

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

R.L., Appellant)	
)	
and)	Docket No. 20-0901
)	Issued: July 27, 2021
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
San Diego, CA, Employer)	
)	

Appearances: *Case Submitted on the Record*
John L. DeGeneres, Esq., for the appellant¹
Office of Solicitor, for the Director

ORDER REMANDING CASE

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

On March 19, 2020 appellant, through counsel, filed a timely appeal from a February 21, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board

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 appealed a purported February 24, 2020 decision concerning on overpayment of compensation. While the case record contains a February 24, 2020 preliminary overpayment determination, it does not contain a final adverse decision of OWCP concerning an overpayment. Therefore, the matter is not currently before the Board. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

³ 5 U.S.C. § 8101 *et seq.* The Board notes that following the February 21, 2020 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.*

has jurisdiction over the merits of this case.⁴ The Clerk of the Appellate Boards assigned Docket No. 20-0901.

On October 20, 2011 appellant, then a 49-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on October 18, 2011 he sustained sprains of his left ankle, right knee, left shoulder, and right finger when he stepped on loose rocks in a steep canyon and lost his footing while in the performance of duty. OWCP accepted appellant's claim under the current file, OWCP File No. xxxxxx939, for sprains of the left shoulder/upper arm, left rotator cuff, and left ankle; right knee contusion; and medial meniscus tear of the right knee.⁵ By decision dated February 21, 2020, OWCP determined that appellant had no greater than six percent permanent impairment of his left upper extremity, for which he had previously received schedule award compensation.

Prior to filing his claim for the October 18, 2011 traumatic injury, OWCP previously had accepted a number of conditions in connection with several separate compensation claims. Under OWCP File No. xxxxxx447, OWCP accepted that on January 4, 1999, appellant sustained a lateral collateral ligament sprain of the right knee and it authorized right knee arthroscopy, which was performed on March 25, 1999. Under OWCP File No. xxxxxx412, OWCP accepted that on January 11, 2005, he sustained right knee chondromalacia and medial meniscus tear of the right knee. Under OWCP File No. xxxxxx775, OWCP accepted that on February 28, 2008, appellant sustained internal derangement and medial meniscus tear of the left knee.

The Board, having duly considered the matter, finds that the case is not in posture for decision. Pursuant to 20 C.F.R. § 501.2(c)(1), 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. Decisions on claims are based on the written record, which may include forms, reports, letters, and other evidence of various types such as photographs, videotapes, or drawings.⁶ Evidence may not be incorporated by reference, nor may evidence from another claimant's case file be used.⁷ Evidence contained in another of the claimant's case files may be used, but a copy of that evidence should be placed into the case file being adjudicated.⁸ All evidence that forms the basis of a decision must be in that claimant's case record.⁹

⁴ Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, counsel asserted that oral argument should be granted because OWCP committed an error of law. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

⁵ Appellant underwent left shoulder arthroscopy on February 8, 2012 and right shoulder arthroscopy on July 11, 2012. Both procedures were authorized by OWCP.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5a (June 2011).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* See also *G.O.*, Docket No. 18-1483 (issued June 20, 2019).

In adjudicating appellant's present claim, OWCP File No. xxxxxx939, OWCP specifically referenced medical evidence obtained from earlier claims, *i.e.*, OWCP File Nos. xxxxxx447, xxxxxx412, and xxxxxx775. For example, OWCP referenced a March 16, 2009 OWCP decision granting a schedule award for 15 percent permanent impairment of the left lower extremity issued under OWCP File No. xxxxxx775. Although the case record contains a copy of this schedule award decision, it does not contain copies of the medical evidence that served as the basis for the schedule award. Similarly, the case record contains a March 7, 2000 OWCP decision granting a schedule award for two percent permanent impairment of the right lower extremity, issued under OWCP File No. xxxxxx447, but it does not contain copies of the medical evidence that served as the basis for the schedule award. The Board notes that OWCP's February 21, 2020 decision, issued under the present claim, contains permanent impairment determinations for appellant's left upper extremity, left lower extremity, and right upper extremity, and that such determinations necessarily involve evaluating whether or not previously granted schedule awards for permanent impairment are duplicative of present assessments of permanent impairment. OWCP's procedures provide that cases should be administratively combined when correct adjudication of the issues depends on frequent cross-reference between files.¹⁰ However, OWCP did not administratively combine the case records related to appellant's schedule award claim or fully incorporate the relevant evidence into the current case record. As noted, all evidence that forms the basis of a decision must be included in the case record.¹¹ Because OWCP neglected to include evidence from OWCP File Nos. xxxxxx447, xxxxxx412, and xxxxxx775 that was used to form the basis for its determination regarding appellant's schedule award claim in the current case record, the Board is not in a position to make an informed decision regarding appellant's entitlement to FECA benefits.¹² Therefore, the case shall be remanded to OWCP to administratively combine OWCP File Nos. xxxxxx447, xxxxxx412, xxxxxx775, and xxxxxx939. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding appellant's schedule award claim.

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8c (February 2000).

¹¹ See *supra* note 9.

¹² See *L.H.*, Docket No. 17-1960 (issued August 16, 2018); *K.P.*, Docket No. 15-1945 (issued February 10, 2016); *M.C.*, Docket No. 15-1706 (issued October 22, 2015).

IT IS HEREBY ORDERED THAT the February 21, 2020 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: July 27, 2021
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