

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

L.A., Appellant)	
)	
and)	Docket No. 19-1248
)	Issued: April 16, 2020
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Phoenix, AZ, Employer)	
)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On May 10, 2019 appellant, through counsel, filed a timely appeal from a November 15, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 19-1248.²

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 The Board notes that following the November 15, 2018 decision, OWCP received additional evidence and that appellant submitted additional evidence on appeal. 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.*

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

On September 14, 2012 appellant, then a 38-year old psychiatrist, filed a traumatic injury claim (Form CA-1) alleging that on August 16, 2012 she sustained an acute stress disorder when a threatening message was left on her office telephone by one of her patients while she was in the performance of duty. A staff assistant indicated that the message was received on July 20, 2012, but that she had not listened to it for two weeks and then called appellant to report the contents of the office telephone voicemail. At that time, appellant was on leave under the Family and Medical Leave Act (FMLA) for a nonemployment-related illness.⁴ Employing establishment police investigated the recorded threat and forwarded a recording to appellant to try and identify the caller. In an October 20, 2012 statement and in her hearing testimony, appellant indicated that she identified the caller after listening to the voicemail that was forwarded to her by the employing establishment police. She stated that, since she knew of the caller's criminal past, she declined to press charges because she was fearful that he would retaliate. Appellant related that she felt unsafe and was unable to return to work. Dr. Clint W. Anthony, an employing establishment Board-certified psychiatrist and appellant's supervisor, reviewed a transcript of the message and disagreed with her assertion that she was in danger.

On January 9, 2013 OWCP denied the claim, finding that appellant had not established a compensable factor of employment. Following a hearing, held on May 14, 2013, by a July 29, 2013 decision, OWCP's hearing representative affirmed the January 9, 2013 decision.⁵ Both decisions indicated that only a transcript of the recorded message was reviewed and that neither the claims examiner nor the hearing representative listened to the recording itself before rendering their decisions.

Appellant appealed to the Board on September 30, 2013 and, by order dated May 2, 2014, the Board remanded the case to OWCP to obtain the actual audio recording of the voicemail message and for further reconstruction and assemblage of the claim file as deemed necessary, to be followed by a *de novo* decision on the merits of appellant's claim.⁶

³ Docket No. 13-2150 (issued May 2, 2014).

⁴ The record indicates that appellant last worked on July 19, 2012 and was removed by the employing establishment effective June 29, 2013.

⁵ The hearing representative, however, acknowledged that the message could be considered incidental to employment, but that the content of the message failed to support appellant's allegation that there was a direct or implied threat to her.

⁶ In an undated occupational disease claim (Form CA-2), dated by the employing establishment on May 11, 2015, appellant alleged that employing establishment duties caused an aggravation of her preexisting depression. OWCP adjudicated that claim under File No. xxxxx954. It accepted major depression, recurrent, with features of post-traumatic stress disorder and paid retroactive wage-loss compensation from August 20, 2012. OWCP placed appellant on the periodic compensation rolls, where she remains to date. Appellant's prior claim has been administratively combined with the present case, OWCP File No. xxxxx500, with OWCP File No. xxxxx954 serving as the master file number.

Following remand, by a May 18, 2015 decision, OWCP noted that it had listened to the actual audio recording approximately 10 times and concluded that the message did not constitute a direct threat against appellant. It further found that, although the message could appear as related to factors of employment as it was left for appellant by a patient, since appellant was on FMLA leave when she listened to the message, she was not performing factors of employment at that time. OWCP denied the claim, finding that appellant was not in the performance of duty at the time of the alleged injury. Appellant, through her then representative, filed a timely request for reconsideration. By decision dated November 15, 2018, OWCP denied modification of the May 18, 2015 decision. It noted that the voicemail recording itself and a transcript had been reviewed. OWCP found the voicemail incidental to employment, but that the content of the voicemail failed to support the contention that there was a direct or implied threat directed toward appellant.

On appeal counsel maintains that the Board should remand the case for OWCP to consider whether appellant's exposure to the voicemail contributed to her emotional condition.

The Board has duly considered the matter and finds that this case is not in posture for decision. Upon review of the case record submitted by OWCP, the Board finds that the record before it is incomplete. While copies of the transcript of the voicemail are of record, a copy of the recording itself is again not found in the record before the Board.

As the Board noted in the prior May 2, 2014 order, listening to the recording itself would be beneficial in rendering an informed opinion in this case. While OWCP has now listened to the actual audio recording, the recording itself has not been forwarded to the Board as a part of the record in the claim file. All evidence that forms the basis of a decision must appear in the case record.⁷ Hence, the Board finds that this case is not in posture for decision as the record before the Board is incomplete and would not permit an informed adjudication of the case. The case must therefore be remanded to OWCP to obtain the aforementioned actual audio recording of the voicemail message and for further reconstruction and proper assemblage of the case record deemed necessary, to be followed by a *de novo* decision on the merits of appellant's claim.⁸

⁷ *D.B.*, Docket No. 19-0262 (issued December 31, 2019).

⁸ *See L.R.*, Docket No. 19-0313 (issued September 4, 2019).

IT IS HEREBY ORDERED THAT the November 15, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: April 16, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board