United States Department of Labor
Employees' Compensation Appeals Board

I.J., Appellant	)	
and	)	**Docket No. 16-0506**
	)	**Issued: November 15, 2016**
DEPARTMENT OF VETERANS AFFAIRS, AUGUSTA VETERANS ADMINISTRATION MEDICAL CENTER, Augusta, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 21, 2016 appellant filed a timely appeal from a September 30, 2015 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 the case.

ISSUE

The issue is whether appellant met her burden of proof to establish an emotional condition causally related to factors of her federal employment.

FACTUAL HISTORY

On April 2, 2015 appellant, then a 41-year-old program support clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained stress and depression as a

[1] 5 U.S.C. § 8101 *et seq.*

result of her employment. She first became aware of her condition and that it was caused or aggravated by her employment on December 30, 2014. Appellant indicated that she applied for another position and was discriminated against because of race and gender and that she filed an Equal Employment Opportunity (EEO) complaint. She indicated that she also had an EEO complaint filed in Florida and that the employing establishment and the union were aware of her situation. Appellant alleged that she was harassed and discriminated against as a result of the EEO complaint she filed. She started seeing a psychiatrist on December 30, 2014 because she was so stressed out because of the job.

In an April 15, 2015 letter, OWCP advised appellant of the deficiencies in the evidence and requested additional factual and medical evidence. This included submitting a detailed description of her allegations which caused her emotional condition and a narrative medical report from her treating psychiatrist or psychologist that contained her medical history, a diagnosis, and an explanation of causation. Appellant was afforded 30 days to submit the requested information.

In an April 27, 2015 statement, appellant asserted several events contributed to her emotional condition. On December 30, 2014 her coworker, S.W., told her that she heard R.H., a hiring official, had contacted her supervisor, D.Y., about an Advanced Medical Support Assistant (MSA) position. She indicated that, when D.Y. was asked if appellant was a good candidate, he stated "no." R.H. then threw appellant's application in the trash. Appellant alleged that R.H. told E.R., a clinic coordinator, who told D.H., who then told her coworker S.W., who told her. She alleged that D.Y. had blocked her from obtaining other positions and that she thought it was race related. Appellant indicated that she filed an EEO complaint and took annual leave. She stated that on December 31, 2014 she saw her psychiatrist, Dr. Leigh McKenzie, as she was upset over the event.

On January 6, 2015 appellant had a meeting with her supervisor, D.Y., and union representative W.D. D.Y. admitted that he spoke with the hiring official about the position and explained why he did not feel that appellant was not a good candidate.

On January 7, 2015 appellant indicated that she had sent out an e-mail advising that she would no longer be sending out the coverage list for Mental Health. She stated that she tried numerous times to talk to Dr. Y.A. about all of the tasks she had to do after a coworker left, but was always told to talk to the supervisor. D.Y., however, stated that he would get back to her, but never did. Appellant indicated why she felt overwhelmed with the coverage list task, given her other tasks and duties. She stated that a meeting was held with regard to the e-mail regarding the coverage list. At the meeting, appellant alleged that Dr. Y.A. pounded a fist in his other hand and stated, in an aggressive tone while looking at her, "you sent this e[-]mail out this morning and you should n[o]t have done that because your duties are not going to change and you think the director has time for little things like this." She stated that she felt threatened. Appellant also alleged that Dr. Y.A. had called her into that office in front of all the others present to belittle her in front of the same people with whom she had issues. She indicated that she was upset and left the meeting. Appellant indicated that she had called her psychiatrist and developed a migraine headache that lasted two days.

On January 8, 2015 appellant called Dr. Y.A. to let him know that she was not able to come into work. She was instructed to call E.M., a secretary, who did not have voicemail. Appellant indicated that she tried calling from 8:00 a.m. to 8:25 a.m. and got no answer, so she sent E.M. an e-mail from her home computer indicating that she was not able to come in.

When she returned to work on January 9, 2015, appellant was instructed to have a meeting with administrative staff. She indicated that E.M. and M.S. were very disrespectful with Dr. Y.A., but appellant was the only one who got disciplined. Appellant described an issue regarding a travel request with another physician and Dr. Y.A.'s secretary, E.M.

Appellant alleged that Dr. Y.A. tried to get her to sign paperwork regarding a proposed five-day suspension on January 12, 2015. She indicated that she felt threatened by him and that the suspension was in retaliation for the EEO complaint she filed. Appellant indicated that Dr. Y.A. had the people she had issues with write statements against her because she refused to do their work.

On January 21, 2015 a mediation session was held to discuss all the extra tasks of appellant. Appellant stated that the mediation was cut short as another physician stated that he did not have time to listen to those types of incidents. Another meeting was supposed to be set up, but never took place as she and her union representative were not informed of the last-minute change. Appellant indicated that a grievance was filed, but she still received a two-day suspension for March 11 and 12, 2015.

In a January 26, 2015 letter, the Office of Resolution Management of the employing establishment indicated that appellant was informally counseled regarding her nonselection for a position as Advanced MSA; regarding a disciplinary action-suspension which she received on January 12, 2015; and regarding the allegation of harassment, hostile work environment (nonsexual) on January 7, 2015, when she was called into Dr. Y.A.'s office and told in front of other people that she should not have sent out an e-mail and he spoke while hitting his fist in his hand. Copies of a January 31 and April 30, 2013 performance appraisal were included. A subsequent unsigned withdrawal of EEO complaint was submitted.

A copy of February 5, 2015 decision to suspend appellant for two days was submitted along with the grievances and other materials related thereto.

In a February 4, 2015 statement, S.W., program support assistant, indicated that at the January 7, 2015 meeting Dr. Y.A. was very aggressive toward appellant from the very beginning of the meeting and used inappropriate body language, a loud tone of voice, and pounded one of his fists into the other hand very aggressively. She indicated that appellant asked to leave the meeting and went back to her office.

Appellant alleged that she was stressed from being bullied and the hostile work environment she received from Dr. Y.A. and another physician ever since she filed the grievance. She indicated that she lost a lot of weight and could not sleep because of the stress and that she took her mental health medicine with alcohol, even though she was not supposed to, as the stress and harassment was so bad.

On March 25, 2015 appellant attended a meeting with Dr. Y.A., M.S., S.W., A.B., and union representative W.D. She indicated that Dr. Y.A. spoke aggressively to her about not posting her timecards every day. Dr. Y.A. also suspended appellant for two days, March 11 and 12, 2015. Appellant indicated that she took leave from March 6 through 20, 2015 because she was stressed out from the hostile work environment. She stated that Dr. Y.A. did not apologize to her. Appellant also indicated that he spoke to her about how the new employee, A.B., was not being trained. She stated that she had been training A.B. and that she had indicated that she did not want to bother appellant while she on suspension. Appellant alleged that, during the meeting, Dr. Y.A. kept saying things directed toward her in an attempt to get her to argue with him. She indicated that he bullied and harassed her at the meeting and oftentimes disrespected her.

In an April 23, 2015 statement, Dr. L.B. indicated that Dr. Y.A.'s method of communication with her and other female employees, including appellant and S.W., was one of social impoliteness and general disrespect, which worked to the inexcusable detriment of hospital morale.

Also submitted were: a copy of a position description; a copy of an October 17, 2013 performance appraisal, numerous e-mails, and health unit notes from the employing establishment dated August 2014 through April 2015 containing diagnoses of depression and chronic pain from Dr. McKenzie, a psychiatrist.

In a June 2, 2015 letter, the employing establishment contested appellant's claim and included a copy of D.Y.'s, communications specialist, response to her statement that he provided a bad reference for her, which he denied.

By decision dated September 30, 2015, OWCP denied appellant's claim as the factual component of fact of injury had not been met. It found that she had not responded to all the questions in its April 15, 2015 questionnaire and that she had not provided any medical records from her preexisting emotional condition, which it had requested. OWCP found that the evidence did not support that the employment incidents occurred as described and while the medical evidence contained a diagnosis of depression, it did not establish that the diagnosis was causally related to the claimed incidents.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence[2] including 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

[2] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

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

essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to a claimant's employment.[5] There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation.[6] In the case of *Lillian Cutler*,[7] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition under FECA. Where an employee experiences emotional stress in carrying out his or her duties, or has fear and anxiety regarding his or her ability to carry out his or her duties, and the medical evidence establishes that the disability resulted from his or her 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 resulted from her emotional reaction to her day-to-day duties. The same result is reached when the emotional disability resulted from the employee's emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of the work.[8]

On the other hand, when a disability results from an employee's feelings of job insecurity per se, fear of a reduction-in-force, or frustration from not being permitted to work in a particular environment or hold a particular position, unhappiness with doing work, or frustration in not being given the work desired, such disability falls outside FECA's coverage because they are found not to have arisen out of employment.[9] The only requirements of employment which will bring a claim within the scope of coverage under FECA are those that relate to the duties the employee is hired to perform.[10]

A claimant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by the employment factors.[11] This burden includes the submission of a detailed description of the employment factors or conditions which he or she believes caused or adversely affected a condition for which compensation is claimed and a rationalized medical opinion relating the claimed condition to compensable employment factors.[12]

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[4] *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

[6] *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

[7] 28 ECAB 125 (1976).

[8] *Id.; see also Trudy A. Scott*, 52 ECAB 309 (2001).

[9] *William E. Seare*, 47 ECAB 663 (1996).

[10] *See Anthony A. Zarcone*, 44 ECAB 751 (1993).

[11] *See Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[12] *See Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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 work 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 compensable factors of employment and may not be considered.[13] If a claimant does implicate a factor of employment, OWCP should then consider whether the evidence of record substantiates that factor. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim. The claim must be supported by probative evidence.[14]

ANALYSIS

OWCP denied appellant's claim finding that she failed to establish fact of injury. FECA and its implementing regulations provide that OWCP shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as it considers necessary with respect to the claim.[15] The reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.[16]

In the September 30, 2015 decision, OWCP found that appellant had not fully responded to its questionnaire and had not provided all medical records from her preexisting emotional condition and, thus, all facts of the case were not established. The Board notes that she did submit a lengthy supplemental statement received by OWCP on April 27, 2015, with corroborating witness statements. OWCP, however, did not discuss the evidence pertaining to the incidents to which appellant attributed her emotional condition. The Board notes that she attributed her emotional condition, in part, to the performance of her regular work duties or to a special work requirement arising from her employment duties under *Cutler*[17] with regard to the coverage list task as well as administrative matters.

Appellant has also alleged that she was harassed by several higher level supervisors at work. The witness statements she submitted from S.W. and Dr. L.B. pertained to Dr. Y.A.'s communication method with females, including appellant in particular. It is noted that S.W.'s February 14, 2015 statement specifically pertains to Dr. Y.A.'s manner and actions at the January 7, 2015 meeting, towards appellant.

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

[14] *See Charles E. McAndrews*, 55 ECAB 711 (2004).

[15] 5 U.S.C. § 8124(a)(2); 20 C.F.R. § 10.125.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5(c) (February 2013). *See also G.S.*, Docket No. 14-1933 (issued November 7, 2014).

[17] *Supra* note 7.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[18] It failed to properly develop the evidence by requesting a statement from appellant's supervisor or knowledable persons after January 7, 2015 addressing allegations including increased workload, suspension, and harassment.[19]

Accordingly, OWCP did not properly discharge its responsibilities in developing the record and the case will be remanded to OWCP for further development of the evidence.[20] On remand it should consider all the evidence in the record and issue a *de novo* decision consistent with its own procedures. OWCP should request a statement from appellant's supervisor after his departure addressing appellant's job requirements, whether she was required to perform duties outside the scope of her position, and any other details relating to her allegations of an increased workload and disciplinary actions.[21] Following this and any other further development deemed necessary, it shall issue an appropriate merit decision, which includes findings of fact and a clear and precise statement regarding her emotional condition claim.[22]

CONCLUSION

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

[18] *See Phillip L. Barnes*, 55 ECAB 426 (2004).

[19] *Lillian E. Lesniak*, Docket No. 00-1021 (issued February 22, 2001).

[20] *K.J.*, Docket No. 14-1874 (issued February 26, 2015); *S.E.*, Docket 08-2243 (issued July 20, 2009).

[21] The employing establishment is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. Such evidence may be submitted at any time. 20 C.F.R. § 10.118(a).

[22] *Id.* Due the disposition of this case, appellant's allegations on appeal will not be addressed.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2015 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: November 15, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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