

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

In the Matter of B.S, Appellant)	
)	
and)	Docket No. 10-2343 & 10-
)	2390
OFFICE OF PERSONNEL MANAGEMENT,)	Issued: September 2, 2014
FEDERAL INVESTIGATIONS DIVISION,)	
Denver, CO, Employer)	

Appearances: *Case Submitted on the Record*
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

ORDER GRANTING FEE PETITION

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

Counsel for appellant has filed a request for approval of attorney's fee in the amount of five thousand, one hundred and twenty dollars (\$5,120.00).¹ By order dated May 6, 2014, the Board denied counsel's request and allowed an additional 60 days for the submission of supplemental material information to review the request under the Board's regulations at 20 C.F.R. § 501.9.

The Board's September 28, 2011 decision found that the selection of the impartial medical specialist was not properly documented. The April 13, 2010 decision of the Office of Workers' Compensation Programs (OWCP) was set aside and remanded for selection of a new impartial medical specialist and further proceedings consistent with the Board's order.

The documents on appeal include an 11-page brief addressing the issue on appeal and counsel appeared before the Board for oral argument. Counsel cited many legal authorities in support of his contention that the impartial specialist was not properly selected, including 5

¹ The Federal Employees' Compensation Act (FECA) (5 U.S.C. § 8127(b)) and its 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.

U.S.C. 8132(a), *J.D.*, Docket No. 09-2015 (issued September 20, 2010) and *N.M.*, Docket No. 10-978 (issued November 9, 2010) in support of his position that OWCP had failed to establish the proper selection of the impartial specialist. As noted, the Board found that a new independent medical specialist needed to be selected.

On June 3, 2014 counsel responded to the Board's May 6, 2014 order providing additional information for consideration of the fee request pursuant to 20 C.F.R. § 501.9(e). He noted that appellant did not contest the amount of the fee and submitted a document signed by appellant agreeing to the fees charged. He also noted that fees for work performed by OWCP are approved on a consistent basis.² Counsel addressed the usefulness of the representative services by submitting legal argument in the claim with citation to Board precedent that was found relevant to the issue on appeal. He noted that this was the third appeal of the case to the Board and that he was successful in his argument, as the Board remanded the case for further development of the claim. Counsel also addressed the time submitted in the fee petition on the case, in communication with appellant and addressed the customary local charges for similar services. He specifically addressed the hourly rates charged by the staff of his law firm in this appeal.

The decision on appeal to the Board was dated April 13, 2010. The fees charged for August 4, 2008 for \$250.00, May 26, 2009 for \$25.00 and August 28, 2009 for \$87.50 are disallowed as they are for periods prior to the OWCP decision from which appellant has appealed to the Board.³ Further, the amounts charged for April 26, 2010 note \$107.50 in the summary but the itemized documentation reflects charges only for \$32.50, a reduction of \$75.00. Therefore, the amount of \$437.50 of the requested attorney fees is disallowed.

It is noted that the fee agreement signed by appellant did not reference work before the Board. In the future, such fee agreements should be specific as to the forum, the state where counsel is retained, hourly rates and the specific legal work to be performed before which it is charging attorney fees.

The Board also notes that it is difficult to ascertain the services for which fees are being charged when the document presented for approval includes fees for services before both OWCP and the Board. It is requested that only the fees charged for work before the Board be included in the request to be approved by the Board. The Board strongly discourages counsel from submitting petitions with redactions, corrections or additions because the Board is without knowledge of who made the changes or why they were made.

The Board expresses its concern about counsel's use of an escrow account for anything other than actual costs incurred by counsel in the representation of appellant before the Board. The fee agreement in the record reads: "We have agreed that \$2,000 to pay for services will be

² 20 C.F.R. 10.703(b) and the FECA Procedure Manual, Part 2 -- Claims, *Representatives' Services*, Chapter 2.1200.6 (June 2012) pertain to uncontested fees for work performed before OWCP. The procedures implemented by OWCP with regard to the consideration of fees are separate from the Board's review of such applications under 20 C.F.R. § 501.9(e). OWCP and the Board are two separate and distinct bodies and separate application to the Board is required for approval of a fee for legal or other services performed in connection with an appeal. *Evelyn R. Adams*, 10 ECAB 585 (1959).

³ *Id.*

deposited into my trust account pending the resolution of your claim and approval of attorney's fees by the Office of Workman's (sic) Compensation Programs. *Funds will be withdrawn as fees are charged.*" (Emphasis added.) Please note that any fees placed in an escrow account cannot be withdrawn prior to approval of those fees by the Board.⁴ Furthermore, the itemized statements submitted by counsel reflect that fees have been received prior to approval by the Board, which is contrary to the regulations.⁵

The Board notes that counsel submitted a statement in support of his petition. The Board encourages counsel to affirm the accuracy of the information provided in their fee petitions as an indication that due care was taken in the preparation of the petition.

The Board has reviewed the fee petition and additional information submitted by counsel and finds, with the above-noted exceptions, that it satisfies the requirements of section 501.9(e) of the Board's implementing federal regulations.

IT IS HEREBY ORDERED THAT the fee petition is granted in the amount of four thousand, six hundred, eight-two dollars and fifty cents (\$4,682.50).

Issued: September 2, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁴ 20 C.F.R. § 501.9(e).

⁵ *Id.*