

ANALYSIS AND FINDINGS

Background

The appellant, represented by counsel, filed a timely Board appeal of the agency's final reconsideration decision dated December 11, 2006, that found she was not entitled to a Federal Employees' Retirement System (FERS) disability retirement annuity. A telephonic Board hearing was held on March 20, 2007. On April 16, 2007, I issued an initial decision reversing the agency and granting the appellant a FERS disability retirement annuity. *O . . . v. Office of Personnel Management*, DE-844E-07-0134-I-1 (Initial Decision, April 16, 2007), Initial Appeal File (IAF), Tab 16. The initial decision became final on May 21, 2007, when no petition for review was filed.

On June 19, 2007, the appellant filed a Petition for Attorney Fees, seeking attorney fees she incurred in her appeal of OPM's reconsideration decision in the amount of \$16,889.75; attorney fees for preparing her Petition for Attorney Fees in the amount of \$1,707.50; and costs in the amount of \$516.12. AFF, Tab 1. The appellant was represented by attorneys Steven E. Brown and Daniel M. Goodkin of the Law Firm of Steven E. Brown, Westlake Village, California. As stated in the Board's Acknowledgment Order dated June 21, 2007, the record closed on July 31, 2007. AFF, Tab 2. The agency did not submit any opposition or response to the appellant's Petition for Attorney Fees or the Board's June 21, 2007 Acknowledgement Order.

Applicable Law

The Board may require an agency to pay an appellant's reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice. 5 U.S.C. § 7701(g)(1). The appellant bears the burden of proving entitlement to an award of attorney fees and must show that: (1) an attorney-client relationship existed pursuant to which counsel rendered legal services on the appellant's behalf in connection with a Board proceeding; (2) the appellant was the prevailing party; (3) an award of attorney fees is warranted in

the interest of justice; and (4) the fees requested are reasonable. *Holmes v. Office of Personnel Management*, 99 M.S.P.R. 330, 333, ¶ 6 (2005); *Kruger v. Department of Veterans Affairs*, 95 M.S.P.R. 471, ¶ 7 (2004).

In retirement appeals, the most relevant categories for determining whether an award is in the interest of justice are whether OPM knew or should have known when it made its decision that it would not prevail on appeal and whether OPM's action was clearly without merit. See *Holmes*, 99 M.S.P.R. at 333, ¶ 6; *Goldbach v. Office of Personnel Management*, 49 M.S.P.R. 9, 14-15 (1991); *Kent v. Office of Personnel Management*, 33 M.S.P.R. 361, 365-69 (1987); *Biscaha v. Office of Personnel Management*, 54 M.S.P.R. 500, 504 (1992). A determination that an award is warranted requires an evaluation of the record before the agency at the time it made its reconsideration decision. *Holmes*, 99 M.S.P.R. at 334, ¶ 9. In determining whether an award is merited under the "knew or should have known" category, the Board considers whether OPM was negligent in processing the application; lacked a reasonable or supportable explanation for its position; or ignored clear, un rebutted evidence that the appellant satisfied the criteria for a benefit. See *Stewart v. Office of Personnel Management*, 70 M.S.P.R. 544, 548 (1996).

To award fees under the "clearly without merit" standard in a retirement appeal, the Board must determine that, at some point prior to the close of the appellate record, OPM's failure to acknowledge the appellant's entitlement to the benefits he sought was blameworthy. *Holmes*, 99 M.S.P.R. at 335, ¶ 11; *Stewart*, 70 M.S.P.R. at 551; *Goldbach*, 49 M.S.P.R. at 15. To make this determination, the Board considers whether the appellant was misled by OPM or whether OPM failed to put her on notice of the kind of evidence needed to prevail on reconsideration; the extent to which reversal was based on evidence not presented by the appellant but readily available to OPM; and the extent to which the appellant produced evidence that was so compelling that reasonable minds could not differ as to her eligibility for an annuity and OPM's continued refusal to

approve the annuity prolonged the proceedings. *See Stewart*, 70 M.S.P.R. at 551. When a fee award is based on OPM's continued, improper refusal to approve an annuity, the award will be limited to those fees incurred after OPM was made aware of the dispositive evidence. *Goldbach*, 49 M.S.P.R. at 15.

The appellant established, by preponderant evidence, that she is entitled to attorneys fees because OPM knew or should have known it could not prevail.

First, it is undisputed that an attorney-client relationship existed. I also find that the appellant was the prevailing party, as the agency's December 11, 2006 final reconsideration decision was reversed by the Board's initial decision, dated April 16, 2007, and which became final on May 21, 2007, when no petition for review was filed. In that decision, the agency was ordered to grant the appellant's application for a FERS disability retirement. Accordingly, I next must determine whether fees are warranted in the interests of justice.

I find that the medical evidence was sufficient, prior to the issuance of the agency's reconsideration decision, to establish that the appellant was unable to perform useful and efficient service in her position as an Air Traffic Control Specialist (ATCS), GS-2152-14, with the United States Department of Transportation, Federal Aviation Administration (FAA). For the following reasons, I find that OPM lacked a reasonable or supportable explanation for its position, and ignored clear, un rebutted evidence that the appellant satisfied the criteria for a FERS disability retirement.

The agency was in possession of the appellant's position description of record at the time it made its reconsideration decision denying the appellant's request for disability retirement benefits. It was clear from the evidence submitted by the appellant prior to the agency's final reconsideration decision that the nature of the ATCS position required her to control and separate air traffic and her position also precluded her from having any established history or diagnosis of mental illness. The agency knew that FAA Order 3930.3A (Appendix I, Medical Qualifications Standards) and OPM's Manual X-118

(Qualification Standard for GS-2152 Series) required that an ATCS be medically qualified on an annual basis, and that an ATCS could not be medically qualified if he or she was using prescription medications such as Xanax, Fiorinal with Codeine, Prozac, and Trazadone, because those medications might limit the ATCS's judgment and ability to safely control air traffic. IAF, Tab 5, Subtab B, p. 10. Based on the medical evidence presented to OPM prior to its reconsideration decision, it was clear that OPM and FAA regulations medically disqualified the appellant from performing air traffic control duties based on her medication regime, including Xanax, Fiorinal with Codeine, Prozac, and Trazadone. *See O'Brien v. Office of Personnel Management*, 20 M.S.P.R. 395, 398 (1984) (even where the FAA did not medically disqualify the appellant, an ATCS, the medical evidence showed his diagnosis of hypertension rendered him medically disqualified under OPM and FAA regulations); *Harpole v. Office of Personnel Management*, 98 M.S.P.R. 232 (2005) (the appellant's loss of a job qualification or credential for medical reasons justifies the award of disability retirement).

During the March 20, 2007 telephonic hearing, in which the agency chose not to participate, the appellant presented a very limited amount of new evidence. IAF, Hearing CD, Left Inside Cover. The appellant's medical evidence, all submitted prior to the filing of her Board appeal, was compelling. As in *Thieman v. Office of Personnel Management*, 78 M.S.P.R. 113, 116 (1998), the issue was whether the appellant's mental condition was incompatible with either useful and efficient service or retention in her position. *Id.* In her request for reconsideration of OPM's initial decision, the appellant provided a medical report from Dr. David Dougherty, noting her prescription medications of Trazadone, Xanax, and Cymbalta. IAF, Tab 5, Subtab B, p. 2, 5-6. The appellant, through her counsel, pointed out to the agency that the FAA Guidelines and OPM Regulations disqualified Air Traffic Controllers taking those medications. *Id.*, pp. 3-4, 7-24. In an addendum to her reconsideration request, the appellant

provided medical reports from Mr. David Jarmon and Dr. George Landrum, showing her diagnosis of Depressive Disorder, and her prescription medications of Prozac, Xanax, Risperdal, and Trazadone. IAF, Tab 5, Subtab B, pp. 25-32. The agency clearly had sufficient evidence prior to issuance of its final reconsideration decision of the appellant's diagnosis and the FAA's disqualification of employees in the ATCS position based on their use of certain medications which the appellant was taking by prescription.

Based on the foregoing, I find that OPM lacked a reasonable or supportable explanation for its position, and ignored clear, unrebutted evidence that the appellant satisfied the criteria for a FERS disability retirement. I therefore find that OPM knew or should have known, at the time it issued its reconsideration decision, that it could not prevail in the appellant's Board appeal. *See Holmes*, 99 M.S.P.R. at 334, ¶ 9. Therefore, I find that attorney fees are warranted in the interests of justice.

The appellant has established, by preponderant evidence, that her attorney fee request is reasonable.

As noted above, the appellant is the prevailing party and the appellant has shown that an award of attorney fees is in the interest of justice. Accordingly, the final issue is whether the appellant's request for attorney fees and costs is reasonable.

The computation of a reasonable attorney fees award based on the "lodestar" begins with an analysis of two objective variables: the attorney's customary billing rate and the number of hours reasonably devoted to the case. *See Stewart v. Department of the Army*, 102 M.S.P.R. 656 (2006); *Ruble v. Office of Personnel Management*, 96 M.S.P.R. 44, ¶ 7 (2004); *Mitchell v. Department of Health and Human Services*, 19 M.S.P.R. 206, 208 (1984). Although the agency did not challenge the reasonableness of the fees requested, the Board must still ensure that only reasonable fees are awarded. *See Ruble*, 96 M.S.P.R. 44, at ¶ 8.

The Board's regulations at 5 C.F.R. § 1201.203 provide that the appellant's motion for attorney fees must include, at a minimum: (1) accurate and current time records; (2) a copy of the terms of the fee agreement (if any); and (3) the attorney's customary billing rate for similar work with evidence that that rate is consistent with the prevailing community rate for similar services in the community in which the attorney ordinarily practices. *See also Martinez v. U.S. Postal Service*, 89 M.S.P.R. 152, ¶ 19 (2001). Here, the appellant submitted itemized time and billing records; a copy of the "Legal Services Agreement" between she and her counsel; the declarations of her counsel Mr. Brown and Mr. Goodkin; and the declarations of attorneys John Weiss, Ronald Ackerman, Mary Dryovage, and Georgianna Regnier, each of whom practice employment law in California. AFF, Tab 1.

Where it is agreed that a specific fee be paid to counsel for legal services rendered on behalf of an appellant, the Board presumes that the agreed upon amount represents the maximum reasonable fee which may be awarded. *See Ceja v. Defense Logistics Agency*, 34 M.S.P.R. 399, 404 (1987) (citing *O'Donnell v. Department of the Interior*, 2 M.S.P.R. 445, 455 (1980) *overruled on other grounds Koch v. Department of Commerce*, 19 M.S.P.R. 219, 222 (1984)). This presumption, however, is rebuttable. *See Andrus v. General Services Administration*, 56 M.S.P.R. 681, 684-85 (1993). Here, the appellant did not agree to pay a specific hourly fee to her counsel. Rather, the Legal Services Agreement specified the minimum hourly rate for attorney time which may be charged, and stated that the fee would be based on the prevailing community rates. AFF, Tab 1, Exhibit C. The appellant has requested that her counsel be compensated at the following hourly rates from June 28, 2006, to December 31, 2006: Mr. Brown at \$375.00 per hour; Mr. Goodkin at \$250.00 per hour; paralegals at \$85.00 per hour. She has requested that her counsel be compensated

at the following hourly rates from January 1, 2007,¹ to the present: Mr. Brown at \$400.00 per hour; Mr. Goodkin at \$275.00 per hour; paralegals at \$125.00 per hour. AFF, Tab 1, pp. 7-8.

Mr. Brown averred that his firm successfully charged and recovered attorney fees in the amount of \$375.00 to \$400.00 per hour for similar work by him, and \$250.00 to \$275.00 for similar work by Mr. Goodkin. Further, the appellant has supported his claimed hourly rate by submitting declarations of other employment law attorneys in the Greater Los Angeles area. AFF, Tab 1, Exhibits D through I. The declarations show that, several years ago, customary rates for attorneys of Mr. Brown's and Mr. Goodkin's experience and expertise ranged from \$275.00 to \$350.00. *Id.* Additionally, counsel have submitted evidence of their education, experience, and other relevant qualifications, which support the fee rates claimed. AFF, Tab 1, pp. 5-11. Thus, I find that the appellant has established that her counsel's claimed attorney fee rate is the prevailing rate in the relevant community for similar work by attorneys of similar experience.

Specifically, I find that Mr. Brown's customary hourly rate of \$375.00 should be applied for his attorney hours through December 2006, after which the rate of \$400.00 should be applied. *See Estate of Lizut v. Department of the Army*, 51 M.S.P.R. 549, 554 (1991) (counsel may be awarded different billing rates for services performed in different years). I find that Mr. Goodkin's customary hourly rate of \$250.00 should be applied for his attorney hours through December 2006, after which the rate of \$275.00 should be applied. *Id.* I also find that the

¹ In his declaration, Mr. Brown averred that on January 1, 2007, his firm raised the hourly rates for attorney and paralegal time based on the prevailing rates charged in his community. AFF, Tab 1, pp. 7-8.

requested rate of \$85.00 (prior to January 1, 2007) and \$125.00 (starting January 1, 2007) for paralegal work² is reasonable.

Finally, the appellant has established that the number of hours devoted to the case was reasonable. *See Ruble*, 96 M.S.P.R. 44, ¶ 7. The itemized billing records included in the record shows that Mr. Brown spent 2.55 hours and Mr. Goodkin spent 48.9 hours working on tasks related to the appeal, and paralegals spent 26.5 hours on the appeal. AFF, Tab 1, Exhibit A. Further, counsel spent 3.8 hours of attorney time and 4.8 hours of paralegal time preparing the Petition for Attorney Fees. AFF, Tab 1, Exhibit B. There is no evidence that any of these hours were unreasonable or excessive on their face, insufficiently documented, or duplicated other work. Moreover, the agency did not object to the billing records submitted by counsel or oppose the number of hours claimed.

I find the appellant is entitled to reasonable attorney fees she incurred in her appeal of OPM's reconsideration decision in the amount of \$16,889.75; attorney fees for preparing her Petition for Attorney Fees in the amount of \$1,707.50; and costs in the amount of \$516.12. Therefore, the appellant is entitled to reasonable attorney fees and costs in the total amount of \$19,113.37.

DECISION

The appellant's motion for attorney fees is GRANTED.

ATTORNEY FEES

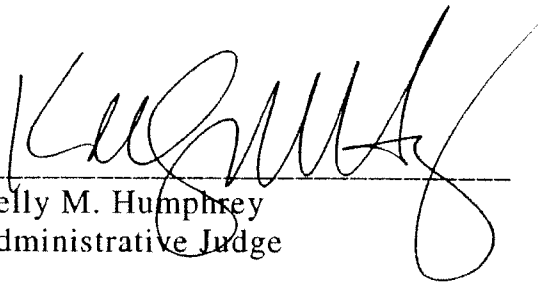
I **ORDER** the agency to pay attorney fees and costs in the amount of **\$19,113.37** by a check made payable to the appellant's counsel. Payment must be

² The Board has held that an attorney fees award under 5 U.S.C. § 7701(g)(1) may include reimbursement for services rendered by paralegals and law clerks, where the fees are routinely billed to the client, are not taxable costs or prohibited by statute or regulation, and are not expenses incurred for the mere convenience of counsel. *Shimotsukasa v. U.S. Postal Service*, 78 M.S.P.R. 679, 682 (1998).

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made no later than 20 calendar days after the date this initial decision becomes final.

FOR THE BOARD:



Kelly M. Humphrey
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **October 31, 2007**, 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 you prove that you received this initial decision 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. You must establish the date on which you received it. 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. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. 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 Pro Se Petitioners and Appellants," which is contained within the court's Rules 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.