

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

D.P., Appellant)	
)	
and)	Docket No. 24-0259
)	Issued: February 16, 2024
U.S. POSTAL SERVICE, WARREN POST)	
OFFICE, Warren, MI, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

ORDER REMANDING CASE

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

On January 19, 2024 appellant, through counsel, filed a timely appeal from a December 22, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned the appeal Docket No. 24-0259.

On August 2, 2016 appellant, then a 30-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date he sprained his right ankle ligament when his right foot got caught in an unpaved/cracked sidewalk while in the performance of duty. He stopped work on August 2, 2016. OWCP accepted the claim for right ankle ligament sprain, and subsequently expanded acceptance of the claim to include other pulmonary embolism without acute cor pulmonale. It paid appellant wage-loss compensation on the supplemental rolls commencing September 17, 2016, and on the periodic rolls as of March 3, 2019.

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.

By decision dated February 22, 2021, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the opinion of Dr. Jeffrey Lawley, an osteopathic physician Board-certified in orthopedic surgery, acting as an impartial medical examiner (IME), resolved the conflict of medical opinion between appellant's treating physician, Dr. Allan M. Grant, a Board-certified orthopedic surgeon, and OWCP's second opinion physician, Dr. Jiab H. Suleiman, a Board-certified orthopedic surgeon. It found that Dr. Lawley's report represented the special weight of the evidence and established that appellant no longer had disability or residuals due to his accepted employment injury.

On March 2, 2021 appellant, through counsel requested a telephonic hearing before a representative of OWCP's Branch of Hearings and review, which was held on May 27, 2021.

Following the hearing, OWCP received a June 7, 2021 report from Dr. Grant, wherein he repeated his opinion that appellant should undergo further right ankle tendon surgery.

By decision dated August 9, 2021, an OWCP hearing representative affirmed the February 22, 2021 termination decision.

OWCP subsequently received additional reports from Dr. Grant.

On September 10, 2021 appellant requested reconsideration. By decision dated December 8, 2021, OWCP denied modification of the August 9, 2021 decision.

On January 26, 2022 appellant, through counsel, requested reconsideration. In support of his request, appellant submitted January 13, 2022 reports wherein Dr. Grant reported that appellant was medically limited to weightbearing as tolerated. He noted that appellant was held off work from February 8 to April 1, 2022 due to pain, and he also noted that, on November 16, 2020, appellant had previously been given work restrictions of sedentary work only, with no walking, standing, or driving.

By decision dated April 26, 2022, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

On May 9, 2022 appellant, through counsel filed a timely appeal to the Board. By decision dated March 7, 2023, the Board affirmed OWCP's April 26, 2022 nonmerit decision.²

On March 29, 2023 appellant, through counsel again requested reconsideration of the April 26, 2022 decision.³ In support thereof, he submitted a February 6, 2023 report⁴ from Dr. Grant. Dr. Grant related that appellant had chronic peroneal tendon issues with sural nerve

² Docket No. 22-0840 (issued March 7, 2023).

³ By decision dated January 27, 2023, OWCP granted appellant a schedule award for 19 percent permanent impairment of the right lower extremity. This schedule award was based on the December 23, 2022 review of the record by OWCP's district medical adviser, Dr. Morley Slutsky, Board-certified in occupational medicine.

⁴ Counsel referenced an April 6, 2022 report from Dr. Grant. This appears to be a typographical error as the report received is dated February 6, 2023.

entrapment. He also explained that he had advised appellant that he could not perform work requiring driving a vehicle and could not perform work requiring standing or walking. Appellant could only perform sedentary work. He further related that he had advised appellant that if surgery was performed to repair or possibly even excise the peroneal tendons and release or excise the sural nerve, he would not have a normal foot, but hopefully would have much less pain.

By decision dated May 31, 2023, OWCP denied summarily appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant, through counsel, appealed to the Board. By order dated November 15, 2023,⁵ the Board found that OWCP failed to properly explain the findings with respect to the issue presented so that appellant could understand the basis for the decision, *i.e.*, whether he had demonstrated clear evidence that OWCP's last merit decision was incorrect. The Board set aside OWCP's May 31, 2023 decision and remanded the case for findings of fact and a statement of reasons, to be followed by an appropriate decision.

By decision dated December 22, 2023, OWCP found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. It noted that the record did not contain the April 6, 2022 report from Dr. Grant referenced by counsel.

The Board, having duly considered this matter, finds that the case is not in posture for decision.

In the case of *William A. Couch*,⁶ the Board held that, when adjudicating a claim, OWCP is obligated to consider and address all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. It is crucial that OWCP consider and address all evidence relevant to the subject matter properly submitted prior to the issuance of its final decision, as the Board's decisions are final with regard to the subject matter appealed.⁷

In support of his March 29, 2023 request for reconsideration, appellant submitted a February 6, 2023 report from Dr. Grant. In the prior appeal, the Board noted a typographical error on the part of counsel when he referenced an April 6, 2022 report from Dr. Grant when it was actually a February 6, 2023 report. However, in denying appellant's reconsideration request, OWCP indicated that no April 6, 2022 report from Dr. Grant had been received without reviewing the February 6, 2023 report, which had been received.

As OWCP did not consider and address the February 6, 2023 report from Dr. Grant on reconsideration, the Board finds that this case is not in posture for decision.⁸ On remand, it shall

⁵ *Order Remanding Case*, Docket No. 23-0867 (issued November 15, 2023).

⁶ 41 ECAB 548 (1990).

⁷ See *Order Remanding Case, B.J.*, Docket No. 23-0927 (issued November 29, 2023); *C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); see also *William A. Couch*, *id.*

⁸ See *Order Remanding Case, G.A.*, Docket No. 23-0347 (issued June 26, 2023); *T.B.*, Docket No. 22-0795 (issued September 12, 2022).

review all evidence of record and, following any further development as deemed necessary, it shall issue an appropriate decision. Accordingly,

IT IS HEREBY ORDERED THAT the December 22, 2023 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: February 16, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board