

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

C.B., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Federal Way, WA, Employer)

**Docket No. 14-1965
Issued: February 4, 2015**

Appearances:
Rainer Brown, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 11, 2014 appellant, through her attorney, filed a timely appeal from a March 18, 2014 merit decision and a June 28, 2014 nonmerit 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.

ISSUES

The issues are: (1) whether appellant has established an emotional condition in the performance of duty; and (2) whether OWCP properly denied reconsideration under 5 U.S.C. 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 30, 2012 appellant, then a 44-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained major depression, generalized anxiety disorder, and panic attacks due to work stress on or before April 16, 2012. She did not stop work.

In a December 3, 2012 letter, OWCP advised appellant of the type of additional evidence needed to establish her claim, including a detailed statement of the work factors alleged to have caused the claimed emotional conditions and a statement from her attending physician explaining how and why those factors would cause those conditions. It afforded her 30 days to submit such evidence.

In response, appellant submitted a November 19, 2012 letter from Dr. Thomas A.J. Patamia, an attending Board-certified psychiatrist, noting that he treated her beginning on April 1, 2012 for major depression, generalized anxiety disorder, and panic attacks. Dr. Patamia opined that “[b]oth cumulative factors and certain acute exposures, some work related, have contributed to these conditions and could potentially exacerbate them in the future.”

By decision dated January 4, 2013, OWCP denied appellant’s claim as fact of injury had not been established. It noted that she had not provided the time, date, and place of any alleged incidents, what occurred, and who was involved.

In a January 11, 2013 letter, appellant requested reconsideration. He described an alleged pattern of supervisory harassment and discrimination. Appellant described a November 1, 2012 incident in which Carolyn Ewell, an acting supervisor, was unable to recruit volunteers to go from priority mail to another section. During a stand-up talk about the assignment, Ms. Ewell allegedly pointed at employees. She ordered appellant to take the assignment as there were no volunteers. When appellant asked questions, Ms. Ewell “became quite angry and belligerent She stuck her finger in [appellant’s] face and [stated], ‘You have to go there right after lunch. Do [not] you understand English?’ [Appellant] felt this attack was based on her fact that she is Asian/Indian.” She filed an Equal Employment Opportunity (EEO) complaint based on race or ethnicity, with redress mediation on January 15, 2013.

Appellant submitted six coworker statements dated from October 4 to 9, 2012 asserting that a male supervisor was intimidating to his subordinates. She also provided EEO preliminary grievance documents, mediation forms, and additional medical evidence.

In a November 16, 2012 report, Dr. Patamia noted a history of depression and anxiety prior to the present claim. He diagnosed major depression, generalized anxiety disorder, and panic attacks. Dr. Patamia noted that the conditions were “aggravated by work-related stress.”

Dr. Laura R. Kaufman, an attending physician Board-certified in occupational medicine and family practice, submitted reports dated from January 7 to February 20, 2013, diagnosing recurrent major depressive disorder, generalized anxiety disorder, and panic attacks, based on Dr. Patamia’s opinion. She noted that appellant had “difficulties with anxiety/depression since March 2012 [d]ue to family issues/health problems.” Dr. Kaufman noted appellant’s account of

“harassment at work, stress by acting supervisor on November 1, 2012, [e]mbarrassed in front of numerous coworkers.”

In a January 7, 2013 letter, the employing establishment asserted that appellant’s stress was self-generated.

By decision dated May 7, 2013, OWCP denied modification, finding that the additional evidence submitted did not establish the claim. It noted that appellant had not submitted witness statements to corroborate the specific alleged November 1, 2012 incident with Ms. Ewell as factual.

In a June 10, 2013 letter, appellant requested reconsideration asserting that new evidence was sufficient to establish fact of injury.² He submitted a November 1, 2012 statement by H.K., appellant’s coworker, recalling that during a November 1, 2012 stand-up talk, Ms. Ewell ordered appellant to go from priority mail to another section as no one volunteered for the assignment. “We had lunch right after the stand-up. During wash up time [H.K. saw] them talking by the office. ... And I heard Ms. Ewell making a comment that ‘Don’t you understand English? I already told you that you have to go.’ [Appellant] went to the restroom and started crying.”

On December 20, 2013 OWCP prepared a statement of accepted facts, accepting as a factor of employment that on November 1, 2012, “following a ‘stand-up’ meeting with several coworkers in the priority section, Ms. Ewell gestured with her finger toward [appellant’s] face and exclaimed: ‘Do [not] you understand English.’” It found as factual, but noncompensable, that Ms. Ewell directed appellant to work outside of her section or pointing at appellant and her coworkers during the stand-up meeting. OWCP found that appellant had not established as factual that the November 1, 2012 accepted incident involving Ms. Ewell constituted discrimination on the basis of race or ethnicity.

In a December 20, 2013 letter, OWCP requested that Dr. Patamia review the statement of accepted facts and explain if the November 1, 2012 remarks by Ms. Ewell caused or aggravated the claimed emotional condition. In a January 10, 2014 report, Dr. Patamia opined that the November 1, 2012 incident in which Ms. Ewell pointed at appellant and asked if she understood English “did aggravate [appellant’s] preexisting conditions.” He explained that appellant “directly stated this relationship to [her] in our visit on November 15, 2012 and the temporal relationship to her condition worsening and the ‘accepted events’ stated in the SOAF [statement of accepted facts.]” Dr. Patamia stated that he did not have sufficient information to determine the duration of the aggravation or a return to work prognosis, as he had not seen appellant since January 28, 2013 “due to loss of insurance” after OWCP denied the claim. He referred to Dr. Kaufman’s opinion regarding the duration of any work-related condition and appellant’s prognosis.

On March 6, 2014 OWCP obtained a second opinion from Dr. Gary R. Hudak, a Board-certified psychiatrist, who reviewed the medical record and the statement of accepted facts. Dr. Hudak noted that appellant’s history was “somewhat vague and nonspecific,” with psychiatric care and medication by Dr. Patamia in 2010 and 2011 after the death of her father in

² Appellant also submitted copies of medical reports and coworker statements previously of record.

2009. On examination, he related her account that she was “able to work at her current workplace as long as she avoided the offensive supervisor.” Appellant was oriented to time, place, and her abstract reasoning was intact. Dr. Hudak diagnosed “[m]ajor depressive disorder with anxious symptoms, preexisted the claim on a more probable than not basis and not made worse by it.” He stated that “[s]tressors include[d] death of biological father in 2009 with resultant, apparent prolonged grief.” Dr. Hudak opined that there was “no evidence that a work event caused or contributed to [appellant’s] mental health condition.” He explained that the “diagnosed emotional condition preexisted the claim. There is no aggravation, precipitation, or acceleration due to employment event as described in the SOAF [statement of accepted facts].” Dr. Hudak noted that it appeared that appellant had a “preexisting mood disorder consistent with major depressive symptoms, and anxiety resulting from nonindustrial-related stress primarily due to the death of her father and in assimilating her mother into the current family living conditions.” He emphasized that “work condition[s] did not contribute or aggravate any mental health condition.” Dr. Hudak found appellant able to perform full-time regular-duty work.

By decision dated March 18, 2014, OWCP partially vacated its May 7, 2013 decision, finding that appellant had established the November 1, 2012 incident with Ms. Ewell as a compensable factor of employment. It denied the claim on the grounds that causal relationship was not established because the medical evidence did not establish that the accepted work incident caused or aggravated an emotional condition. OWCP accorded the weight of the medical evidence to Dr. Hudak, who provided a detailed, well-reasoned report, based on a complete medical, and factual history, explaining that the November 1, 2012 incident did not aggravate or accelerate appellant’s preexisting mood disorder.

In a March 25, 2014 letter, appellant requested reconsideration. She contended that there was a conflict between Dr. Patamia and Dr. Hudak requiring selection of an impartial medical specialist. Appellant requested to participate in selection of the impartial medical specialist “to assure fairness in the case.”

By decision dated June 27, 2014, OWCP denied reconsideration on the grounds that appellant’s reconsideration request did not contain new, relevant evidence, or legal argument.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁴

³ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

Where disability results from an employee's 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.⁵ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁶ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition, or conditions for which compensation is claimed.⁷

In cases involving emotional conditions, the Board has held that when working conditions are alleged as factors in causing 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.⁸ If a claimant implicates 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, it must base its decision on an analysis of the medical evidence.⁹

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained an emotional condition due to a pattern of supervisory harassment, and a November 1, 2012 incident of harassment and discrimination by Ms. Ewell. OWCP found the November 1, 2012 incident, in which Ms. Ewell asked appellant if she understood English, constituted a compensable employment factor. It denied the claim on the grounds that the medical evidence was insufficient to establish a causal relationship between the accepted incident and the claimed emotional condition.

In support of her claim, appellant submitted reports from Dr. Patamia, an attending Board-certified psychiatrist. On November 16 and 19, 2012 Dr. Patamia noted a history of preexisting depression and anxiety, aggravated by unspecified "work-related stress," and unidentified acute exposures. On January 10, 2014 he opined that the accepted November 1, 2012 incident aggravated appellant's preexisting conditions, based on her remarks during a November 15, 2012 visit and the temporal relationship to a worsening of her condition. While Dr. Patamia noted an apparent temporal relationship between a decline in appellant's condition and the November 1, 2012 incident, the Board has held that a temporal relationship alone is insufficient to establish causal relationship.¹⁰

⁵ 5 U.S.C. §§ 8101-8193. *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁷ *Effie O. Morris*, 44 ECAB 470 (1993).

⁸ See *Norma L. Blank*, 43 ECAB 384 (1992).

⁹ *Marlon Vera*, 54 ECAB 834 (2003).

¹⁰ *Louis R. Blair, Jr.*, 54 ECAB 348 (2003).

Dr. Kaufman, an attending physician Board-certified in occupational medicine and family practice, submitted reports dated from January 7 to February 20, 2013, reiterating Dr. Patamia's psychiatric diagnoses. She attributed appellant's condition to family issues and health problems beginning in March 2012, as well as the accepted November 1, 2012 incident.

The Board finds that neither Dr. Patamia nor Dr. Kaufman provided sufficient medical rationale explaining how and why the November 1, 2012 incident would cause or aggravate appellant's preexisting psychiatric conditions. The physicians did not set forth the mechanism whereby the November 1, 2012 incident would aggravate or accelerate preexisting depression, anxiety, and panic attacks. Therefore, the opinions of Dr. Patamia and Dr. Kaufman are insufficient to meet appellant's burden of proof in establishing causal relationship.¹¹ Also, Dr. Patamia omitted the etiology of appellant's preexisting psychiatric conditions from his reports. The Board has held that medical opinion based on an incomplete history is of diminished probative value.¹²

The Board finds that OWCP properly accorded the weight of the medical evidence to Dr. Hudak, a Board-certified psychiatrist and second opinion physician, who submitted a March 6, 2014 report, based on a statement of accepted facts and a comprehensive medical history. Dr. Hudak explained that appellant had a preexisting mood disorder due to the death of her father in 2009. He emphasized that the accepted November 1, 2012 occupational incident did not cause or contribute to her mental health condition. Dr. Hudak predicated his opinion on a complete factual and medical history and a thorough clinical examination. His explanation clearly negates the claimed causal relationship between the November 1, 2012 incident and an emotional condition. OWCP's March 18, 2014 decision was therefore proper in denying appellant's claim due to a lack of causal relationship between the claimed emotional condition and Ms. Ewell's November 1, 2012 remark.

Appellant also attributed the claimed emotional condition to Ms. Ewell directing appellant to work outside of her section and pointing at her on November 1, 2012. OWCP found that the coworker affidavits and factual statements did not establish as factual that Ms. Ewell pointed at appellant. Under these circumstances, appellant failed to establish a compensable employment factor in this regard. Also, the Board finds that an employee's dissatisfaction with the way a supervisor exercises discretion in assigning work is not compensable absent error or abuse.¹³ Appellant did not submit evidence establishing that Ms. Ewell's directive that she perform work in another section was erroneous or abusive. Therefore, she has not established the work assignment as a compensable employment factor. OWCP's March 18, 2014 decision was proper in this regard.

Appellant also alleged a pattern of supervisory harassment and discrimination, and that the accepted November 1, 2012 incident constituted discrimination on the basis of race or ethnicity. For harassment or discrimination to give rise to a compensable disability under FECA,

¹¹ *Deborah L. Beatty*, 54 ECAB 340 (2003).

¹² *Douglas M. McQuaid*, 52 ECAB 382 (2001).

¹³ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005); *Linda J. Edward-Delgado*, 55 ECAB 401 (2004).

there must be probative and reliable evidence that harassment or discrimination did in fact occur.¹⁴ Mere perceptions of harassment, retaliation, or discrimination are not compensable under FECA.¹⁵ While OWCP accepted that on November 1, 2012 Ms. Ewell asked appellant, who self-identifies as Asian/Indian, if she understood English, there is insufficient evidence that this remark constituted racial or ethnic discrimination. Also, the coworker statements were too vague to establish a pattern of harassment by Ms. Ewell. These statements did not identify the date, place, and time of any specific incident. Therefore, the Board finds that appellant did not establish her allegations of harassment and discrimination as factual. OWCP's March 18, 2014 decision therefore properly denied her claim on the grounds that her allegations of harassment and discrimination were not established as factual.

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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁶ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant must: (1) show OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁷ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁸

In support of a request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge her burden of proof.¹⁹ She need only submit relevant, pertinent evidence not previously considered by OWCP.²⁰ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.²¹

¹⁴ *Supra* note 9.

¹⁵ *Kim Nguyen*, 53 ECAB 127 (2001).

¹⁶ 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.606(b)(2).

¹⁸ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

¹⁹ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

²⁰ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

²¹ *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS -- ISSUE 2

Appellant requested reconsideration by March 25, 2014 letter, asserting a conflict between Dr. Patamia, her attending psychiatrist, and Dr. Hudak, the second opinion physician. She requested to participate in selection of the impartial medical specialist. OWCP denied reconsideration by June 27, 2014 decision, finding that the March 24, 2014 letter did not contain new, relevant evidence, or argument.

The Board finds that OWCP appropriately denied reconsideration as appellant's argument was not relevant to the claim. The critical issue was the causal relationship of a claimed emotional condition to an accepted November 1, 2012 work incident. Appellant's remarks did not address that issue. Therefore, they do not comprise a basis for reopening the case.²²

A claimant may be entitled to a merit review by submitting new and relevant evidence or argument. Appellant did not do so in this case. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant contends that OWCP wrongfully deprived her of the opportunity to participate in the selection of an impartial medical examiner. As stated above, the probative quality of Dr. Hudak's opinion clearly exceeds that of Dr. Patamia. As the opinions of the two physicians are not of equal weight, there is no conflict of medical opinion in this case. Therefore, there was no reason to select an impartial medical examiner.

CONCLUSION

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty as alleged. The Board further finds that OWCP properly denied reconsideration.

²² *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 28 and March 18, 2014 are affirmed.

Issued: February 4, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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