

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 19, 2009 appellant, then a 52-year-old patient services assistant, filed a claim alleging that, on July 31, 2009, she sustained a recurrence of a September 15, 2003 work injury.² She stated that job stress aggravated her preexisting condition. Additionally, appellant sustained hypertension, aggression, anxiety, neck strain requiring physical therapy and diarrhea and migraine headaches. She alleged that she had worked a 32-hour workweek since September 15, 2003. Furthermore, appellant indicated that, since her original injury, her workload doubled, there was a shortage of staff, she received 100 telephone calls a day, she worked without breaks and she was denied annual leave. She stopped work on August 24, 2009. The employing establishment noted that appellant's accommodations after the original injury included working 32 hours per week and taking one day of leave without pay.

In an August 19, 2009 report, Dr. Robert W. Sharkey, a licensed psychologist, examined appellant and noted that she related that she worked 32 hours a week without adequate part-time help. He opined that appellant suffered from work-related stressors that had influenced her present symptoms of anxiety, depression and anger. Dr. Sharkey advised placing appellant off work full time.

On October 15, 2009 OWCP determined that the matter should be developed as a new occupational disease claim. By letter dated November 2, 2009, it informed appellant of the type of evidence needed to support her claim and requested that she submit such evidence within 30 days.

In an August 18, 2009 statement, Jill Bruno-Enright, a nursing supervisor, indicated that on that date, she contacted appellant to review a potential disciplinary action and advised her that she was entitled to have union representation. She noted that appellant advised her that she would contact the union and make arrangements. Ms. Bruno-Enright indicated that, afterwards, appellant contacted her to inform her that she wished to file a claim.

In statements dated August 18, 2009, Jeffery Owens and Paula Zulinski, coworkers, indicated that, on that date, appellant came into the lunch room distraught and crying after being advised of a potential disciplinary matter. They indicated that they covered the front desk on appellant's behalf.

In an August 20, 2009 memorandum, Andrea Collins, the director of nursing and patient care services, informed appellant of a proposal to remove her for unauthorized access of a sensitive medical record. In a September 15, 2009 removal notice, Michael Murphy, the medical center director, informed appellant that she was being removed from her position.

In an August 31, 2009 e-mail, Karen Duerkop, a supervisor, confirmed that appellant was never denied or unable to take lunch. However, she was asked to wait until relief came to cover the front desk while she was away. Ms. Duerkop noted that, on one occasion, a staff meeting

² The record reflects that appellant has a separate claim under No. xxxxxx135 for a September 15, 2003 injury, which was accepted for aggravation of adjustment disorder with mixed emotional features. Appellant returned to work in a part-time capacity.

was held during lunch, and everyone ate their lunch during the meeting or prior to the meeting. She noted that appellant declined to eat and despite being offered the opportunity after the meeting, she declined the offer and indicated that “she had too much to do.” Ms. Duerkop noted that she had relieved appellant during her morning break at 11:00 a.m. and appellant came back to work at 11:20 a.m. and asked her to cover because she was going to lunch. She stated that appellant did not work overtime and she routinely left five to seven minutes prior to the end of the day. Ms. Duerkop stated that she was unaware of leave being denied to appellant.

In a December 4, 2009 response, Ms. Collins denied that appellant’s workload increased. She confirmed that appellant’s duties did not change. She indicated that a new position for a licensed practical nurse was added in April 2008 with duties that included covering the clerk area when needed, which meant more clerical coverage than in the past. Ms. Collins also explained that a review of the workload data from 2008-09 showed no significant difference in the primary care workload. She explained that there was an increase in mental health appointments; however, staffing was increased accordingly. Ms. Collins confirmed that there were no staffing shortages. She indicated that appellant did not work any overtime, often left work five to seven minutes early and was able to take breaks. Ms. Collins confirmed that appellant’s requests for annual leave were granted. She indicated that appellant was removed due to conduct and not performance of duties. Appellant’s termination was effective October 2, 2009. She enclosed documents regarding leave usage. They included an August 11, 2009 notice of written counseling regarding leave usage. The employer found a pattern of sick leave abuse based on leave taken in connection with scheduled days off. A leave use summary for September 9, 2008 to September 9, 2009 showed use of 195 hours annual leave, 92.5 hours sick leave, 19 hours family care leave, and 392 hours leave without pay. The leave use summary also revealed that appellant was in a leave without pay status on Wednesdays.

In an undated report of contact received by OWCP on December 11, 2009, Ms. Zulinski indicated that, while she pointed out to appellant that there would be no clerk coverage available, if appellant was granted leave, she had never denied appellant annual leave, lunch or breaks. She also indicated that she did not have the authority to deny annual leave. Additionally, Ms. Zulinski noted that there were several times when appellant asked her to relieve her for a break or lunch, and she was unable to do so. Furthermore, there were times that the front desk was unattended while appellant was on a lunch break. Ms. Zulinski noted that, on one occasion, appellant had a lunchtime training meeting, and she was able to eat lunch while being trained.

In a December 9, 2009 statement, appellant alleged that since her 2003 injury her workload had doubled or tripled due to the employment of two full-time social workers and a part-time psychiatrist. She asserted that there was insufficient clerical staff to support such additional employees, and as a result her workload, which included scheduling and handling phone calls doubled. Appellant alleged that on Tuesdays, Thursdays and Fridays she worked the front desk by herself. Additionally, the only employees who provided clerical support were herself and a part-time (20 hours per week) clerk. Appellant enclosed with her statement a handwritten list of received telephone calls occurring between January and April 2009. The list included calls received for the listed dates, including Tuesdays, Wednesdays, Thursdays and Fridays.

A January 22, 2010 Merit Systems Protection Board (MSPB) settlement agreement stated that appellant resigned from the employing establishment and received a payment of \$3,500.00. It also indicated that the settlement did not constitute an admission of liability or fault by the employer.

In a February 8, 2010 statement, appellant alleged that she did not take medication until, after a few years on the job, she was placed on three hypertension medications and an antidepressant. She alleged that the nurses did not know the front desk duties; her workload increased from 2008 to 2009 due to the hiring of a full-time nurse and a part-time psychiatrist and the front desk was always understaffed. Appellant indicated that Ms. Collins instructed her to put a sign at the desk window when she was at lunch or other break. She acknowledged that while the hiring of a nurse “in 2008 helped, what about the years prior to that?” Appellant indicated that she had never been disciplined for conduct issues and she was forced to resign due to a mistake in entering a secured record. She reiterated that there was no back-up for morning or afternoon breaks. Appellant acknowledged that her requests for annual leave were never denied, but she was required to ensure that there was back-up for when she was away.

In an April 21, 2010 decision, OWCP denied the claim. It found that the evidence of record failed to establish that an injury occurred in the performance of duty. OWCP determined that none of the factors identified by appellant were compensable factors of employment.

In a letter dated May 5, 2010 appellant’s representative requested a telephonic hearing, which was held on July 26, 2010. During the hearing, appellant alleged that her workload increased as of July 2009 to the point that she and the part-time clerk were overwhelmed. Appellant testified that she worked only four days per week. Additionally, she confirmed that she did not work overtime. Additionally, while she was not denied lunch, appellant had to wait to take a lunch break. OWCP received another copy of the January 22, 2010 settlement agreement from MSPB. The agreement did not contain an admission of guilt or liability.

By decision dated September 14, 2010, an OWCP hearing representative affirmed the April 21, 2010 decision.

LEGAL PRECEDENT

Workers’ compensation law does not apply to each and every illness that is somehow related to an employee’s employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers’ compensation. Where the disability results from an employee’s emotional reaction to his regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the FECA. On the other hand the disability is not covered where it results from such factors as an employee’s fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.³

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition, for which he claims compensation was caused or adversely affected by employment factors.⁴ This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions, for which compensation is claimed.⁵

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP as part of its adjudicatory function, must make findings of fact regarding, which working conditions are deemed compensable factors of employment and are to be considered by the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.⁶ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of the matter establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.⁷

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated September 14, 2010, OWCP affirmed the April 21, 2010 decision which denied her emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

Appellant alleged that her workload doubled; there were staffing shortages; she received 100 phone calls a day and she worked without breaks. The Board has held that emotional reactions to situations in which an employee is trying to meet her position requirements are compensable.⁸ In *Antal*, a tax examiner filed a claim alleging that his emotional condition was caused by the pressures of trying to meet the production standards of his job and the Board, citing the principles of *Cutler*, found that the claimant was entitled to compensation. In *Kennedy*, the Board, also citing the principles of *Cutler*, listed employment factors which would be covered under FECA, including an unusually heavy workload and imposition of unreasonable deadlines.

However, in the instant case, the employing establishment provided statements which contradict appellant's allegations. For example, while appellant alleged that her workload

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁶ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁷ *Id.*

⁸ *See Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

doubled or tripled, and she worked without breaks due to the employment of additional social workers and a part-time psychiatrist, Ms. Collins and Ms. Duerkop denied these allegations. They also provided a leave use summary that contradicted appellant's statements regarding how many hours she worked. It also showed that she did not work Wednesdays, as she used leave without pay. Ms. Duerkop indicated that appellant was never denied or unable to take lunch, although she was asked to wait until relief came to cover the front desk in her absence. Additionally, Ms. Collins in her December 4, 2009 statement noted that an additional nurse position was added in 2008, and her duties included covering the front desk. She indicated that the workload data from 2008-2009 showed no significant increase in the primary care workload. Ms. Collins explained that, while patient appointments increased, staffing was increased and that appellant took her breaks. Ms. Collins and Ms. Duerkop both noted that appellant did not work overtime and routinely left work several minutes early. Ms. Duerkop explained that on one occasion a lunch meeting was held and, while everyone ate their lunch during or prior to the meeting, appellant declined to eat. Ms. Duerkop stated that she relieved appellant on that date. Ms. Zulinski explained that there were a few occasions in which appellant asked her to cover the front desk, and she was unable to do so. On those occasions, appellant went on her break with the desk unattended. Appellant in her February 8, 2010 statement confirmed that she put a sign on the front desk when she was at lunch or on break. The Board finds that appellant has not established a compensable factor under *Cutler* in this regard.

To the extent that appellant is alleging that the employing establishment engaged in improper disciplinary actions and wrongly denied leave, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of FECA.⁹ Although the handling of disciplinary actions and leave requests are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.¹⁰ However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹¹ Regarding disciplinary actions, it is well established that an employer has the right to conduct investigations if wrongdoing is suspected.¹² OWCP received an August 18, 2009 statement from Ms. Enright, a nursing supervisor, who indicated that, on that date, she contacted appellant to review a potential disciplinary action and advised her that she was entitled to have union representation. Afterwards appellant advised her that she wished to file a claim. OWCP received August 18, 2009 statements from Mr. Owens and Ms. Zulinski which noted that, on that date, appellant was distraught and crying after being advised of a potential disciplinary matter. They confirmed that they covered the front desk on appellant's behalf. In an August 20, 2009 memorandum, Ms. Collins indicated that appellant was informed of a proposal to remove her for unauthorized

⁹ See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

¹⁰ *Id.*

¹¹ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹² See *Linda K. Mitchell*, 54 ECAB 748 (2003).

access of a sensitive medical record. In a September 15, 2009 removal notice, Mr. Murphy, confirmed appellant's removal. On December 4, 2009 Ms. Collins also indicated that the removal was due to conduct not performance of duties. A settlement agreement dated January 22, 2010 reveals that appellant resigned from the employing establishment and received a settlement. However, the agreement indicated that it did not constitute an admission of fault on the part of the employing establishment. The Board notes that the agreement did not establish that the employing establishment erred or acted in an abusive manner. Furthermore, these statements do not support error or abuse.

Regarding her leave requests, the Board notes that the development of any condition related to such matters would not arise in the performance of duty as matters pertaining to leave are administrative in nature and bear no relation to appellant's day-to-day or specially assigned duties.¹³ Furthermore, the employing establishment provided statements from Ms. Collins who confirmed that all of appellant's requests for leave were granted. Appellant also acknowledged that her leave requests were granted.

Thus, appellant has not established a compensable employment factor under FECA with respect to administrative matters.

For the foregoing reasons, appellant has not established any compensable employment factors under FECA and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.¹⁴

CONCLUSION

For the foregoing reasons, as appellant has not established any compensable employment factors under FECA, she has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.

¹³ See *Lori A. Facey*, 55 ECAB 217 (2004); *George A. Ross*, 43 ECAB 346, 353 (1991).

¹⁴ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the September 14 and April 21, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 28, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board