



## **FACTUAL HISTORY**

On December 29, 2011 appellant, then a 52-year-old supply distribution clerk, filed an occupational disease claim alleging that she sustained anxiety, depression, post-traumatic stress disorder, insomnia and flashbacks due to factors of her federal employment. She attributed her condition to racial discrimination by the employing establishment and retaliation after she filed a complaint with the Equal Employment Opportunity Commission (EEOC). On the reverse of the claim form, the employing establishment indicated that appellant had been removed from employment.

By letters dated January 9, 2012, OWCP requested additional factual information from appellant and the employing establishment. It also requested supporting medical information from her.

In a decision dated March 19, 2012, OWCP denied appellant's claim after determining that she had not established the factual basis for her claim. It found that she had not submitted a factual statement identifying the allegations that she believed caused her emotional condition.

In an undated statement received on March 23, 2012, appellant related that starting in September 2001 she and her coworkers were part of an unspecified experiment. She asserted that the employees could not physically keep up with the workload, which included ordering, picking up, delivering and scanning supplies. Appellant maintained that around 2005, after another facility transferred surgical instruments to her location, the workload became "completely out of control." She believed that she was entitled to a promotion based on her level of expertise as a surgical technician. Appellant informed the employing establishment that it should create an oversight position to ensure that instruments were properly sterilized. The employing establishment hired a Caucasian nurse in the position that appellant described as needed. It removed appellant when she was off sick after indicating that it had not received paperwork from her physician. Appellant filed an EEOC complaint in 2005. She alleged that she was called racial slurs, including being referred to as black before her first name. Appellant submitted records regarding her EEOC discrimination complaint.

On April 14, 2012 appellant requested a telephone hearing before an OWCP hearing representative. At the telephonic hearing, held on July 16, 2012, she made a series of claims that in 2001 the employing establishment selected her location to conduct an experiment that had some workers doing inventory and purchasing and others sterilization. Appellant had extra training in sterilization and others came to her because of her knowledge. She had a much heavier workload than the white employees in another location and it became "humanly impossible to do." Appellant formally complained in 2005 that the patients were not being adequately cared for and believed that a person should oversee the sterilization of instruments. In March 2006, she requested a promotion because of her experience and training. A desk audit indicated that appellant was in the proper position. The employing establishment created a position to oversee sterilizations but hired a Caucasian nurse instead of appellant. It removed appellant from her position in sterilization as retaliation. In the new position appellant had a heavy workload that caused physical complaints. A supervisor asked a black coworker how her "mammie" was doing. A supervisor called her "black Lisa" whenever he saw her. After the war began it was not possible to get all the work done because the state abolished its program and

sent veterans to the employing establishment. Appellant described her work duties. She worried that there were contaminated eye drops on the shelf. After appellant began working in the clinics the employing establishment locked the door to her office.

On July 25, 2012 the hearing representative provided a copy of the transcript to the employing establishment and allowed it 20 days to provide comments.

By decision dated October 31, 2012, an OWCP hearing representative affirmed the March 19, 2012 decision as modified to show that appellant failed to establish an injury in the performance of duty. He found that she had not established any compensable employment factors.

On appeal, appellant asserted that the employing establishment retaliated against her until she was unable to continue in the employment.

### **LEGAL PRECEDENT**

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.<sup>3</sup> 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.<sup>4</sup>

OWCP's procedures provide:

“An employee who claims to have had an emotional reaction to conditions of employment must identify those conditions. The [claims examiner] must carefully develop and analyze the identified employment incidents to determine whether or not they in fact occurred and if they occurred whether they constitute factors of the employment. When an incident or incidents are the alleged cause of disability, the [claims examiner] must obtain from the claimant, agency personnel and others, such as witnesses to the incident, a statement relating in detail exactly what was [stated] and done. If any of the statements are vague or lacking detail, the responsible person should be requested to submit a supplemental statement clarifying the meaning or correcting the omission.”<sup>5</sup>

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<sup>3</sup>*Supra* note 1; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>4</sup>*Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17(j) (July 1997); *see also A.K.*, Docket No. 13-79 (issued April 15, 2013).

OWCP's regulations provide that an employer who has reason to disagree with an aspect of the claimant's allegation should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.<sup>6</sup>

### ANALYSIS

Appellant attributed her emotional condition to discrimination and administrative actions and retaliation by the employing establishment. She submitted a detailed statement received on March 23, 2013 describing the events to which she attributed her condition. Appellant maintained that she could not keep up with the workload, that she should have received a promotion, that she was subject to racial slurs and that she was removed while off on sick leave. Even though many of the incidents she described relate to administrative actions by the employer, she contended that the actions resulted from discrimination and were, therefore, compensable. OWCP did not obtain a statement from the employing establishment addressing appellant's allegations. Its procedures require that, in development of an emotional condition claim, it must obtain statements from witnesses, coworkers and supervisors, among others, before it makes a determination of whether the incidents alleged by a claimant occurred and whether such incidents or factors constitute compensable factors of employment.<sup>7</sup> OWCP's procedures further provide, in certain types of claims, such as a stress claim, a statement from the employer is imperative to properly develop and adjudicate the claim.<sup>8</sup>

Although it is a claimant's burden to establish his or her claim, OWCP is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source. It shares responsibility to see that justice is done.<sup>9</sup> OWCP's regulations provide that an employer who has reason to disagree with an aspect of the claimant's allegation should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.<sup>10</sup> If the employer does not submit a written explanation to support its disagreement, OWCP may accept the claimant's report of injury as established.<sup>11</sup>

The case will, consequently, be remanded to OWCP to further develop the factual evidence and, thereafter, to make appropriate findings regarding appellant's allegations. OWCP shall request that the employer address the assertions set forth in appellant's statements.

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<sup>6</sup> 20 C.F.R. § 10.117(a); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7(a)(2) (June 2011) (in certain types of claims, such as a stress claim, a statement from the employer is imperative to properly develop and adjudicate the claim).

<sup>7</sup> See *supra* note 4.

<sup>8</sup> Federal (FECA) Procedure Manual, *supra* note 6, Chapter 2.800.5(d)(1) (June 2011).

<sup>9</sup> See *S.P.*, Docket No. 11-1271 (issued April 19, 2012).

<sup>10</sup> 20 C.F.R. § 10.117(a).

<sup>11</sup> *Id.*; see *Alice F. Harrell*, 53 ECAB 713 (2002).

Following this and such further development as deemed necessary, OWCP should issue a *de novo* decision.

**CONCLUSION**

The Board finds that the case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 31, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 21, 2013  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board