



On September 8, 2016 and February 21, 2017 appellant underwent right knee arthroscopic surgery. He continued to receive medical treatment.

In a July 14, 2017 report, Dr. Alois J. Binder, a Board-certified orthopedic surgeon, noted appellant's history of right knee pain and lateral and medial meniscus tears. He related that appellant was currently four months post status right knee arthroscopy and still continued to have moderate pain and buckling sensations while ambulating. Upon physical examination of appellant's right knee, Dr. Binder explained that because appellant had failed a long course of conservative measures, he recommended right total knee arthroplasty.

On July 18, 2017 Dr. Binder formally requested authorization for total right knee arthroplasty.

OWCP referred the request to Dr. Nathan Hammel, a Board-certified orthopedic surgeon and OWCP district medical adviser. In an August 14, 2017 report, Dr. Hammel opined that the proposed total right knee replacement surgery was not medically necessary to treat appellant's April 18, 2016 employment injury. Dr. Hammel explained that the medical evidence submitted lacked historical elements, examination findings, and clear imaging findings to determine that the request was medically necessary. He noted that the medical records had no discussion of appellant's functional limitations, recent weight bearing x-rays, or reporting of body mass index to ensure reduction of risk of infection.

By letter dated August 16, 2017, OWCP informed appellant: "the request for right knee total knee replacement is denied." It explained that there was insufficient evidence of record to establish that the proposed surgery was medically necessary to treat his accepted injury.<sup>2</sup>

On August 28, 2017 appellant, through counsel, requested a telephonic hearing before a hearing representative from OWCP's Branch of Hearings and Review. He submitted additional reports by Dr. Binder regarding treatment for his right knee injury.

By decision dated September 13, 2017, an OWCP hearing representative denied appellant's request for a hearing before the Branch of Hearings and Review. He noted that there was no final, adverse decision of record upon which an appeal could be made.

The Board has duly considered the matter and finds that this case is not in posture for decision. In its August 16, 2017 letter, OWCP notified appellant that his physician's request for authorization of right knee surgery was denied. The Board finds that this correspondence apprised appellant of an adverse action and constituted an appealable decision.<sup>3</sup> It contained findings of fact and a statement of reasons.<sup>4</sup> The August 16, 2017 letter notified appellant that his request for authorization was denied and indicated that the basis for the denial was explained in the August 14, 2017 district medical adviser's report. As the August 16, 2017 letter was an appealable decision, there was an adverse, final decision on the record upon which an appeal could be made, contrary

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<sup>2</sup> The August 16, 2017 correspondence did not include a notice of appeal rights or an appeal request form.

<sup>3</sup> See *C.M.*, Docket No. 16-1569 (issued May 3, 2017).

<sup>4</sup> 20 C.F.R. § 10.126.

to OWCP's finding in its September 13, 2017 hearing representative decision. Because appellant's August 28, 2017 hearing request was timely filed within 30 days of the August 16, 2017 decision, he was entitled to a hearing before a hearing representative from OWCP's Branch of Hearings and Review.<sup>5</sup>

The case shall be remanded to OWCP for proper consideration of appellant's August 28, 2017 request for a telephonic hearing.

**IT IS HEREBY ORDERED THAT** the September 13, 2017 decision of the Office of Workers' Compensation Programs is set aside and remanded for further action consistent with this decision of the Board.

Issued: March 8, 2019  
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

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<sup>5</sup> A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration. 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).