

SELECTED CASES DEALING WITH MEDICAL DOCUMENTATION

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*Note: Since many of these cases involve the issue of reasonable accommodation, there are numerous references to the Rehabilitation Act and an agency's obligation to accommodate medical conditions impacting on an employee's ability to work. Please note that prior to 1992, the Rehabilitation Act contained the language "handicap" and "handicapped person." When Congress amended the law in 1992, it replaced all references to "handicap" and similar terms with "disability." However, the Board did not officially adopt the new language in its decisions until 1994, so only the more recent cases reflect the "disability" terminology. As noted by the Board in *Wilson v. Veterans Affairs*, 63 MSPR 63 (1994) this change in the wording of the law did not constitute any change in meaning.*

General Issues

Bond v. Department of Energy, 82 MSPR 534 (1999) The Board found that the administrative judge had erroneously held that the appellant's medical documentation proved that he had a disability. In its review, the Board agreed that the agency had sustained its charges of absence without leave (AWOL) and sleeping while on duty. However, the Board found insufficient evidence that the employee's condition of gastroesophageal reflux disease, or the effects of medication for this disease, substantially limited any major life activity, including the ability to work. The MSPB reviewed the medical documentation submitted, including medical statements on the impact on the employee due to the medication he was taking. The Board noted that the medical information did not support the appellant's claim that his medication was causing him to sleep on the job. Therefore, the Board reversed the administrative judge's findings on disability discrimination. In examining the penalty of removal, the Board took the medical condition into consideration, as well as the fact that the agency's progressive discipline had all occurred within the two months preceding the removal.

Robinson v. Department of the Air Force, 77 MSPR 486 (1998) The Board held that in establishing a prima facie case of disability discrimination, the employee is not required to prove conclusively that specific job accommodations are reasonable, but must only make a facial showing that her disability can be reasonably accommodated. The bare assertion of an employee in an Editorial Assistant position suffering from cervical spondylosis that the agency "did not take precautions to make my working area safer to enable me to perform" and "at no time made preventions, after my job injury, to make the environment safer to alleviate my pain" did not constitute an articulation by the employee of a reasonable accommodation under which she could perform the necessary duties of her Editorial Assistant position. Appellant did articulate a reasonable accommodation when she stated that she could have been reassigned or placed back to her former position of GS-5 secretary position. The Board remanded this case for evidence based

on the appellant's burden (see Clark below) to prove that she could have performed in the job had accommodation been made.

Clark v. U.S. Postal Service, 74 MSPR 552 (1997) The Board held that in adjudicating claims of disability discrimination, the Board will only follow the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) in cases where the appellant must rely on indirect evidence. In cases involving direct evidence, the burden of proof remains with the appellant until he or she proves that the suggested accommodation would enable the appellant to perform the essential functions of the job; at that time the burden then shifts to the agency to demonstrate, through some objective evidence, that the accommodation would cause an undue hardship on the agency. In this case, the Board found that the appellant met his burden of making a prima facie case of disability discrimination. The medical evidence supported a substantial limitation in the major life activities of lifting, sitting, standing and bending and the record is clear that the removal action was based on the medical condition. Further, the Board noted the numerous suggestions for accommodation which the appellant brought forward prior to and after receiving his proposed notice. With the burden of proof shifted back to the agency, the Board found that the agency's analysis of the suggested accommodations was weak and the agency was unable to demonstrate that it had investigated thoroughly any of the suggestions prior to removing the employee.

Stevens v. Army, 73 MSPR 619 (1997) The Board reversed the agency's removal for AWOL, finding that the appellant was qualified disabled person who could be accommodated in the future and that the AWOL charges were directly related to his disability. The Board reached this conclusion based on expert medical testimony from the appellant's physician and testimony from his family members. Interestingly, the Board found that the appellant's inability to maintain a regular work schedule was part of the evidence that his medical condition impacted on the major life activity of working. Although this decision conflicts with its previous case law in the area of inability to maintain a regular work schedule, the Board found that the agency should attempt to accommodate the employee through a modified work schedule, as needed and closer supervision.

Jackson v. U.S. Postal Service, 73 MSPR 512 (1997) The Board sharply disagreed with the finding by the administrative judge that the agency had not discriminated against the employee based on her medical condition. Despite the agency's many efforts to place the employee, the Board found that it had misconstrued the medical evidence submitted by her physician and had not made enough of an effort to place the employee in a different position. The employee had a chemical reaction to cleaning fluids used in her position as custodian so the agency attempted to place her elsewhere in the agency but the appellant had a medical condition which rendered her unable to wear regular shoes and the other available positions had safety requirements regarding appropriate footwear. Based on the physician's documentation that she could not be exposed to chemicals on the job, the agency removed her for medical inability to perform. The Board held that the agency had misunderstood the doctor's statement and that it was only intended to restrict the appellant from custodial jobs. Then the Board dismissed the testimony of agency officials

regarding the appellant's inability to wear appropriate shoes in order to meet the safety requirements of the installation. The removal action was reversed, the Board provided the appellant with an opportunity to request a hearing from the administrative judge on her compensatory damages claim.

Baker v. U.S. Postal Service, 71 MSPR 680 (1996) The Board issued a significant change to its holding regarding what constitutes a constructive suspension in situations where an employee's medical status changes after he has absented himself voluntarily. In this case, the appellant absented himself in June 1990 and asked for light duty in August 1990. However, there was no work available within the appellant's medical restrictions, as outlined by his physician. In January 1991, the employee made another request for light duty, with revised restrictions from his physician. At that time, the supervisor mistakenly interpreted the medical documentation as prohibiting the employee from standing and found that no work was available on that basis. The Board clarified its holding in *Pledger v. Navy*, 50 MSPR 325 (1991) by stating that once an employee who has been absent communicates his willingness to work, under changed medical restrictions, the burden shifts to the agency to return him to work, show that no work existed, or show that the employee declined an offer to return. Since the agency had no testimony regarding whether or not work was available, had the medical documentation been correctly interpreted, the Board vacated the finding of no constructive suspension and sent it back to the administrative judge for a new decision based on the Board's holding regarding burden of proof.

McConnell v. Army, 61 MSPR 163 (1994) The Board held that an agency is not responsible for providing reasonable accommodation where an employee generally asserts that his physician has suggested that he find another job. Here, the appellant took some time in providing medical documentation to the agency and then complained that some vacancies had been filled by the time the agency proceeded with its search for a new position based on his medical restrictions. The Board found that the agency properly began its search once it received the documentation and that it was entitled to a reasonable amount of time to evaluate the medical information and make its determination on suitable accommodation.

Kinsey v. Navy, 59 MSPR 226 (1993) The Board found that the appellant's temporary medical restrictions did not establish that he was a "handicapped person" since the medical documentation did not state that his back problem permanently affected his health to the degree that it substantially limited a major life activity.

Ruiz v. U.S. Postal Service, 59 MSPR 76 (1993) The appellant attempted to convince the Board to reverse its earlier holding that compulsive gambling is not a disabling condition under the Rehabilitation Act of 1973 (*see Jacobs v. Air Force, 29 MSPR 76 (1985)*). The Board declined to do so and noted that while the American Psychiatric Association regards compulsive gambling as a "disorder," that does not automatically equate with recognition of the behavior as a "disabling" condition.

Dazey v. Air Force, 54 MSPR 658 (1992) The appellant challenged the AJ's credibility determinations on the testimony of the appellant and of her physician regarding the appellant's manic-depressive illness. The appellant presented evidence and personal testimony that her condition could be accommodated. However, the Board approved the AJ's conclusion, drawn from "demeanor evidence," that the appellant could not be accommodated because of her condition. "Demeanor evidence" referred to the AJ's consideration of the fact that the appellant exhibited mood swings at the hearing and demonstrated a continuing irrational dislike for her supervisor. The Board upheld the initial decision finding that the appellant was not a qualified handicapped person and her disruptive behavior in the workplace merited the removal action.

Day v. Army, 47 MSPR 617 (1991) Board reversed the initial decision and found that because appellant's medical documentation indicated long term depression and prognosis indicated limited ability to deal with stress, a change in supervisor would not necessarily mean that the appellant was "recovered" and able to perform in her job. The AJ had applied *Street v. Army*, 23 MSPR 335 (1984), and had held that the appellant's stress was due to her relationship with her supervisor. Therefore, the AJ reasoned that since the supervisor had left the job at the time of the appeal, the appellant could be considered recovered and returned to her position under different supervision. The Board found the medical documentation did not support the AJ's assumptions regarding recovery.

Sufficiency of Medical Documentation

Bell v. Henderson (Postmaster General), EEOC Appeal # 01974429, 3/6/00 In a case in which the complainant was eventually found not to be a disabled person under the law, the Commission noted that the employee had challenged that the agency's request for a fitness for duty examination was discriminatory since it was the second such examination ordered. The Commission found no discrimination because the agency was able to provide supervisory testimony explaining the bases for the request for a second exam. The employee had been on temporary light duty for a year and the supervisor needed medical information (not present in the earlier documentation) regarding whether or not the employee would be able to return to regular duties. While the Postal Service is unique in its ability to order examinations of all of its employees, the holding is a reminder to all agencies that there should be a logical, work-related basis for any request for medical information.

Morgan v. Dalton (Secretary of Navy), EEOC Appeal #01972175, 2/3/00 In its decision, the Commission found that the employee had not demonstrated that her impairment of a panic disorder was a disability under the law. However, it is notable that the Commission explicitly corrected an error made by the agency, even though the error did not impact on the final decision. The employee had submitted medical information from a Licensed Clinical Social Worker. The agency informed her that she would need to provide documentation from a medical doctor in order for the agency to consider her request for accommodation. Citing to its own "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with

Disabilities Act” (dated March 1, 1999), the Commission held that the agency was in error. The EEOC’s position is that medical documentation must be from an “appropriate health care provider” in order to support a request for accommodation.

Hupka v. Cohen (Secretary of Department of Defense), EEOC Appeal # 02960003, 8/13/97

The EEOC found that the agency had discriminated against the complainant when it failed to provide reasonable accommodation for his diagnosed condition of Chronic Fatigue Immune Dysfunction Syndrome (CFIDS). The agency had argued that the employee failed to provide all of the medical information the agency had asked for in response to the employee’s request for accommodation. The agency stated that despite its many requests for medical information, the employee only provided partial information and the agency was, therefore, unable to make a decision on the requested accommodation. On review, the Commission found the agency at fault for continuing to request a specific amount of medical documentation after it had received sufficient information to address the accommodation. The Commission noted that the agency should have “provided the appellant with the accommodations recommended therein, identified other accommodations that would have accomplished the same results, or denied the request based on undue hardship...”

Schrodt v. U.S. Postal Service, 79 MSPR 609 (1998) In a case involving a charge of medical inability to perform, the Board found that the agency failed to meet its burden of proving that the medical condition either caused observed deficiencies in performance and/or conduct or created a high probability of hazard resulting in injury to the appellant or others. The agency-ordered fitness for duty examination was the basis for the removal action. The Board found that the testimony of the physician revealed that he did not have specific knowledge of the appellant’s worksite although he was generally familiar with the duties of the position and had toured the worksite at one time. The Board found the medical statement conclusory and lacking in a specific analysis regarding which duties the employee was failing to perform. The Board found no documented insufficient performance or deficiencies. The Board found the agency testimony on the issue of future risk of hazard to be insufficient since it was only a subjective assessment by a supervisor, with no supporting testimony or statements from safety experts or medical personnel.

Ellshoff v. Interior, 76 MSPR 54 (1997) In a case involving significant holdings on interim relief and the Family and Medical Leave Act, the Board clarified its position on the burden of proof in a case involving a charge of medical inability to perform job duties. Although the agency was able to provide evidence that the employee was not performing successfully in the six week period between her return to duty following an illness and her removal, it did not have medical evidence to support that she was medically unable to perform. In fact, her doctor released her to work on the same day that the agency issued a proposed removal for “Inability to perform the duties of your position due to depression.” The agency attempted to argue that due to the psychiatric nature of the employee’s illness, it was difficult to establish a nexus between her illness and her deficiencies. However, the Board denied this argument, stating that an agency retains the same burden of proof of medical inability regardless of the nature of the illness.

Carrick v. U.S. Postal Service, 67 MSPR 280 (1995) The appellant did not raise the issue of reasonable accommodation, *per se*, but asked that the Board mitigate the agency penalty based on her "documented sleeping disorder." The Board found no information in the record to support her claim that the disorder existed or had been documented. An agency fitness for duty examination revealed that the appellant had described a "history of sleep disorder-narcolepsy by history" and the examining physician recommended further medical evaluation. However, the appellant provided no evidence concerning a sleep disorder and specifically waived her affirmative defenses during the hearing.

Sigler v. Army, 63 MSPR 103 (1994) An appellant's personal statement that she suffered from "cumulative stress disorder" was insufficient evidence of a handicapping condition. Appellant's medical documentation stated that she had been hospitalized for "atypical chest pains and anxiety" but was released for work with no restrictions. Therefore, the Board denied her claim of handicap discrimination.

Avant v. Navy, 60 MSPR 467 (1994) The appellant submitted a medical statement asserting that he was dependent upon alcohol and drugs for the entire period during which his AWOL occurred. The Board held that it would not given any weight to the physician's "expert" testimony since it was totally unsupported by medical documentation or tests. Further, the Board found that the conclusions reached by the physician in his statement were drawn solely from the appellant's self-reports on his status during the time he was AWOL.

Flanagan v. U.S. Postal Service, 56 MSPR 134 (1992) In a case involving an assault on a supervisor, the appellant argued that his medical documentation supported his argument that he could perform on the job with accommodation. The Board addressed the issue of whether the appellant constituted a risk to safety in the workplace and in the process analyzed the medical documentation presented. They found that the doctors' conclusions regarding the appellant's competency to work did not reflect any knowledge of the appellant's attack on his supervisor. The Board held that the physicians' determination of competency did not support a finding that the appellant was not a danger to himself or others.

Mitchell v. Department of Defense, 54 MSPR 641 (1992) The Board rejected the administrative judge's determination that the appellant proved he was "handicapped" following surgery to remove a brain tumor. The appellant's physician testified that the appellant had residual neurological impairments including partial hearing loss, partial facial paralysis, double vision, difficulty in swallowing, and difficulty in speaking. However, he did not testify that any of these impairments substantially limited one or more of the appellant's major life activities. Without this proof, the appellant did not meet his burden of establishing his status as a handicapped person.

Bordelon v. Health and Human Services, 54 MSPR 400 (1992) Board reversed the initial decision in which the administrative judge accepted testimony of two expert witnesses who stated that the appellant suffered from Post Traumatic Stress Disorder (PTSD). Based on the experts'

diagnosis, the AJ had reversed the agency's removal action finding that it was the result of discrimination on the basis of the appellant's handicapping condition. The Board examined the qualifications of the two expert witnesses and found both had little experience in treating PTSD in Vietnam-era veterans. The first expert testified that she believed anyone who served in Vietnam, regardless of their experiences there, satisfied the diagnostic criteria for PTSD. She testified that she did not interview the appellant to determine what his experiences were during his service time. The second witness only saw the appellant three times and had not conducted any psychological tests on him during those visits. The Board found insufficient medical evidence to support a claim of handicap discrimination and sustained the agency's removal based on misconduct.

Fuentes v. U.S. Postal Service, 54 MSPR 4 (1992) Appellant appealed removal from his Window and Distribution Clerk position and the Board found insufficient evidence to support appellant's claim of handicap discrimination based on his mental illness. The appellant submitted many letters from his physician which stated that the appellant suffers from chronic schizophrenia, paranoid type, but if he were allowed to work in an environment free from work pressures and away from the public, he would be fine. The Board held that none of the letters indicated that the appellant is substantially limited in performing a major life activity. Further, the information did not provide a prognosis and contained little to no objective analysis of the condition. Therefore, the removal action was sustained.

Maulding v. Sullivan, No. 91-2747 (8th Cir.) April 7, 1992 Appellant appealed her removal through the MSPB, the district court and finally to the Court of Appeals for the Eighth Circuit. The appellant argued that she could not perform laboratory work because of a sensitivity to chemicals. However, the agency physician reviewing her medical documentation found it insufficient, out of date, and lacking in supportive clinical findings. Both the district court and the appeals court found that appellant had not shown sufficient evidence of a handicapping condition. However, both courts also stated that if the documentation were accepted, it would still only have shown that the appellant was precluded from laboratory work and that such a limitation does not substantially limit her employment as a whole. In so holding, the 8th Circuit accepted the 4th Circuit's 1986 finding in *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986).

Conflicting Medical Opinions

Merzweiler v. US Postal Service, 69 MSPR 274 (1996) In a rare case involving an agency-initiated disability retirement, the Board upheld the underlying removal for mental inability to perform, despite the appellant's numerous allegations of harmful error. On the merits, the Board examined the weight given to the three medical reports involved in the case and found unsupportable the appellant's argument that the agency doctor was not credible simply because he was the agency doctor. The Board stated that, in determining credibility of a physician, it would look for evidence that he was not qualified to render a medical opinion or "otherwise suffers one of the infirmities that would render any witness unreliable." Also, the Board found that the medical report the appellant wanted given the most weight was only a one-page cursory letter

while the other two medical reports were specific, more explanatory and better-grounded in their medical analysis of the appellant's condition.

Frye v. Army, 63 MSPR 242 (1994) In a case involving bi-polar disorder, the Board moved away from previous holdings on the issue of conflicting medical opinion. The agency based its removal on the medical opinion of the physician who had treated the employee for the longest period of time rather than the most recent physician. The first doctor stated that the employee had a history of not taking his lithium which resulted in behavioral problems on the job. The second physician said that the appellant had been on the medication for eight months and that the current threat of losing his job would alter his previous behavior. The majority opinion held that the agency needed to give the employee another chance at maintaining his medication since the majority did not believe that the risk of future behavioral problems was significant.

Lassiter v. Justice, 60 MSPR 138 (1993) In a case involving conflicting medical opinions and the appellant's challenge to the agency's right to require a fitness-for-duty examination, the Board upheld the examination because the employee occupied a law enforcement position specifically requiring "emotional and mental stability with no history of basic personality disorder." On the issue of the conflicting medical opinions, the Board gave deference to the testimony of the agency's medical officer based on his extensive review of the appellant's medical history and the facts leading to the appellant's involuntary commitment to a hospital for psychiatric observation. Additionally, the Board analyzed the appellant's medical expert testimony and found that although they believed the appellant was no longer suffering from the severe condition previously diagnosed, they acknowledged that the condition could resurface at a later time. The 4th Circuit upheld the removal of the appellant on the basis that his mental condition prevented him from performing the essential functions of the job. **Lassiter v. Reno, US Attorney General, 96 FEOR 7042 (5/29/96)** The court considered whether the evidence provided by the appellant "was sufficient to raise a genuine issue as to whether he would be able to perform his duties, including carrying a firearm, without posing a significant risk to the safety of himself or others" and found that the evidence was not persuasive that the appellant was not a danger to public. The court affirmed the removal action and found the agency had not failed in its reasonable accommodation duties.

Colon v. Navy, 58 MSPR 190 (1993) In a case involving other significant holdings regarding the appellant's violent outburst, the Board examined the medical testimony of four experts and determined that the evidence supported that the appellant suffered from the condition of Post Traumatic Stress Disorder due to childhood abuse and that the agency should have known of the appellant's condition. Further, the Board found that although the experts testified that they felt the employee was a good candidate for rehabilitation, they also stated that she would need intensive therapy in an ongoing treatment program in order to prevent future outbursts on the job. The Board found no evidence that the appellant had begun such treatment (even by the time of the appeal) and therefore, found that no reasonable accommodation existed which would permit the employee to work safely.

Sargent v. Air Force, 55 MSPR 387 (1992) When a routine fitness-for-duty examination showed that an employee in a Firefighter position had organic heart disease, the agency determined that the individual was not medically fit to perform in the job and demoted him to a lower graded Supply Clerk position. The appellant presented medical evidence that his heart condition was a minor one which had no impact on his performance and argued that the agency discriminated against him based on management's misperception that he was handicapped. Board held that the employee was a handicapped person because the agency perceived him to be one. Further, he was a qualified handicapped person based on sufficient medical evidence that he could perform the job despite his heart condition.

Koneiczko v. U.S. Postal Service, 47 MSPR 509 (1991) Board found that the agency had erred in relying on the opinion of its medical officer in determining the medical limitations of the appellant. In making his request for accommodation, the employee submitted a report from his attending physician describing the results of a stress test. The physician indicated that due to the appellant's heart condition, he could not lift heavy mail bags and was, thus, restricted from performing the duties of a letter carrier. The agency medical officer interpreted this report to mean that the appellant could only do sedentary work, and since no positions were available, the appellant was removed for physical inability. During the hearing, the attending physician testified that the report was misinterpreted and the appellant was not limited to sedentary work. The Board gave deference to the appellant's documentation because the agency medical officer had never examined the appellant and the agency did not present any testimony at the hearing to rebut the attending physician's statement regarding the interpretation of the stress test results.

Johnson v. Navy, 58 MSPR 386 (1993) Appellant was separated during RIF due to his inability to meet the physical requirements for the Security Guard position he had been offered during the RIF process. The agency presented medical tests and testimony from the agency medical officer that the employee was suffering from uncontrolled diabetes and therefore was disqualified from the position. The appellant submitted an unsworn statement from his personal physician who indicated that he believe the diabetes was under control but offered no medical analysis to support that statement. The Board found the appellant's unsworn, undocumented doctor's statement did not overcome the evidence presented by the agency.

Medical Exams - Fitness for Duty Exams

Randel v. Dalton, Secretary of Navy, 96 FEOR 3230 (8/8/96) The Commission disagreed with the Merit Systems Protection Board and found that the agency failed to properly consider a reasonable accommodation for the appellant before removing him from the Federal service. The appellant was reprimanded for several instances of disrespectful conduct toward his supervisor and then requested several weeks of leave based on a doctor's statement that he was suffering from "severe stress symptoms" which the doctor attributed to the situation at work, as described by the appellant. Over the next several months, the appellant submitted medical documentation

which said that the appellant suffered from depression and that he would not be able to return to his previous position because of the “conditions that exist there...” but that he could function in other work locations. The agency finally removed the appellant for continuing unauthorized absence from work because the medical documentation was not sufficient, despite ongoing requests to the appellant. The Commission found that the agency had erroneously disregarded the medical documentation and, instead of challenging the basis for the medical opinion, chose to believe that the appellant had a personality conflict with his supervisor and was attempting to justify his absence with an assertion that he had a medical condition. The Commission found that the agency should have obtained additional medical information by speaking directly with the appellant’s physician (presuming a release by the appellant) or by “referring petitioner for a fitness-for-duty examination” (presuming that the agency would have the authority to do so under regulations at 5 CFR Part 339). Further, the EEOC decision noted that the medical documentation had established that the employee’s ability to think clearly and make good decisions had been diminished by his depression. Finally, the Commission found that the agency did not seriously consider the appellant to be disabled and, therefore, did not conduct a real search for a possible reassignment. The Commission found that the agency engaged in disability discrimination when it removed the appellant. The case was then returned to the MSPB for further consideration on the removal action, based on the EEOC’s finding of disability discrimination. The MSPB accepted the findings of the EEOC with regard to the disabling condition and referred the case to its regional office for a hearing on compensatory damages (*Randel v. Navy*, 72 MSPR 288 (1996)).

Harris v. Air Force, 62 MSPR 524 (1994) Following a period of extended sick leave, the agency required that the employee submit to a psychiatric examination before resuming her duties. The employee did not fully comply with the agency's order and was removed based on one disciplinary charge of failure to cooperate in an officially ordered medical examination and one nondisciplinary charge of medical inability to perform. The Board did not sustain the agency's disciplinary charge, finding that where, as here, an agency exceeds its authority to order an examination, it is not entitled to have its order obeyed, nor can it charge the employee with failure to follow an improper order. (Interestingly, the agency's charge of inability to perform was upheld based on the medical information available.)

Tyler v. U.S. Postal Service, 62 MSPR 509 (1994) When an employee requests to return to duty following a period of approved leave, the agency's decision to deny the employee's request triggers a constructive suspension and (if the period exceeds 14 days) due process is required. In this case the employee notified the agency that he would be returning from a one year leave of absence. The agency required a fitness for duty examination (NOTE!!! Under Postal Service regulations, these exams are still authorized) and refused to allow the employee to return to work while the agency medical review was pending. The Board found that at any time an agency involuntarily places an employee in a leave status, regardless of the availability of work within the employee's medical restrictions, a suspension occurs.

Caddell v. Justice, 52 MSPR 529 (1992) Appellant brought an individual right of action (IRA) appeal to the Board alleging that the agency had improperly directed him to undergo a fitness for duty examination, suspended him and reassigned him in retaliation for his whistleblowing activities. The initial decision found no jurisdiction over the agency's order for a fitness for duty examination and that appellant failed to show that his whistleblowing activities were a contributing factor in the suspension and reassignment actions. The full Board remanded on the issue of whether the suspension and reassignment actions were proper but agreed with the AJ that the agency's order for an employee to undergo a fitness for duty examination was not (at the time of the appeal) a "personnel action" within the meaning of 5 USC §2302(a)(2). The Board determined that this appeal was raised prior to the passage of the OSC Reauthorization Bill (P.L. 103-424, 10/29/94) which amended the law to reflect that an order for a psychiatric examination does fall under the category of a personnel action.

Collins v. Navy, 41 MSPR 256 (1989) Board reversed initial decision in which AJ held that the agency must prove medical inability to perform with a showing of objective medical evidence and found that the agency should have ordered a fitness for duty examination. Citing the change in OPM regulations at 5 CFR Part 339 that limit the circumstances in which an agency may order a medical examination, the Board held that there is no requirement that a comprehensive medical examination is needed to prove that an employee is medically incapable of performing his/her job. The case was remanded for a determination on the agency's evidence which had been presented by the agency Director of Medical Services, who was a board-certified psychiatrist and the appellant's immediate supervisor.

Murray v. Army, 40 MSPR 250 (1989) Board reversed the decision of the administrative judge who erroneously found that the agency committed a harmful procedural error when it failed in its obligation to order a fitness for duty examination. In its analysis, the Board cited OPM regulations at 5 CFR Part 339 which establish the limited conditions for ordering a medical examination and the provision which allows agencies to offer a medical examination.