

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

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<b>In the Matter of S.D., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 17-1211</b>
	)	<b>Issued: January 7, 2020</b>
<b>DEPARTMENT OF THE TREASURY,</b>	)	
<b>INTERNAL REVENUE SERVICE,</b>	)	
<b>Kansas City, MO, Employer</b>	)	
_____	)	

*Appearances:*  
*Melford V. McCormick*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**ORDER DENYING FEE PETITION**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

The representative for appellant has filed a fee petition for services performed before the Board in the amount of \$5,031.25.<sup>1</sup> 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<sup>2</sup> (FECA) and under its *Rules of Procedure* found at 20 C.F.R. § 501.9(e).<sup>3</sup>

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<sup>1</sup> FECA (5 U.S.C. § 8127(b)) and its implementing regulation (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. The fee petition submitted by appellant's representative also includes entries for services performed before OWCP, but the Board does not have jurisdiction over the approval of fees for such services. *See* 5 U.S.C. § 8127; 20 C.F.R. § 501.9(e).

<sup>2</sup> 5 U.S.C. § 8127.

<sup>3</sup> 20 C.F.R. § 501.9(e).

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

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

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.<sup>9</sup> She did not respond to the written notice within the allotted period of time.<sup>10</sup>

The requested fees pertain to services performed before both OWCP and the Board. By decision dated April 4, 2017, the Office of Workers' Compensation Programs (OWCP) denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).<sup>11</sup> By decision dated April 10, 2018, the Board affirmed OWCP's April 4, 2017 decision finding that it had properly denied her request for reconsideration of the merits of her claim.

On appeal appellant's representative submitted a six-page brief containing supporting legal citation for the argument that appellant submitted sufficient medical evidence to establish the claimed period of disability. However, the representative did not provide argument or citation to

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<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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).

<sup>8</sup> 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 FECA appeals.

<sup>9</sup> 20 C.F.R. § 501.9(e).

<sup>10</sup> On March 22, 2018 appellant had signed the fee petition, noting that she approved of the fees delineated in the document.

<sup>11</sup> Appellant filed her appeal to the Board from OWCP's January 11, 2016 decision which denied her claim for disability from June 14 to July 6, 2014 due to her April 2, 2014 employment injury.

legal precedent on the relevant issue before the Board, which was whether appellant had been entitled to a merit review of the April 4, 2017 OWCP decision.

On March 23, 2018 the representative provided a fee petition and a statement of service, requesting approval of fees totaling \$5,031.25. The requested fees are for services performed from January 14, 2016 through December 13, 2017 for a total of 28.75 hours at the rate of \$175.00 per hour. The representative requested that the Board “please approve same immediately.” He also submitted a copy of his appeal brief in which he noted that he was “not certain” it had been “received by [our] offices.”

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 overall covers significant fees relating to work before OWCP, for which the Board cannot provide approval. Further, the fee petition fails to explain how the claimed fee, especially the hourly rate of \$175.00 per hour, is 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.” 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: January 7, 2020  
Washington, DC

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

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

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