

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

CAROLINE MARTINEZ,
Appellant,

DOCKET NUMBER
SF-844E-04-0263-A-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: **SEP 30** 2004

Steven E. Brown, Esquire, Westlake Village, California, for the appellant.

Camela Green-Brown, Washington, D.C., for the agency.

BEFORE

Ronald J. Weiss
Administrative Judge

INITIAL DECISION

On August 6, 2004, the appellant filed a timely motion for attorney fees pursuant to 5 U.S.C. § 7701(g). *See* 5 C.F.R. § 1201.37(a). The appellant seeks a total of \$10,513.50 in attorney fees incurred in her retirement appeal. Attorney Fee File (AFF), Tab 1. For the reasons set forth below, the motion for attorney fees is GRANTED.

BACKGROUND

In an initial decision dated June 30, 2004, I reversed the reconsideration decision of the Office of Personnel Management (OPM) which denied her application for disability retirement benefits under the Federal Employees'

Retirement System (FERS). *See Martinez v. Office of Personnel Management*, MSPB Docket No. AT-844E-04-0263-I-1. That decision became final on August 4, 2004, when no petition for review of my initial decision was filed by that date. The present motion for attorney fees followed.

ANALYSIS AND FINDINGS

Under 5 U.S.C. § 7701(g)(1), the Board may require payment by the agency of reasonable attorney fees incurred by an employee if the employee is the prevailing party and the Board determines that payment is warranted in the interest of justice. The appellant bears the burden of proving her entitlement to attorney fees and must show that: (1) an attorney-client relationship existed and fees were incurred; (2) she is the prevailing party; (3) an award of fees is warranted in the interest of justice; and (4) the fees are reasonable. *Peek v. Office of Personnel Management*, 63 M.S.P.R. 430, 432 (1994), *aff'd*, 59 F.3d 181 (Fed. Cir. 1995) (table); *Kenyon v. Department of the Navy*, 57 M.S.P.R. 258, 260 (1993).

In a retirement appeal, an award of fees is warranted in the interest of justice when: (1) OPM knew or should have known that it would not prevail on the merits at the time it issued its reconsideration decision; or (2) OPM's reconsideration decision is clearly without merit. *Mopps v. Office of Personnel Management*, 69 M.S.P.R. 314, 317 (1996). In determining whether OPM "knew or should have known it would not prevail on the merits," the Board is required to evaluate the record before OPM at the time it issued its reconsideration decision. *Id.* If it is determined that OPM was negligent in processing a retirement application, that it lacked a reasonable and supportable explanation for its position, or that it ignored clear, un rebutted evidence that the appellant satisfied the criteria for a retirement benefit, then it can be concluded that OPM knew or should have known that it could not prevail on the merits. *Id.*

In the instant case, it is uncontroverted that the appellant is the prevailing party, that an attorney-client relationship existed, and that fees were incurred. I further find that OPM knew or should have known that, in denying the appellant's application for disability retirement benefits, it could not prevail on the merits.

As set forth in my initial decision, the appellant's subjective evidence of pain was supported by persuasive medical evidence establishing that her medical condition prevented her from performing the essential duties of either her distribution clerk position, or any of the successive rehabilitation positions offered by her former employer in an attempt to accommodate her medical restrictions. Although additional subjective and medical evidence was submitted during the Board process, I find that OPM ignored unrebutted evidence of the appellant's incapacity that was available at the time of its reconsideration decision. *See Duke v. Office of Personnel Management*, 78 M.S.P.R. 578, 586087 (1998). Accordingly, I conclude that an award of attorney fees is in the interest of justice under the circumstances of this case.

In evaluating the reasonableness of an attorney fee request, the Board considers the lawyer's customary billing rate and the number of hours reasonably devoted to the case. *Mitchell v. Department of Health & Human Services*, 19 M.S.P.R. 206, 208 (1984). In order to establish the appropriate hourly billing rate, the fee application must contain a copy of the fee agreement, if any, as well as evidence of the attorney's customary billing rate for similar work. *Id.* *See* 5 C.F.R. § 1201.37(a)(3)(ii) and (iii). The customary billing rate may be established by evidence showing the rate the attorney actually billed other clients for similar work during the period for which he seeks compensation, or, if the attorney has not billed sufficient comparable work, through affidavits from other attorneys in the community with similar experience, stating the rate that they charge fee paying clients in similar cases. *See Swanson v. Defense Logistics Agency*, 35 M.S.P.R. 115, 119 (1987).

The appellant here submitted a copy of his fee agreement, indicating his rate of \$300.00 per hour, as well as affidavits from other attorneys licensed to practice in Los Angeles, California, and familiar with the fees charged for various types of employment litigation, attesting to the reasonableness of this rate. AFF, Tab 3.* Based on this evidence, and in the absence of objection from OPM, I find that this hourly rate is reasonable. I further find that the itemized charges and hours claimed by the appellant, none of which are challenged by OPM, appear reasonable on their face.

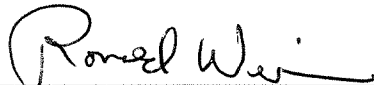
DECISION

The appellant's motion for attorney fees is GRANTED.

ATTORNEY FEES

I **ORDER** the agency to pay attorney fees in the amount of **\$10,513.50** by a check made payable to the appellant's counsel. Payment must be made no later than 20 calendar days after the date this initial decision becomes final.

FOR THE BOARD:



Ronald J. Weiss
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

* As the hearing in this appeal was conducted telephonically, the relevant market for determination of the appropriate hourly billing rate is the site of the attorney's practice.

NOTICE TO APPELLANT

This initial decision will become final on NOV - 4 2004, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this

initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pre Se Petitioners and Appellants," which is contained within the court's Rule of Practice, and Forms 5, 6, and 11.

ENFORCEMENT

If the agency fails to pay the attorney fees awarded within 20 calendar days after the date this initial decision becomes final, you may ask the Board to enforce its decision by filing a motion with this office.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.