

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

D.T., Appellant)	
)	
and)	Docket No. 12-1534
)	Issued: April 10, 2013
U.S. POSTAL SERVICE, POST OFFICE,)	
Austintown, OH, Employer)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 9, 2012 appellant, through her attorney, filed a timely appeal from the June 13, 2012 Office of Workers' Compensation Programs' (OWCP) decision, which denied her emotional condition claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On February 10, 2009 appellant, then a 61-year-old customer service supervisor, filed a claim alleging an emotional condition in the performance of duty. On February 7, 2009 she experienced nervousness, anxiety, sleeplessness, loose bowels and fearfulness after a verbal and

¹ 5 U.S.C. § 8101 *et seq.*

physical confrontation with a subordinate. Appellant was instructing Ed Hernan, when he grabbed her right upper arm and “raised his voice.” Mr. Hernan told her not to walk away from him and she told him not to touch her. Appellant stopped work on February 9, 2009. The employing establishment controverted the claim, noting that she stated that she was not concerned for her safety.

On February 23, 2009 OWCP requested that appellant submit additional factual and medical evidence.

In disability certificates dated February 9 and 16, 2009, Dr. Arthur Lapping, an osteopath Board-certified in family medicine, advised that appellant was unable to work since February 9, 2009. On February 17, 2009 he diagnosed acute anxiety and filled in “due to February 7, 2009 incident.” Dr. Lapping checked the box “yes” in response to whether he believed that the condition found was caused or aggravated by appellant’s employment. He noted that she was totally disabled since February 9, 2009.

In a February 7, 2009 e-mail, appellant informed Supervisor Ronald Zimcosky that a carrier pulled her arm. She stated that, at 3:50 p.m. that date, Mr. Hernan, a regular carrier, returned to the office with a handoff, which had been given to him as under time. Appellant had instructed him earlier to maintain his eight hours since he was not on the “OTDL [Overtime Desired List]” and she was going to give it to a carrier on OTDL. When Mr. Hernan returned, she decided to have him complete his assignment instead of giving it to someone else. Appellant stated that, when she heard his voice, she went to the workroom floor to give him further instructions. In response, Mr. Hernan raised his voice and she began to walk away. He then grabbed her right arm and stated, “Don’t you walk away from me!” Appellant told him not to touch her and that she was calling the postal inspectors. She noted that there were other carriers in the area.

Appellant contacted a postal inspector, who instructed her to contact the local police to escort her from the premises after an investigation. She noted that two officers arrived and conducted interviews. One of the police officers advised appellant that, because there were two conflicting stories and no attempt to cause physical harm, there was no criminal offense and the employer would handle the matter internally. Appellant noted that carriers, Jim Stoyanov and Ruth McIntyre, advised the police that Mr. Hernan put his hand out to stop appellant from walking away but did not pull her arm. She explained that, after the police officers left and Mr. Hernan was no longer on the premises, she called Brian Green, a postal inspector who advised her that an investigation would be conducted on Monday. Appellant remained in the building alone because of late returning carriers and reports she had to complete. She stated that she did not feel comfortable because it was dark outside and she had to go to her car. A February 13, 2009 statement reiterated appellant’s version of the incident.

In a February 10, 2009 statement, Darlene Jones, a customer service manager, addressed the February 7, 2009 incident in which Mr. Hernan grabbed appellant’s upper right arm after she gave him instructions to deliver mail. Appellant related that Mr. Hernan raised his voice and stated loudly, “Don’t you walk away from me.” She further reiterated the incident as related by her. Ms. Jones noted that appellant indicated that the police arrived and escorted Mr. Hernan out of the building. She stated that appellant contacted the employing establishment on Monday,

February 9, 2009 and indicated that she was unable to report to work because she was fearful, anxious and nervous. Ms. Jones explained that appellant called later that date and advised that her physician took her off work until February 18, 2009.

In a February 10, 2009 statement, Ms. McIlduff, a coworker, noted that on February 7, 2009 at about 3:50 p.m. she “witnessed letter carrier Ed Hernan pull [appellant’s] right arm.” She stated that he inquired about his timecard and she told him that she had his timecard and the situation had changed since he telephoned earlier about not being able to complete his assignment. Ms. McIlduff noted instructing Mr. Hernan to return to the street and deliver his handoff and his voice started getting louder as he informed her that he called in and appellant instructed him to bring the mail back as she was going to give the handoff to someone on the OTDL. She explained that appellant heard this discussion and approached him who raised his voice and stated, “Oh no, I called in and you said to bring the mail back.” Ms. McIlduff advised that appellant began to walk away and Mr. Hernan grabbed her right upper arm and stated, “Don’t you walk away from me!” She noted that appellant responded “Don’t touch me; I am calling the [p]ostal inspectors. Did you see that?” Ms. McIlduff also advised that two carriers, Ms. McIntyre and Mr. Stoyanov, witnessed the incident.

In a March 9, 2009 statement, appellant repeated the details of the February 7, 2009 incident. She indicated that she had no stress in her life other than her federal employment. Appellant advised that she had a lot of job stress since Ms. Jones became manager the previous year. She noted that she was on leave due to anxiety in 2008 and attended employee assistance program counseling sessions in October 2008. Appellant also noted that she was in the process of attempting to obtain an appointment with a psychiatrist.

OWCP received treatment notes from Dr. Daniel Guy, a licensed psychologist. In a March 17, 2009 note, Dr. Guy stated that he saw appellant after a confrontation with a male employee at work. He advised that the confrontation left her overwhelmed with stress such that she was unable to immediately return to work until her anxiety reaction was resolved. Dr. Guy noted that appellant was undergoing a psychological evaluation.

In a report dated March 17, 2009, Dr. Guy noted appellant’s history of injury as a physical confrontation with a subordinate worker. He diagnosed anxiety and nervous tension and explained that she was not normally anxious and nervous. Dr. Guy explained that appellant’s present state of anxiety and nervousness was due to her fearfulness of the threat of violence in the workplace. He indicated that she had not reached maximum improvement and advised that she abstain from returning to work where the “fear-provoking worker continues to be employed.” Dr. Guy recommended that appellant be relocated as he did not believe that she could effectively perform her duties in the location where the incident occurred. In a March 24, 2009 treatment note, he provided diagnoses of mixed mood adjustment disorder and severe stress. OWCP also received handwritten unsigned treatment notes dated June 23, August 22 and December 15, 2008 and February 9, 2009.

The employing establishment provided a February 9, 2009 statement from Ms. McIntyre, a carrier, who explained that on February 7, 2009 she was clearing her accountable mail when she heard Mr. Hernan and appellant discussing instructions given to him regarding a handoff. Ms. McIntyre noted that he appeared to be quite upset about the instructions and was talking

about not going back on the street. She explained that Mr. Hernan had a tendency to talk with his hands and, while doing so, appellant started to walk away from him. Ms. McIntyre explained that from her viewpoint “it appeared that [appellant] walked into Ed Hernan’s hand with her arm.” She noted that appellant “screamed for him not to ever touch her.” However, Ms. McIntyre indicated that “it appeared to be an accident and nothing was done with intent to harm or to be malicious.” She believed that “the incident was blown out of proportion.”

In a February 10, 2009 statement, Carrier Stoyanov explained that he witnessed appellant and Mr. Hernan engage in a discussion on February 7, 2009. He noted that a telephone rang and he saw Mr. Hernan “talking with his hands as usual.” Mr. Stoyanov thought appellant was going to answer the telephone when “it seemed like Ed’s hand got caught on [appellant’s] bicep unintentionally as she turned quickly and bolted toward the desk. No police report was filed because the cop said that [appellant] had said in was not deliberate contact.” OWCP received a February 7, 2009 summary call sheet from the police department.

On May 14, 2009 OWCP requested that Dr. Guy provide additional information about the February 7, 2009 incident. In an undated response, Dr. Guy noted that, during his clinical interview, it was determined that appellant had an altercation with a subordinate, Mr. Hernan, after he was given a directive. Appellant related that he became agitated and raised his voice. She began to walk away from her subordinate, “who then tried to physically restrain her by reaching out and grabbing her arm. Appellant protested and stated ‘Do not touch me.’” Dr. Guy explained that as a result of the altercation she became extremely nervous, anxious and was unable to sleep and very fearful. He opined that appellant’s current diagnosis was not a part of her clinical history until the February 7, 2009 altercation and her feelings of fearfulness and anxiety were supported by the examination. Dr. Guy diagnosed adjustment disorder with anxious mood and recommended that she not return to work with Mr. Hernan. He also noted that appellant’s fearfulness was not only associated with Mr. Hernan, but with reports in the media and press associated with lethal retaliation by unhappy and angry subordinates in the workplace. Dr. Guy indicated that she could return to work as long as she did not work with the worker who assaulted her.

In a June 29, 2009 decision, OWCP denied the claim as the evidence was insufficient to establish that appellant sustained an injury as alleged. It found that the medical evidence did not establish that the event of February 7, 2009 caused her claimed emotional condition. OWCP found that appellant’s feeling fearful while working after the incident and having police walk her to her car after the workday ended was not an employment factor.

Appellant’s representative requested a telephonic hearing, which was held on October 6, 2009. During the hearing, appellant confirmed that she was not initially concerned for her safety. She also noted that she had some stress earlier. It was also confirmed that no police report was filed because there were two contradictory stories. Appellant indicated that she disagreed with Mr. Stoyanov and was not in his presence.

By letter dated August 26, 2009 and received September 2, 2009, appellant’s attorney submitted an undated report from Dr. Guy, who noted that, as a result of his examination of appellant and her past clinical history, he concluded that “her present severe reaction to the

altercation she had with her subordinate on February 7, 2009 is the direct cause.” Dr. Guy recommended that appellant return to work in a different location from her previous subordinate.

In a December 23, 2009 decision, an OWCP hearing representative affirmed the June 29, 2009 decision. He found that compensable work factors were established in the form of a verbal altercation and physical contact with Mr. Hernan on February 7, 2009. The hearing representative specified that the incident was not a physical assault but was nonassaultive physical contact. He also found that appellant’s being fearful and calling the police to watch her walk to her car after the workday ended was not in the performance of duty and amounted to a fear of future injury. The hearing representative also found that the medical evidence was based upon an incorrect factual history of assault and lack of knowledge of appellant’s prior stress problems which were not compensable. Thus, the medical evidence was insufficient to establish a causal relationship between the emotional condition and the established work factors.

Appellant’s attorney requested reconsideration and referred to a copy of a March 13, 2009 letter to appellant from the employer advising her that she was being temporarily assigned to the main office window in her supervisory capacity. By decision dated October 27, 2010, OWCP denied modification.

On August 1, 2011 appellant’s representative requested reconsideration. He submitted a June 9, 2011 report from Dr. James M. Medling, a clinical psychologist, who noted that appellant had an adjustment disorder with anxiety beginning in June 2008, when a new manager arrived. Dr. Medling indicated that she received treatment from her primary care physician, Dr. Lapping, for this condition. He opined that appellant had an adjustment disorder with anxiety at the time of her February 7, 2009 incident. Dr. Medling advised that he believed that the incident substantially aggravated her adjustment disorder following the February 7, 2009 work incident, which was now in full remission. He included a copy of his April 12, 2011 psychological evaluation. Dr. Medling noted that appellant’s history included reporting work stress in 2008 due to a stressful work environment with her new manager. He described the incident of February 7, 2009 as: “[s]he states a carrier grabbed her arm when she told him he had to do another half-hour route and she became frightened over it.”

By decision dated June 13, 2012, OWCP denied modification of its prior 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 or her regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of 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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.²

An employee 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.³ 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.⁴

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.⁵ 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.⁶

ANALYSIS

Appellant alleged that she sustained an emotional condition in the performance of duty. The Board must thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

The Board initially notes that appellant has attributed her emotional condition to the regular or specially assigned duties of her position as customer service supervisor. The Board has held that conditions related to stress resulting from situations in which a claimant is trying to meet his or her position requirements are compensable.⁷ In this case, appellant alleged that on February 7, 2009 a verbal altercation and physical contact occurred with Mr. Hernan as she was giving him instructions about his work. The Board notes that OWCP properly found this occurred in the performance of duty. The Board finds that there was a verbal altercation⁸ and some physical

² See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

³ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁴ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁵ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁶ *Id.*

⁷ *Richard H. Ruth*, 49 ECAB 503 (1998).

⁸ See *Peter D. Butt Jr.*, 56 ECAB 117 (2004) (the Board has recognized the compensability of verbal altercations or abuse when sufficiently detailed by the claimant and supported by the record).

conduct with Mr. Hernan as appellant tried to discuss work instructions with a subordinate employee. Appellant has alleged a compensable factor under *Cutler*.⁹

Appellant also alleged that she was fearful at the end of her work shift on February 7, 2009 and had the police walk her to her car. The Board notes that during the hearing she explained that she was not initially concerned for her safety. Later that date as appellant was leaving for the day, she became fearful and thus asked for a police escort. However, fear of a future injury is not compensable.¹⁰ Thus, this is not a compensable employment factor.¹¹ Although appellant has identified a compensable factor of employment with respect to a verbal altercation and physical contact on February 7, 2009, her burden of proof is not discharged. To establish her claim for an emotional condition, she must also submit rationalized medical evidence establishing that she has an emotional condition that is causally related to the accepted compensable employment factor.¹²

The medical evidence submitted in support of appellant's claim included several reports from her treating physician, Dr. Lapping, an osteopath. In his disability certificates dated February 9, 2009, Dr. Lapping indicated that appellant was unable to work from that date to the present. In his February 17, 2009 report, he diagnosed acute anxiety due to the incident on February 7, 2009 and checked the box "yes" in response to whether he believe that appellant's condition was caused or aggravated by stress at work. However, Dr. Lapping did not identify the accepted work factors as causing her stress.

Dr. Guy provided several March 17, 2009 reports in which he generally noted that appellant was involved with a confrontation with a male employee at work which left her overwhelmed with stress such that she was unable to immediately return to work. When OWCP requested additional information, Dr. Guy provided an undated response received on June 1, 2009. He described the injury as appellant having had an altercation with Mr. Hernan, after he was given a directive. Dr. Guy indicated that Mr. Hernan "tried to physically restrain her by reaching out and grabbing her arm. [Appellant] protested and stated 'Do not touch me.'" He explained that as a result of the altercation she became extremely nervous, anxious and has been unable to sleep and has been very fearful. Dr. Guy further explained that appellant's current diagnosis was not a part of her clinical history until the February 7, 2009 altercation and her feelings of fearfulness and anxiety were supported by the examination. He recommended that she not return to work in a location with Mr. Hernan.

In an undated report received on September 2, 2009, Dr. Guy opined that appellant's present reaction was related to her altercation. The Board notes that his reports are insufficient to establish causal relationship as his opinion on causal relationship contains insufficient

⁹ See *supra* note 2.

¹⁰ See *Joseph G. Cutrufello*, 46 ECAB 285 (1994) (fear of future injury is not a compensable factor of employment).

¹¹ Appellant also made general allegations about stress at work since the appointment of a new manager. She provided insufficient evidence to show how any specific actions by the manager were compensable work factors.

¹² See *William P. George*, 43 ECAB 1159, 1168 (1992).

reasoning and his opinion is premised upon an inaccurate description of incident since the weight of the evidence supports that Mr. Hernan's touching of appellant was minimal. Furthermore, Dr. Guy does not appear to be aware that appellant had a prior history of stress. Appellant noted that she was on leave due to stress in 2008. It is well established that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value.¹³

Dr. Medling provided June 9 and April 12, 2011 reports in which he opined that appellant had an adjustment disorder with anxiety beginning in June 2008, when a new manager was transferred to employing establishment. He opined that the February 7, 2009 work incident substantially aggravated her adjustment disorder following the incident, which had been now in full remission. However, Dr. Medling's description of the incident was inaccurate as he indicated that the "carrier grabbed her arm." As noted, the witness' statements support a much lower level of physical contact, which one witness described as an accidental touching. As previously noted, medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value.¹⁴

The Board finds that appellant has not submitted rationalized medical evidence establishing that her claimed conditions are causally related to the accepted compensable employment factors.

Appellant may submit evidence or argument with a written request for reconsideration 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 the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

¹³ *Douglas M. McQuaid*, 52 ECAB 382 (2001).

¹⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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