United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 10-2266**
	)	**Issued: September 30, 2011**
DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, New York, NY, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2010 appellant, through her attorney, filed a timely appeal of a June 2, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision denying her emotional condition claim. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment.

On appeal, counsel argued that appellant had established that involvement with two cases were stressful to her, that this involvement was part of her regular job duties and that she had established a compensable factor of employment which necessitated review of the medical evidence.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on two occasions. On October 4, 2004 appellant, then a 50-year-old occupational health nurse filed an occupational disease claim alleging that she developed severe heart palpitations and abdominal pain as a result of employment-related stress. OWCP denied her claim on January 27, 2005 and March 1, 2006. Appellant appealed to the Board and by decision dated April 17, 2007,[2] the Board reviewed her claim and made factual findings ultimately setting aside both OWCP decisions and remanding for further development.

Appellant alleged that she began performing the work of two nurses in August 2002 and that the number of claimants increased. She sometimes worked more than eight hours a day in order to complete her work and sometimes ate lunch at her desk. Appellant supervised 70 nurses. When she returned from a vacation, her workload doubled or tripled because there was no one to perform her duties in her absence. The employing establishment failed to provide full-time clerical assistance as had been promised. Appellant reviewed 50 to 450 reports daily from field nurses. During the first week of June 2004 her supervisor, Zev C. Sapir, District Director, instructed her to review 71 cases for accuracy and coding, which required five days and caused a delay in appellant completing other work. When a new computer system was installed, appellant spent additional time processing documents.

The employing establishment disputed these allegations and the Board found there was insufficient evidence to establish appellant's allegations regarding her workload as factual as she did not provide corroborating evidence to support them. Consequently, these allegations were not accepted as compensable factors of employment.

Appellant also alleged that Mr. Sapir treated her unfairly, spoke condescendingly and criticized her. Mr. Sapir also directed her to return to full-time work within a month and advised her that she should avoid being in an absent-without-leave status. The Board found that these allegations were administrative matters in which appellant had not established error and abuse.

Appellant alleged that there were several cases in which she had difficulty. She had difficulty getting a particular seriously ill claimant admitted to a hospital because of outstanding hospital bills and encountered other problems obtaining authorization for her treatment. The patient was eventually admitted to a hospital. Appellant had difficulty getting a pharmacy to provide medication for another patient prior to written authorization from the employing establishment. She had difficulty getting an unnamed critically ill claimant airlifted to a hospital. During the process, the claimant's wife cried, became emotional and tearful that her husband would die. In another incident, a claimant alleged that a supervisor refused to authorize epidural injections and the claimant telephoned appellant and was crying. These difficult cases made appellant depressed and sad. Appellant felt that the claimants were not receiving treatment in a timely manner and sometimes developed serious medical complications as a result. The Board found that appellant's allegations regarding her emotional reaction to cases where the employing establishment did not timely authorize medical treatment for particular claimants might

[2] Docket No. 06-1746 (issued April 17, 2007).

constitute compensable factors of employment and directed OWCP to further develop the factual evidence regarding these cases.

Following the Board's April 17, 2007 decision, OWCP requested additional information from appellant. Appellant responded on May 19, 2007 and stated that a field nurse called because of the difficulty of transferring a particular patient from an acute care hospital to a rehabilitation hospital. Appellant stated that she reported this information to her supervisor and the claims examiner as well as providing the field nurse with further suggestions to call customer service and to directly contact the claims examiner. She stated that the patient's acceptance to an appropriate hospital was delayed because of nonpayment of her bills which was a barrier to the quality and timeliness of care that she received. Appellant alleged that she became helpless, sad and depressed because she could not help to provide the best quality of care for the patient. She stated that she developed palpitations whenever the nurse called about the case.

Appellant also discussed her reaction to a telephone call from a claimant's wife who was crying because her husband was in severe back pain and needed medication which they could not buy. She telephoned the pharmacy and with the assistance of a supervisor, Jonathan Lawrence, obtained the antibiotic needed for a postsurgical infection. Appellant stated that the telephone calls required one hour of her time. She stated that these telephone calls caused her to feel distressed due to the claimant's pain and the failure to provide the quality and timely care that he deserved.

In a statement dated June 8, 2007, the employing establishment administrative officer, Eve Bartusik, stated that appellant did not generally have contact with injured workers directly as her principal responsibility was to manage various employing establishment nurses. She stated that appellant supervised nurses who had limited authority to authorize treatment.

By decision dated June 21, 2007, OWCP denied appellant's claim. Counsel requested an oral hearing on June 28, 2007. By decision dated August 23, 2007, the Branch of Hearings and Review vacated OWCP's June 21, 2007 decision and remanded the case for OWCP to review the cases mentioned by appellant by claim number and issue a *de novo* decision.

In a letter dated August 27, 2007, OWCP asked that the employing establishment review the cases mentioned by appellant and provide a detailed statement of appellant's involvement. Ms. Bartusik responded on October 22, 2007 and stated that a review of the cases identified by appellant did not include the specifics of her involvement and listed only telephone calls to the appropriate field nurse or claims examiner. However, she found that appellant assigned a nurse on March 18, 2003 to one case and that she reviewed the nurse reports. Appellant was found to have participated in five telephone calls a month with the field nurse or the rehabilitation facility and engaged in one call of 47 minutes. Ms. Bartusik noted that there were no telephone memorandum or other documentation of the content of the calls.

By decision dated November 13, 2007, OWCP again denied appellant's claim. Counsel requested an oral hearing on November 20, 2007. Appellant testified at the oral hearing on March 26, 2008. She discussed a specific claim and stated that she worked with the field nurse. Appellant stated that the various hospitals had not been paid and the field nurse was unable to locate another facility willing to take Ms. Johnson with outstanding medical bills. She agreed

that one telephone call lasted 47 minutes due to difficulties finding a facility. Appellant alleged that the situation depressed her because she could not advocate for the patient. She also testified that the patient with the spinal infection telephoned her crying because he had no money to buy his antibiotics. Appellant noted that his claim had not been approved. She stated that she also talked to the claims examiner and the pharmacist. Appellant reported that at the employing establishment she managed a case load of 70 nurses.

In a statement dated March 8, 2008, appellant asserted that she supervised nurses in the claimant advocacy program employing 20 nurses and the nurse intervention program utilizing up to 30 field contract nurses. In support of her statement, appellant submitted a letter from the director of the employing establishment EEO unit, Kate Dorrell, dated September 3, 2004 which stated that appellant supervised over 70 contract nurses. She alleged that she had never received any formal training to oversee contract nurses. Appellant alleged that her position required her to do performance appraisals and certify credentials. The case management aspect of her position required her to pay nurse bills, ensuring that nursing care plans were appropriate, train and certify contract nurses and obtain direction from claims examiners.

Appellant stated that immediately after she assumed her position in August 2003, she found that two nurses were working without licenses resulting in their termination. One nurse died soon after she was terminated and the other nurse sent appellant "nasty e-mails," wrote letters to the Secretary of Labor and had her member of Congress contact appellant. She stated that as a result of this employee contacting the Office of the Inspector General (OIG), the employing establishment was investigated for employing nurses without licenses. Appellant stated that the investigation was stressful, that she was humiliated and denied union representation.

By decision dated May 27, 2008, the Branch of Hearings and Review affirmed OWCP's June 21, 2007 decision and counsel appealed that decision to the Board. The Director of OWCP filed a Motion to Remand, which the Board granted on September 23, 2009, finding that OWCP improperly reviewed evidence outside the record in reaching the November 13, 2007 and May 27, 2008 decisions.[3] The Board remanded the case for further development of the evidence regarding appellant's allegations of the claimant telephone calls including a statement to the record from the employing establishment addressing appellant's allegations.

In a letter dated October 9, 2009, OWCP requested additional information from the employing establishment in accordance with the Board's order. It repeated this request on November 30, 2009. Mr. Sapir, the district director, responded on December 16, 2009 and stated that the employing establishment records did not show more than 50 contract nurses working at any one time. He stated that there were other categories of nurses and that contract nurses served in more than one role. Mr. Sapir opined that Ms. Dorrell had no access to reliable information regarding contract nurses at the employing establishment as she worked in the Washington, DC office of the employing establishment.

Mr. Sapir stated that appellant did not require formalized contract training because she was trained by her predecessor and by management. He stated that appellant was not the

[3] Docket No. 08-2503 (issued September 23, 2009).

particular subject of the investigation because the OIG was conducting an agency-wide audit. Appellant was praised not humiliated for determining that a contract nurse's credentials were not appropriate and that there was no contractual or other requirement that appellant be represented by a union steward. Mr. Sapir denied that he was condescending or demeaning to appellant. He stated that the case record did not reflect extensive involvement in claim of the patient with a spinal infection. Mr. Sapir cited as an inconsistency in appellant's statement the fact that Mr. Lawrence left the employing establishment is 2003 and appellant claimed to have worked with him in 2004. He stated that appellant's direct communication with claimants was not a regular part of her job.

By decision dated December 30, 2009, OWCP denied appellant's claim finding that appellant failed to substantiate a compensable factor as Dr. Sapir disputed her allegations. Counsel requested an oral hearing on January 11, 2010. He submitted a statement dated August 10, 2008 from Sara Curry who coordinated the nurse intervention program from October 1992 until June 2003. Ms. Curry stated that the program expanded during her tenure and that her workdays were extremely busy requiring her to work overtime. She noted that she received clerical assistance for her position. Ms. Curry stated that she supervised 20 inside nurses and 50 outside nurses.

By decision dated June 2, 2010, the Branch of Hearings and Review found that the record did not support appellant's allegations regarding her workload because the employing establishment stated that she was provided with clerical assistance, that she supervised only 50 nurses and that she did not perform the work of two nurse managers. It also found that the evidence did not show that she reviewed more than 30 reports per day and that appellant did not work more than one credit hour per pay period. The hearing representative found that appellant's reaction to authorization of medical treatment of injured workers was not compensable as any such contact was incidental and not part of appellant's regular responsibilities. Furthermore, the hearing representative found that there was no evidence that medical authorizations were unreasonably delayed or improperly denied and that appellant's reaction and frustration was not compensable. The hearing representative found that there were no compensable factors of employment established.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[4] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.[5] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.[6] When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an

[4] 28 ECAB 125 (1976).

[5] 5 U.S.C. §§ 8101-8193.

[6] *See Robert W. Johns*, 51 ECAB 136 (1999).

emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[7] In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is not sufficient to constitute a person injury sustained in the performance of duty within the meaning of FECA. Thus disability is not covered when it results from an employee's fear of a reduction-in-force. Nor is disability covered when it results from such factors as an employee's frustration in not being permitted to work in a particular environment or to hold a particular position.[8]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[9] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[10] A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.[11]

ANALYSIS

Appellant has attributed her emotional condition and resulting physical conditions to work-related stress. She alleged that while she was out of work her supervisor, Mr. Sapir, spoke to her in condescending and demeaning manners causing her stress. Mr. Sapir denied these allegations. Appellant did not support her allegations with corroborating evidence such as witness statements that Mr. Sapir's tone or manner was in appropriate. The Board has held that complaints about the manner in which a supervisor performs his or her duties as a rule falls outside the scope of coverage of FECA. Mere disagreement or dislike of a supervisor or managerial action will not be compensable, absent evidence of error or abuse.[12] As there is no evidence that Mr. Sapir either erred or acted abusively in his interactions while supervising appellant, she has not established a compensable factor of employment in this regard.

Appellant also attributes her emotional condition to stress from an investigation conducted at the employing establishment by the OIG regarding nurses' credentials and Mr. Sapir's refusal to allow her union representation. Mr. Sapir stated that this was not an investigation of appellant, but was an agency-wide audit. As such he stated that appellant was

[7] *Cutler, supra* note 5.

[8] *Id.*

[9] *Charles D. Edwards*, 55 ECAB 258 (2004).

[10] *Kim Nguyen*, 53 ECAB 127 (2001). *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[11] *Roger Williams*, 52 ECAB 468 (2001).

[12] *T.G.*, 58 ECAB 189, 196 (2006).

not entitled to union representation. Investigations are considered to be an administrative function of the employing establishment as they are not related to an employee's day-to-day duties or specially assigned duties or to a requirement of the employment.[13] The Board finds that appellant has not submitted any evidence substantiating her allegation that she should have been allowed a union representative and thus has not established error or abuse on the part of the employing establishment in the conduct of the investigation.

Appellant also attributed her emotional condition to specific cases upon which she worked the nurses or was contacted directly by claimants. She testified regarding the difficulty in placing a claimant in a rehabilitation hospital following her treatment at an acute care hospital. Appellant stated that she had several contacts with the nurse, the claims examiner and others including one telephone call of approximately 47 minutes regarding this claimant. She noted that the patient could not be easily placed due to outstanding medical bills unpaid by the employing establishment. The employing establishment has substantiated several calls including one of 47 minutes regarding this claimant. Appellant noted that the patient was eventually placed in a rehabilitation facility, but that she died shortly thereafter. She stated that, as a result of this case, she felt helpless, sad and depressed because she could not help to provide the best quality of care for the patient.

The Board finds that there is no dispute in the record that the interactions concerning the patient occurred in the performance of appellant's regularly assigned duties. However, appellant's allegation is essentially dissatisfaction with perceived poor management. She states that she could not adequately help the patient because management had not paid outstanding medical bills. This is frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable.[14]

Appellant also attributed her emotional condition to personal contact with a claimant and his wife who were unable to obtain needed medication because the patient's claim had not been accepted by the employing establishment. The employing establishment has repeatedly stated that appellant was not generally required to have direct communication with claimants and found no evidence of appellant's involvement with this specific case. Furthermore, Mr. Sapir noted that appellant and Mr. Lawrence could not have worked in this case in 2004 because he had left the employing establishment in 2003. The Board finds that due to the discrepancies in the factual statement from appellant and the statements from the employing establishment, appellant has not established that these conversations occurred as alleged and has not substantiated a compensable employment factor in this regard.

Appellant credibly alleged that she was required to supervise between 50 and 70 nurses, ensure credentials were current and engage in case management. It is agreed that she never received any formal supervisory training for dealing with contract nurses. Appellant alleged that her position required her to perform nurse appraisals and read reports, pay nurse bills, and ensure that nursing care plans were appropriate. She stated that she found these activities stressful.

[13] *K.W.*, 59 ECAB 271 (2007).

[14] *Cyndia R. Harrill*, 55 ECAB 522, 529 (2004). (Finding that appellant's alleged stress due to coworkers' inability to interact with civilian workers was not compensable.).

The record includes a statement by appellant's predecessor, Ms. Curry that she supervised 20 inside nurses and 50 outside nurses which may confirm appellant's claim to have supervised 70 nurses. Appellant also included a statement from Ms. Dorrell dated September 3, 2004 which stated that appellant supervised over 70 contract nurses.

Mr. Sapir, her supervisor, disputed appellant's allegations noting that there were only 50 contract nurses employed at any given time. He also asserted that Ms. Dorrell, despite her statement, was not in a position to know how many employees appellant supervised.

The Board finds that the weight of the evidence substantiates appellant's allegation that she supervised about 70 nurses and that she engaged in case management including reading reports, paying nurse bills, reviewing nursing care plans and training as well as insuring certification of contract nurses. Appellant has alleged credible, specific aspects of her job duties that relate to overwork and stress. The Board has held that condition related to stress from situations in which an employee is trying to meet her position requirements are compensable.[15] Accordingly, the Board finds that appellant has substantiated a compensable factor of employment. OWCP found there were no compensable employment factors and did not analyze or develop the medical evidence. The case will be remanded to OWCP for this purpose.[16] After such further development as deemed necessary, OWCP should issue a *de novo* decision on this claim.

On appeal counsel argued that appellant had substantiated employment factors in regard to her telephone contacts. The Board has reviewed the evidence and disagrees with this assessment for the reasons given above.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant sustained an emotional condition in the performance of duty. On remand, OWCP should review and develop the medical evidence as it deems necessary and issue a *de novo* decision.

[15] *See M.D.*, 59 ECAB 211 (2007) (Finding that an employee's difficulty meeting a production standard resulting in an unacceptable performance evaluation was a compensable employment factor); *Beverly R. Jones*, 55 ECAB 411 (2004).

[16] *Tina D. Francis*, 56 ECAB 180 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of Office of Workers' Compensation Programs dated June 2, 2010 is set aside and remanded for further development consistent with this decision of the Board.

Issued: September 30, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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