

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

C.M., Appellant	)	
	)	
and	)	Docket No. 22-0229
	)	Issued: March 29, 2023
DEPARTMENT OF HOMELAND SECURITY,	)	
TRANSPORTATION SECURITY	)	
ADMINISTRATION, NEW YORK STEWART	)	
INTERNATIONAL AIRPORT,	)	
New Windsor, NY, Employer	)	
	)	

*Appearances:*  
Paul Kalker, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On November 29, 2021 appellant, through counsel, filed a timely appeal from a July 1, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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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> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability commencing September 4, 2014 causally related to her accepted May 5, 2014 employment injury.

## FACTUAL HISTORY

This case has previously been before the Board.<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.

On March 23, 2015 appellant, then a 45-year-old lead transportation security officer, filed an occupational disease claim (Form CA-2) alleging that she developed an emotional condition in the performance of duty on or about May 5, 2014. She described her condition as depression, anxiety, panic, and post-traumatic stress disorder (PTSD). Appellant did not specifically identify what caused her condition(s) other than noting "It was almost traumatic ...." She stopped work on September 4, 2014.

Appellant subsequently explained that the employing establishment retaliated against her for filing an Equal Employment Opportunity (EEO) complaint against a supervisor, which was protected activity. She was then wrongfully terminated from employment and denied unemployment benefits, in retaliation. The record reflects that appellant was removed from employment on January 10, 2014. Appellant was reinstated to her position on April 2, 2014 and returned to full-time full-duty capacity work on June 1, 2014. She stopped work on September 4, 2014 and resumed employment in the private sector on February 1, 2016.

By decision dated October 16, 2015, OWCP denied the claim, finding that appellant failed to establish a compensable employment factor. On May 26, 2016 appellant requested reconsideration. By decision dated March 23, 2017, OWCP denied modification of its prior decision.

On April 17, 2017 appellant, through counsel, appealed to the Board. By decision dated November 14, 2018, the Board found that appellant established a compensable employment factor and remanded the case to OWCP for further development. The Board found that the evidence established that the employing establishment unreasonably removed appellant from her employment as an act of discipline and unreasonably sought to deny her claim for unemployment compensation. The Board concluded that the administrative decision and the subsequent actions by the employing establishment were unreasonable.<sup>4</sup>

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<sup>3</sup> Docket No. 17-1076 (issued November 14, 2018), *granting petition for recon. and modifying prior Board decision*, Docket No. 17-1076 (issued June 11, 2019).

<sup>4</sup> *Id.*

On December 10, 2019 OWCP accepted the condition of major depressive disorder, single episode, severe without psychotic features.

In an October 5, 2020 claim for compensation (Form CA-7) and an accompanying October 21, 2020 time analysis form (Form CA-7a), appellant claimed wage-loss compensation for the period May 5, 2014 through October 23, 2018.<sup>5</sup> She noted that she had worked for New York Metropolitan Transportation Authority (NYMTA) from February 1 through April 30, 2016. The employing establishment contested, without specifying, the information provided by appellant.

On February 4, 2021 appellant filed a notice of recurrence (Form CA-2a) claiming disability from work commencing September 1, 2014 due to a change or worsening of her accepted work-related conditions. She alleged that her emotional condition affected her ability to perform her employment duties and she experienced difficult relations with her supervisors. Appellant also noted that she returned to work elsewhere on February 1, 2016.

In a September 22, 2014 report, Dr. Joseph R. Agyemang, an internal medicine specialist, noted appellant was seen for “medical reasons” and indicated that she was unable to work from September 22 to October 6, 2014. On October 8, 2014 he referred her to a psychiatrist to be treated for depression. In a January 15, 2015 report, Dr. Agyemang indicated that appellant had been under his care since May 2014 for post-traumatic stress disorder (PTSD) and anxiety.

Appellant began treatment with Martin Ogulnick, Ph.D., a licensed clinical psychologist. In a report dated March 23, 2016 and in office notes from September 21, 2015 through March 8, 2016, Dr. Ogulnick noted a complete history of appellant’s emotional condition and provided extensive progress reports regarding her emotional status. He diagnosed major depression, single episode, severe, and related appellant’s condition to her being wrongfully terminated and unreasonably bullied. Dr. Ogulnick indicated that appellant stopped working due to the series of events at the employing establishment and she was unable to continue to work due to her diagnosed conditions.

In a November 21, 2014 report, a psychiatric nurse practitioner indicated that appellant had been under her care since June 11, 2014. She provided diagnoses of depression, panic attacks and PTSD and opined that appellant was totally disabled as a result of such conditions.

By letter dated April 12, 2021, OWCP found that Dr. Ogulnick’s March 23, 2016 narrative report supported disability from work from September 21, 2015 to March 23, 2016. It requested a medical report from a psychiatrist or clinical psychologist in support of her inability to perform the date-of-injury job she held on May 5, 2014 during the period claimed from May 5, 2014 through October 23, 2018. OWCP also noted that clarifying information as well as evidence to verify the period of employment appellant worked for NYMTA was needed. It afforded her 30 days to submit additional evidence.

In a separate developmental letter also dated April 12, 2021, OWCP provided the definition of a recurrence of disability. It advised appellant of the type of factual and medical evidence

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<sup>5</sup> OWCP paid appellant wage-loss compensation for the period May 5 through 31, 2014.

necessary to establish her claim, provided a questionnaire for her completion, and afforded her 30 days to submit additional evidence.

By letter also dated April 12, 2021, OWCP requested additional information from the employing establishment with regard to appellant's pay status during the period claimed, including the date of last exposure and the first date she stopped work.

OWCP received an April 24, 2021 statement from appellant. Appellant indicated that her disability was for the period September 1, 2014 through February 1, 2016 and that she received ongoing medical care through the period of disability.

OWCP also received medical evidence. In a May 12 and June 3, 2015 reports, Dr. Lydia Fazio, a Board-certified psychiatrist, diagnosed PTSD and other unspecified depressive disorder. In the May 12, 2015 report, she indicated that residual symptoms impacted appellant's ability to perform/return to work. In a June 10, 2015 report, Dr. Fazio opined that appellant could return to work. In reports dated July 1 and August 5, 2015, she reported that appellant had some anxiety about returning to work, but otherwise had resolution of depressive symptoms. Appellant diagnosed PTSD, other unspecified depressive disorder, and major depressive disorder, recurrent episode, in full remission.

Progress reports from a licensed social worker dated June 25, July 2 and 30, August 14, and 19, 2015 were received along with a June 16, 2016 report from a psychiatric nurse practitioner, in which she opined that appellant was unable to perform any of her job functions due to her diagnosed major depressive disorder and anxiety.

In a November 7, 2020 report, Dr. Ogulnick diagnosed chronic PTSD and major depressive disorder, single episode, and opined that appellant was permanently disabled due to the severity and intransigence of her symptoms. He reported that when she was seen on September 21, 2015 she was severely depressed and had uncontrolled ruminations due to the abusive behavior she suffered at her job at the employing establishment which led to her being fired and then rehired. Dr. Ogulnick noted that during that period appellant took another job and then again worked for the employing establishment. He indicated that, despite working on and off, she was battling severe depression and anxiety while being prescribed a series of psychotropic medications that were only partially successful. Dr. Ogulnick noted that when she was last seen on November 3, 2020, appellant continued to manifest all of the significant symptoms of PTSD and major depressive disorder.

On May 27, 2021 the employing establishment indicated that appellant's last exposure and first date she stopped work was on May 4, 2014. Appellant returned to work on June 1, 2014 and was off work again on September 4, 2014. Pay information was also provided.

By decision dated July 1, 2021, OWCP denied appellant's recurrence claim.

### **LEGAL PRECEDENT**

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous

compensable injury or illness and without an intervening injury or new exposure in the work environment.<sup>6</sup>

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>7</sup>

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.<sup>8</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>9</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

The record supports that appellant underwent continuing psychiatric treatment during the recurrence period claimed. The Board notes that OWCP, in its letter of April 12, 2021, found that Dr. Ogulnick's March 23, 2016 narrative report supported disability from work from September 21, 2015 to March 23, 2016. The Board further notes that in his November 7, 2020 report, Dr. Ogulnick opined that appellant was disabled. OWCP, however, failed to sufficiently discuss or analyze this evidence or the other evidence submitted in support of the recurrence claim.

FECA provides that OWCP shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as OWCP considers necessary with respect to the claim.<sup>10</sup> Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings and facts and a statement of reasons.<sup>11</sup> As well, OWCP's procedures provide that the

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<sup>6</sup> 20 C.F.R. § 10.5(x); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

<sup>8</sup> *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

<sup>9</sup> *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

<sup>10</sup> 5 U.S.C. § 8124(a)(2).

<sup>11</sup> 20 C.F.R. § 10.126.

reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.<sup>12</sup>

As noted above, in the July 1, 2021 decision, OWCP listed, but failed to sufficiently analyze the evidence appellant submitted in support of her recurrence claim. Thus, appellant did not know the precise defect in her claim.

The Board will therefore set aside OWCP's July 1, 2021 decision and remand the case for a *de novo* decision on appellant's claim which considers and addresses the evidence submitted.<sup>13</sup>

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 1, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 29, 2023  
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

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<sup>12</sup> Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

<sup>13</sup> See *Order Remanding Case, A.J.*, Docket No. 21-0944 (issued March 23, 2022).