

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

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**D.W., Appellant** )

**and** )

**DEPARTMENT OF JUSTICE, FEDERAL )  
BUREAU OF PRISONS, FCI TERMINAL )  
ISLAND, San Pedro, CA, Employer** )  
\_\_\_\_\_ )

**Docket No. 20-1481  
Issued: December 1, 2021**

*Appearances:*

*Daniel M. Goodkin, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On August 3, 2020 appellant filed a timely appeal from a February 6, 2020 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.<sup>3</sup>

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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 an 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.*

<sup>3</sup> The Board notes that, following the February 6, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of disability commencing March 21, 2016 causally related to his accepted March 9, 2011 employment injury.

## FACTUAL HISTORY

On March 11, 2011 appellant, then a 44-year-old utility systems repairer/operator, filed a traumatic injury claim (Form CA-1) alleging that on March 9, 2011 he was struck in the head by a steel hatch and knocked to the ground while in the performance of duty. OWCP accepted the claim for neck sprain and brachial neuritis or radiculitis not otherwise specified.<sup>4</sup> It subsequently expanded its acceptance of the claim to include cervical disc displacement at C6-7, an acceleration of cervical disc degeneration, muscle contraction headache. Appellant stopped work on March 10, 2011 and returned to his date-of-injury employment on April 8, 2012.

On August 17, 2016 appellant filed a claim for compensation (Form CA-7) for disability from work for the period March 21 to August 17, 2016 “and continuing.”

In a development letter dated December 22, 2016, OWCP advised appellant of the definition of a recurrence of disability and requested that he provide additional factual and medical evidence in support of his claim. It afforded him 30 days to respond.

Thereafter, OWCP received a July 11, 2016 report from Dr. Roger Epstein, a Board-certified psychiatrist, who opined that appellant’s work duties had aggravated his depression and anxiety disorder. Dr. Epstein noted that appellant’s work on the night shift had caused sleep difficulties and that his work with prisoners required constant vigilance. He discussed appellant’s history of being struck by a steel hatch in 2011, followed by a year of both “physical and brain rehabilitation.” Dr. Epstein opined that appellant had developed post-traumatic stress disorder (PTSD). He related that, in July 2015, appellant had what seemed to be a stroke, but that further evaluation had shown to be myasthenia gravis, “a neurologic condition that is characterized by marked muscle weakness along with decreases in vision, concentration, speech, and stamina.”

In a statement dated January 6, 2017, appellant attributed his condition to “repetitive activities and cumulative trauma, which exacerbated the original injuries.” He advised that he had last worked on October 21, 2015. Appellant described his work duties and indicated that his original injuries had worsened such that he could not work, noting that he had sustained emotional and physical trauma.

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<sup>4</sup> OWCP assigned the claim OWCP File No. xxxxxx575. On March 28, 2016 appellant filed an occupational disease claim (Form CA-2) alleging that he sustained physical and emotional conditions due to factors of his federal employment. He noted that he first became aware of his condition and its relation to his federal employment on February 9, 2016. OWCP assigned that claim OWCP File No. xxxxxx510 and accepted it for bilateral carpal tunnel syndrome; anxiety disorder, unspecified; and major depressive disorder, single episode, unspecified. Appellant’s claims have been administratively combined, with OWCP File No. xxxxxx575 serving as the master file.

By decision dated February 16, 2017, OWCP found that appellant had not established a recurrence of disability commencing March 21, 2016 causally related to his accepted employment-related conditions.

In a report dated January 12, 2018, Dr. Mark N. Monroe, a physician specializing in family medicine, evaluated appellant for his March 9, 2011 traumatic injury. He advised that appellant's condition had not improved. Dr. Monroe opined that appellant was permanently disabled from appellant's usual employment due to his cervical disc displacement/bulging at C5-6, C6-7, chronic trapezius muscle strain/sprain headaches chronic cervical sprain, cervical radiculopathy, and bilateral carpal tunnel syndrome.

On February 13, 2018 appellant, through counsel, requested reconsideration.

In a work capacity evaluation (Form OWCP-5c) dated February 12, 2018, Dr. Monroe found that appellant was permanently disabled from employment.

By decision dated February 27, 2018, OWCP denied modification of its February 16, 2017 decision.

Under OWCP File No. xxxxxx510, on March 7, 2018 OWCP referred appellant to Dr. Stephan Simonian, a Board-certified psychiatrist, for a second opinion examination. It also referred appellant to Dr. Robert A. Moore, a Board-certified neurologist, for a second opinion examination.

In a report dated April 16, 2018, Dr. Simonian provided his review of a March 1, 2018 statement of accepted facts (SOAF) and the medical evidence of record.<sup>5</sup> He discussed appellant's history of a work injury on March 9, 2011. Appellant advised that symptoms of the condition had begun in 2015. He had a "major attack of myasthenia gravis, which required intubation." Dr. Simonian noted that appellant had stopped work in November 2016 due to myasthenia gravis and neck pain causing headaches and radiculopathy. He diagnosed depressive disorder and anxiety disorder, not otherwise specified. Dr. Simonian advised that the cause of appellant's disc disease, transient ischemic attacks, and myasthenia gravis, should be addressed by appropriate specialists. He opined that appellant's employment injury had permanently aggravated appellant's anxiety and depression. Dr. Simonian found that appellant was unable to perform his usual employment and was also "not able to function with restrictions or limitations."

On May 3, 2018 OWCP expanded its acceptance of appellant's claim under OWCP File No. xxxxxx575 to include an aggravation of anxiety disorder and an aggravation of major depressive disorder.

In a report dated May 8, 2018, Dr. Moore discussed the appellant's history of a 2011 injury when he was struck by a metal hatch. He diagnosed bilateral carpal tunnel syndrome, neck sprain, brachial neuritis or radiculitis not otherwise specified (cervical radiculopathy), myasthenia gravis, and a history of a cerebral vascular accident. Dr. Moore attributed appellant's cerebral vascular event to a combination of his high blood pressure, obesity, and sleep apnea. He opined that appellant's myasthenia gravis was unrelated to his employment, noting that it was autoimmune

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<sup>5</sup> While the claims had not yet been administratively combined, the SOAF referenced appellant's accepted conditions under both OWCP File Nos. xxxxxx510 and xxxxxx575.

disorder of uncertain etiology. Considering the accepted conditions, Dr. Moore noted functional limitations, including restrictions of pushing and pulling for 2 hours each day and pushing, pulling, lifting, and carrying 10 to 25 pounds. He advised that, if the condition of myasthenia gravis was considered as an accepted condition, appellant was not capable of working in a full or part-time basis. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Moore found that appellant could work eight hours per day with restrictions not considering his myasthenia gravis. He indicated that appellant could reach for 2 hours per day, performing repetitive wrist and elbow movements for 2 hours per day, and push, pull, and lift up to 25 pounds for 2 hours per day.

On June 5, 2018 appellant, through counsel, requested reconsideration. Counsel asserted that Dr. Simonian had found that appellant was disabled from his regular employment.

On October 10, 2018 OWCP requested that Dr. Simonian review Dr. Moore's May 8, 2018 report and address whether appellant was disabled from work commencing March 21, 2016 due to his accepted injuries.

In a supplemental report dated October 30, 2018, Dr. Simonian related that appellant had diagnosed anxiety disorder and depressive disorder, due in part to appellant's stroke and in part to his pain, headaches, and injury to his cervical spine. He noted that Dr. Moore found that appellant's employment-related condition had partially resolved such that appellant could resume work and that the main issue was myasthenia gravis, which was not due to his federal employment. Dr. Simonian opined that the "psychiatric component of depression and anxiety in relation to the work injury that happened on March 9, 2011 now is partially resolved to the extent that by itself it is not inhibiting [appellant] to return back to work." He found that appellant was currently disabled due to myasthenia gravis. Dr. Simonian related that appellant's inability to work commencing March 21, 2016 was "in relation to the development of an illness, myasthenia gravis, and the physiological concern that followed, and is not industrial."

By decision dated November 19, 2018, OWCP denied modification of its February 27, 2018 decision.

OWCP subsequently received an October 16, 2018 impairment evaluation performed by Dr. Mark Bernhard, an osteopath. Electrodiagnostic testing performed on that date revealed findings "consistent with axonal and demyelinating neuropathies of the upper extremities...."

In a report dated January 26, 2019, submitted under OWCP File No. xxxxxx510, Dr. Seth Bricklin, a psychologist, diagnosed recurrent, severe major depressive disorder and PTSD causally related to the accepted employment injuries.<sup>6</sup>

In a supplemental report dated May 8, 2019, Dr. Bernhard reviewed a January 29, 2019 magnetic resonance imaging scan of the cervical spine, which he noted showed an increase in the size of the disc protrusion at C6-7 with cord impingent. He advised that the findings were "consistent with cervical radiculopathy." Dr. Bernhard described appellant's work duties and noted that electrodiagnostic testing had revealed moderately severe carpal tunnel syndrome. He opined that appellant was unable to perform the duties of his usual employment. Dr. Bernhard related, "[Appellant] has conditions that present a synergistic effect in terms of pain, weakness,

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<sup>6</sup> The case record indicates that OWCP File Nos. xxxxxx510 and xxxxxx575 were administratively combined as of March 22, 2019.

and instability, namely the bilateral carpal tunnel with the cervical spine conditions resulting in a greater degree of weakness than either of those conditions in isolation.”

Under OWCP File No. xxxxxx510, on May 23, 2019 OWCP referred appellant, along with a May 13, 2019 updated SOAF, to Dr. Simonian for a second opinion examination to determine whether appellant had sustained an emotional condition causally related to his employment duties.

In a report dated June 30, 2019, Dr. Simonian diagnosed depressive disorder and anxiety disorder with features of PTSD. He found that appellant was temporarily totally disabled beginning October 21, 2015 due to appellant’s myasthenia gravis attack, but that other symptoms also contributed, including headaches, hand numbness and tingling due to carpal tunnel syndrome and his neck injury, and symptoms of PTSD due to his work for the employing establishment. Dr. Simonian related, “Therefore, it is my opinion that the period of total temporary disability from October 21, 2015 onward is partly justified on an industrial basis, and partly on the basis of myasthenia gravis, which happened about a year ago and the claimant states that has not been a problem anymore and it has not repeated its attack.” He opined that appellant was unable to return to his usual employment “because of the symptoms of depression and anxiety as well as physical pain that exacerbates the psychiatric findings and symptoms.” Dr. Simonian asserted that appellant was totally disabled from employment.

On November 5, 2019 appellant, through counsel, requested reconsideration.

By decision dated February 6, 2020, OWCP denied modification of its November 19, 2018 decision. It found that the June 30, 2019 report from Dr. Simonian, its referral physician, was insufficiently reasoned to establish disability from work commencing March 21, 2016.

### **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>7</sup> 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.<sup>8</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

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<sup>7</sup> 20 C.F.R. § 10.5(x); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

<sup>8</sup> *Id.*

condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>9</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>10</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>11</sup>

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>12</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>13</sup>

### ANALYSIS

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

Dr. Monroe, a treating physician, opined in a January 12, 2018 report that appellant was totally disabled from employment due to his cervical disc displacement/bulging at C5-6, C6-7, chronic trapezius muscle strain/sprain headaches chronic cervical sprain, cervical radiculopathy, and bilateral carpal tunnel syndrome. In contrast, on May 8, 2018 Dr. Moore, an OWCP referral physician, diagnosed bilateral carpal tunnel syndrome, cervical sprain, brachial neuritis or radiculitis, myasthenia gravis, and a history of a cerebral vascular event. He attributed the cerebral vascular event to appellant's high blood pressure, obesity, and sleep apnea and found that his myasthenia gravis was unrelated to his employment. Dr. Moore found that, considering only the accepted conditions, appellant work full time with restrictions, including pushing, pulling, and lifting up to 25 pounds for 2 hours per day, and reaching, reaching above the shoulder, and performing repetitive movements for 2 hours per day. The Board finds that there is an unresolved conflict of medical opinion between Dr. Monroe, for appellant, and Dr. Moore, for the government, regarding whether appellant sustained a recurrence of disability beginning March 21, 2016 causally related to appellant's accepted March 9, 2011 employment injury.<sup>14</sup>

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<sup>9</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>10</sup> *L.O.*, Docket No. 19-0953 (issued October 7, 2019); *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

<sup>11</sup> *M.G.*, Docket No. 19-0610 (issued September 23, 2019); *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

<sup>12</sup> 5 U.S.C. § 8123(a); *see J.S.*, Docket No. 17-0626 (issued January 22, 2019).

<sup>13</sup> 20 C.F.R. § 10.321.

<sup>14</sup> *See S.C.*, Docket No. 20-0856 (issued August 26, 2021); *D.N.*, Docket No. 19-1344 (issued November 6, 2020).

OWCP's regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.<sup>15</sup> The Board will therefore remand the case to OWCP for referral to an impartial medical examiner regarding whether appellant has submitted sufficient evidence to establish a recurrence of disability beginning March 21, 2016 due to the accepted March 9, 2011 employment injury. OWCP should additionally further develop the issue of whether appellant sustained disability due to his aggravation of anxiety disorder and major depressive disorder and whether acceptance of his claim should be expanded to include PTSD.<sup>16</sup> Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

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

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<sup>15</sup> 5 U.S.C. § 8123(a); *K.C.*, Docket No. 19-0137 (issued May 29, 2020).

<sup>16</sup> The Board notes that OWCP found that the June 30, 2019 report from Dr. Simonian, a referral physician on the issue of appellant's psychological condition, was insufficiently rationalized. However, if OWCP found deficiencies in Dr. Simonian's report, it should have sought clarification or referred appellant for a new second opinion evaluation. *See D.G.*, Docket No. 20-1183 (issued May 26, 2021); *M.S.*, Docket No. 19-0282 (issued August 2, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 6, 2020 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: December 1, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board