

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

O.R., Appellant)	
)	
and)	Docket No. 18-1583
)	Issued: September 17, 2019
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Miami, FL, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

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

On August 13, 2018 appellant filed a timely appeal from a May 16, 2018 decision of the Office of Workers' Compensation Programs (OWCP).¹ The Clerk of the Appellate Boards assigned Docket No. 18-1583.

On April 22, 2013 appellant, then a 29-year-old transportation security officer, injured his lower back while in the performance of duty. OWCP accepted his traumatic injury claim for lumbar sprain and herniated disc at L5-S1 and assigned File No. xxxxxx033.²

On May 12, 2017 appellant filed a new traumatic injury claim (Form CA-1) alleging that on May 14, 2013 he aggravated his prior lumbar condition when dragging luggage while in the

¹ The Board notes that, following the May 16, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*

² On April 1, 2014 appellant underwent lumbar surgery.

performance of duty.³ OWCP assigned the claim File No. xxxxxx403. By decision dated January 26, 2018, an OWCP hearing representative found that appellant had established his claim for aggravation of a herniated disc at L5-S1 as a result of employment duties on May 14, 2013. He also found that sufficient medical evidence had been presented to merit referral to a second opinion physician on the issue of whether appellant had developed a consequential right knee injury due to either of his accepted lumbar injuries. The January 26, 2018 decision referenced several reports, including, but not limited to reports from Dr. Samy F. Bishai, an attending Board-certified orthopedic surgeon, dated June 17, 2017, as well as a June 12, 2013 magnetic resonance imaging (MRI) scan report, which do not appear in the current case record under File No. xxxxxx403.

On May 22, 2017 appellant filed a traumatic injury claim (Form CA-1) alleging that on August 6, 2014 he injured his right knee when reportedly doing lunging exercises as part of physical therapy/work-condition program while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx404. By decision dated July 7, 2017 OWCP denied appellant's claim. On August 14, 2017 appellant requested reconsideration and submitted additional medical evidence. By decision dated September 20, 2017 OWCP modified the prior decision to find that appellant had established a diagnosed medical condition, however, the claim remained denied as to causal relationship. Appellant timely appealed the September 20, 2017 decision to the Board. By order dated April 9, 2018 the Board set aside and remanded the case for OWCP to incorporate evidence from File No. xxxxxx033 into File No. xxxxxx404. On remand, by decision dated July 9, 2018 OWCP denied the claim finding that the medical evidence of record was insufficient to establish causal relationship. Appellant appealed to the Board and by decision dated August 2, 2019 the Board affirmed the July 9, 2018 decision.

On February 8, 2018 OWCP accepted appellant's claim for aggravation of L5-S1 herniated lumbar disc.

In further development of the claim for a right knee condition in File No. xxxxxx043, appellant was referred to a second opinion examination with Dr. Clinton G. Bush, III, a Board-certified orthopedic surgeon. In its questions to Dr. Bush, dated March 21, 2018, OWCP requested that he address whether appellant had developed a right knee condition causally related to either the initial back injury of April 22, 2013 under OWCP File No. xxxxxx033 or to the claim that had been accepted under OWCP File No. xxxxxx403.

In a second opinion report dated April 12, 2018, Dr. Bush noted that there had been an initial injury on April 22, 2013, followed by an aggravating injury on May 14, 2013. He listed OWCP's case record relevant to his report as File No. xxxxxx403. Dr. Bush noted that the first record presented in the documents provided was dated May 13, 2013. He noted that appellant provided him with two MRI scan reports dated April 23, 2015 and March 31, 2016, as well as medical reports dated October 5, 2015 and June 14, 2017, which are not of record under OWCP File No. xxxxxx403. Dr. Bush observed that there was reasonable evidence of primary intra-articular pathology of the knee, referencing the MRI scans of April 23, 2015 and March 31, 2016, which had been provided by appellant. He opined that, within a reasonable degree of medical

³ Effective April 14, 2016, appellant was removed from service.

certainty, there was no objective or logical basis for stating a causal relationship between appellant's right knee symptoms and the work-related injury of April 22, 2013.

By decision dated May 16, 2018, OWCP denied appellant's claim for a right knee consequential injury due to his accepted aggravation of an L5-S1 herniated lumbar disc on May 14, 2013 based on the second opinion examination by Dr. Bush..

The Board finds that this case is not in posture for decision. Pursuant to 20 C.F.R. § 501.2(c)(1), the Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Decisions on claims are based on the written record, which may include forms, reports, letters, and other evidence of various types such as photographs, videotapes, or drawings.⁴ Evidence may not be incorporated by reference, nor may evidence from another claimant's case file be used.⁵ Evidence contained in another of the claimant's case files may be used, but a copy of that evidence should be placed into the case file being adjudicated.⁶ All evidence that forms the basis of a decision must be in that claimant's case record.⁷

For a full and fair adjudication of appellant's claim, the Board finds that the case records under OWCP File Nos. xxxxxx033, xxxxxx403, and xxxxxx404 must be combined.⁸ The Board finds both the hearing representative's decision dated January 26, 2018 and Dr. Bush in his report of April 12, 2018 referenced medical evidence that does not appear in the case record under OWCP File No. xxxxxx403. OWCP has not combined the case records related to appellant's claims, nor did it incorporate all referenced evidence into the current case record.⁹ Because it neglected to include evidence that helped to form the basis for its determination regarding appellant's consequential right knee claim in the current case record (including evidence from OWCP File No. xxxxxx033), the Board is not in a position to make an informed decision regarding appellant's claim.¹⁰

Therefore, the case shall be remanded to OWCP to administratively combine OWCP File Nos. xxxxxx033, xxxxxx403, and xxxxxx404. Following this and any necessary further

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5a (June 2011).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *See K.T.*, Docket No. 17-0432 (issued August 17, 2018); *L.Z.*, Docket No. 11-1415 (issued December 12, 2011).

⁹ *See supra* note 4 at Chapter 2.400.8c (February 2000) (noting cases should be doubled/combined when correct adjudication of the issues depends on frequent cross-reference between files).

¹⁰ *See L.H.*, Docket No. 17-1960 (issued August 16, 2018); *K.P.*, Docket No. 15-1945 (issued February 10, 2016); *M.C.*, Docket No. 15-1706 (issued October 22, 2015).

development, OWCP shall issue a *de novo* decision on appellant's claim for a consequential right knee condition under OWCP File No. xxxxxx403.¹¹

IT IS HEREBY ORDERED THAT the May 16, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: September 17, 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

¹¹ See *M.M.*, Docket No. 17-1150 (issued January 28, 2018).