

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

_____)
C.M., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, NEW YORK STEWART)
INTERNATIONAL AIRPORT,)
New Windsor, NY, Employer)

Docket No. 24-0801
Issued: October 15, 2024

Appearances:

Paul Kalker, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 31, 2024 appellant, through counsel, filed a timely appeal from a July 24, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.

² 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.³ The facts and circumstances as set forth in the Board's prior decisions and prior order 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 causally related to factors of her federal employment. She stopped work on September 4, 2014. OWCP noted that she had been removed from employment on January 10, 2014 and reinstated on April 2, 2014. Appellant returned to work on May 25, 2014.

In a September 22, 2014 report, Dr. Joseph R. Agyemang, a Board-certified internist, noted that 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 November 24, 2014 report, Ann Rodriguez, a psychiatric nurse practitioner, completed a form report indicating that appellant had been under her care since June 11, 2014. She diagnosed depression, panic attacks and post-traumatic stress disorder (PTSD) and opined that appellant was totally disabled from work due to these conditions.

In a January 15, 2015 report, Dr. Agyemang indicated that appellant had been under his care since May 2014 for PTSD and anxiety. He attributed her condition to her work duties, the environment, and her investigation and termination from employment.

Appellant began treatment with Dr. Martin Ogulnick, a licensed clinical psychologist. In a September 21, 2015 diagnostic evaluation, Dr. Ogulnick reviewed appellant's history of major depression due to work events, including being fired for complaining about bullying by her supervisor. He noted that she had been cleared to return to work and was waiting for a response from the employing establishment. Dr. Ogulnick diagnosed a single episode of severe major depression. He found that appellant had made progress with her feelings but that they were "exacerbated by the ongoing frustration with not being able to return to work."

In office-visit notes dated September 28, 2015 through March 8, 2016, Dr. Ogulnick described appellant's emotional status and noted that she desired to return to work. On March 8, 2016 he indicated that she had completed training with the Metropolitan Transit Authority (MTA)

³ 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); Docket No. 22-0229 (issued March 29, 2023); *Order Remanding Case*, Docket No. 24-0080 (issued February 29, 2024).

in New York City, but worried she would not get a convenient assignment, in which case she planned to return to the employing establishment. Dr. Ogulnick indicated that appellant was “frightened to return” to the employing establishment but that the “people who tormented her are no longer there. She said she wants to work, that she needs to work.”

In a report dated March 23, 2016, Dr. Ogulnick advised that he had treated appellant since September 21, 2015. He attributed her psychiatric condition to employment factors, including wrongful termination and bullying. Dr. Ogulnick related, “The ongoing mistreatment led [appellant] finally to become severely depressed and anxious and unable to continue to work due to these symptoms.”

Following development, OWCP ultimately accepted appellant’s claim for major depressive disorder, single episode, without psychotic features.⁴ It found that appellant had established as compensable employment factors that the employing establishment committed error and acted unreasonably in removing her from employment and in seeking to ensure that her claim for unemployment compensation was denied.

On October 5, 2020 appellant filed a claim for compensation (Form CA-7) for intermittent disability from work during the period May 5, 2014 through October 23, 2018.⁵ She noted that she had worked for the New York MTA from February 1 through April 30, 2016.

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. Appellant also noted that she had returned to other employment on February 1, 2016.

In a development letter dated April 12, 2021, OWCP advised appellant of the definition of a recurrence of disability and of the deficiencies of her claim. It informed her of the factual and medical evidence necessary to establish a recurrence of disability, provided a questionnaire for her completion, and afforded her 30 days to submit additional evidence. In a separate letter of even date, OWCP requested information regarding appellant’s work for the MTA from February 1 through April 30, 2016. It noted that the March 23, 2016 report from Dr. Ogulnick supported disability from work for the period September 21, 2015 through March 23, 2016 and requested that she submit a medical report from a psychiatrist or clinical psychologist addressing her ability to perform her usual employment during the claimed period of May 5, 2014 through October 23, 2018. OWCP afforded appellant 30 days to submit the requested information.

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

⁴ 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).

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

OWCP received an April 24, 2021 statement, wherein appellant indicated that she claimed disability from September 1, 2014 through February 1, 2016, the date she returned to work with the New York MTA. She advised that her symptoms had been continuous and that she had received ongoing medical care through the period of disability.

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

Progress reports from a licensed social worker dated 2015 were received by OWCP along with a June 16, 2016 form report from Ms. Rodriguez, 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 the employing establishment which led to her being fired and then rehired. Dr. Ogulnick noted that appellant hoped to return to work as she felt emotionally improved but was waiting for the hiring process to be completed. While waiting to return to the employing establishment, appellant took another job and then again worked for the employing establishment. Dr. Ogulnick related, "During these years, 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." He noted that when he last evaluated appellant on November 3, 2020, she had manifested all 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.

By decision dated July 1, 2021, OWCP found that appellant had not established a recurrence of disability beginning September 4, 2014, causally related to her accepted employment injury.

Appellant appealed to the Board. By decision dated March 29, 2023, the Board set aside the July 1, 2021 decision.⁶ The Board found that OWCP had failed to sufficiently discuss or analyze Dr. Ogulnick's March 23, 2016 and November 7, 2020 reports, or other evidence that appellant submitted in support of her claim such that appellant did not know the precise defect in her claim. The Board noted that OWCP had previously indicated that Dr. Ogulnick's March 23,

⁶ Docket No. 22-0229 (issued March 29, 2023).

2016 report supported disability from work from September 21, 2015 through March 23, 2016. The Board remanded the case for OWCP to address the evidence submitted and issue a *de novo* decision containing findings of fact and a statement of reasons, pursuant to its regulations at 20 C.F.R. § 10.126.

By decision dated June 7, 2023, OWCP accepted that appellant had sustained a recurrence of the need for further medical treatment based on Dr. Ogulnick's November 7, 2020 report.

Appellant appealed to the Board. By an order dated February 29, 2024, the Board set aside the June 7, 2023 decision.⁷ The Board noted that OWCP had failed to adjudicate whether appellant had sustained a recurrence of disability beginning September 4, 2014, as instructed by the Board in its March 29, 2023 decision. Rather, it had summarily found that she had sustained a recurrence of a medical condition. The Board remanded the case for OWCP to determine whether appellant had sustained an employment-related recurrence of disability beginning September 4, 2014.

By decision dated July 24, 2024, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish a recurrence of disability commencing September 4, 2014, causally related to her accepted employment injury. It determined that the medical evidence was not contemporaneous with the claimed recurrence of disability and was unsupported by medical rationale explaining the relationship between the disability and the accepted employment injury.

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.⁸ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.⁹

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

⁷ *Order Remanding Case*, Docket No. 24-0080 (issued February 29, 2024).

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

⁹ *Id.*

condition that results from a new injury, even if it involves the same part of the body previously injured.¹⁰

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, based on 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.¹¹ Where no such rationale is present, the medical evidence is of diminished probative value.¹²

ANALYSIS

The Board finds that appellant has not 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.

In a report dated March 23, 2016, Dr. Ogulnick noted that he began treating appellant on September 21, 2015. He attributed her psychiatric condition to employment factors, including the wrongful termination. Dr. Ogulnick advised that appellant's poor treatment at work caused severe depression and anxiety such that she was unable to continue her employment. He did not, however, provide any rationale for his opinion or identify any specific dates of disability. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given condition or disability has an employment-related cause.¹³ Therefore, Dr. Ogulnick's March 23, 2016 report is insufficient to establish the recurrence claim.¹⁴

On November 7, 2020 Dr. Ogulnick opined that appellant was permanently disabled due to intransient symptoms of chronic PTSD and major depression. He related that when he examined her on September 21, 2015 she was severely depressed and ruminating about the abusive behavior on the job that led to her termination and subsequent rehiring. Dr. Ogulnick opined that appellant's depression and anxiety remained even though she had worked periodically after her employment injury. He asserted that on November 3, 2020, the date of his most recent evaluation, she continued to have symptoms of significant PTSD and major depressive disorder. Again, however, while Dr. Ogulnick generally found appellant permanently disabled, he did not provide any rationale for

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

¹¹ *A.B.*, Docket No. 24-0449 (issued July 10, 2024); *L.O.*, Docket No. 19-0953 (issued October 7, 2019); *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

¹² *M.G.*, Docket No. 19-0610 (issued September 23, 2019); *G.G.*, Docket No. 18-1788 (issued March 26, 2019); *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹³ *See M.T.*, Docket No. 23-0251 (issued February 22, 2024); *A.E.*, Docket No. 20-0259 (issued April 28, 2021).

¹⁴ *See T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

his opinion. As discussed, medical reports lacking rationale are of diminished probative value and insufficient to meet appellant's burden of proof.¹⁵ Dr. Ogulnick further attributed appellant's disability, in part, to PTSD, a condition not accepted by OWCP as employment related, thus rendering the cause of disability unclear.¹⁶ Therefore, the Board finds that this evidence is insufficient to establish a recurrence of disability.¹⁷

In a September 21, 2015 diagnostic evaluation, Dr. Ogulnick discussed appellant's history of major depression as a result of various work events, including being fired. He related that she had been cleared to resume work, but had not received an offer from the employing establishment. Dr. Ogulnick diagnosed a single episode of major depression that he found was exacerbated by her frustration with not being able to return to work. In progress reports dated September 28, 2015 through March 8, 2016, he evaluated appellant's emotional state, and noted that she wanted to resume work. On March 8, 2016 Dr. Ogulnick related that she had completed training for MTA, but planned to return to the employing establishment depending on the assignment. He indicated that appellant was frightened about returning to the employing establishment, but that her tormentors were no longer there. Dr. Ogulnick asserted that she wanted to work. While he discussed appellant's fears about resuming work, he did not independently find her disabled in these reports, and further noted that she wanted to return to work. Consequently, Dr. Ogulnick's reports are insufficient to establish that she sustained a recurrence of disability.¹⁸

In a May 12, 2015 report, Dr. Fazio diagnosed PTSD and an unspecified depressive disorder. She found that residual symptoms impacted appellant's work ability. Dr. Fazio, however, did not address specific dates of disability, provide rationale for her opinion, or relate appellant's work restrictions to compensable employment factors. The question of whether a claimant's disability from work is related to an accepted condition must be established by a physician who, based on a complete and accurate factual and medical history, concludes that the disability is causally related to the employment injury and supports that conclusion with sound medical reasoning.¹⁹ Dr. Fazio did not provide such evidence and thus her reports are insufficient to establish the recurrence claim.

On September 22, 2014 Dr. Agyemang indicated that he had evaluated appellant for medical reasons and opined that she was unable to work until October 6, 2014. He did not, however, address the cause of the disability. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative

¹⁵ See *E.H.*, Docket No. 19-1352 (issued December 18, 2019); *E.C.*, Docket No. 17-1645 (issued June 11, 2018).

¹⁶ See *R.A.*, Docket No. 20-0969 (issued August 9, 2021); *M.G.*, Docket No. 19-0610 (issued September 23, 2019).

¹⁷ *Id.*

¹⁸ A physician's report is of little probative value when it is based on a claimant's belief rather than the doctor's independent judgment. See *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *Earl David Seale*, 49 ECAB 152 (1997).

¹⁹ See *C.B.*, Docket No. 19-0464 (issued May 22, 2020); *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *M.C.*, *id.*; *G.B.*, Docket No. 16-1033 (issued December 5, 2016).

value on the issue of causal relationship.²⁰ As such, Dr. Agyemang's report is insufficient to establish the recurrence claim.

On January 15, 2015 Dr. Agyemang advised that he was treating appellant for work-related PTSD and anxiety. On June 10, 2015 Dr. Fazzio opined that she could return to work. On July 1 and August 5, 2015 she noted that appellant had anxiety about resuming work, but that otherwise her depressive symptoms had resolved. Dr. Fazzio diagnosed PTSD, other unspecified depressive disorder, and major depressive disorder, recurrent episode, in full remission. Neither Dr. Agyemang nor Dr. Fazzio addressed the relevant issue of whether appellant was disabled beginning September 4, 2014. As these physicians did not address disability during the claimed period, their opinions are insufficient to establish her claim.²¹

The record contains reports from a licensed social worker and a psychiatric nurse practitioner. The Board has held, however, that the reports of nurse practitioners and social workers do not constitute probative medical evidence as they are not physicians under FECA.²² Consequently, these reports are of no probative value regarding appellant's recurrence claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not 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.

²⁰ See *F.S.*, Docket No. 23-0112 (issued April 26, 2023); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

²¹ *Id.* See also *M.P.*, Docket No. 23-1131 (issued June 18, 2024); *E.D.*, Docket No. 21-1368 (issued September 7, 2023).

²² Section 8101(2) of FECA provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a (May 2023); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA); see also *S.P.*, Docket No. 23-0622 (issued September 13, 2013) (nurse practitioners are not considered physicians under FECA); *C.M.*, Docket No. 24-0074 (issued July 12, 2024) (social workers are not considered physicians as defined by FECA).

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 15, 2024
Washington, DC

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

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

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