United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 11-2144**
	)	**Issued: June 5, 2012**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Montgomery, AL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 23, 2011 appellant filed a timely appeal of a June 9, 2011 Office of Workers' Compensation Programs' (OWCP) merit decision denying her emotional condition claim and a September 2, 2011 nonmerit decision. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merit and nonmerit issues of the case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she developed an emotional condition due to factors of her federal employment; and (2) whether OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 8, 2010 appellant, then a 52-year-old ultrasound medical technician, filed a notice of occupational disease alleging that she developed stress, depression, frustration, severe anxiety and work-related post-traumatic stress disorder. She attributed her condition to the requirement that she stay past her scheduled dismissal time as she was unable to leave at the end of her shift due to an overflow of patients. Appellant stated that the employing establishment was short-handed and that her supervisor would not allow her to leave when her shift ended.

Appellant submitted notes from the medical clinic stating that on December 1, 2010 she presented a note from her physician limiting her work schedule to her normal work hours with no overtime. On November 2, 2010 Keith S. Hughes, a Board-certified family practitioner, stated that she should not work overtime due to her mental health. On November 24, 2010 William C. Freeman, M.D., stated that appellant should not work any overtime due to medical reasons for two months. On December 3, 2010 Dr. Hughes completed a certification of serious health condition in conjunction with her request for leave under the Family and Medical Leave Act. He stated that appellant could not perform overtime or on-call duty and diagnosed post-traumatic stress disorder.

Appellant submitted e-mails pertaining to the scheduling of patients for ultrasounds. In an e-mail dated December 3, 2010, she requested that Connie L. Smith, supervisor, abide by her physician's restrictions and not schedule appointments such that appellant was required to work overtime. On July 8, 2010 appellant protested that her on-call pay was removed from the entire night when she did not respond to calls to her home telephone or being paged on her pager number.

By letter dated February 18, 2011, OWCP requested additional factual and medical evidence in support of appellant's claim. In a statement dated February 21, 2011, appellant stated that she was a veteran with post-traumatic stress disorder from spousal abuse and military sexual trauma, an attempted rape and sexual harassment by her supervisor during her military career. She stated that her health was precarious due to metabolic syndrome, extremely high cholesterol as well as diabetes.

Appellant alleged that she was overworked, that she had asked for help and been promised help for five years, but still worked by herself. She stated that her physician recommended no overtime for two months, but the recommendation was not honored by the employing establishment. Appellant noted that her regular hours were Monday through Friday from 8:00 a.m. until 4:30 p.m. She stated that she was frequently pressured to stay past her shift, with physicians adding patients at 4:29 p.m. Appellant stated that there were not enough technicians to cover ultrasound calls resulting in delays in ultrasounds. She stated that Ms. Smith and John L. Marshall, supervisors, pressured her to add more patients to the schedule causing her stress. Appellant stated that patients were admitted and added to her schedule when she returned from her scheduled days off resulting in the add-ons to the booked schedule. She noted that weekend patients were directed to appear Monday morning at 8:00 a.m., but were not informed that they would have to be worked into the schedule. These patients then frequently became upset with appellant due to the wait, while patients with scheduled appointments also became irate due to delays. Appellant stated that she was the only technician performing many

lengthy examinations. She stated that her supervisor tried to coerce her into working overtime by adding patients at the end of the day. Appellant stated that her average day was more than 10 patients, plus add-ons from the emergency room, clinics and intensive care unit. She alleged that her supervisors did not help to regulate patient flow by informing doctors that the table was booked. Appellant noted on one occasion that she was an hour late leaving and was unable to pay her power bill on time resulting in no power for her for two weeks. She stated that, when her direct supervisor gave her a direct order to stay overtime, she was afraid that she would be found insubordinate if she left and fired. Appellant alleged that she was unable to find assistance for venous studies which required a second person to squeeze the legs for augmentation and approximately an hour to scan both legs. She noted that she was instructed to have a chaperon for ultrasound of scrotum, but was required to search for volunteers and if no one was available she was frequently sexually harassed when performing these studies by herself. Appellant noted that the patient population frequently required help to access the table either through lifting or positional assistance and that she was also forced to search for volunteers. She alleged that she was required to perform x-ray calls even though she had not performed x-rays for over 10 years. Appellant stated that she requested to be removed from this duty but this request was denied. She stated that she had no control over her schedule and was required to work in the x-ray department which resulted in rescheduling her patients.

Appellant stated that patients, nurses and doctors yelled at her due to waiting times. She stated that she was completely overwhelmed, going as fast as she could, but that her speed was never fast enough. Appellant stated that she was subjected to sarcasm, antagonism, intimidation, harassment, ridicule and retaliation on a daily basis. She stated that coworkers questioned her sick leave usage. Appellant alleged that Mr. Marshal, a supervisor, asked why she did not wear make-up as he liked eye candy. She stated that she reported sexual harassment to her supervisor including "Ferman, a coworker," reaching inside her bra, feeling and squeezing her breasts as well as asking to see them. Appellant reported that a supervisor kept chocolate on his desk for all the "moody" women and stated that one woman was always on her period. She noted that he made her the butt of his jokes by telling coworkers that she was "too dumb to pass the registry certification test." Appellant alleged that her supervisor accused her of being "slutty" and looking at naked pictures of men at work. She also alleged that she was discriminated against through the denial of a bonus.

Appellant submitted e-mails in support of her claim. In an e-mail dated March 24, 2010, she stated that three examinations had been rescheduled and that she already had add-ons. Vichai Chaichamcheep responded and stated that this was an unresolved chronic issue and asked whether additional qualified ultrasound staff could be requested. Appellant corresponded with Stephen Pursley on October 6, 2010 and stated that she had 17 patients and stayed until 6:00 p.m. Mr. Pursley suggested some ultrasound help. On December 3, 2010 appellant informed her supervisors that she was not to work overtime in accordance with her physician's orders. Mr. Marshall refused to pay appellant an on-call subsidy on June 16, 2010 as she did not respond to pages. Appellant checked her pager and the system indicated that she was not paged. She requested that he correct the error in her paycheck. Mr. Marshall refused and appellant alleged that she was treated differently from others as she was not paged and her on-call pay was removed for the entire night. On September 16, 2009 appellant requested that clerks call the patients and inform them when no technician was available. On September 18, 2009

Mr. Marshall noted that appellant examined 8 patients and performed 10 examinations 3 of which transferred from another facility.

There was a series of e-mails dated January 18, 2010, which appellant alleged were from Ferman regarding whether appellant would have sex with him. On August 3, 2010 and February 10, 2011 appellant sent an e-mail and listed her issues with scheduling. Mr. Marshall responded and suggested that Ms. Smith only perform tests on emergency and ward patients when appellant is using annual leave.

In an e-mail dated February 16, 2011, Sandra Melton, a supervisor, requested that appellant change her sick leave requests from January 26 through 28, 2011 to a request for annual leave as she had no sick leave available.

In a report dated December 16, 2010, Dr. Daniel C. Clark, a licensed psychologist, provided testing results and diagnosed generalized anxiety disorder, post-traumatic stress disorder -- chronic, panic disorder without agoraphobia, major depressive disorder, sexual abuse of an adult, victim by history and physical abuse of an adult, victim by history.

In a note dated February 3, 2011, Dr. William C. Freeman, a Board-certified psychiatrist, stated that he initially examined appellant on November 24, 2010. He recommended that she be excused from any overtime work due to medical reasons.

By decision dated June 9, 2011, OWCP denied appellant's claim for an emotional condition on the grounds that she had not submitted any medical evidence relating a diagnosed condition to her employment.

Appellant requested reconsideration on July 11, 2011. She submitted evidence of appointments with Bobby J. Dunn, a licensed clinical social worker. Appellant also submitted copies of prescriptions from Dr. Freeman.

By decision dated September 2, 2011, OWCP declined to reopen appellant's case for review of the merits on the grounds that she failed to submit any relevant new evidence in support of her request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between

the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.[2]

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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 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 personal 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

[2] *Lourdes Harris*, 45 ECAB 545, 547 (1994).

[3] *Lourdes Harris*, 45 ECAB 545, 547 (1994).

[4] 28 ECAB 125 (1976).

[5] 5 U.S.C. §§ 8101-8193.

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

[7] *Cutler*, *supra* note 4.

[8] *Id.*

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 -- ISSUE 1

The Board finds that this case is not in posture for decision. Contrary to OWCP's June 9, 2011 decision, appellant has submitted medical evidence of a preexisting military service-connected emotional condition. Dr. Hughes diagnosed post-traumatic stress disorder on December 3, 2010. Furthermore, Dr. Clark diagnosed generalized anxiety disorder, post-traumatic stress disorder -- chronic, panic disorder without agoraphobia, major depressive disorder, sexual abuse of an adult, victim by history and physical abuse of an adult victim by history on December 16, 2010. As appellant has submitted medical evidence of a diagnosed emotional condition, OWCP is obligated to consider her factual allegations and determine whether she has alleged and substantiated any compensable factors of employment.

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. If a claimant does implicate a factor of employment, it should then determine whether the factual evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.[12] The Board has found that when OWCP does not make findings on the compensability of factors alleged, then the case should be remanded to OWCP to determine whether the incidents constitute compensable employment factors and, if so, whether the medical evidence establishing that appellant's condition was causally related to compensable work factors.[13]

The Board finds that the case should be remanded to OWCP to consider the factors of employment alleged by appellant and to make findings of whether she has implicated and substantiated a compensable employment factor. After this and such other development as it deems necessary, OWCP should issue a *de novo* decision as to whether she sustained an

[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] *M.D.* 59 ECAB 211 (2007); *Albert K. Ignacio*, 50 ECAB 121 (1998).

[13] *See Ignacio, supra* note 12.

emotional condition in the performance of duty causally related to compensable factors of her federal employment.[14]

CONCLUSION

The Board finds that this case is not in posture for a decision and remands for further development of the factual evidence by OWCP.

ORDER

IT IS HEREBY ORDERED THAT the September 2 and June 9, 2011 decisions of Office of Workers' Compensation Programs are set aside and remanded for further development consistent with this decision of the Board.

Issued: June 5, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[14] Due to the disposition of this issue, it is not necessary for the Board to address the denial of merit review in OWCP's September 2, 2011 decision.