

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

_____)
R.H., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Kansas, MO, Employer)

_____)

Docket No. 12-501
Issued: May 9, 2014

Appearances:
Andrew Schendel, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER DENYING ATTORNEY'S FEE

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

Counsel for appellant has filed a request for approval of attorney's fee in the amount of one thousand, nine hundred and fifty dollars (\$1,950.00). The Board notes that all petitions for approval of fees for representative services are considered under the Board's *Rules of Procedure* and the applicable statute and regulation are found at 20 C.F.R. § 501.9.¹

Under these regulations, the Board must consider the petition under the following general criteria:

- (1) The usefulness of the Representative's services;²
- (2) The nature and complexity of the appeal;³

¹ 5 U.S.C. § 8127; 20 C.F.R. § 501.9(e).

² The Board's consideration of "usefulness" includes, but is not limited to, the frequency and quality of communication by the attorney with the client, the factual evidence and legal argument offered by the attorney and written pleadings filed in the case. The Board will also consider the usefulness of an attorney's work as it aided the Board in its consideration and decision of the issue appealed.

³ 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 attorney must establish the complex or unusual nature of the appeal.

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

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.⁷ Appellant filed a response with the Board on October 8, 2013 strongly disputing both the amount of the fees and Mr. Schendel's legal services as his representative.

The Board, having considered the fee petition and supporting documentation, denies the fee petition. The Board notes the following defect(s):⁸

- (1) The fee agreement provided with the petition for attorney's fee is a contingent contract. Although Mr. Schendel suggests that it was simply a mistake and that the fee petition only sought approval for the fees actually spent in representing appellant, a letter in the record disputes that allegation. By letter dated July 31, 2013, Mr. Schendel wrote appellant requesting that the fee be paid or he would "be forced to resort to approval through OWCP" and that should he not pay the fee, Mr. Schendel would "resign as your attorney in your workers' compensation case and will take no further action to prosecute your claim." Further he notes, "You knew when you signed up with my office that we would collect an attorney's fee *in the event we were successful.*" The Board finds this to be a contingent contract and cannot be approved.⁹

⁴ The Board's consideration of the "capacity" in which an attorney appears includes, but is not limited to, whether the attorney obtained a written retainer and fee agreement.

⁵ The Board's evaluation of an attorney's 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 counsel 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).

⁶ The Board's consideration of customary, local fees recognizes that attorneys often have clients in several states and that local custom must be balanced against national practice in the Federal Employees' Compensation Act appeals.

⁷ 20 C.F.R. § 501.9(e).

⁸ This list is intended to assist counsel but does not limit the Board's discretion to evaluate any future fee petition on its own merits.

⁹ The Board's *Rules of Procedure* provide at section 501.9(e) that "No contract for a stipulated fee or on a contingent fee basis will be approved by the Board."

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

Issued: May 9, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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