

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

L.G., Appellant)

and)

DEPARTMENT OF HEALTH & HUMAN)
SERVICES, SOCIAL SECURITY)
ADMINISTRATION, Somerville, MA, Employer)

**Docket No. 11-647
Issued: February 2, 2012**

Appearances:
Susan B. Conrad, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 19, 2011 appellant, through her representative, filed a timely appeal of the September 20, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.²

ISSUE

The issue is whether appellant established that she sustained an emotional condition in the performance of duty.

¹ 5 U.S.C. § 8101 *et seq.*

² On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before OWCP at the time of the final decision. *See* 20 C.F.R. § 501(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

On appeal, appellant's representative contends that appellant was overworked due to a staff shortage and time limitations for conducting interviews with claimants.

FACTUAL HISTORY

On July 31, 2009 appellant, then a 51-year-old claims representative, filed a traumatic injury claim alleging that on July 22, 2009 she sustained head and cervical injuries when she was given a formal reprimand by Glenn Romero, a supervisor. While talking on the telephone to an intake worker in the Employee Assistance Program (EAP) regarding the July 22, 2009 incident, she became so nervous that she had an asthma or panic attack. Appellant fainted and fell down hitting her head.

A July 22, 2009 hospital emergency room report which contained an illegible signature advised that appellant had a cervical strain and an anxiety reaction.

In reports dated July 30 through August 18, 2009, Dr. Robert D. Davison, a chiropractor, addressed the treatment of appellant's cervical and thoracic sprain/strain. On August 18, 2009 he released her to return to full activity with no restrictions or expectations of residuals.

In an August 21, 2009 report, Dr. Virginia H. Palazzo, an attending Board-certified internist, advised that appellant should be placed on medical leave due to work-related stress. She was unable to determine when appellant could return to work.

By letter dated September 25, 2009, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested additional factual and medical evidence. Also, on September 25, 2009 OWCP requested that the employing establishment respond to appellant's allegations and provide information regarding her work activities and job description.

In a September 28, 2009 narrative statement, appellant alleged that her stress and headaches were caused by working overtime due to a staff shortage, heavy workload of cases and case processing deadlines for one and one-half years. She also received a formal written reprimand for being rude.

In an October 9, 2009 letter, Mr. Romero contended that appellant informed an emergency medical technician (EMT) called to the employing establishment on July 22, 2009 that she did not hit or injure any part of her body when she fell. Appellant refused to be transported by stretcher to the ambulance. She walked out without assistance. Mr. Romero stated that her claims representative position was challenging, but no more so than any other public service position. Overtime was not mandatory. Appellant's assigned job duties did not vary from those described in her job description. The employing establishment had adequate staff at the time of her injury. Appellant was generally able to perform her required work duties as expected by management. She had conduct problems which led to a formal reprimand on July 22, 2009.

A July 23, 2009 memorandum contained a reprimand from Mr. Romero who stated that on July 10, 2009 appellant displayed rude, discourteous and disrespectful behavior towards management when her request for two weeks of annual leave from July 27 through August 7, 2009 and her alternate request for advance leave to cover her absence during this period were

denied. Mr. Romero stated that as of July 10, 2009 she only had 10.5 hours of annual leave and she would not be able to accumulate enough leave to cover the requested time off work by the start of the two-week period.

By letter dated October 15, 2009, OWCP advised appellant that her traumatic injury claim was being treated as an occupational disease claim.

In a January 27, 2010 decision, OWCP denied appellant's claim. Regarding her emotional claim, it found that the factual evidence was insufficient to establish a compensable factor of her employment. OWCP also found that the medical evidence was insufficient to establish that she sustained physical injuries causally related to her employment.

On January 29, 2010 appellant requested an oral hearing.

In a June 3, 2009 note, appellant stated that she was off work from May 20 to 22, 2009 due to a respiratory virus and flu. In a June 18, 2009 e-mail, she denied displaying rude behavior when her request for advance leave was denied by management. Appellant contended that management was rude. She further contended that its requests for medical documentation were unreasonable as she had already submitted a letter from her physician.

Appellant's applications for annual leave for the period July 27 to 31 and August 3 to 7, 2009 were denied on July 13, 2009 by Mr. Romero who stated that she did not have sufficient leave to cover her request.

E-mails dated July 10, 2009 to February 9, 2010 between appellant, Susan Conrad, a coworker, Susan Barscherer, an operations manager and Charles Strigler, a district manager, indicated that appellant's request for advanced sick leave was denied. On July 28, 2009 appellant filed a grievance with the Equal Employment Opportunity (EEO) Commission against management for its denial of her leave requests and issuance of reprimand memorandum.

In a January 13, 2010 e-mail, appellant advised Ms. Conrad that she was unable to keep up with the workload and pace in her office. Mr. Romero never responded to her request for relief. In a January 14, 2010 e-mail, appellant advised Ms. Conrad that Lenny Butler, an employing establishment employee, told her that she may be fired.

Appellant submitted an affidavit dated February 17, 2009 on behalf of Ms. Conrad who filed an emotional condition claim alleging harassment by the employing establishment.

A mediator's March 15, 2010 resolution of appellant's grievance provided that the employing establishment would offer her an early-out retirement effective September 30, 2009 and would remove the July 22, 2009 letter of reprimand from her personnel file. The employing establishment would not impede the processing of appellant's appeals filed with the Office of Personnel Management, the employing establishment and OWCP regarding her disability claims. Appellant would not seek future employment at the employing establishment. She would contact the human resource office for help with completing her retirement paperwork and withdraw her grievance regarding the above issues.

In a May 26, 2010 narrative statement, Thomas Eng, an employee, related that on the last day appellant was in the office, he heard someone who appeared to be in distress, crying out in a loud hoarse voice. He could detect labored breathing and anguish in the person's voice as the person denied an accusation of wrongdoing and could not breathe. Mr. Eng next discovered appellant lying on the floor in her cubicle. Appellant was being comforted by coworkers and waiting for an EMT to arrive. Mr. Eng stated that, after receiving medical treatment, appellant was allowed to go home. He stated that she always conducted herself in a professional manner with coworkers, management and claimants. Appellant was also always available to assist him with complex cases. She served the public to the best of her ability, was always courteous and showed compassion.

In a July 15, 2005 narrative statement, Kathy Houba-Kane, an employee, stated that she was overworked. Unlike other employing establishment offices, the employees in her office had to handle a large volume of interviews which affected the quality of their work and resulted in increased complaints from claimants.

EEO documents which included decisions dated August 7 and September 27, 2006 and an article addressed its award and enforcement of its finding that an employee was entitled to compensatory damages plus costs on the grounds that the employing establishment discriminated against her on the basis of her race, national origin and color and in reprisal for protected EEO activity.

In a February 18, 2009 e-mail, Mr. Strigler, a district manager, discussed the mixed results of the implementation of a new interviewing system. He thanked claims representatives who had lived up to management's expectations and doing their part to make the system work. Mr. Strigler noted that some claims representatives were not taking their fair share of interviews, but were waiting for easy interviews while other representatives selected complex cases. He also noted that some representatives were taking inordinate amounts of time to accept interviews, not going to their designated location in the morning and waiting for other representatives to finish their interviews to go to lunch/break together. Mr. Strigler encouraged representatives to take responsibility for their actions and stated that management expected every staff member to perform their best and deliver the type of service deserved by claimants.

In a September 20, 2010 decision, an OWCP hearing representative affirmed the January 27, 2010 decision. He found that appellant did not sustain an emotional condition in the performance of duty as the evidence did not establish a compensable factor of her employment. The hearing representative further found that she did not sustain any physical injury in the performance of duty. The evidence established that the fall on July 22, 2009 and any resulting injury was idiopathic in nature.³

³ The Board notes that on appeal, appellant's representative has not specifically challenged OWCP's hearing representative's finding that appellant did not sustain a physical injury in the performance of duty, but rather an idiopathic fall on July 22, 2009. Accordingly, the Board will not address this particular issue on appeal.

LEGAL PRECEDENT

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her federal employment.⁴ This burden includes the submission of 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 Appellant must also submit rationalized medical opinion evidence establishing a causal relationship between the claimed condition and the established, compensable work factors.⁶

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an 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 specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁷ 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.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 FECA⁹ However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.¹⁰ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹¹

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 a physician when

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

⁵ *Roger Williams*, 52 ECAB 468 (2001); *Anna C. Leanza*, 48 ECAB 115 (1996).

⁶ *See Bonnie Goodman*, 50 ECAB 139, 141 (1998).

⁷ 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁸ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁹ *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹⁰ *See William H. Fortner*, 49 ECAB 324 (1998).

¹¹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.¹² 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 record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.¹³

ANALYSIS

Although appellant initially filed a traumatic injury claim for an incident at work on July 22, 2009, she subsequently alleged that she sustained an emotional condition as a result of several work incidents and conditions leading up to the July 22, 2009 incident. OWCP treated her traumatic injury as an occupational disease claim and denied her emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

Appellant has alleged that she was overworked as she had to work overtime due to a staff shortage, heavy workload of cases and case processing deadlines. She was unable to keep up with her workload and the pace of her office. Appellant feared being fired. She stated that Mr. Romero did not respond to her request for relief. The Board has held that where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability can come within FECA.¹⁴ Appellant did not submit sufficient evidence to substantiate her allegations. Ms. Houba-Kane stated that she was overworked due to handling a large volume of interviews which affected the quality of her work and resulted in increased complaints from claimants but there were no specific incidents noted and no corroboration was provided regarding appellant's allegation of overwork. She did not specifically address appellant's assigned duties or allegations. Mr. Romero stated that appellant's claims representative position was challenging, but no more than any other public service position. He further stated that her assigned duties did not vary from the duties contained in her job description. Mr. Romero related that overtime was not mandatory. He stated that appellant was generally able to perform her required work duties as expected by management. Mr. Romero denied the existence of a staff shortage. Mr. Strigler stated that claims representatives were performing well under the new interviewing system. He also stated that the performance of other claims representatives under the new system was not acceptable to management. Mr. Strigler related management's expectations that claims representatives should be responsible for their actions and provide good service to claimants. The Board finds that appellant has failed to establish a compensable employment factor based on her regular or specially assigned duties.

¹² *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹³ *Id.*

¹⁴ *Cutler*, *supra* note 7.

Appellant further alleged that management denied her request for two weeks of annual leave from July 27 to 31 and August 3 to 7, 2009 and alternate request for advance leave to cover her absence during the two-week period. She stated that management's request for medical documentation was unreasonable since she had already submitted a physician's report in support of her requests. Appellant alleged that Mr. Romero improperly issued a reprimand memorandum to her on July 22, 2009 for the behavior she displayed on July 10, 2009 in response to his denial of her leave requests. She denied responding to him in a rude manner. Appellant filed grievances for the above-stated actions.

Appellant's allegations regarding the denial of leave,¹⁵ request for medical documentation,¹⁶ issuance of a disciplinary memorandum¹⁷ and the filing of a grievance¹⁸ are administrative matters and not compensable absent a showing of error or abuse on the part of the employing establishment. Although she has alleged error by management, she did not submit any probative evidence establishing error or abuse regarding the above-noted administrative matters. While appellant submitted a mediator's March 15, 2010 resolution on the EEO grievance she filed against the employing establishment for denying her leave requests and issuing a reprimand to her, there was no final EEO decision finding that the employing establishment committed error or abuse. The Board notes that the decision to remove the memorandum of reprimand from appellant's personnel file does not establish evidence of error. The mere fact that personnel actions are later modified or rescinded does not in and of itself, establish error or abuse.¹⁹ The affidavit on behalf of Ms. Conrad's emotional condition claim which alleged harassment by the employing establishment is self-serving and does not address appellant's allegations of error or abuse by management in handling the above-noted administrative and personnel matters nor is it relevant to this claim. Mr. Eng stated that he heard appellant crying out in distress on July 22, 2009 about being falsely accused of wrongdoing and her subsequent inability to breathe. However, he did not state that he witnessed the July 10, 2009 incident involving appellant and Mr. Romero. Mr. Romero stated that appellant's requests for annual leave and advance leave were denied because she had not accumulated sufficient leave to cover the requested time off work. He related that, as of July 10, 2009, she only had 10.5 hours of annual leave. Mr. Romero also related that appellant would not be able to accumulate enough leave by the start of the two-week period. The Board finds, therefore, that the evidence submitted by appellant is insufficient to establish error or abuse by the employing establishment in handling the above administrative and personnel matters. For the reasons stated, the Board finds that appellant has failed to establish a compensable employment factor.

¹⁵ *T.G.*, 58 ECAB 189 (2006).

¹⁶ *James P. Guinan*, 51 ECAB 604, 607 (2000); *John Polito*, 50 ECAB 347, 349 (1999).

¹⁷ 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).

¹⁸ *Michael A. Salvato*, 53 ECAB 666, 668 (2002).

¹⁹ *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

Since appellant has not established a compensable work factor, the Board will not address the medical evidence.²⁰

On appeal, appellant's representative contended that appellant was overworked due to a staff shortage and time limitations for conducting interviews with claimants. For reasons noted, the Board finds that appellant did not establish a compensable factor of her employment.

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

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 2, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²⁰ *Karen K. Levene*, 54 ECAB 671 (2003).