

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

In the Matter of J.H., widow of D.H., Appellant)	
)	
and)	
)	
DEPARTMENT OF LABOR, MINE)	Docket No. 13-0505
SAFETY & HEALTH ADMINISTRATION,)	Issued: August 22, 2016
Boulder City, NV, Employer)	
)	

Appearances:
Toby Rubenstein, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER GRANTING FEE PETITION

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

Appellant's representative has filed a fee petition in the amount of \$2,220.80.¹ 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 Act,² (FECA) and under its *Rules of Procedure* found at 20 C.F.R. § 501.9(e).³

Pursuant to its regulation, the Board considered the fee 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 20 C.F.R. § 501.9(e).

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;⁷ and
- (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.¹⁰

The requested fees pertain to services performed before the Board in the above-referenced appeal, which involved a September 18, 2012 merit decision wherein OWCP denied appellant's claim for survivor benefits. Her representative filed the appeal on January 2, 2013 and submitted a 25-page brief in support of the appeal. The Board issued its decision on May 8, 2014, which set aside OWCP's September 18, 2012 decision, and remanded the case for further medical development.

The fee petition requests approval of time from September 19, 2012 through May 10, 2014, and documents 17.5 hours spent in connection with this appeal before the Board. Toby Rubenstein accounted for 13.5 hours of the total time spent at an hourly rate of \$136.83.¹¹ Her colleague, Richard Kulick, accounted for the remaining 4 hours of services provided, which were billed at an hourly rate of \$93.50.¹² A substantial portion (12.2 hours) of the total time spent was devoted to preparation of the 25-page brief submitted on appellant's behalf. Ms. Rubenstein

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 was obtained.

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 The representative's fee petition was accompanied by an August 10, 2014 signed statement from appellant indicating that she agreed with "the time expended and the charges for that time...." Appellant also noted that the Board had remanded her survivor's claim, which OWCP subsequently accepted and paid her various benefits in excess of \$500,000.00.

¹¹ Ms. Rubenstein is a nonattorney, lay representative with at least 30 years of experience in the area of workers' compensation. She represented that she previously worked for the Department of Labor/OWCP for 21 years, including work as a senior claims examiner.

¹² Mr. Kulick's services were limited to the period of December 16 through December 21, 2012. He reviewed and provided input on the brief that was ultimately filed with the Board on January 2, 2013. The fee petition identifies Mr. Kulick as an affiliate consultant with at least 12 years of experience working with OWCP, including work as a senior claims examiner.

represented that her hourly fee (\$136.83) and her affiliate's (\$93.50) were far less than the rate charged (\$180.00) by the only other nonattorney, lay representative in the Nation with comparable experience. Ms. Rubenstein also provided a copy of the retainer -- fee agreement she and appellant executed in March 2012. Regarding the nature and complexity of the case, appellant's representative noted, *inter alia*, that the decedent-employee's death occurred in May 2001 and since the filing of the survivor's claim numerous (17) decisions had been issued, including two prior appeals to the Board. The representative also noted that the cause of death -- cardiac condition -- was somewhat unusual in FECA cases.¹³ Lastly, with respect to the usefulness of the representative's services, she noted that appellant prevailed before the Board, and after thirteen years and 19 decisions, OWCP ultimately accepted the claim and awarded more than \$500,000.00 in survivor benefits.

The Board has carefully reviewed the fee petition, and finds it satisfies the requirements of section 501.9(e) of the Board's implementing regulations. The Board concludes that the fee requested is reasonable.

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.” Under 18 U.S.C. § 292, collecting a fee without the approval of the Board may constitute a misdemeanor, subject to fine or imprisonment for up to a year or both.

¹³ Additionally, Ms. Rubenstein raised a number of unique arguments in her brief regarding employer liability, including “deleterious effects” and “human instincts” doctrines. She also challenged the adequacy of the impartial medical examiner's opinion, which ultimately was the basis for the Board's decision to remand the case to OWCP for further medical development.

IT IS HEREBY ORDERED THAT the fee petition is granted in the amount of \$2,220.80.¹⁴

Issued: August 22, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁴ Richard J. Daschbach, Chief Judge, participated in the original decision but was no longer a member of the Board effective May 16, 2014.