

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

N.D., Appellant)
and) Docket No. 20-0131
DEPARTMENT OF TRANSPORTATION,) Issued: September 11, 2020
FEDERAL AVIATION ADMINISTRATION,)
St. Petersburg, FL, Employer)

)

Appearances:

Stephanie M. Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

On October 21, 2019 appellant, through counsel, filed a timely appeal from a September 27, 2019 decision.² The Clerk of the Appellate Boards assigned Docket No. 20-0131.

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 September 27, 2019, 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.*

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

On November 15, 1998 appellant, then a 49-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his low back and groin when he slipped on a wet floor while in the performance of duty. The Office of Workers' Compensation Programs (OWCP) accepted the claim, assigned File No. xxxxxx744, for cervical and lumbosacral strain, cervical and lumbar disc displacement, sciatica, lumbar neuritis, an aggravation of brachial neuritis, and chronic pain syndrome.⁴ It paid appellant wage-loss compensation on the supplemental rolls as of March 1, 2001 and then on the periodic rolls as of October 30, 2005.

In a report dated June 5, 2019, Dr. Kenneth P. Botwin, a Board-certified physiatrist, noted that appellant had sustained occupational injuries on July 4, 1977 and November 15, 1998. He diagnosed displacement of a lumbar and cervical intervertebral discs without myelopathy, sciatica, lumbar radiculitis, lumbar myofascial pain, lumbar stenosis, back muscle spasm, lumbar spinal enthesopathy, and insomnia. Dr. Botwin advised that appellant required physical therapy, in particular BioWave treatment, aquatic therapy, and massage therapy, to treat his cervical and lumbar intervertebral disc displacement, sciatica, and radiculitis. He opined that BioWave therapy, aquatic therapy, and massage therapy would improve his ability to function and reduce his need for pain medication.

On September 5, 2019 Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon serving as a district medical adviser (DMA), advised that the proposed BioWave treatment, massage therapy, and aquatic therapy were causally related to appellant's accepted employment injury. He found, however, that the treatments were not medically necessary as there was insufficient evidence supporting the effectiveness of BioWave treatment and massage therapy. Dr. Ugokwe further opined that a home exercise program would benefit appellant to the same extent as aquatic therapy.

By letter dated September 27, 2019, OWCP indicated that it had authorized physical therapy for an extended period that had not resulted in increased function or decreased disability. It advised that a DMA had reviewed appellant's claim on September 5, 2019 and found that further physical therapy or services were not medically necessary.

The Board has duly considered the matter and finds that the letter dated September 27, 2019, while not accompanied by appeal rights, constitutes a final adverse decision by OWCP. In the letter, OWCP denied appellant's request for further authorization for BioWave treatment, massage therapy, and aquatic therapy as a DMA had found that further such services were no longer medically necessary. The letter noted that a copy of the DMA's findings was enclosed.

³ Docket No. 17-0233 (issued December 20, 2017).

⁴ OWCP had previously accepted that on July 4, 1977 appellant sustained thoracic, lumbar, and cervical strains and cervical radiculitis under File No. xxxxxx162. It administratively combined appellant's claims with File No. xxxxxx744 designated as the master file.

The Board notes that section 8124(a) of FECA⁵ and section 10.126 of its implementing regulations⁶ require that final decisions of OWCP contain findings of fact and a statement of reasons. A decision should contain a correct description of the basis for the denial in order that the parties of interest have a clear understanding of the precise defect of the claim and the kind of evidence which would overcome it.⁷

The Board finds that the September 27, 2019 decision was incomplete as OWCP did not provide findings regarding the medical evidence appellant submitted from Dr. Botwin, nor did it provide a statement of reasons explaining its determination that the opinion of the DMA constituted the weight of the evidence on the issue of authorization for BioWave treatment, aquatic therapy, and massage therapy. Appellant, therefore, was not apprised of the deficiencies that OWCP had found in the medical evidence. Although the September 27, 2019 decision included a copy of the DMA's report, OWCP did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining its disposition so that appellant could understand the basis for the decision, as well as the precise defect and the evidence needed to overcome the denial of authorization for physical therapy.⁸

Accordingly, the case must be remanded to OWCP to properly consider all of the evidence and provide clear reasons regarding its disposition of appellant's request for authorization for BioWave treatment, aquatic therapy, and massage therapy. Following this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

⁵ 5 U.S.C. § 8124(a).

⁶ 20 C.F.R. § 10.126.

⁷ L.R., Docket No. 15-0235 (issued December 21, 2015); *Patrick Michael Duffy*, 43 ECAB 280 (1991).

⁸ R.M., Docket No. 19-0163 (issued July 17, 2019).

IT IS HEREBY ORDERED THAT the September 27, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this order of the Board.

Issued: September 11, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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