

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

_____)	
T.B., Appellant)	
)	
and)	Docket No. 18-1163
)	Issued: February 11, 2019
DEPARTMENT OF THE AIR FORCE, TINKER)	
AIR FORCE BASE, OK, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 22, 2018 appellant filed a timely appeal from an April 20, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP abused its discretion in approving a fee in the amount of \$4,500.00 for 14 hours of services rendered by then-counsel from July 26, 2011 through November 16, 2017.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the April 20, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On September 27, 2006 appellant, then a 42-year-old aircraft mechanic, filed a traumatic injury claim (Form CA-1) alleging that, on September 22, 2006, he injured his lower back while climbing into a forward lower lobe of an aircraft at work. OWCP accepted the claim for sprain of back, lumbar region and degeneration of thoracic or thoracolumbar intervertebral disc. Appellant had periods of intermittent disability during the period May 8, 2007 through January 3, 2011. He stopped work again on May 5, 2011 and claimed a recurrence of disability.

On August 5, 2011 appellant authorized Alan J. Shapiro, Esq. to represent him in all matters arising out of his workers' compensation claim.

By decision dated October 3, 2011, OWCP accepted that appellant sustained a recurrence of disability on May 5, 2011.

On November 21, 2012 OWCP determined that the position of aircraft engine repairer was available and suitable in accordance with appellant's medical limitations as provided by Dr. Sai R. Framjee, an orthopedic spine surgeon serving as an impartial medical specialist, in his amended report of April 26, 2012.

On November 26, 2012 appellant retired effective December 1, 2012, and elected to receive Office of Personnel Management (OPM) benefits in lieu of FECA compensation benefits.

By decision dated February 15, 2013, OWCP finalized an overpayment of compensation in the amount of \$1,472.19 for the period December 1 through 15, 2012 as appellant was not entitled to FECA benefits after OPM benefits were elected. While it found that he was without fault in the creation of the overpayment of compensation, it denied waiver of recovery of the overpayment as no financial information had been received from appellant to establish a basis for granting waiver of recovery of the overpayment.

In 2017 OWCP received evidence pertaining to a schedule award due to his accepted employment conditions from his treating physician, Dr. John W. Ellis, Board-certified in family medicine.³

On September 28, 2017 OWCP referred the case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, serving as an OWCP district medical adviser (DMA), for an evaluation of permanent impairment of appellant's lower extremities. Dr. Harris issued his impairment rating report on September 30, 2017.

By decision dated November 8, 2017, OWCP granted appellant a schedule award for 10 percent permanent impairment of his right lower extremity. The award ran for 28.8 weeks from September 24, 2015 to April 12, 2016 and was based on the reports from Dr. Ellis and Dr. Harris. The record reflects that then-counsel filed several letters pertaining to the status of the schedule award claim prior to its issuance.

³ The record does not contain a Form CA-7 requesting a schedule award.

On December 12, 2017 OWCP received a letter from appellant requesting a copy of his files. Appellant noted that his then-counsel “states that he did a lot of work and wants to[o] much money.” OWCP also received then-counsel’s fee application in the amount of \$4,500.00 for 14 hours of services rendered from July 26, 2011 through November 16, 2017 in the current claim. An itemized statement listing the services and time spent on each date was provided.⁴ The time spent for each service ranged from 5 minutes to no more than 90 minutes, for a total of 840 minutes, or 14 hours. Then-counsel’s hourly rate was \$325.00 per hour. The total fee requested was in the amount of \$4,550.00 with an “agreed fee” of \$4,500.00. In his December 11, 2017 cover letter, then-counsel requested that OWCP assist in processing the fee request of \$4,550.00 -- not the “agreed fee” of \$4,500.00. He explained that appellant had not signed the fee petition nor had he returned the fee petition with payment.

In a February 15, 2018 letter, OWCP forwarded to appellant a copy of the fee application in the amount of \$4,550.00 for services rendered from July 26, 2011 through November 16, 2017. It afforded him 30 days to comment on the fee application request and to denote whether the fee charged was reasonable and appropriate.

On March 22, 2018 appellant advised that he did not approve of the fee. He noted that, based on his review of the file, his prior counsel did nothing to help his case. Appellant also alleged that his then-counsel’s office had not called or answered his e-mails since 2014.

By decision dated April 20, 2018, OWCP approved then-counsel’s fee petition in the amount of \$4,500.00 for services rendered from July 26, 2011 through November 16, 2017.

LEGAL PRECEDENT

It is not the function of the Board to determine the fee for services performed by a representative of a claimant before OWCP. That function is 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 sole function of the Board on appeal is to determine whether the action of 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(a)(2) of the Code of Federal Regulations provides in pertinent part that a representative must submit a fee application, which includes a statement of agreement or disagreement with the amount charged, signed by the claimant.⁷ While the regulations provide

⁴ The services provided included writing letters to appellant and to OWCP, telephone conferences, e-mail exchanges, review of OWCP’s decisions, and submissions of schedule award packets to OWCP.

⁵ See *T.S.*, Docket No. 17-1706 (issued July 10, 2018); *Alvin T. Groner, Jr.*, 47 ECAB 588 (1996); *Edward Snider*, 39 ECAB 1268 (1988).

⁶ See *R.P.*, Docket No. 18-0681 (issued November 1, 2018); *Claudio Vazquez*, 52 ECAB 496 (2001); *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁷ 20 C.F.R. § 10.703(a)(2).

that a fee application is deemed approved when it is accompanied by a signed statement indicating the claimant's agreement with the fee,⁸ the regulations do not specifically provide for approval when a claimant fails to contest a fee application.⁹ 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.¹⁰ After the claimant has been afforded a reasonable time to respond to the request, OWCP will then proceed to review the fee application. Pursuant to section 10.703(c), when a fee is in dispute, OWCP will determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors: (i) usefulness of the representative's services; (ii) the nature and complexity of the claim; (iii) the actual time spent on development and presentation of the claim; and (iv) customary local charges for similar services.¹¹

ANALYSIS

The Board finds that the case is not in posture for decision.

In its April 20, 2018 decision, OWCP approved then-counsel's fee petition in the amount of \$4,500.00 for services rendered from July 26, 2011 through November 16, 2017. However, appellant had disputed the fee petition, and specifically disputed the usefulness of his services. OWCP's regulation provides that, when a fee is in dispute, OWCP will determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors: (i) usefulness of the representative's services; (ii) the nature and complexity of the claim; (iii) the actual time spent on development and presentation of the claim; and (iv) customary local charges for similar services.¹² OWCP failed to make findings in its decision which considered the fee application according to applicable regulatory requirements.¹³ Consequently, the Board finds that the case is not in posture for decision regarding whether OWCP abused its discretion in approving then-counsel's fee petition in the amount of \$4,500.00 for services rendered from July 26, 2011 through November 16, 2017.¹⁴

⁸ *Id.* at § 10.703(b).

⁹ *See R.P.*, *supra* note 6; *see also Helen J. Cavorley*, Docket No. 02-2325 (issued February 7, 2003).

¹⁰ 20 C.F.R. § 10.703(c).

¹¹ *Id.*

¹² *See supra* note 10.

¹³ 5 U.S.C. § 8124(a) provides that OWCP shall determine and make a finding of facts and make an award for or against payment of compensation. 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP shall contain findings of fact and a statement of reasons. *See also K.C.*, Docket No. 06-2130 (issued July 24, 2007). In *K.C.*, the Board found that the case was not in posture for decision regarding whether OWCP abused its discretion with respect to its determination regarding a fee application because OWCP had not adequately considered the factors denoted in 20 C.F.R. § 10.703(c).

¹⁴ *See C.S.*, Docket No. 18-0047 (issued March 15, 2018); *J.J.*, Docket No. 17-0825 (issued June 13, 2017).

The Board will therefore set aside OWCP's April 20, 2018 decision and remand the case to OWCP for further consideration of this matter, to be followed by the issuance of a *de novo* decision containing adequate facts and findings.¹⁵

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP abused its discretion in approving then-counsel's fee in the amount of \$4,500.00 for 14 hours of services rendered from July 26, 2011 through November 16, 2017.

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further action consistent with this decision.

Issued: February 11, 2019
Washington, DC

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

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

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

¹⁵ See *supra* note 13.