work on January 3, 2012.

On March 22, 2012 OWCP received an undated form signed by appellant authorizing his then-counsel, Thomas R. Uliase, Esq., to represent him before OWCP.

On October 25 and November 12, 2012 appellant's then-counsel submitted reports from Dr. Nicholas Diamond, an osteopath specializing in pain medicine, dated July 25, 2012 and revised on October 25, 2012. In these reports, Dr. Diamond provided appellant's physical examination findings and found that appellant had seven percent permanent impairment of the left lower extremity pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

On November 20, 2012 appellant's then-counsel submitted a claim for a schedule award (Form CA-7), signed by appellant on November 12, 2012.

By decision dated March 31, 2013, OWCP denied appellant's schedule award claim, finding that he had not reached maximum medical improvement (MMI) as he had filed a new traumatic injury claim in OWCP File No. xxxxxx417, wherein he alleged that he had reinjured his left Achilles tendon during a fall on November 15, 2012.

In a letter dated July 29, 2014, appellant advised OWCP that then-counsel was no longer authorized to represent him.

On August 14, 2014 prior counsel submitted a fee petition in the amount of \$4,514.75 for services rendered from March 8, 2012 through May 8, 2014 and \$537.50 in additional fees for medical reports and records/copies/reports. The fee petition noted that the hours spent as: 4.18 hours for Carolyn B. Uliase, at an hourly rate for counsel's services of \$275.00 per hour; 7.97 hours for Thomas R. Uliase at an hourly rate for counsel's services of \$300.00 per hour; 1.24 hours for Alisha M. Flynn at an hourly rate for a paralegal's services of \$150.00 per hour; 1.35 hours for Janet F. Kennedy at an hourly rate for a paralegal's services of \$150.00 per hour; 1.08 hours for William R. Headington at an hourly rate for a paralegal's services of \$150.00 per hour; 0.71 hours for Cheryl A. Leonard at an hourly rate for a secretary's services of \$75.00 per hour; 1.36 hours for Donna M. Rahter at an hourly rate for a secretary's services of \$75.00 per hour; 3.10 hours for

³ A.M.A., *Guides* (6th ed. 2009).

Mary Ann Lamanteer at an hourly rate for a secretary's services of \$75.00 per hour; 0.34 hours for Stacy L. Issel at an hourly rate for a secretary's services of \$75.00 per hour; and 0.68 hours for Veronica A. Jacovini at an hourly rate for a secretary's services of \$75.00 per 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 medical providers and review of communications from OWCP and medical providers. Prior counsel noted on a cover sheet that he had attempted to contact appellant without success. He also noted that he would assume the fee had been approved if there was no response within 30 days.

In a September 19, 2014 letter, OWCP advised appellant's prior counsel that he had included other charges in addition to the charges for professional services rendered. It requested appellant's prior counsel to submit a fee request that did not include expenses. OWCP also informed prior counsel that he could not assume the fee had been approved until it was reviewed and he was informed that it was approved.

On September 26 and November 3, 2014, 2014 prior counsel forwarded a revised attorney fee petition claiming \$4,514.75 for services rendered from March 8, 2012 through May 8, 2014.

In a January 14, 2015 letter, OWCP informed appellant of prior counsel's request for authorization for payment of \$4,514.75 in attorney fees and provided him an opportunity to review the fee request. It informed appellant that, if he did not respond by February 12, 2015, it would be assumed he did not wish to comment and the fee would be approved as fair and reasonable. A copy of the revised fee petition dated May 14, 2014 was attached.

In a letter dated February 10, 2015, appellant objected to the fee petition. He asserted that OWCP had forwarded him an unsigned invoice from his prior counsel and that he had not received a copy of the fee petition itself or any supporting information submitted by his prior counsel. Appellant argued that the invoice should not be approved as it was inconsistent with 20 C.F.R. §§ 10.700 *et seq.*

OWCP received letters dated March 22 and April 1, 2013 from prior counsel. The March 22, 2013 letter advised appellant that, in light of his November 15, 2012 new injury, his schedule award claim could not be pursued at that time. His prior counsel requested appellant to provide an update on the status of the November 15, 2012 injury and requested that appellant sign an authorization for prior counsel to work on the November 15, 2012 injury as it appeared to be an aggravation of the prior injury. Prior counsel, in an April 1, 2013 letter, responded to appellant's March 25, 2013 fax and March 28, 2013 telephone conversation. Prior counsel reminded appellant that the firm did not represent him on his November 15, 2012 injury and advised that he should utilize the appeal request form on the denial of his schedule award claim and request an oral hearing within 30 days of the decision.

In a January 30, 2014 letter, prior counsel referenced a January 21, 2014 conversation regarding appellant's pending schedule award. She noted that appellant was represented by someone else for the November 15, 2012 injury claim. Prior counsel advised appellant that, per his request, no further action would be taken on his schedule award claim for his September 20, 2011 injury.

Appellant's prior counsel, in a March 21, 2014 letter, advised appellant that, if he did not respond within 30 days, the firm would assume that he no longer wished to pursue his schedule award under the current claim. If there was no response within 30 days, appellant's file would be closed and a bill for services rendered to that date would be sent to him.

In a May 12, 2014 letter, appellant's prior counsel noted that there had been no response to the March 21, 2014 letter. Appellant was advised that the firm was no longer representing him and attached a bill for services rendered to date.

In a June 23, 2014 letter, appellant's prior counsel advised that appellant had an outstanding obligation of \$5,052.25 and intended to institute a suit to recover fees if no check was received. Appellant was advised that he could pursue Fee Arbitration under the State of New Jersey Rules Governing the Courts if he believed a valid dispute regarding fee services existed.

On July 20, 2014 appellant requested fee arbitration with the State of New Jersey on his prior counsel's fee petition. On the Attorney Fee Arbitration Request Form, he noted that prior counsel closed his case. Appellant disputed the fee as it was inconsistent with the contingent fee agreement, the billing was duplicative and included redundant charges, billing was made at higher rates not commensurate with the services provided especially where similar services were billed at lower rates, and the firm terminated the relationship by letter dated May 12, 2014 when he refused to enter into a new retainer for a new aggravating injury sustained on November 15, 2012.

In a July 24, 2015 letter, OWCP informed appellant that his objection to the attorney fee petition was general and nonspecific. It advised him to note the specific line item and the reason for his objection. OWCP provided appellant 30 days to respond.⁴

On August 20, 2015 appellant authorized the law firm of Debra A. Washington, Esquire to represent him regarding the current claim.

On August 25, 2015 appellant, through his counsel, further objected to prior counsel's fee petition. Counsel asserted that the appellant's former counsel's fee petition was based upon a contingent fee agreement expressly forbidden under 20 C.F.R. § 10.702. Thus, counsel asserted that any fee agreement based upon a contingent fee agreement was unenforceable. In addition, appellant's prior counsel improperly demanded payment on his fee petition prior to approval by OWCP, which is contrary to 20 C.F.R. §§ 10.702 and 10.704. Counsel also argued that the bill was excessive for the skills and expertise required.

In a September 22, 2015 letter, appellant's prior counsel requested OWCP approve a billing statement in the amount of \$5,052.25.

On April 18, 2019 OWCP received appellant's prior counsel's request for approval of its fee petition.

⁴ By a decision dated July 29, 2015, OWCP granted appellant a schedule award for a seven percent permanent impairment of his left lower extremity. The period of the award was from July 25 through December 13, 2012. The award was based on Dr. Diamond's July 25, 2012 report.

By decision dated May 3, 2019, OWCP approved the fee petition in the amount of \$4,415.75 for services rendered from March 8, 2012 through May 8, 2014, as reasonable. It found that appellant's objections to the fee petition were not valid.

On May 30, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. He submitted a copy of a contingency fee agreement with his prior counsel dated March 8, 2012. The fee agreement was titled, "Contingency Fee Agreement." The agreement noted that, if appellant received retroactive compensation or a schedule award, the maximum that would be billed would be 20 percent of the retroactive check, or the schedule award prior to any deduction by the Department of Labor for surplus or overpayment. It noted that a record would be kept on the services performed in his claim and he would be billed accordingly. The hourly rates for the firm were: \$300.00 per hour for Thomas R. Uliase, \$275.00 per hour for Carolyn B. Uliase; \$150.00 per hour for paralegals/legal assistants; and \$75.00 per hour for secretaries. The fee agreement contained an additional provision, noting that appellant understood that his prior counsel reserved the right to request a retainer regarding the expansion of his claim.

A hearing was held on August 21, 2019.

In a September 17, 2019 letter, counsel asserted that the contingency fee agreement with appellant's prior counsel was unenforceable as it violated FECA regulations. Additionally, the invoiced attorney fee was not reasonable based on services actually rendered.

By decision dated September 23, 2019, OWCP's hearing representative affirmed the May 3, 2019 decision approving the fee petition in the amount of \$4,415.75 for services rendered from March 8, 2012 through May 8, 2014, as reasonable.

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 OWCP's 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.⁷ When a fee application has been disputed, OWCP is

⁵ *E.J.*, Docket No. 19-1909 (issued August 19, 2020); *R.P.*, Docket No. 18-0861 (issued November 1, 2018); *C.H.*, Docket No. 17-0623 (issued June 27, 2017); *W.H.*, Docket No. 16-1297 (issued May 9, 2017); *L.H.*, Docket No. 11-0900 (issued December 6, 2011); *C.H.*, Docket No. 10-0987 (issued March 22, 2011); *Eric B. Petersen*, 57 ECAB 680 (2006); *Sharon Edwards*, 56 ECAB 749 (2005).

⁶ *E.J.*, *id.*; *R.P.*, *id.*; *Claudio Vazquez*, 52 ECAB 496 (2001).

⁷ 20 C.F.R. § 10.703(a)(1).

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: (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.⁹

ANALYSIS

The Board finds that OWCP has not abused its discretion in approving the fee in the amount \$4,514.75 for services rendered by appellant's prior counsel from March 8, 2012 through May 8, 2014.

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 OWCP. In this case, OWCP approved the requested fee of \$4,514.75 for services rendered by appellant's prior counsel and considered the general allegations made by appellant and his current counsel.

OWCP reviewed the fee agreement with the prior counsel and concluded that it was not an unenforceable contingency fee agreement. The Board has previously explained that 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. A contingency fee agreement therefore also provides that no fee will be assessed if the claim is unsuccessful.¹⁰ While the May 8, 2012 fee agreement was titled, "Contingency Fee Agreement," the agreement noted that if appellant received retroactive compensation or a schedule award, the maximum that would be billed would be 20 percent of the retroactive check or the schedule award. The fee agreement further noted that a record would be kept on the work performed in appellant's claim and he would be billed accordingly on an hourly basis. Although it was titled a contingency fee agreement, the fee agreement did not purport to obtain a percentage of an award. Rather, it noted a maximum fee based upon a percentage and then further explained the hourly billing process upon which the fee would be based. The Board has previously held that a fee agreement based upon hourly billing, with a maximum fee noted, does not constitute an illegal fee agreement.¹¹ The Board, therefore, finds that OWCP did not abuse its discretion by finding that the fee agreement was not an unenforceable contingency fee agreement.

⁸ *Id.* at § 10.703(c).

⁹ *Id.*

¹⁰ *S.P.*, Docket No. 14-0467 (issued September 26, 2014).

¹¹ *See S.D.*, Docket No. 14-1851 (issued May 22, 2015); *Angela M. Sanden*, Docket No. 04-1632 (issued September 20, 2004).

OWCP further found that the hourly rates listed for prior counsel and the legal staff were agreed to. Further, the rates were customary and no contrary evidence was presented. It, therefore, found that the time spent on activities was not unreasonable. Finally, OWCP also found appellant's argument that he could be billed because he had not terminated the contract to be meritless. 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.¹² OWCP has the discretion to approve attorney fees and, in this case, the Board finds no abuse of discretion.¹³

CONCLUSION

The Board finds that OWCP has not abused its discretion in approving a fee in the amount of \$4,514.75 for services rendered by appellant's prior counsel from March 8, 2012 through May 8, 2014.

ORDER

IT IS HEREBY ORDERED THAT September 23, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 22, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

¹² *J.K.*, Docket Nos. 19-1420 and 19-1422 (issued August 12, 2020); *R.P.*, Docket No. 18-0681 (issued November 1, 2018); *William Arthur Burney*, 29 ECAB 253 (1978).

¹³ *J.K.*, *id.*; *C.H.*, Docket No. 17-0623 (issued June 27, 2017); *W.H.*, Docket No. 16-1297 (issued May 9, 2017); *L.H.*, Docket No. 11-0900 (issued December 6, 2011); *C.H.*, Docket No. 10-0987 (issued March 22, 2011); *Eric B. Petersen*, 57 ECAB 680 (2006); *Sharon Edwards*, 56 ECAB 749 (2005).