

U.S. Department of Labor

Office of Inspector General—Office of Audit

REPORT TO OFFICE OF WORKERS' COMPENSATION PROGRAMS AND EMPLOYEES' COMPENSATION APPEALS BOARD



OWCP AND ECAB DID NOT MONITOR THE REPRESENTATIVES' FEES PROCESS TO PROTECT FECA CLAIMANTS FROM EXCESSIVE FEES

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BRIEFLY...

March 31, 2016

OWCP AND ECAB DID NOT MONITOR THE REPRESENTATIVES' FEES PROCESS TO PROTECT FECA CLAIMANTS FROM EXCESSIVE FEES

WHY OIG CONDUCTED THE AUDIT

The Office of Inspector General received a Senate request that expressed concerns regarding the processes established to protect federal workers from paying excessive representation fees when they file workers' compensation claims.

The Federal Employees' Compensation Act (FECA) provides workers' compensation coverage to 3 million federal and postal workers for employment-related injuries and occupational diseases. FECA allows a claimant to authorize an individual to represent them before the Office of Workers' Compensation Programs (OWCP) during the claims process and before the Employees Compensation Appeals Board (ECAB) during the appeals process. FECA permits the representative to charge fees for the services provided and the FECA claimant is solely responsible for paying those fees. While FECA does not limit the amount a representative may charge, the law does require OWCP or ECAB to approve the fees to protect claimants from paying excessive fees.

WHAT OIG DID

Our objective was to determine the following:

Did OWCP and ECAB ensure represented claimants and appellants were properly protected from paying excessive fees to their representatives?

READ THE FULL REPORT

To view the report, including the scope, methodologies, and full agency responses, go to <http://www.oig.dol.gov/public/reports/oa/2016/03-16-001-04-431.pdf>

WHAT OIG FOUND

OWCP and ECAB did not ensure represented claimants and appellants were properly protected from paying excessive fees to their representatives. The two agencies had policies and procedures in place for the use of representation, including authorizing the representation and the submission, review, and approval of representatives' fees, but did not properly manage key aspects of the process. OWCP did not notify claimants and representatives of the regulations and requirements regarding legal fees and OWCP and ECAB did not obtain and approve legal fee applications.

OWCP did not obtain the required fee applications in 44 percent (12 of 27) of the OWCP claim files tested because OWCP did not notify claimants or their representatives of the requirement to file an application. When fee applications were not submitted, OWCP did not follow up to obtain them. While representatives who do not submit fee applications are subject to fines or imprisonment not to exceed one year, or both, OWCP could not demonstrate it ever pursued such actions. OWCP officials stated these conditions occurred because activities related to fee applications were a low priority as the fees did not impact disability determinations or involve the use of government funds.

ECAB notified appellants and their representatives of the requirement to file fee applications; however, less than two percent did so. ECAB did not follow up with noncompliant representatives to obtain the applications. ECAB stated it was unaware the number of legal fee applications filed was as low as our analysis showed.

WHAT OIG RECOMMENDED

We made recommendations to the Director of OWCP and the Chairperson of ECAB regarding actions needed to improve management of the agencies' fee application processes.

OWCP and ECAB agreed with their statutory responsibility to protect FECA claimants and appellants from paying excessive fees for representation. However, OWCP expressed concern that continuously monitoring fee approval compliance would require enormous resources that could adversely impact FECA benefit delivery.

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March 31, 2016

INSPECTOR GENERAL'S REPORT

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The Office of Inspector General received a Senate request that expressed concerns about whether or not the processes established by the Office of Workers' Compensation Programs (OWCP) and the Employees' Compensation Appeals Board (ECAB) protected federal workers who file workers' compensation claims and appeals from paying potentially excessive representation fees. The Federal Employees' Compensation Act (FECA) requires OWCP and ECAB to protect claimants and appellants from these potential abuses. In response, OWCP and ECAB implemented legal fee application processes to provide those protections.

In response to the Senate request, we performed a review of the FECA claims and appeal processes to determine the following:

Did OWCP and ECAB ensure represented claimants and appellants were properly protected from paying excessive fees to their representatives?

RESULTS IN BRIEF

OWCP and ECAB did not ensure represented claimants and appellants were properly protected from paying excessive fees to their representatives. The two agencies had policies and procedures in place for the review and approval of representatives' fee applications, but did not properly manage key aspects of the process. OWCP did not

notify claimants and representatives of the regulations and requirements regarding legal fees and OWCP and ECAB did not obtain and approve legal fee applications. Without obtaining and reviewing the required legal fee applications, OWCP and ECAB could not ensure FECA claimants and appellants were protected from potential abuses involving excessive representative fees.

OWCP did not obtain the required fee applications in 44 percent (12 of 27) of the OWCP claim files tested because OWCP did not notify claimants or their representatives of the requirement to file an application. When applications were not submitted, OWCP did not follow up to obtain them. While representatives who do not submit fee applications are subject to fines or imprisonment not to exceed one year, or both, OWCP could not demonstrate it ever pursued such actions. OWCP officials stated these conditions occurred because activities related to fee applications were a low priority as the fees did not impact disability determinations or involve the use of government funds.

ECAB notified appellants and their representatives of the requirement to file fee applications; however, less than two percent did so. ECAB did not follow up with noncompliant representatives to obtain the applications. ECAB stated it was unaware the number of legal fee applications filed was as low as our analysis showed.

BACKGROUND

FECA authorizes a workers' disability compensation program, administered by OWCP, for 3 million civilian employees of the federal government and postal workers around the world injured at work. These injured federal employees file a claim with OWCP for benefits such as medical care, wage loss replacement, and help in returning to work.

During the claims process, FECA allows claimants to authorize an individual to represent them before OWCP. While claimants are responsible for paying the representation and FECA does not limit the amount of fees that a representative may claim, FECA provides protections to the claimant regarding these fees, such as prohibiting legal representatives to charge contingency fees. To implement these protections, FECA requires OWCP to inform claimants and representatives of these protections and obtain written authorization of representation. Additionally, FECA regulations require representatives who charge claimants for their services to submit a fee application to OWCP, along with a signed statement by the claimant of agreement or disagreement with the amount charged and an acknowledgement that OWCP is not responsible for paying the fee or other costs. OWCP approves legal fee applications when they have a signed statement indicating the claimant's agreement with the fee, the amount charged is not the result of a contingency fee arrangement, and the amount charged appears reasonable.

ECAB was created by statute to hear FECA appeals and provide final decisions. FECA claimants may appeal OWCP determinations and awards to ECAB, whose authorizing law and regulations require it to approve the legal fees of the appellants' attorneys. Because ECAB does not allow payment of legal fees on a contingency basis, the appellant is responsible for paying all representation fees; however, ECAB is responsible for ensuring the appellant agrees with the fees charged and reviewing the fee application for reasonableness.

RESULTS

As required by FECA, OWCP and ECAB developed and implemented policies and processes for the use and payment of representatives by FECA claimants. Although these policies and processes were in place, we determined OWCP and ECAB had not properly managed key aspects of them. We found OWCP and ECAB obtained the required written authorization from the claimant for representation; however, OWCP claim files did not contain the required fee application in 12 of the 27 files we tested. Additionally in ECAB, we found that less than two percent of the representatives filed the required fee applications.

OWCP AND ECAB COMPLIED WITH REGULATIONS REQUIRING WRITTEN AUTHORIZATION FOR REPRESENTATION

Our testing of OWCP's FECA cases with representation determined that 95 percent (40 of 42) contained the required written authorization from the claimant for representation. Our testing of 34 ECAB appeals with representation determined 100 percent contained the required written authorization from the appellant for representation. FECA allows claimants/appellants a representative to assist in adjudicating the claim/appeal. It is important that claimants/appellants submit the authorization form to ensure only the authorized representative receives protected information and OWCP and ECAB use the authorization forms to identify recipients of information regarding the regulations, requirements, and application process for representative's fees.

We tested FECA case files and forms to determine whether OWCP obtained signed forms from the claimants with representation. From OWCP's 758,328 cases open during fiscal year (FY) 2012, we identified a universe of 44,804 cases with representation and randomly selected a sample of 51 cases for testing. In this test of our sample, we excluded 9 cases due to the contact coding errors in the contact type and a case originating prior to the current system of record and determined 95 percent of the remaining cases (40 of 42) contained the required written authorization for representation from the claimant.

Upon receiving the FECA claimant's appeal of an OWCP determination, ECAB provides the appellant with a notification of requirements for representatives. If the appellant elects representation, the appellant must submit a signed Authorization for Representation form designating an individual as their representative in matters related to the appeal.

We tested FECA appeal files and forms to determine whether ECAB obtained signed authorization forms from the appellants with representation. For our testing, ECAB provided information regarding 6,286 appeals of FECA determinations and awards in FYs 2011 through 2013. Of those appeals, we identified 2,577 with representation, 34 of which also had a legal fee application on file. We tested all 34 of the appeals with a legal fee application and identified that 100 percent had provided the required written authorization from the appellant for representation.

OWCP AND ECAB DID NOT ENSURE REPRESENTATIVES FILED THE REQUIRED LEGAL FEE APPLICATION

Our testing of the 51 OWCP FECA cases in our sample found 27 cases should have had a fee application on file and 44 percent (12 of 27) of those cases did not have one on file. Our testing of ECAB's 2,577 appeals with representation determined just 1.3 percent (34 of 2,577) filed a legal fee application. FECA requires OWCP/ECAB approval of a representative's fees prior to payment for assisting in the claim/appeal adjudication. Without obtaining and reviewing the required fee applications, OWCP and ECAB cannot ensure FECA claimants and appellants are protected from paying excessive fees for representation.

In OWCP, FECA regulations require the representative to submit to the OWCP district office for approval a legal fee application signed by the claimant and containing an itemized statement showing the representative's hourly rate, the number of hours worked, the work performed, and the total amount charged. OWCP approves legal fee applications that have a signed statement indicating the claimant agrees with the fee and the amount charged is not based on a contingency fee arrangement. If the claimant disagrees with the fees, OWCP evaluates the claimant's objection and decides whether to approve, modify, or deny the legal fee application. According to FECA regulations, OWCP's decision is appealable. We further tested our sample of the 51 FECA cases and determined 27 should have had a legal fee application filed because they had been adjudicated with someone identified as an attorney, but 44 percent (12 of 27) did not.

OWCP did not obtain and review fee applications as required because it did not follow its own policy to provide notification of legal fee requirements and information to claimants and representatives. OWCP officials explained they did not monitor representatives' compliance with the legal fee application requirement because they considered the fees to be low risk and a low priority. Specifically, the fees did not impact disability determinations and there was no loss of government funds since FECA

claimants were responsible for paying the representatives' fees. As a result of OWCP's inaction, FECA claimants were at risk of paying excessive fees for representatives' services.

When a claimant files an appeal with ECAB using the Application for Review form, ECAB notifies the claimant/appellant and their representative that it has received the appeal, and provides to them the ECAB regulations regarding the requirement for the representative to file a legal fee application before the appellant pays any fees, and that contingency fees are not allowed. For the 34 ECAB cases in which representatives filed fee petitions, our review of the appeal files found that ECAB notified the appellants and their representative in all 34 cases. However, we determined only 1.3 percent (34 of 2,577) of the appeals with representation filed during FYs 2011 through 2013 had a legal fee application on file.

ECAB regulations state ECAB must approve a claim for a fee from an appellant's representative for legal or other services performed on appeal before ECAB, otherwise the claim is invalid. A representative collecting a fee without this approval constitutes a misdemeanor that is subject to fines and/or imprisonment not to exceed one year. ECAB's regulations require the representative to submit a legal fee application to ECAB's Clerk and include a statement supporting the extent and nature of the work. ECAB is responsible for ensuring the appellant is in agreement with the fee and reviewing the fee application for reasonableness. ECAB considers several factors, including the geographic location of the appellant and representative when reviewing the representative's requested hourly rate. We questioned the ECAB Clerk to determine why only 1.3 percent (34 of 2,577) of the appeals with representation filed had a legal fee application on file. ECAB stated it did not realize the number of legal fee applications received was as low as our analysis showed and did not have an explanation as to why representatives were not complying with the legal fee application requirement. ECAB did not monitor the receipt of representatives' fee applications, and as a result, it could not ensure FECA appellants agreed to the fee amounts and the fees were reasonable.

OIG RECOMMENDATIONS

To improve the protection of FECA claimants from excessive fees charged by their representatives, we recommend the Director of the Office of Workers' Compensation Programs:

1. Enforce OWCP's policy to notify FECA claimants and representatives of the requirements for submitting fee applications early in the claims process, and monitor compliance with this policy.

2. Implement controls that monitor the receipt of fee applications and conduct appropriate follow up if they are not received in a timely manner after a claim determination or award.

To improve the protection for FECA appellants from excessive fees charged by their representatives, we recommend that the Chairman and Chief Judge of the Employees' Compensation Appeals Board:

3. Implement controls that monitor the receipt of fee applications and conduct appropriate follow up if not received in a timely manner after a decision.

MANAGEMENT RESPONSES

OWCP concurred in part with our recommendations and described actions it is taking to revise representative correspondence and stress to claims examiners the need to provide written notice of fee approval requirements to claimants and their representatives. However, OWCP expressed concern that, given the agency's lack of investigative resources and the long life cycle of many FECA claims, continuously monitoring fee approval compliance would require enormous resources that could adversely impact FECA benefit delivery.

OWCP also stated the reported error rate may be exaggerated and the conclusions overstated due to the small sample size the auditors used. To the contrary, if controls were working, the probability of finding errors in a small sample would be very low. The error rate for our sample was 44 percent.

OWCP's response to our draft report is included in its entirety in Appendix B.

ECAB concurred with our recommendation and described actions it has taken to ensure all appellants and their representatives are aware of the requirement to file a fee petition. ECAB's response to our draft report is included in its entirety in Appendix C.

We appreciate the cooperation and courtesies that OWCP and ECAB personnel extended to the Office of Inspector General during this review. OIG personnel who made major contributions to this report are listed in Appendix D.



Elliot P. Lewis
Assistant Inspector General
for Audit

Appendices

APPENDIX A

**OBJECTIVE, SCOPE, METHODOLOGY, AND
CRITERIA**

OBJECTIVE

Did OWCP and ECAB ensure represented claimants and appellants were properly protected from paying excessive fees to their representatives?

SCOPE

Our review of the OWCP legal fees process covered the FECA cases active in FY 2012.

Our review of the ECAB legal fees process covered the appeals of FECA determinations and awards filed and completed in FYs 2011 through 2013.

We conducted our review in Washington, DC, and Philadelphia, PA, under the Quality Standards for Inspection and Evaluation, issued January 2012, by the Council of the Inspectors General on Integrity and Efficiency.

METHODOLOGY

We met with OWCP and ECAB officials and reviewed FECA and ECAB laws, regulations, and OWCP policies and procedures to obtain an understanding of the requirements and processes related to representation of FECA claimants and submission and approval of legal fee applications.

For OWCP there were 44,804 cases with the contact type for Attorneys (A), Legal Representatives (R), Representative at Hearing (RH) and Survivor Attorneys (SA), excluding the cases with no contact type identified or identified as third-party representation. From this population, we reviewed a random sample of 51 cases for our testing. We reviewed this sample of FECA cases to determine if OWCP obtained the required authorization for the representative. We further tested this sample to determine if a legal fee application was required, and if so, whether the representative filed, and OWCP processed, it in accordance with FECA regulations and OWCP policies and procedures.

ECAB provided information regarding 6,286 appeals of FECA determinations and awards during FYs 2011 through 2013. Of those appeals, 2,577 appellants' submitted authorizations for representation and only 35 of those appeals had submitted a fee petition. We tested 34 of the 35 appeals in which a legal fee application was submitted — one fee application, ECAB could not retrieve from archives. To determine if the required authorization was obtained for the representative, we tested those 34 appeals with a legal fee application on file to verify the appeal had an authorization for

representation. We further tested these 34 appeals to determine if a legal fee application was required, and if so, whether it was filed and processed in accordance with FECA regulations and ECAB policies and procedures.

For both OWCP and ECAB data, we performed data validation checks, including testing cases that OWCP and ECAB identified as not having a legal fee application, to verify if this was the case.

CRITERIA

- Title 5, United States Code (U.S.C.), Chapter 81 – Section 8102 Compensation for Disability or Death of Employee –and Section 8127, Representation; Attorneys Fee
- Title 18, U.S.C., Section 292 – Solicitation of employment and receipt of unapproved fees concerning Federal employees' compensation
- Title 20, Code of Federal Regulations, Part 10 – Claims for Compensation Under the Federal Employees' Compensation Act, as Amended, Parts 10.700 to 10.704, Chapter I (4-1-12 Edition), June 28, 2011
- OWCP Division of Federal Employees' Compensation Procedure Manual, Part 2, Chapter 2-1200, Representative Services
- ECAB Procedures for Processing and Appeal

OWCP'S RESPONSE TO DRAFT REPORT

**Division of Federal Employees' Compensation
Response to Office of the Inspector General's Legal Fees Audit Report
03-A13-002-04-430**

The following is the Office of Workers' Compensation Programs (OWCP) response to the Department of Labor's (DOL) Office of Inspector General (OIG) draft report on OWCP's Division of Federal Employees' Compensation (DFEC) procedures for the authorization, notification, and fee approval for representatives under the Federal Employees' Compensation Act (FECA). In its report, DOL OIG makes the following recommendations to protect FECA claimants from excessive fees charged by their representatives:

1. Enforce OWCP's policy to notify FECA claimants and representatives of the requirements for submitting fee applications early in the claims process, and monitor compliance with this policy.
2. Implement controls that monitor the receipt of fee applications and conduct appropriate follow up if they are not received in a timely manner after a claim determination or award.

OWCP DFEC offers the following comments in response to the draft report:

- OWCP takes its statutory responsibility under 5 U.S.C. 8127 seriously and has issued detailed regulations and procedures for the handling of representative fee approvals. While it is true that no government monies are expended, we fully recognize it is our statutory obligation to approve fees when fees are in fact charged to claimants. Our published regulations give legal notice of these requirements to the representative community. In the 2011 FECA regulations, we added language (20 C.F.R. §10.704) to announce that a person who collects a fee without OWCP approval may be charged with a misdemeanor under 18 U.S.C. 292 to provide notice of the potential consequences for failing to comport with the OWCP fee approval process. In addition, the FECA Procedure Manual contains a full chapter of guidance on representatives including guidance on responding to inquiries from bar associations.¹
- OWCP is in the process of revising the representative correspondence to highlight FECA's statutory, regulatory and procedural requirements for representatives. We will also stress to our claims examiners the need to provide written notice of these fee approval requirements to claimants and their representatives.
- Given OWCP's lack of investigative resources and the long life cycle of many FECA claims, we are concerned that continuously monitoring fee approval compliance would require enormous resources that could adversely impact FECA benefit delivery to our injured workers. Because of the wide variation in the time a FECA claim may take; the various FECA benefits that may be paid or denied; and the numerous issues that may arise in connection with a single claim, the regulations and procedures do not specify a single point in a claim at which a fee approval must be submitted. For example, a claims determination such as a schedule award for permanent impairment may be issued on a given date but the representative may seek a hearing or

¹ Because the Employees' Compensation Appeals Board (ECAB) is a separate quasi-adjudicatory body that is completely independent of OWCP, we express no opinion on that portion of the report that addresses ECAB's fee application approval process.

reconsideration seeking an award for additional percentages. Some representatives may choose to seek a fee at the time of the initial award and others may await the results of the appeal.

- Regarding whether fees are in fact charged, as we have explained to DOL OIG, certain representatives such as union representatives do not charge fees for representation. In other instances, the representative's work was so *de minimis* (for example consisting of a single letter) that it seems likely the representative may not have charged a fee requiring OWCP approval.
- The OIG report uses an extremely small sample size of 27. With such a low sample size (particularly compared to the hundreds of thousands of claims filed during the over decade long period encompassed by the sample), the study's error rate may be exaggerated and its conclusions overstated.

In conclusion, OWCP works hard to have a good working relationship with the representative community which includes union representatives, family members, lay representatives and attorneys. While we will work to ensure notice of our statutory requirement is provided to representatives and claimants and will work with DOL OIG to establish a more formalized protocol for referring suspected violations to DOL OIG, we do not believe the report demonstrates a systemic problem of excessive fees.

ECAB'S RESPONSE TO DRAFT REPORT

U.S. Department of Labor

Employees' Compensation Appeals Board
Washington, D.C. 20210



March 9, 2016

MEMORANDUM FOR ELLIOTT P. LEWIS
Assistant Inspector General for Audit

FROM: CHRISTOPHER J. GODFREY *C.J.G.*
Chairman and Chief Judge
Employees' Compensation Appeals Board

SUBJECT: Response to the Office of Inspector General's Report,
"OWCP and ECAB Did Not Monitor the
Representatives' Fees Process to Protect FECA
Claimants from Excessive Fees"

The Employees' Compensation Appeals Board (ECAB) has received and reviewed the Inspector General's report, "OWCP and ECAB Did not Monitor the Representatives' Fee Process to Protect FECA Claimants from Excessive Fees" and responds to those OIG findings and recommendations specifically addressed to it. ECAB thanks the OIG audit team for its hard work and extensive study of the FECA program. ECAB remains committed to the common goal of protecting FECA appellants from paying excessive fees for representation before the Board.

I. Responses to ECAB Recommendations

Recommendation 3:

Implement controls that monitor the receipt of fee applications and conduct appropriate follow-up if not received in a timely manner after a decision.

ECAB agrees with Recommendation 3. Increased steps have been taken to insure that all appellants and their representatives are aware of the requirement to file a fee petition for work performed before ECAB and the potential penalties for failure to comply. ECAB's website and standard correspondence addressed to appellants and/or their representatives have been updated to provide representatives with detailed instructions on how to properly file their fee petitions and to provide information on how the fee petitions are evaluated by the Board. ECAB has also provided public access to all orders granting and denying representative fees.

Additionally, information regarding the necessity of filing a fee petition for work before ECAB will specifically be included with all ECAB decisions in which a party is represented. ECAB will also highlight and enhance the information provided in all standard correspondence from the Board to appellants and their representatives. Finally, ECAB will periodically review reports following the issuance of decisions to determine whether fee petitions are being filed in a timely manner in cases when the appellant has representation.

APPENDIX D

ACKNOWLEDGEMENTS

Key contributors to this report were Michael Hill, Stephen Fowler, Daniel Pompili, Joseph Pomianek, David Halstead, and Theresa Remolde.

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