

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

S.S., Appellant	)	
	)	
and	)	Docket No. 19-1737
	)	Issued: April 7, 2020
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Pittsburgh, PA, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**ORDER REMANDING CASE**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

On August 16, 2019 appellant, through counsel, filed a timely appeal from a May 3, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> The Clerk of the Appellate Boards assigned Docket No. 19-1737.

The Board has duly considered the matter and finds that this case is not in posture for a decision.

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<sup>1</sup> 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.

<sup>2</sup> The Board notes that following the May 3, 2019 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.*

On December 14, 2015 appellant, then a 32-year-old casual mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he sustained an injury to his right index finger as a result of automated postal center (APC) shelves dislodging and slamming his right index finger while in the performance of duty. On February 18, 2016 OWCP accepted the claim for rupture of the right ulnar collateral ligament.

On May 2, 2018 appellant filed a claim for a schedule award (Form CA-7). In support of his claim, he submitted a June 16, 2018 report from Dr. Robert W. Macht, a general surgeon, in which he calculated that appellant had two percent permanent impairment of his right upper extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation or Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup>

On September 10, 2018 OWCP referred appellant's case to Dr. Jovito Estaris, Board-certified in occupational medicine, serving as an OWCP district medical adviser (DMA). Dr. Estaris calculated in his September 16, 2018 report that appellant had one percent permanent impairment of the right upper extremity. The DMA explained that the discrepancy between his and Dr. Macht's impairment ratings were due to the use of a different diagnosis. Dr. Macht chose the diagnosis of joint dislocation or sprain, but the criteria for a class 1 finger PIP joint dislocation or sprain was less than 10 degrees of instability. His examination of the index finger demonstrated no laxity of the index or middle fingers, and thus, the DMA related that Dr. Macht's use of the joint dislocation or sprain diagnosis was incorrect. The DMA explained that the proper diagnosis was sprain/strain of the finger with residual pain and normal motion.

By decision dated November 9, 2018, OWCP granted appellant a schedule award for one percent permanent impairment of the right upper extremity. The award covered a period of 3.12 weeks from June 11 through July 2, 2018.

On November 15, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

The hearing was held on March 20, 2019. The hearing representative held the record open for 30 days for the submission of additional evidence.

By letter dated March 28, 2019, received by OWCP on April 1, 2019, Dr. Macht responded to the DMA's September 16, 2018 report. He explained that under the sixth edition of the A.M.A., *Guides*, there was no reason to use the generalized sprain/strain diagnosis found on page 392 when the accurate diagnosis could be rated based upon the table on page 393. Dr. Macht noted that pursuant to the sixth edition of the A.M.A., *Guides*, a class 1 impairment could be rated with less than 10 degrees instability and residual findings, and that appellant had a class 1C impairment, yielding 2 percent RUE permanent partial impairment for the specific diagnosis of right proximal interphalangeal index joint sprain.

By decision dated May 3, 2019, OWCP's hearing representative affirmed the November 9, 2018 decision. The hearing representative reviewed the case record, including the June 16, 2018 report of Dr. Macht and the September 16, 2018 DMA's report. OWCP's hearing representative

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

found that “no additional medical evidence from Dr. Macht clarifying his calculations ha[d] been received” and “[appellant] may wish to have Dr. Macht review and comment on the DMA’s report.”

Having reviewed the case record submitted by OWCP, the Board finds that this case is not in posture for decision.<sup>4</sup>

In the case of *William A. Couch*,<sup>5</sup> the Board held that when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

In its May 3, 2019 decision, OWCP’s hearing representative affirmed the November 9, 2018 decision granting appellant a schedule award for one percent permanent impairment of the right upper extremity. While the May 3, 2019 decision discussed other medical reports of record, it failed to acknowledge the March 28, 2019 letter from Dr. Macht, responding to the DMA’s September 16, 2018 report.<sup>6</sup> As OWCP did not note receipt or consideration of this medical report, it failed to follow its own procedures by properly discussing the relevant medical reports of record.<sup>7</sup>

As the Board’s decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim which was properly submitted to OWCP prior to the time of issuance of its final decision be reviewed and addressed by OWCP.<sup>8</sup> Because OWCP failed to consider Dr. Macht’s March 28, 2019 report, the Board cannot review such evidence for the first time on appeal.<sup>9</sup>

For these reasons, the case will be remanded to OWCP to properly consider all of the evidence of record.<sup>10</sup> Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.<sup>11</sup> Accordingly,

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<sup>4</sup> See *K.F.*, Docket No. 19-0888 (issued January 2, 2020); *J.J.*, Docket No. 13-1666 (issued August 18, 2014).

<sup>5</sup> 41 ECAB 548, 553 (1990).

<sup>6</sup> See *R.P.*, Docket No. 19-0301 (issued August 21, 2019).

<sup>7</sup> All evidence submitted should be reviewed and discussed in the decision. Evidence received following development that lacks probative value should also be acknowledged. Whenever possible, the evidence should be referenced by author and date. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5(b)(2) (November 2012).

<sup>8</sup> See *S.K.*, Docket No. 18-0478 (issued January 2, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); see also *Linda Johnson*, 45 ECAB 439 (1994) (applying *Couch* where OWCP did not consider a medical report received on the date of its decision).

<sup>9</sup> 20 C.F.R. § 501.2(c). See also *G.M.*, Docket No. 16-1766 (issued February 16, 2017).

<sup>10</sup> *M.J.*, Docket No. 18-0605 (issued April 12, 2019).

<sup>11</sup> *B.N.*, Docket No. 17-0787 (issued July 6, 2018).

**IT IS HEREBY ORDERED THAT** the May 3, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for proceedings consistent with this order of the Board.

Issued: April 7, 2020  
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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