

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

R.H., Appellant)	
)	
and)	Docket No. 19-1457
)	Issued: July 17, 2020
U.S. POSTAL SERVICE, KENMORE BRANCH)	
POST OFFICE, Kenmore, NY, Employer)	
)	

Appearances:
John L. deGeneres, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On June 25, 2019 appellant, through his representative, filed a timely appeal from a January 7, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² The Clerk of the Appellate Boards assigned Docket No. 19-1457.³

On November 1, 2017 appellant, then a 60-year-old retired letter carrier, filed an occupational disease claim (Form CA-2) alleging that his work-related employment duties

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 Appellant also filed a timely request for oral argument in this case. In light of the disposition of the current appeal, the Board finds that the request for oral argument is denied.

³ The Board notes that following the January 7, 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.*

contributed to his right knee osteoarthritis condition. He reported that he first became aware of his condition on June 6, 2007, but was not aware of its relationship to his employment until August 24, 2017 following his examination with Dr. Kevin Scott, a Board-certified orthopedic surgeon. On the reverse side of the form, appellant's supervisor controverted the claim stating that he last worked for the employing establishment on September 16, 2006 when he separated as a result of disability from a January 9, 2004 work-related right shoulder injury under OWCP File No. xxxxxx673. She reported that appellant last worked on January 9, 2004 and his occupational disease claim was not timely filed within three years from the date of onset or the date of the last exposure.

In a statement dated July 18, 2017, appellant described his duties as a postal carrier over the course of his employment for 24 years to which he attributed to his right knee condition. In support of his claim, he submitted medical and diagnostic reports dated September 9, 2005 through August 24, 2017.

In an August 24, 2017 report, Dr. Scott provided examination findings and reviewed appellant's right knee history dating back to 1997, and discussed the mechanism of injury pertaining to his employment duties. He opined that appellant's right knee osteoarthritis was permanently aggravated and accelerated by his work-related activities.

In a December 19, 2017 response to OWCP's factual development questionnaire, appellant reported that, although he was aware of his right knee condition having previously underwent right knee replacement on June 6, 2007, he was not aware that his condition was work related until August 24, 2017 when Dr. Scott informed him that his employment duties contributed to the acceleration and aggravation of his right knee arthritis, leading to a right knee replacement.

On December 19, 2017 appellant, through counsel, submitted medical reports dated May 3, 2006 through August 27, 2007 from Dr. Mark S. Mieth, a Board-certified orthopedic surgeon. A May 10, 2006 bilateral knee injection note was provided from Dr. Mieth which identified a bilateral knee degenerative joint disease diagnosis and a January 9, 2004 date of injury. A November 10, 2006 knee injection note from him identified a diagnosis of bilateral knee degenerative joint disease, a January 9, 2004 date of injury, and stated, "Work related: Yes." Dr. Mieth's subsequent medical reports provided a transcription of office visits with discussion of appellant's medical history, description of complaints, physical examination findings, review of diagnostic studies, assessment and diagnoses, treatment discussion, patient instructions, and further orders for treatment of his degenerative knee condition.

By decision dated May 7, 2018, OWCP denied appellant's occupational disease claim finding that it was untimely filed. It found that he reasonably became aware of the relationship between his condition and his federal employment as early as May 10, 2006, but did not file a claim until November 1, 2017.

On May 21, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on October 23, 2018.

Appellant subsequently submitted a statement dated October 16, 2018, wherein he reported that at the time of his May 10 and November 10, 2006 medical visits, Dr. Mieth was treating him for both his January 9, 2004 work-related right shoulder injury and his bilateral knee arthritis. He reported that he was aware of his arthritis in 2004, but did not know that the condition was work related as he had not sustained a knee injury at work and Dr. Mieth never provided an opinion stating his knee condition was work related. Appellant reported that he first became aware that his knee arthritis was work related following an August 24, 2017 examination with Dr. Scott. He reported that the May 10 and November 10, 2006 medical reports which identified a January 9, 2004 date of injury were in reference to his work-related right shoulder claim.

In an October 23, 2018 memorandum, counsel argued that although appellant knew of his right knee condition back in 2006, he was not aware that his condition was related to his federal employment until August 24, 2017, rendering his appeal timely filed. He reported that the May 10 and November 10, 2006 reports identified a January 9, 2004 date of injury which was the date of appellant's right shoulder traumatic injury under a different OWCP claim. Therefore, information in these reports pertaining to a work-related January 9, 2004 injury was not in reference to his knee condition, but rather to his accepted work-related right shoulder injury.

By decision dated January 7, 2019, OWCP's hearing representative affirmed the May 7, 2018 decision. The hearing representative found no evidence to support that Dr. Mieth's May 10 and November 10, 2006 reports were related to his right shoulder condition, noting that the records provided did not reference any treatment of the shoulder, nor did they appear in the case file for the shoulder injury under OWCP File. No. xxxxxx673. The hearing representative also found that there was no evidence that appellant's supervisor had actual knowledge of appellant's claimed injury within 30 days.

In the January 7, 2019 decision, OWCP's hearing representative specifically referenced reviewing the case file in OWCP File. No. xxxxxx673 to determine whether evidence in that record was applicable to establishing timeliness in this claim. Since the case record as transmitted to the Board does not contain evidence that OWCP relied upon in reaching its final decisions, the Board is unable to properly "consider and decide" appellant's claim.⁴ The Board further notes in this regard that Dr. Mieth's May 10 and November 10, 2006 chart notes documented knee injections with a January 9, 2004 date of injury, the date of the injury under OWCP File No. xxxxxx673.

The Board thus finds that, for a full and fair adjudication, the claims in OWCP File Nos. xxxxxx925 and xxxxxx673 must be administratively combined.⁵ This will allow OWCP to consider all relevant allegations and accompanying evidence in developing the current occupational disease claim.⁶

⁴ *L.K.*, Docket No. 19-0313 (issued September 4, 2019); *K.P.*, Docket No. 17-1667 (issued March 8, 2018).

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c) (February 2000).

⁶ *L.M.*, Docket No. 19-1490 (issued January 29, 2020).

Accordingly, the Board will remand the case to OWCP to administratively combine the files. Following this and such further development as it deems necessary, OWCP shall issue a *de novo* decision.⁷ Accordingly,

IT IS HEREBY ORDERED THAT the January 7, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: July 17, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

⁷ *M.B.*, Docket No. 18-1290 (issued August 13, 2019).