

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

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In the Matter of T.U., Appellant)

and)

U.S. POSTAL SERVICE, FLAGLER STATION)
POST OFFICE, Miami, FL, Employer)
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Docket No. 19-1636
Issued: July 27, 2023

Appearances:
Matthew Person, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER DENYING FEE PETITION

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

Counsel for appellant has filed a fee petition for services performed before the Board in the amount of \$3,050.00.¹ The Board notes that all petitions for approval of fees for representative's services are considered under the Board's statutory authority found at section 8127 of the Federal Employees' Compensation Act² (FECA) and under its *Rules of Procedure* found at 20 C.F.R. § 501.9(e).³

Under these regulations, the Board considered the petition under the following criteria:

(1) The usefulness of the Representative's services;⁴

¹ FECA (5 U.S.C. § 8127(b)) and the implementing regulations (20 C.F.R. § 501.9) clearly require the Board to review each fee petition on its own merits and with regard to the unique facts and issues of each appeal. The recognition that each appeal to the Board has unique aspects is reflected in the Board's orders granting or denying fee petitions.

² 5 U.S.C. § 8127.

³ *Id.*

⁴ The Board's consideration of "usefulness" includes, but is not limited to, the frequency and quality of communication by the representative with the client, the factual evidence and legal argument offered, and written pleadings filed in the case. The Board will also consider the usefulness of a representative's work as it aided the Board in its consideration and decision of the issue appealed.

- (2) The nature and complexity of the appeal;⁵
- (3) The capacity in which the Representative has appeared;⁶
- (4) The actual time spent in connection with the Board appeal;⁷and
- (5) Customary local charges for similar services.⁸

As required by the Board's regulations, appellant has been afforded written notice of the fee requested and provided an opportunity to comment on the fee petition.⁹ No response was received.

The requested fees pertain to services performed before the Board in the above-referenced appeal. The Board issued its decision on October 29, 2020 which reversed in part and affirmed in part a June 5, 2019 decision of the Office of Workers' Compensation Programs (OWCP). In its June 5, 2019 decision, OWCP found that appellant had not met her burden of proof to establish a diagnosed medical condition causally related to an accepted April 20, 2019 employment incident.¹⁰

On October 30, 2020 counsel provided a fee petition and a statement of services requesting approval of fees totaling \$3,050.00.

OWCP's decision on appeal was dated June 5, 2019 and the appeal was filed with the Board on July 29, 2019. The fee petition requests approval of services provided from July 17, 2019 through October 29, 2020 including fees for composite descriptions of legal review, gathering evidence, calling witnesses, reviewing medical documents, researching case law for a brief, drafting a brief, notice to court, case planning and preparation for a hearing, texting client, and call in information for 9 hours at the rate of \$300.00 per hour and 1 hour on September 11, 2020 at the rate of \$350.00 per hour. There are also two separate charges for September 30, 2019, \$240.00 on invoice #1635 and an additional \$150.00 on invoice #1092 both for the composite descriptions of fees for legal review, gathering evidence, calling witnesses, filing all medical records, and preparation for a hearing.

⁵ The Board's evaluation of the "nature and complexity" of an appeal includes, but is not limited to, whether the issue appealed is novel or required extensive or unusual factual evidence or legal argument. The Board recognizes that not all complex issues are cases of first impression. However, the representative must establish the complex or unusual nature of the appeal.

⁶ The Board's consideration of the "capacity" in which a representative appears includes, but is not limited to, whether the representative obtained a written retainer and fee agreement.

⁷ The Board's evaluation of an itemized statement of work and charges includes, but is not limited to, whether the statement is clear, detailed, and describes those aspects of the appeal which merit the fee claimed and whether the representative has personally affirmed the correctness of the fee. No stipulated or contingent fee will be approved by the Board. 20 C.F.R. § 501.9(e).

⁸ The Board's consideration of customary, local fees recognizes that representatives often have clients in several states and that local custom must be balanced against national practice in the FECA appeals.

⁹ 20 C.F.R. § 501.9(e).

¹⁰ While counsel requested an oral argument before the Board on the July 29, 2019 AB-1 Form, he failed to provide argument in support of this request.

The Board has carefully reviewed the fee petition and finds that it does not currently satisfy the requirements of section 501.9(e) of the Board’s regulations. The fee petition fails to explain how the claimed fee, especially the variable hourly rate of \$300.00 and \$350.00 per hour, and the duplicative charges on September 30, 2019 are justified under any of the five factors listed in the order. Finally, with regard to his services provided to the appellant before the Board, the fee petition fails to explain how the claimed fee is justified with regard to usefulness, complexity, capacity, time, and customary charges. Thus, the Board concludes that the fee requested without such explanation is unreasonable.

The Board notes that under 20 C.F.R. § 501.9(e) “[n]o claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board.”¹¹ Under 18 U.S.C. § 292, collecting a fee without the approval of the Board may constitute a misdemeanor, subject to fine or imprisonment up to a year or both. As such, the representative may not charge appellant, any fee based upon the work before the Board until a fee petition in conformance with the five factors listed above is both submitted and approved.

IT IS HEREBY ORDERED THAT the fee petition is DENIED and may be resubmitted to the Board within 60 days of the date of this order.

Issued: July 27, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees’ Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees’ Compensation Appeals Board

¹¹ *Id.*