United States Department of Labor
Employees' Compensation Appeals Board

C.D., Appellant	)	
and	)	**Docket No. 14-168**
	)	**Issued: April 22, 2014**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH CARE SYSTEM, West Haven, CT, Employer	)	

Appearances:
Alan J. Shapiro, 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, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 30, 2013 appellant, through her attorney, filed a timely appeal from a July 15, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her emotional condition claim. Pursuant to the Federal Employees' Compensation Act[1] (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 sustained an emotional condition on November 13, 2012 in the performance of duty.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 13, 2012 appellant, then a 53-year-old nurse, filed a traumatic injury claim alleging that on November 13, 2012 she sustained shock, fear and anxiety when her supervisor informed her that she was no longer covered by workers' compensation. She stopped work on November 13, 2012. The employing establishment controverted the claim, indicating that it had requested that appellant make a proper leave request.

The record indicates that OWCP previously accepted that appellant sustained post-traumatic stress disorder (PTSD) under file number xxxxxx838. Following this injury, appellant returned to modified part-time work on May 27, 2009 but continued to receive compensation for intermittent disability.

In a letter dated December 18, 2012, the employing establishment noted that appellant "alleged that she experienced a crisis event following discussions with her employing [establishment] about leave usage." Appellant had returned to work on November 13, 2012 after being out of work from August to November 2012 assisting her father-in-law. The employing establishment enclosed e-mail messages between her and her supervisor, Donna Vogel. In an e-mail dated November 13, 2012, appellant informed Ms. Vogel that she was "sitting here at my workstation basically unable to leave" and that she felt like she did in 2004 when a patient wanted to kill her and no one knew what to do.[2] She related that she had called for medical assistance but everyone was at lunch. Appellant asserted, "I am embarrassed. I am confused. I am scared. I want things to be communicated clearly. I have always been very up front. I discussed my plans with many people way back in July."

In a report of contact dated November 13, 2012, Ms. Vogel related that she returned a telephone call from appellant on that date around 11:30 a.m. in the morning. Appellant asked Ms. Vogel why she had to request leave without pay (LWOP) when she had been receiving compensation from OWCP. Ms. Vogel "suggested [that] she reread the information sent on time and leave and offered to re-forward the information." Appellant telephoned Ms. Vogel at 11:55 a.m. and told her that she had too much to do, including "e-mail, notes to cosign [and] training to complete since she had been out for so long. I told [appellant] to take the next two days to get caught up…." At 1:05 p.m. Ms. Vogel received an e-mail from appellant that she did not understand what needed to be done and that she had PTSD and was in crisis. She telephoned appellant who related that "she was distraught, no one was helping her, she could not do the request for leave or enter her time[;] it was too much coming back after being gone since August." They discussed the process for obtaining LWOP and Ms. Vogel told appellant that she could use sick or annual leave in the meantime. After she received the e-mail from appellant indicating that she did not feel safe, Ms. Vogel telephoned appellant and on speakerphone requested that a coworker take her to the emergency room.[3]

[2] Appellant also sent the e-mail to other managers. In an August 27, 2012 e-mail, she asked Ms. Vogel about teleworking from Florida while helping her father-in-law.

[3] The record indicates that appellant received treatment at the emergency room on November 13, 2012.

By letter dated December 27, 2012, OWCP notified appellant that she should submit additional factual and medical information.

In an e-mail message dated November 4, 2012, appellant requested annual leave and sick leave for her 24 hours of work time. She indicated that she took LWOP for the remaining work hours and received compensation from OWCP. In response, Amy Brown, a lead injury specialist, informed appellant that she needed to complete claims for compensation on account of disability (Forms CA-7) to claim compensation from OWCP. She stated, "It is not an automatic payment. You will also need to provide medical to justify your absence(s)." Ms. Brown indicated that she told appellant's timekeeper that she had to request annual leave, sick leave or LWOP and if she requested LWOP she had to file a Form CA-7.[4]

In an undated response to OWCP's request for further information, received on January 23, 2013, appellant related that she returned to limited-duty employment in 2009 after a work injury and progressed to working 24 to 28 hours per week using both flexitime and flexiplace. She experienced difficulty "learning new skills or multitasking." Appellant indicated that she had previously requested both annual or sick leave and LWOP but Ms. Vogel told her that she could not enter LWOP. She asked for assistance but did not receive help and Ms. Vogel hung up on her. Appellant did not understand why she had to enter her time as 40 hours per week when she was working a part-time schedule. Ms. Vogel advised appellant that she had to work eight hours per day and that LWOP was not approved. She also informed appellant to pick up 30 patients but she refused until she saw her physician and had her time clarified. Appellant felt unsafe because no one assisted her when she was crying and the crisis line only cared if she was suicidal. She indicated that in a conference call with Ms. Brown she asked her how to request the leave.

By decision dated January 29, 2013, OWCP denied appellant's claim after finding that she did not establish an injury in the performance of duty. It determined that she had not established any compensable work factors.

On February 14, 2013 appellant requested an oral hearing before an OWCP hearing representative. In an accompanying statement, she related that on November 13, 2012 she spent two hours reviewing e-mails, many of which were hard to understand. Appellant contacted Ms. Vogel, who told her that she was not approved to request LWOP and that she must use either sick or annual leave and work full time. Ms. Vogel advised appellant that she was not approved for the 16 hours of LWOP that she had been getting from OWCP since 2009 when she returned to work. Appellant stated that she had filled out CA-7 forms from June 2009 through October 2012 requesting LWOP and it had been approved. Ms. Brown informed appellant that any LWOP over 30 days in a year required the approval of higher level management. Appellant

[4] In an e-mail dated September 27, 2012, appellant requested that Ms. Vogel help her complete a form under the Family and Medical Leave Act (FMLA). In response, a manager told her that a father-in-law was not covered under FMLA but that she could use leave, including up to 30 days of LWOP without approval or more with approval. In an October 2, 2012 e-mail, appellant informed Ms. Vogel that she was confused about how to take leave and requested assistance. In response Tom Ricciardi, a human resource specialist, told appellant to request annual leave, sick leave or LWOP from her supervisor. In an e-mail to Ms. Vogel dated October 8, 2012, appellant questioned why she was listed absent without leave as she was not near her allotment for taking leave. Ms. Vogel told appellant to request leave and that it would be "straightened out."

asserted that Ms. Vogel told her that she no longer had coverage under OWCP and that she had to work full time or request sick and annual leave. Ms. Brown advised appellant to complete a Form CA-7 but she knew that she could only complete a Form CA-7 if she used LWOP. Appellant related that she had told the employing establishment to request information needed from her physician directly from him.

In an e-mail dated November 3, 2012, Ms. Vogel told appellant that she was scheduled to work 24 hours per week and that she should submit requests for LWOP to human resources. She noted that up to 30 hours of LWOP could be granted per year.

In a letter dated March 13, 2013, issued under file number xxxxxx838, OWCP informed appellant's senator that it had paid her compensation for intermittent LWOP since her return to part-time modified employment on May 27, 2009. It indicated that it had paid her compensation for intermittent LWOP from November 5, 2012 through January 3, 2013 based on CA-7 forms filed March 7, 2013.

At the telephone hearing, held on May 20, 2013, appellant related that on November 13, 2012 she did not know why the employing establishment refused to allow her to take LWOP and told her that she was no longer entitled to benefits from OWCP. She knew that she had to enter LWOP to submit a CA-7 form to OWCP. Appellant indicated that OWCP accepted in 2004 that she had PTSD and paid her compensation for 24 hours per week. She related that when she returned to work on November 13, 2012 after being off on family leave she had a lot of e-mails regarding LWOP. Appellant tried to understand why she was unable to request LWOP for the 16 hours of compensation that she was receiving from OWCP. Appellant's supervisor told her that she could no longer approve appellant's leave requests without consent from an unspecified individual. Ms. Vogel advised appellant that she had to work eight hours per day or use sick or annual leave. Appellant called human resources on November 13, 2012 to find out what to do because she did not understand. Ms. Brown told appellant that if you ask for more than 30 days of LWOP something had to be done. Appellant asked for "specific concrete guidelines on who it goes to and what time it comes from" and then broke down crying. She believed that she would have to work 40 hours without restrictions. Appellant telephoned the crisis line because she began experiencing PTSD. She was confused and no one would help her. Ultimately, the employing establishment approved appellant's request for LWOP.

In an e-mail dated November 13, 2012, appellant notified Ms. Vogel and Ms. Brown that she had returned to work but was "very confused and upset about issues with pay, use of time and OWCP." In another November 13, 2012 e-mail, she informed Ms. Vogel that she had "absolutely no understanding of what needs to be done" and was in crisis with PTSD.

In a statement dated June 11, 2013, the employing establishment related that on May 27, 2009 appellant returned to modified full-time work after an employment injury. Appellant would intermittently request LWOP and submit CA-7 forms. She was off work from August 13 through November 13, 2012 taking care of her father-in-law. Appellant took her work laptop but did not enter leave. On November 13, 2012 appellant's supervisor told appellant of leave procedures.

By decision dated July 15, 2013, the hearing representative affirmed the July 15, 2013 decision.

On appeal, appellant's attorney submitted a payment history showing that appellant received compensation for partially disabled due to her previously accepted PTSD claim. He contends that when she returned to work from being off in Florida caring for her father-in-law she experienced a flashback to her prior work injury. Appellant could not address the inconsistent e-mails about her leave usage due to her prior mental injury. She only understood how to use LWOP to obtain workers' compensation. Counsel argues that management did not give appellant clear instructions for requesting leave and appeared uncertain of the policy. He maintains that their actions constituted error. Appellant's attorney asserts that the employing establishment should have treated appellant with special consideration due to her preexisting PTSD and the death of her father-in-law. Counsel also contends that she sustained a consequential injury. Citing *William R. Dibona*,[5] he argues that the Board should remand the case for combination with appellant's prior emotional condition claim. Citing *Beth P. Chaput*,[6] *Glenn C. Chasteen*[7] and *Arnold Gustafson*,[8] appellant's attorney maintains that a condition is compensable if a work factor contributes in any way to the injury.

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.[9] 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.[10]

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.[11] However, the Board has held that where the evidence establishes error or abuse on the part of the employing

[5] Docket No. 03-962 (issued December 4, 2003).

[6] 37 ECAB 158 (1985).

[7] 42 ECAB 493 (1991).

[8] 41 ECAB 131 (1989).

[9] 5 U.S.C. § 8101 *et seq*.; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[10] *Gregorio E. Conde*, 52 ECAB 410 (2001).

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

establishment in what would otherwise be an administrative matter, coverage will be afforded.[12] 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.[13]

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 providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[14] 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.[15]

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. OWCP denied her emotional condition claim on the grounds that she did not establish any compensable employment factors. 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 notes that appellant's allegations do not pertain to her regular or specially assigned duties under *Cutler*.[16] Rather, appellant has alleged error and abuse in administrative matters on the part of her supervisors.

In *Thomas D. McEuen*,[17] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the facts surrounding the administrative or personnel action established error or abuse by employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing

[12] *See William H. Fortner*, 49 ECAB 324 (1998).

[13] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[14] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[15] *Id.*

[16] *See Lillian Cutler*, *supra* note 9.

[17] *See Thomas D. McEuen*, *supra* note 11.

establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[18]

Appellant maintained that, when she returned from work after being away from August to November 2012, she had many e-mails to review regarding her leave usage. She was confused about how to complete her timesheet and requested assistance. Appellant contended that her supervisor told her that she could not take LWOP and could no longer request compensation from OWCP for partial disability. She felt unsafe because no one helped her when she cried and the crisis line cared only whether she was suicidal. Ms. Brown told appellant that more than 30 days of LWOP usage required higher approval. Appellant believed that she would no longer be able to claim partial disability from OWCP under her other claim number. In an e-mail to her supervisor dated November 13, 2012, she advised that she felt unable to leave her work location and felt like she did in 2004 when a patient wanted to kill her.

Matters involving the use of leave are not considered compensable factors of employment without a finding of error or abuse as they are administrative functions of the employing establishment and not duties of the employee.[19] In a November 3, 2012 e-mail, Ms. Vogel noted that appellant was scheduled to work 24 hours per week and should direct any requests for LWOP to human resources. In an e-mail dated November 4, 2012, Ms. Brown informed appellant that she needed to complete CA-7 forms to claim compensation from OWCP as it was not paid automatically. In a November 13, 2012 report of contact, Ms. Vogel related that appellant telephoned her on that date around 11:30 a.m. to ask why she had to request LWOP. She advised appellant to read the time and attendance information. Appellant telephoned Ms. Vogel again and related that she had too much to do. She then e-mailed Ms. Vogel that she was in crisis from PTSD. Ms. Vogel telephoned appellant and discussed with her how to obtain LWOP and told her to use sick or annual leave pending LWOP approval. While appellant contended that she was no longer able to request LWOP from OWCP, she has not submitted any evidence in support of this allegation. As there is no evidence that the employing establishment committed error or abuse in leave matters, appellant has not established a compensable employment factor.

On appeal, appellant's attorney argues that the employing establishment should have treated appellant with special care due to both her preexisting employment injury and the recent death of her father-in-law. The Board's jurisdiction, however, extends only to reviewing final adverse decisions of OWCP issued under FECA.[20] Matters regarding the treatment of employees by the employing establishment are outside the Board's jurisdiction. As noted, appellant has not shown error or abuse by the employing establishment in matters regarding leave.

Counsel also alleges that a condition is compensable if employment contributes in any way. He cites Board cases of *Chaput*, *Gustafson* and *Chasteen* in support of his contention. In an emotional condition claim, however, a claimant must initially establish a compensable work

[18] *See Richard J. Dube*, 42 ECAB 916 (1991).

[19] *See Lori A. Facey*, 55 ECAB 217 (2004); *Judy L. Kahn*, 53 ECAB 321 (2002).

[20] 20 C.F.R. §§ 501.2(c) and 501.3(a).

factor in order to be covered under FECA.[21] Appellant did not substantiate a compensable work factor and thus has not met her burden of proof.

Appellant's attorney argues that the employing establishment erred by failing to provide appellant with clear instructions regarding leave usage. It is appellant's burden, however, to submit evidence showing error or abuse by the employing establishment in this administrative matter.[22]

Counsel also maintains that appellant has established a consequential injury and that the Board should remand the case for the current file number to be combined with the prior accepted PTSD claim, citing *Dibona*. In *Dibona*, a claimant attributed his emotional condition, in part, to pain and limitations from accepted orthopedic injuries. The Board found that this constituted a compensable work factor and remanded the case for OWCP to combine the file numbers and further develop the issue of whether he sustained an emotional condition due to his accepted employment injuries. In this case, however, appellant attributed her emotional reaction to matters regarding leave rather than a pain and limitations from a prior employment injury. She argued that she sustained her stress reaction in part due to her preexisting emotional condition. If counsel wants to allege a consequential injury, he should pursue the claim under the appropriate file number.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that she sustained an emotional condition on November 13, 2012 in the performance of duty.

[21] *See D.L.*, 58 ECAB 217 (2006) (a claimant's allegations alone are generally insufficient to establish a factual basis for an emotional condition claim; the claimant must substantiate such allegations with probative and reliable evidence).

[22] *See Jeral R. Gray*, 57 ECAB 611 (2005) (the handling of leave requests is an administrative function or the employer and not a duty of the employee and will be considered to be an employment factor only where the evidence discloses error or abuse on the part of the employing establishment).

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 22, 2014
Washington, DC

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

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

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