

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

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| A.H., Appellant |) | |
| |) | |
| and |) | Docket No. 19-1336 |
| |) | Issued: April 16, 2020 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Columbus, OH, Employer |) | |
| |) | |

Appearances: *Case Submitted on the Record*
Stanley R. Stein,, Esq., for the appellant¹
Office of Solicitor, for the Director

ORDER REMANDING CASE

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

On May 30, 2019 appellant, through counsel, filed a timely appeal from a February 7, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 19-1336.²

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.

²The Board notes 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 as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 23, 2009 appellant, then a 43-year-old part-time flexible mail clerk bent over a hamper to retrieve a bundle of mail flats and felt pain through his lower back. OWCP accepted the claim for lumbar and thoracic sprains and displacement of a lumbar intervertebral disc without displacement. On May 31, 2012 it expanded acceptance of the claim to include dysthymic disorder.

On January 11, 2013 appellant filed a wage-loss compensation claim (Form CA-7) for leave without pay for the period August 22, 2010 and continuing.

By decision dated May 13, 2015, OWCP denied the claim for compensation for the period August 22, 2010 through February 24, 2012. On May 27, 2015 appellant, through counsel, requested a hearing before an OWCP hearing representative. By decision dated April 21, 2016, OWCP's hearing representative found that appellant had not met his burden of proof to establish that he was totally disabled for work for the period from August 22, 2010 to February 24, 2014 causally related to the February 23, 2009 employment injury.

On October 14, 2016 appellant, through counsel, filed an appeal with the Board.

By decision dated June 22, 2018,⁴ the Board found that OWCP had not made findings as to appellant's ability to work during the period August 22, 2010 to February 24, 2014, causally related to all of his accepted conditions, including his dysthymic disorder. The Board found the case was not in posture for decision and remanded the case to OWCP to obtain clarification from Dr. Alan B. Levy, a Board-certified psychiatrist serving as a second opinion physician, regarding appellant's ability to work during the period August 22, 2010 to February 24, 2014. The Board specifically noted that Dr. Levy had related in his May 2, 2014 report that appellant's dysthymic condition prevented him from working and had not improved, while he also reported that appellant's condition had improved and no longer prohibited him from returning to work.

By decision dated July 23, 2018, OWCP denied the claim for compensation for the period from August 22, 2010 through February 24, 2012. Appellant, through counsel, requested a hearing before an OWCP hearing representative.

On February 7, 2019 OWCP reversed its July 23, 2018 decision with regard to the denial of compensation for the period from August 22, 2010 through February 24, 2012.

The Board, having duly considered the matter, concludes that the case is not in posture for decision.

³ Docket No. 17-0035 (issued June 22, 2018); Docket No. 13-0266 (issued October 24, 2013).

⁴ *Id.*

The Board has final authority to determine questions of fact and law. The Board's determinations are binding upon OWCP and must, of necessity, be so accepted and acted upon by the Director of OWCP.⁵ A decision of the Board is final upon the expiration of 30 days following the date of its order and, in the absence of new review by the Director, the subject matter is *res judicata* and not subject to further consideration by the Board.⁶

As indicated above, in the prior appeal, the Board found that the case was not in posture for decision with regard to whether appellant had met his burden of proof to establish a recurrence of total disability for the period from August 22, 2010 to February 24, 2014. By decision dated February 7, 2019, OWCP reversed its July 23, 2018 decision finding that appellant was entitled to compensation for the period August 22, 2010 through February 24, 2012. However, the Board notes that the period of disability at issue upon remand from the Board was from August 22, 2010 to February 24, 2014. The Board finds that OWCP failed to address the specific deficiencies the Board ordered it to address on remand.⁷

Thus, the case must be remanded for consideration of appellant's claim for a recurrence of total disability for the period from February 25, 2012 to February 24, 2014. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's wage-loss compensation claim for the period from February 25, 2012 to February 24, 2014.

⁵ *K.B.*, Docket No. 17-0969 (issued March 13, 2018); see *Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976); *Anthony Greco*, 3 ECAB 84 (1949). See also *Frank W. White*, 42 ECAB 693 (1991) (the Board's order in a prior appeal imposed an obligation on the Director to take particular actions as directed); *L.C.*, Docket No. 09-1816 (issued March 17, 2010) (OWCP did not follow the Board's instructions); *T.S.*, Docket No. 13-2135 (issued April 3, 2014).

⁶ See *K.B.*, *id.*; 20 C.F.R. § 501.6(d); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998). There is no indication that a petition for reconsideration was filed within 30 days of the issuance of the Board's June 22, 2018 decision and the decision became final after 30 days had elapsed. 20 C.F.R. § 501.6(d).

⁷ *T.D.*, Docket No. 16-1883 (issued December 27, 2017).

IT IS HEREBY ORDERED THAT the February 7, 2019 decision of the Office of Workers' Compensation Programs is set aside in part and the case is remanded for further action 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