

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

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**A.B., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Seattle, WA, Employer**

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**Docket No. 17-1480  
Issued: June 8, 2018**

*Appearances:*  
*John Eiler Goodwin, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**ORDER REMANDING CASE**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

On June 21, 2017 appellant, through counsel, filed a timely appeal from a December 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> The Board assigned Docket No. 17-1480.

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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> Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated December 4, 2017, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1480 (issued December 4, 2017).

This case has previously been before the Board.<sup>3</sup> On January 17, 2007 appellant, then a 33-year-old medical records technician, filed an occupational disease claim (Form CA-2) alleging that workplace conditions caused PTSD and depression. She stopped work that day and did not return. OWCP initially denied the emotional condition claim on April 12, 2007. On May 9, 2007 appellant timely requested a hearing with an OWCP hearing representative. By decision dated January 3, 2008, OWCP's hearing representative found two compensable factors of employment: pain and disability from the accepted right knee injury; and fear due to working around prisoners. The hearing representative remanded the case to OWCP to refer appellant for a second opinion evaluation, to be followed by a *de novo* decision. On March 27, 2008 OWCP accepted major depressive episode, severe, and PTSD.

Beginning in May 2013, appellant filed claims for compensation (Form CA-7) under the accepted emotional condition claim, for time loss beginning November 2, 2012. By decision dated September 18, 2013, OWCP denied appellant's claim for disability compensation beginning on November 2, 2012 and ongoing due to the accepted emotional condition. It found that the weight of the medical evidence rested with the opinion of the second opinion physician, Dr. Jeffrey J. Hansen, a Board-certified psychiatrist, who opined that any employment-related disability due to appellant's accepted emotional condition had ceased.

Appellant requested a hearing before an OWCP hearing representative, which was held on March 28, 2014. By decision dated July 2, 2014, the hearing representative set aside the September 18, 2013 OWCP decision. He found that OWCP erred by not sending the appointment notice letter to counsel and that the statement of accepted facts (SOAF) provided Dr. Hansen contained a leading question. On remand OWCP was to refer appellant for a new second opinion evaluation with a Board-certified psychiatrist to be followed by a *de novo* decision.

On July 16, 2014 OWCP referred appellant to Dr. Larry Bornstein, a Board-certified psychiatrist, for another second opinion examination. Dr. Bornstein submitted his report on August 6, 2014. In correspondence dated August 27, 2014, OWCP asked him for clarification of responses in an August 6, 2014 report. A memorandum to file dated October 16, 2014 indicates that OWCP's scheduler received a clarification report from Dr. Bornstein, but a question, which was posed, was not answered. The Board notes that neither a copy of an August 6, 2014 report, nor any report from him is found in the record of OWCP File No. xxxxxx399 or OWCP File No. xxxxxx650. However, OWCP referred appellant to another second opinion specialist and denied

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<sup>3</sup> Appellant has two OWCP claim files, a March 22, 2006 traumatic injury accepted for tear of the medial meniscus of the right knee, and a January 2007 occupational disease claim accepted for major depressive episode, severe, and post-traumatic stress disorder (PTSD). The claims were adjudicated by OWCP under File Nos. xxxxxx650 and xxxxxx399, respectively. They were combined by OWCP, with the former becoming the master file. On June 15, 2007 appellant underwent arthroscopic repair of medial meniscus tear. Under the orthopedic claim (File No. xxxxxx650) she received compensation on the supplemental rolls beginning June 15, 2007 and continuing. OWCP placed appellant on the periodic compensation rolls in April 2008. Under File No. xxxxxx650, accepted for a right medial meniscus tear, the Board found on September 2, 2014 that OWCP met its burden of proof to terminate her wage-loss compensation and medical benefits on November 2, 2012. Docket No. 14-354 (issued September 2, 2014). In a November 16, 2016 decision, the Board found that, as appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error, OWCP properly denied a merit review of her orthopedic claim. Docket No. 16-0864 (issued November 16, 2016).

appellant's disability claim on January 8, 2015, which an OWCP hearing representative affirmed on September 28, 2015, and for which OWCP denied modification on December 27, 2016.

Board precedent and OWCP procedures provide that medical evidence may be excluded for improper conduct in certain circumstances: (1) If the physician selected for a referee examination is regularly involved in performing fitness-for-duty examinations for the employing establishment; (2) A second referee specialist's report is requested before OWCP has attempted to clarify the original referee specialist's report; (3) A referee medical report is obtained through telephone contact with the physician; and (4) A medical report is obtained as a result of leading questions.<sup>4</sup> There is no evidence in this record that the exclusionary principles apply to any report from Dr. Bornstein.

OWCP's procedures provide that all evidence that was before OWCP at the time it rendered its decision should be in the case record before the Board.<sup>5</sup> To consider appellant's appeal in piecemeal fashion, as presented to the Board, could result in further inconsistent results. It is the Board's policy to avoid such an outcome.<sup>6</sup> As Dr. Bornstein's reports were not contained in the case record as of the issuance of OWCP's final decisions, the Board concludes that to adjudicate the case based on the evidence presently of record would result in piecemeal adjudication of appellant's claim and, thus, would not allow it to make an informed decision. The Board, having duly considered the matter, thus concludes that this case is not in posture for decision and must therefore be remanded for further evidentiary development.

On remand OWCP should first obtain Dr. Bornstein's reports and place them in the record. It should then prepare a new SOAF that includes an accurate depiction of all accepted conditions. OWCP should then refer appellant to an appropriate medical specialist for an opinion regarding whether she was totally disabled beginning November 2, 2012 and ongoing due to an accepted emotional condition. Following this and such other development as OWCP deems necessary, it shall issue a *de novo* decision on this claim.

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<sup>4</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Exclusion of Medical Evidence*, Chapter 2.810.12 (September 2010); see also *Terrance R. Stath*, 45 ECAB 412 (1994) (where the Board distinguished situations where medical reports were excluded because OWCP might have influenced the opinion of an impartial medical specialist from circumstances in which the medical report obtained was defective for other procedural reasons); *Carlton L. Owens*, 36 ECAB 608 (1985) (impartial medical specialist's report was excluded because it was obtained as a result of a leading question); *George W. Coast*, 36 ECAB 600 (1985) (impartial medical specialist's report was excluded because specialist was regularly involved in fitness-for-duty examinations for the employing establishment).

<sup>5</sup> See *id.* at *Initial Development of Claims*, Chapter 2.800.5(a) (June 2011).

<sup>6</sup> See *William T. McCracken*, 33 ECAB 1197 (1982).

**IT IS HEREBY ORDERED THAT** the December 27, 2016 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: June 8, 2018  
Washington, DC

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

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

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