

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

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**J.A., Appellant** )

**and** )

**U.S. POSTAL SERVICE, POST OFFICE,** )  
**Brick, NJ, Employer** )  
\_\_\_\_\_ )

**Docket No. 21-0912**  
**Issued: February 18, 2022**

*Appearances:*

*Robert D. Campbell, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**ORDER REVERSING CASE**

Before:

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

On May 24, 2021 appellant, through counsel, filed a timely appeal from a March 23, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> The Clerk of the Appellate Boards assigned Docket No. 21-0912.

This case has previously been before the Board on a different issue.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

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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 March 23, 2021 decision, appellant submitted additional evidence to OWCP and with his appeal to the Board. 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.*

<sup>3</sup> Docket No. 15-0421 (issued June 1, 2015).

On April 9, 2013 appellant, then a 45-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right knee when he tripped over uneven pavement on a walkway and fell on his right knee while in the performance of duty. OWCP accepted his claim for right knee medial meniscus tear and right knee contusion. On November 27, 2013 appellant underwent OWCP-approved right knee arthroscopic surgery and stopped work. OWCP paid him wage-loss compensation on the supplemental rolls, from November 27, 2013 until he returned to full-duty work on March 8, 2014.<sup>4</sup>

On September 16, 2014 OWCP received a request from Dr. William F. Kennard, a Board-certified general surgeon, seeking authorization for right knee arthroscopic surgery.

In a February 20, 2020 letter, OWCP informed appellant that it had authorized right knee arthroscopic surgery.

In letters dated September 23 and October 2, 2020, Dr. Kenneth S. Klein, a Board-certified orthopedic surgeon, explained that due to the COVID-19 pandemic and cancelation of selective surgeries, appellant could not undergo his previously approved surgery. He indicated that appellant's right knee condition had not changed and that surgery was still medically necessary. Dr. Klein requested that OWCP again authorize appellant's right knee arthroscopic surgery.

In an October 5, 2020 report, Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as the DMA, reviewed the evidence of record and responded "No" indicating further that appellant's proposed right knee arthroscopic surgery was not medically necessary to treat appellant's accepted right knee injury as the magnetic resonance imaging scan did not demonstrate a tear.

By decision dated October 23, 2020, OWCP denied authorization for right knee arthroscopic surgery based on the October 5, 2020 report of the DMA.

On November 9, 2020 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated March 23, 2021, a hearing representative affirmed the October 23, 2020 decision.

The Board, having duly considered this matter, finds that OWCP improperly rescinded authorization for appellant's right knee arthroscopic surgery.

As OWCP attempted to rescind its prior authorization for surgery, it must follow its established procedures for rescission.<sup>5</sup> Its procedures require a proposed and final decision

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<sup>4</sup> Appellant subsequently filed a notice of recurrence (Form CA-2a) on May 27, 2014 alleging that on May 22, 2014 he sustained a recurrence of his April 9, 2013 employment injury. OWCP converted the claim to a new occupational disease (Form CA-2) claim assigned OWCP File No. xxxxxx034. It accepted that claim for aggravation of right knee contusion and aggravation of right knee medial meniscus tear and paid appellant wage-loss compensation on the periodic rolls, effective July 26, 2015. On December 21, 2015 appellant filed another Form CA-2 alleging that he aggravated his posterior medial meniscus tear as a result of his federal employment. OWCP assigned that claim OWCP File No. xxxxxx424 and accepted it for aggravation of pre-existing right knee medial meniscus tear. It has administratively combined these claims, with the current claim serving as the master file.

<sup>5</sup> *L.M.*, Docket No. 16-1464 (issued November 1, 2017).

rescinding the original finding.<sup>6</sup> These procedures further provide that a rescission decision should contain a brief background of the claim, discuss the evidence on which the original decision was based, and explain why OWCP finds that the decision should be rescinded.

Herein, OWCP failed to provide a proposed decision rescinding the authorization for surgery.<sup>7</sup> It has, therefore, not complied with its own procedures and thus, failed to meet its burden of proof to rescind its prior authorization for surgery.<sup>8</sup> Accordingly,

**IT IS HEREBY ORDERED THAT** the March 23, 2021 merit decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 18, 2022  
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

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<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, Disallowances, Chapter 2.1400.19(b) (February 2013).

<sup>7</sup> See *S.C.*, Docket No. 19-1045 (issued July 24, 2020); *S.R.*, Docket No. 12-1404 (issued December 11, 2012).

<sup>8</sup> See *S.R.*, Docket No. 09-2332 (issued August 16, 2010) (once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits; this holds true where OWCP later decides that it erroneously accepted a claim). *T.H.*, Docket No. 15-1372 (issued September 20, 2016); *Ixtala Ccihuahatl*, 49 ECAB 427 (1998); *supra* note 6 at Chapter 2.1400.19.c. (February 2013).