

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

L.K., Appellant)	
)	
and)	Docket No. 19-0313
)	Issued: September 4, 2019
U.S. POSTAL SERVICE, POST OFFICE, Homewood, IL, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 November 28, 2018 appellant, through counsel, filed a timely appeal from a September 26, 2018 decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 19-0313.

This case has previously been before the Board. By decision dated July 7, 2014, the Board affirmed OWCP's termination of appellant's wage-loss compensation benefits effective July 30, 2010, and found that she had not established employment-related disability after that date.² By decision dated September 15, 2016, the Board remanded the case to OWCP finding that evidence presented on reconsideration was sufficient to warrant merit review on the issue of whether

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 Docket No. 14-0526 (issued July 7, 2014).

appellant established continuing disability.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

Following the Board's September 15, 2016 decision, OWCP issued a September 26, 2018 decision denying modification. It noted that counsel had maintained that Dr. Mukund Komanduri, a Board-certified orthopedic surgeon, who performed an impartial medical evaluation on February 1, 2010, and submitted reports dated March 8 and April 30, 2010, had not reviewed the complete evidence of record, including four digital video discs (DVDs) of surveillance video. OWCP continued that, after reviewing Dr. Komanduri's reports, it was clear that he had reviewed four DVDs before rendering his opinion. It concluded that the evidence presented was of insufficient probative value to modify its prior decisions.

The DVDs at issue were obtained during the period from April 2, 2008 to March 16, 2009 by the employing establishment's Office of the Inspector General (OIG). The integrated Federal Employees' Compensation System digital case record contains an April 3, 2009 physical evidence receipt for four surveillance video DVDs obtained by the OIG. The surveillance DVDs allegedly documented that appellant performed activities which exceeded the physical restrictions provided by her treating physician. Moreover, the August 5, 2009 statement of accepted facts provided to Dr. Komanduri referenced the DVDs. The four surveillance DVDs, however, are not included in the case record transmitted to the Board.

Section 501.2(c) of the Board's *Rules of Procedure*,⁴ provides that the Board has jurisdiction "to consider and decide appeals from final decisions of OWCP in any case arising under the [Federal Employees' Compensation] Act."⁵ Additionally, the Board's review of the case is limited to the evidence which was before OWCP at the issuance of the final decision.⁶ Since the record as transmitted to the Board does not contain evidence that OWCP relied upon in reaching its final decision, the Board is unable to properly "consider and decide" appellant's claim. The September 26, 2018 decision of OWCP, therefore, must be set aside⁷ and the case remanded to OWCP for reconstruction and proper assemblage of the case record, including obtaining the four above-referenced surveillance DVDs. Following this and such further development as OWCP deems necessary, OWCP shall issue a *de novo* decision. Accordingly,

³ Docket No. 15-0659 (issued September 15, 2016).

⁴ 20 C.F.R. § 501.2(c).

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ 20 C.F.R. § 501.2(c)(1).

⁷ *See W.M.*, Docket No. 17-1667 (issued March 8, 2018).

IT IS HEREBY ORDERED THAT the September 26, 2018 decision is set aside and the case is remanded to the Office of Workers' Compensation Programs for proceedings consistent with this order of the Board.

Issued: September 4, 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