United States Department of Labor
Employees' Compensation Appeals Board

V.H., Appellant	)	
and	)	**Docket No. 14-433**
	)	**Issued: July 3, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Redmond, WA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 18, 2013 appellant, through her attorney, filed a timely appeal from a November 5, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 in the performance of duty causally related to factors of her federal employment.

FACTUAL HISTORY

On January 6, 2012 appellant, then a 51-year-old customer service supervisor, filed an occupational disease claim alleging that she sustained major depression and panic attacks causally related to factors of her federal employment. She stopped work on December 12, 2011.

[1] 5 U.S.C. § 8101 *et seq.*

In a January 11, 2012 statement, appellant related that she worked as a letter carrier from 1984 until she injured her elbow in 2002 and her shoulder in 2003. After her injuries, she was assigned to work as a guard for the back door, which she found demeaning. Appellant learned administrative duties, voluntarily relinquished her bid position and "became an unassigned regular." In 2006, when the National Reassessment Program (NRP) began, she trained to be a supervisor. When appellant returned from training, a new postmaster changed her days off when she was on vacation and listed her as absent without leave even though she was unaware that her work hours had changed. In 2008, she and her family moved to another state after she obtained another position as a supervisor. At appellant's new work location in Redmond, WA, the postmaster, Kathy Smith, rarely came to work and supervisor, Ken Thompson, ran the organization. Mr. Thompson marked his annual leave days as travel days. When appellant went on vacation, he offered to give her "travel days" so she would not have to use vacation but she refused. Mr. Thompson spent his time at work on the Internet and running a private business. Appellant told Ms. Smith, but then learned that Mr. Thompson also let Ms. Smith indicate that she was at work when she was absent. In 2010, Harleynda Wilcox became postmaster. Appellant believed that the illegal activities would stop but they did not. She began seeing a counselor with the Employees' Assistance Program (EAP) to help cope with her mother's terminal diagnosis. Ms. Wilcox changed appellant's schedule so she could not attend EAP counseling. She wanted to change the no lunch policy for carriers. After appellant told Ms. Wilcox that she did not believe that she would have been successful, Ms. Wilcox changed appellant's scheduled days off. Ms. Wilcox told appellant to change any overtime used by a carrier who signed the no lunch list to annual leave or leave without pay. She also instructed appellant to not use carriers who signed the no lunch list for overtime and to send carriers who were not on the overtime list. When appellant objected because it violated the union contract, Ms. Wilcox yelled at appellant and ordered her out of the office. In November 2010, she learned that her mother's cancer had metastasized but Ms. Wilcox denied appellant's request for time off. Appellant went to visit her mother around Christmas 2010. When appellant's return flight was cancelled due to weather, Ms. Wilcox marked appellant as absent without leave.

In March 2011, appellant returned to work after her mother died and found that the office had relocated and she had 40 more employees to supervise. The employing establishment wanted her to work less hours with an increased workload. Rich Miele, a manager, instructed appellant to manually fix express mail that had been scanned or delivered improperly. Appellant's work location had poor results for scanning so Mr. Miele asked her to scan parcels "as business closed so we could get off the poor performers list. I was not comfortable doing this, but I had been given a direct order." Mr. Thompson used work hours to run his business so appellant answered most of the telephone calls and all of the complaints online. Appellant stated, "I felt bad when [customers] complained about not getting packages, because I knew that we had them, but were [not] delivering them." She complained to consumer affairs but "got read the riot act" because of a previous complaint. Mr. Thompson refused to allow overtime and would give carriers a 1260 form and indicate that they ended the tour without overtime. Appellant stated, "I did this a few times because I was given a direct order to do so, but felt bad because it was wrong." On November 23, 2011 she refused to change the times for the carriers who worked overtime. Joyce Chen took Family and Medical Leave Act (FMLA) leave to care for her daughter but was not entitled to the leave because her daughter was not disabled and was an adult. Appellant was not comfortable breaking rules. She began to have attacks of stress and

stated, "Part of what was causing my attacks was the notion that if I reported what I knew about my fellow supervisor, they could possibly lose their jobs."

In a report dated January 7, 2012, Dr. David P. Shaw, a Board-certified psychiatrist, diagnosed disabling major depression that might be related to employment.

In a February 29, 2012 response to OWCP's request for additional information, appellant again described the actions to which she attributed her condition. She provided the dates from October through November 2011 that Mr. Miele instructed her "to change carrier clock rings so our office did not show any penalty overtime."

Appellant submitted a May 14, 2011 arbitration determination settling a grievance from her work location. The arbitrator found that carriers were allowed to request no lunch and work overtime. Appellant also submitted time and attendance records.

In an e-mail dated February 25, 2012, July Ngo, with the employing establishment, controverted appellant's claim. She had not witnessed falsifying clock rings. Ms. Ngo noted that appellant had taken much time off work and argued that her workload had not increased as the employing establishment had reduced mail volume.

In a statement dated February 27, 2012, Mr. Miele related that appellant requested his assistance in 2010 because Ms. Wilcox was constantly changing appellant's work hours such that she could not easily attend EAP sessions. In August 2012, Ms. Wilcox stopped the no lunch policy and indicated that carriers on the no lunch list could not work overtime. Appellant questioned this action in light of prior grievances, after which Ms. Wilcox changed her work schedule. In 2011, Mr. Miele became postmaster. He related that they had "more work to do with fewer employees." Mr. Miele "finally began directing my supervisors to make sure that our employees did not work over 10 hours per day and go into penalty overtime." When employees did work over 10 hours, he "gave direct orders to [appellant] to ensure that any employee who worked over 10 hours would fill out a 1260 stating [that] their end tour time was 10 hours or less. I also instructed her to try and make up that time for the employee on a day that they had worked under 10 hours." Mr. Miele further related:

> "In July and August 2011, our office kept showing up on the poor performance list for scans for Express Mail and delivery confirmation packages. I tried everything I could think of to improve our performance but nothing seemed to work. I finally gave directly order to [appellant] that when she checked our Express Mail delivery and delivery confirmation labels at the end of the day, to fix any errors. That meant she would have to manually input false information so that we could get off the poor performer list. When [appellant] told me that she had been told not to do that by [manager] Evie, I told her to still do it anyway. When she finally refused to do it anymore, I assigned that task to my morning supervisors."

Mr. Miele also ordered appellant to "falsely input any missing scans" on parcels not sorted before carriers left on their routes. He instructed her to enter time for Ms. Chen's absence after her daughter gave birth as sick leave instead of annual leave because he "did not want to

make any waves with [Ms. Chen] and thought that someone else would tell her that she was not entitled to use that type of leave."

By decision dated April 13, 2012, OWCP denied appellant's claim after finding that she had not established any compensable employment factors. On May 11, 2012 appellant requested an oral hearing before an OWCP hearing representative.

In a statement dated September 5, 2012, Louis J. Matthews, a therapist, counseled appellant through the EAP program.[2] Appointments could not be scheduled with appellant because the postmaster kept changing her schedule or assigning her to route counts. Appellant received assistance from the union.

In a statement dated October 24, 2012, appellant described the work factors to which she attributed her condition. She related that the arbitration panel's finding that the no lunch policy was acceptable established that the postmaster violated the union contract in ordering her to take away no lunch for employees who worked overtime.

A hearing was held on October 25, 2012. Appellant's attorney attributed her condition to management instructing her to manipulate data to meet standards, as confirmed by Mr. Miele.

In a report dated November 12, 2012, Dr. Shaw reviewed appellant's duties as a supervisor and noted that she was instructed to make packages look as though they had been timely scanned. He discussed the postmaster refusing to allow carriers to work overtime if they did not take lunch, which she believed violated both a contract and arbitration decisions. Mr. Miele also advised appellant to manually input inaccurate data. He stated, "[Appellant] reports [that] she was repeatedly asked to bend or to break the rules or to overlook someone else ignoring the rules and guidelines. She reported that supervisors were misusing company time for their personal business, misreporting their work hours, vacation and leave days." Management changed appellant's schedule while she was on vacation and marked her absent without leave and changed her schedule so she could not attend medical appointments. Appellant had an additional 40 employees when she returned to work in March 2011 after the death of her mother. She addressed angry complaints from customers. Dr. Shaw diagnosed moderate major depression, anxiety disorder with panic attacks and post-traumatic stress disorder and found that she could no longer perform her usual employment. He listed both work and nonwork stressors and found that her condition was related, at least in part, to work stressors that occurred during the course of her employment. When appellant refused the work duties because of her conscience, she "worried about disobeying orders. With her military background and her family history of law enforcement employment both were equally abhorrent to her (disobey a superior, or break the law)."

In a decision dated January 2, 2013, an OWCP hearing representative set aside the April 13, 2012 decision. She found that appellant had established as compensable work factors that in October and November 2011 Mr. Miele told her to falsely change scans on Express Mail and in July and August 2011 instructed her to fill out 1260 forms listing that carriers worked 10

[2] In a letter dated October 3, 2012, Diana J. LaCount related that appellant experienced constant schedule changes.

hours or less even if they worked more than 10 hours. The hearing representative determined that appellant established error or abuse by her manager when Mr. Miele "directed the claimant to input false information regarding inputting carrier time, scanning Express Mail delivery, delivery confirmation and [Ms.] Chen's FMLA." She instructed OWCP to prepare a statement of accepted facts describing the compensable and noncompensable work factors and refer appellant for a second opinion examination.

In a January 18, 2013 statement of accepted facts, OWCP listed as compensable factors of employment that Mr. Miele told her to change scans on Express Mail and carrier clock rings, instructed her to hand out 1260s and advised her to allow Ms. Chen to take FMLA when it was not warranted.

In a statement dated January 29, 2013, Ms. Wilcox related that she changed appellant's schedule because of operational needs. She did not order appellant out of her office and denied that she asked her to falsify carrier lunch, time records or scanning reports.

On February 6, 2013 OWCP referred appellant to Dr. Douglas Robinson, a Board-certified psychiatrist, for a second opinion examination.

In a report dated February 28, 2013, Dr. Robinson discussed appellant's work history and the factors to which she attributed her condition. He also listed nonwork stressors, including a custody dispute over grandchildren. Dr. Robinson diagnosed recurrent major depressive disorder, panic disorder with agoraphobia and some obsessive-compulsive personality traits. He found that the compensable work factors "did not directly cause, aggravate, precipitate or accelerate the identified psychiatric disorders." Dr. Robinson noted that appellant did not adjust to her transfer to Redmond, WA. He stated, "However, it was not until more significant personal stressors arose that [appellant] experienced a recurrence of depression and the onset of panic disorder." Dr. Robinson related:

> "Third, it is my impression that [appellant's] personality places her at risk for interpreting events as representing malfeasance, illegal activities, *et cetera*. The information available from the Statement of Accepted Facts indicates that her allegations regarding her supervisor have not been established. Therefore, it is unclear whether her perceptions are valid and if such behaviors represented a violation or some form of illegal activity. In any case, there does seem to be a pattern of grudge-keeping, fault-finding and perceiving herself as vulnerable to the whims of supervisor above and beyond what might be reasonable."

Dr. Robinson concluded that appellant was not disabled as a result of any condition due to compensable work factors.

By letter dated March 26, 2013, appellant's attorney disputed Dr. Robinson's opinion, noting that he questioned the occurrence of the accepted compensable work factors.

By decision dated April 25, 2013, OWCP denied appellant's emotional condition claim, finding that the weight of the medical evidence established that she did not sustain any condition as a result of the accepted employment factors.

On April 30, 2013 appellant, through her attorney, requested a review of the written record by an OWCP hearing representative. On May 29, 2013 he submitted a February 19, 2005 letter indicating that due to a work injury appellant was giving up her bid position and becoming an unassigned regular.

In a report dated May 20, 2013, Dr. Shaw diagnosed a single episode of moderate major depression, anxiety disorder with panic attacks and post-traumatic stress disorder. He stated, "The recurring challenges to [appellant's] sense of right and wrong made this work situation untenable and unhealthy for her; this has not changed. She reported that she was repeatedly asked to bend or break the rules or to overlook someone else ignoring the rules and guidelines, some of which are in place to protect carriers against unreasonable expectations." Dr. Shaw found that appellant was disabled from employment. He stated:

> "Thus, as I have said before, work factors have certainly contributed to [appellant's] emotional condition. [Appellant's] family, personal and occupational history and perhaps her genetic vulnerability rendered her unable to cope with and conflicted over requirements to violate [employing establishment] and union rules. Even when she was excused from some of those requirements, she remained conflicted over disobeying her superiors for the same reasons."

By decision dated November 5, 2013, an OWCP hearing representative affirmed the April 25, 2013 decision. She found that the opinion of Dr. Robinson represented the weight of the evidence and established that appellant did not sustain an emotional condition due to compensable work factors. The hearing representative further determined that appellant had not established that giving up her bid position constituted a compensable factor of employment.

On appeal, appellant's attorney contends that OWCP should have accepted additional compensable work factors. He argues that her schedule was unreasonably changed and that she did not give up her bid position voluntarily. Appellant supervised an additional 40 employees when she returned to work after her mother's death and answered most of the telephone calls and all of the online complaints. Customers screamed at her many times each day. Counsel also argues that the statement of accepted facts provided by OWCP to Dr. Robinson did not adequately set forth that appellant had established error or abuse by the employing establishment. He noted that Dr. Robinson questioned the existence of compensable work factors. At a minimum, appellant's attorney contends that a conflict in medical opinion exists between Dr. Robinson and Dr. Shaw.

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.[3] On the other hand, the

[3] 5 U.S.C. § 8101 *et seq.*; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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.[4]

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.[5] 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.[6]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[7] The opinion of the physician must be based on a complete factual and medical background of the claimant,[8] must be one of reasonable medical certainty[9] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[10]

OWCP's procedures provide as follows:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts,] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[11]

ANALYSIS

OWCP accepted as compensable work factors that the employing establishment committed error and abuse when appellant's supervisor, Mr. Miele, instructed her to improperly

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

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

[6] *Id.*

[7] *John J. Montoya*, 54 ECAB 306 (2003).

[8] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[9] *John W. Montoya*, *supra* note 7.

[10] *Judy C. Rogers*, 54 ECAB 693 (2003).

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600(3) (October 1990).

input scans on Express Mail in July and August 2011, wrongly indicate on 1260 forms that carriers worked less than 10 hours and place Ms. Chen on unwarranted sick leave.

Appellant submitted supporting medical evidence from Dr. Shaw, who noted that the employing establishment instructed her to inaccurately input data and ignore rules. Dr. Shaw diagnosed major depression, anxiety disorder and post-traumatic stress disorder due at least in part to work stress, including been forced to choose between violating rules and obeying orders from her superiors. OWCP referred appellant to Dr. Robinson for a second opinion examination to determine whether she had established an emotional condition causally related to the accepted work factors. In an accompanying SOAF, it listed as compensable work factors that Mr. Miele told her to change scans on Express Mail and carrier clock rings, instructed her to hand out 1260s and advised her to allow Ms. Chen to take FMLA when it was not warranted.

On February 28, 2013 Dr. Robinson diagnosed recurrent major depressive disorder, panic disorder with agoraphobia and obsessive-compulsive personality traits. He found that the diagnosed conditions were not related to the compensable work factors as her symptoms coincided with personal stressors. Dr. Robinson also found that appellant's personality might cause her to misinterpret incidents as illegal or unethical and indicated that the SOAF "indicates that her allegations regarding her supervisor have not been established. Therefore, it is unclear whether her perceptions are valid and if such behaviors represented a violation or some form or illegal activity." OWCP accepted as a compensable work factor that appellant's supervisor erroneously required her to mislabel Express Mail, inaccurately reflect carrier work hours and allow inaccurate leave usage. As noted, if an OWCP referral physician fails to utilize the SOAF in forming his opinion, the probative value of the report is diminished or negated.[12] As Dr. Robinson did not accept the compensable work factors set forth by OWCP in the SOAF, his report is insufficient to resolve the issue of whether appellant sustained an emotional condition in the performance of duty. The Board notes that she has submitted evidence from Dr. Shaw in support of her claim. Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do in a manner that will resolve the relevant issues in the case.[13] The case will, consequently, be remanded for OWCP to further develop the issue of whether appellant sustained an emotional condition causally related to the compensable work factors. On remand, OWCP should clearly indicate in the SOAF that she established error and abuse by the employing establishment in instructing her to falsify scans on Express Mail and delivery confirmation, inaccurately completing forms showing carrier work hours and erroneously allowing Ms. Chen to use FMLA when it was not warranted. After such further development as deemed necessary, it should issue a *de novo* decision.

On appeal, appellant's attorney argues that OWCP should have accepted as compensable work factors that the employing establishment changed appellant's schedule unreasonably and forced her to relinquish a bid position. Matters involving schedule changes and the assignment of work are administrative or personnel matters of the employing establishment, which are covered only when erroneous or abusive.[14] Appellant has not submitted sufficient evidence

[12] *Id*.

[13] *See Melvin James*, 55 ECAB 406 (2004).

[14] *See D.L.*, 58 ECAB 217 (2006); *Jeral R. Gray*, 57 ECAB 611 (2006).

establishing that management erred in changing her schedule or taking away her bid position. Ms. Matthews, a counselor, indicated that she could not schedule appointments with her due to schedule changes. While Mr. Miele also confirmed that appellant's schedule had changed such that she could not easily attend counseling, he did not describe the changes as erroneous. Ms. Wilcox asserted in a January 29, 2013 statement that she changed appellant's schedule due to operational needs. In a letter dated February 19, 2005, the postmaster and union president agreed to post appellant's bid position and convert her to an unassigned regular due to a work injury. Appellant has not submitted any evidence establishing error by the employing establishment in these administrative matters and thus has not established a compensable work factor.[15]

Counsel also maintains that appellant had to supervise an additional 40 employees when she returned to work after her mother's death. Overwork, when substantiated by sufficient factual information, may be a compensable factor of employment.[16] Mr. Miele generally asserted that they had additional work with less staff but did not specifically confirm that appellant was overworked. Ms. Ngo asserted that appellant's workload had not increased. The Board finds that the evidence is insufficient to support appellant's allegations of overwork.[17]

Regarding appellant's contention that she had to address the complaints of angry customers, the Board has held that emotional reactions to situations in which an employee is trying to meet his or her position requirements are compensable under *Cutler*.[18] Appellant generally indicated that she had to deal with angry customers by telephone and online and was unhappy that they had not received their packages. She did not, however, provide further details about this allegation or establish a factual basis for any particular customer complaints that she handled as part of her duties. The Board thus finds that appellant has not established a compensable employment factor.[19]

CONCLUSION

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

[15] *See L.S.*, 58 ECAB 249 (2006) (the fact that management changed an employee's work schedule a number of times did not bring the claim within the scope of workers' compensation absent a showing that management changed her schedule in error).

[16] *See Bobbie D. Daly*, 53 ECAB 691 (2002).

[17] *See J.R.*, Docket No. 13-1881 (issued January 24, 2014).

[18] *See Lillian Cutler*, *supra* note 3.

[19] *See D.M.*, Docket No. 09-212 (issued August 14, 2009).

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion by the Board.

Issued: July 3, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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