

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

L.D., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
FEDERAL PROTECTIVE SERVICE,
Rochester, NY, Employer**

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**Docket No. 16-1742
Issued: July 21, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

ORDER REMANDING CASE

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

On August 31, 2016 appellant, through counsel, filed a timely application for review of an August 2, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). The appeal was docketed as No. 16-1742.

On November 12, 2014 appellant, then a 43-year-old police officer/evidence custodian, injured his right wrist while firing a hand gun in the performance of duty (File No. xxxxxx405). OWCP accepted appellant's claim for right wrist scapholunate ligament tear. On November 25, 2014 he underwent right wrist scapholunate ligament repair. Effective March 23, 2015, appellant's surgeon released him to light-duty work with a 5- to 10-pound limit on lifting, pushing, and pulling. He was also precluded from participating in weapons qualification and defense tactics. Appellant's March 2015 return to work was short-lived, lasting under two weeks.

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.

On May 11, 2015 appellant filed a Notice of Recurrence (Form CA-2a) claiming that he sustained a recurrence of disability on March 31, 2015 due to his accepted November 12, 2014 right wrist injury. Regarding how the recurrence of disability occurred, he indicated that he never had full functionality in his right wrist/hand or absence of tingling/numbness symptoms since his November 12, 2014 work injury. Appellant reported that, while engaging in writing and typing at work, his fingers began to tingle for longer periods than usual and then went numb.² The employing establishment represented that following his original injury, appellant returned to work in a light-duty status performing administrative office tasks. Appellant was not authorized to perform any law enforcement-related activities, and the employing establishment reportedly did not issue appellant any law enforcement gear.

OWCP developed appellant's claimed recurrence as a new occupational disease claim (Form CA-2) sustained prior to March 31, 2015. Appellant provided a statement in which he indicated that he had tingling and numbness in his right wrist, which extended into his hand, since suffering his November 12, 2014 work injury. He also discussed the light-duty evidence custodian job he performed in March 2015.

In a report dated June 15, 2015, Dr. Richard J. Miller, an attending Board-certified orthopedic surgeon, noted that appellant was seen in follow-up regarding "difficult issues that continue with regard to his right wrist, concerns about carpal tunnel syndrome, this following his [scapholunate ligament] surgery and capsulodesis [on November 25, 2014] and work-related injury [on November 12, 2014]." Dr. Miller further noted that appellant complained of right hand dysesthesias which seemed to be in the median nerve distribution, sparing the little finger. He released appellant to light duty with work limitations of no lifting, pushing, or pulling over 5 to 10 pounds.

In a report dated August 7, 2015, Dr. Miller indicated that right carpal tunnel syndrome consequent to the accepted November 12, 2014 work injury was his working diagnosis. He noted that he did not consider this to be a "new injury" and he continued to indicate that appellant could only perform light-duty work.

In a decision dated September 1, 2015, OWCP determined that appellant did not meet his burden of proof to establish an occupational disease in the performance of duty. It found that he did not submit rationalized medical evidence showing that he sustained an occupational disease due to work duties.

In a September 28, 2015 letter, appellant, through counsel, requested a telephone hearing with an OWCP hearing representative. During the hearing held on May 18, 2016, appellant noted that he had continuous right wrist symptoms, including tingling and numbness which extended into his fingers, since his November 12, 2014 work injury. Counsel argued that appellant was really arguing that he sustained a recurrence of disability on or after March 31, 2015 due to his November 12, 2014 work injury. He indicated that appellant was not claiming a new occupational injury as he only worked a week after returning to light-duty work after the November 25, 2014 surgery which was authorized by OWCP. Counsel also argued that the case

² Appellant used sick leave beginning March 31, 2015. He later filed a Claim for Compensation (Form CA-7) claiming disability for the period April 3, 2015 and continuing.

file that OWCP created for the present claim (File No. xxxxxx806) should be combined with the case file for the November 12, 2014 work injury (File No. xxxxxx405).

By decision dated August 2, 2016, the hearing representative affirmed OWCP's September 1, 2015 decision finding that appellant did not meet his burden of proof to establish an occupational disease in the performance of duty. However, the hearing representative also made a determination that appellant did not sustain a recurrence of disability on or after March 31, 2015 due to his November 12, 2014 work injury.

The Board has duly considered the matter and notes that the case is not in posture for a decision. Pursuant to OWCP procedures, OWCP has determined that cases should be combined where correct adjudication depends on cross-referencing between files.³ 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.⁴ Evidence may not be incorporated by reference, nor may evidence from another claimant's case file be used.⁵ 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.⁶ All evidence that forms the basis of a decision must be in that claimant's case record.⁷

In the August 2, 2016 decision, the OWCP hearing representative decided two issues, *i.e.*, whether appellant met his burden of proof to establish a recurrence of disability due to his November 12, 2014 work injury and whether appellant met his burden of proof to establish an occupational disease in the performance of duty. With respect to the issue of a recurrence of disability due to the November 12, 2014 work injury, the record lacks relevant information from claim, File No. xxxxxx405, which information OWCP's hearing representative relied upon in denying appellant's recurrence of disability claim. Consequently, the Board finds that, for a full and fair adjudication in accordance with OWCP procedures, the case file pertaining to appellant's claim for his accepted November 12, 2014 work injury should be combined with the present case file which OWCP created for his May 11, 2015 claim alleging that he sustained a recurrence of disability on March 31, 2015 due to his accepted November 12, 2014 work injury. This will allow OWCP to consider all relevant case files in evaluating appellant's claims. Moreover, to consider appellant's appeal at this stage would involve a piecemeal adjudication of the issues in this case and raise the possibility of inconsistent results. It is the Board's policy to avoid such an outcome.⁸

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c) (February 2000).

⁴ *Id.* at Chapter 2.800.5a (June 2011).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *See William T. McCracken*, 33 ECAB 1197 (1982).

The case will be remanded to OWCP to combine case File No. xxxxxx405 with case File No. xxxxxx806. Following this and such other development as deemed necessary, OWCP shall issue a *de novo* merit decision on appellant's claim.

IT IS HEREBY ORDERED THAT the August 2, 2016 decision of the Office of Workers' Compensation Programs' decision is set aside, and the case is remanded to OWCP for further proceedings consistent with this order.

Issued: July 21, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board