

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

S.T., Appellant)	
)	
and)	Docket No. 19-0037
)	Issued: October 21, 2019
DEPARTMENT OF HOMELAND SECURITY,)	
FEDERAL AIR MARSHAL SERVICE,)	
East Elmhurst, NY, Employer)	
)	

Appearances: *Case Submitted on the Record*
Daniel B. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

ORDER REMANDING CASE

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

On October 5, 2018 appellant, through counsel, filed a timely appeal from an April 9, 2018 decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 19-0037.²

This case has been previously before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated April 4, 2019, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0037 (issued April 4, 2019).

³ Docket No. 17-1292 (issued February 8, 2018).

On October 1, 2014 appellant, then a 42-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging a left knee injury that day as a result of a fall while in the performance of duty. He stated that he was on the elliptical machine in the second floor office gym when his left knee buckled and he felt immediate pain.

By decision dated January 21, 2015, OWCP accepted that the October 1, 2014 employment incident occurred as alleged, but denied appellant's claim finding that he had not submitted evidence containing a medical diagnosis in connection with the injury or events.

By decisions dated August 16, 2016, OWCP modified its prior decision and accepted that the October 1, 2014 employment incident occurred as alleged, but denied the claim because the medical evidence of record failed to establish causal relationship between appellant's diagnosed conditions and the accepted October 1, 2014 employment incident. By decisions dated November 23, 2016 and May 4, 2017, it denied modification of its August 16, 2016 decision.

By decision dated February 8, 2018, the Board set aside OWCP's May 4, 2017 decision and remanded the case to OWCP for further medical development. The Board found that the case was not in posture for decision because the reports from appellant's physician, Dr. Bruce R. Ross, a Board-certified orthopedic surgeon, strongly suggested causal relationship between the accepted October 1, 2014 employment incident and appellant's new left knee ACL tear.⁴ The Board found that while Dr. Ross' reports were not completely rationalized, they were consistent in indicating that appellant had sustained a new ACL tear due to the accepted employment incident and that they were not contradicted by any substantial or factual evidence of record. Therefore, the Board remanded the case to OWCP for further medical development "to obtain a rationalized medical opinion" as to whether appellant's condition was causally related to the accepted employment incident and to issue a *de novo* decision. The Board explained that while the claimant bears the burden of proof to establish entitlement to compensation, OWCP "shares responsibility" in the development of the evidence and to see that justice is done.⁵

In a development letter dated February 14, 2018, OWCP requested that appellant submit a narrative medical report containing "a well-rationalized physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated a medical condition." The letter noted that the documentation that had been received to date was insufficient to support his claim because the evidence was insufficient to establish that he actually experienced the incident or employment factor alleged to have caused injury or a medical report on causal relationship. It afforded appellant 30 days to submit additional evidence in support of his claim.

Appellant, through counsel, responded by submitting a February 27, 2018 letter contending that OWCP had misconstrued the Board's decision by asking appellant to submit additional medical opinion evidence and requested a review by an OWCP district medical adviser (DMA).

By decision dated April 9, 2018, OWCP found that the medical evidence of record failed to establish causal relationship between appellant's diagnosed conditions and the accepted

⁴ *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *J.C.*, Docket No. 16-1649 (issued February 8, 2017); *L.F.*, Docket No. 14-1906 (issued August 13, 2015); *John J. Carlone*, 41 ECAB 354 (1989).

⁵ *J.S.*, Docket No. 16-0777 (issued January 3, 2017); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

October 1, 2014 employment incident finding that the opinion of Dr. Ross was not well rationalized. OWCP further noted that the Board's decision did not require that the case be referred to a DMA or any other medical expert and noted that its February 14, 2018 development letter provided sufficient opportunity for appellant to submit the requested evidence.

The Board has duly considered the matter and finds that this case is not in posture for decision.

By decision dated February 8, 2018, the Board set aside OWCP's May 4, 2017 decision and remanded the case to OWCP "to obtain a rationalized medical opinion" as to whether appellant's condition was causally related to the accepted October 1, 2014 employment incident and to issue a *de novo* decision. However, on remand, OWCP failed to properly develop the record by obtaining a rationalized medical opinion from an OWCP physician, such as a DMA or second opinion examiner, on the issue of causal relationship as instructed by the Board.

Therefore, the Board will set aside OWCP's April 9, 2018 decision and remand the case for proper development of the medical evidence. On remand OWCP shall prepare a statement of accepted facts and thereafter obtain from a DMA or second opinion examiner a well-rationalized medical opinion on the issue of causal relationship. Following this and such other development as deemed necessary, OWCP shall issue a *de novo* decision. Accordingly,

IT IS HEREBY ORDERED THAT the April 9, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: October 21, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board