

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

V.H., Appellant)
and) Docket No. 17-0439
U.S. POSTAL SERVICE, POST OFFICE,) Issued: December 13, 2017
Redmond, WA, Employer)
)

Appearances:

Jeffrey P. Zeelander, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 20, 2016 appellant, through counsel, filed a timely appeal from an August 31, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 has established an emotional condition causally related to factors of her federal employment.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances outlined in the Board's prior decisions are incorporated herein by reference. The facts relevant to this appeal are set forth below.

On January 6, 2012 appellant, then a 51-year-old customer service supervisor, filed an occupational disease claim (Form CA-2) alleging that she sustained major depression, panic attacks, and anxiety due to factors of her federal employment. She stopped work on December 12, 2011.

Appellant, in a January 11, 2012 statement, advised that she began working as a letter carrier in 1984. She injured her elbow in 2002 and her shoulder in 2003. In 2008 appellant reassigned to a position as a supervisor. She had difficulties with a supervisor, who used work time inappropriately, and with the new postmaster, who allegedly changed appellant's schedule and implemented policies that violated the union contract. In March 2011 appellant's office changed locations and she had additional employees to supervise. Appellant's work location had poor scanning results so R.M., a manager in charge of the operation, ordered her to scan parcels inaccurately so that they could "get off the poor performers list." She received calls from customers who were not getting their packages. R.M. wanted her to indicate that carriers ended tours without overtime even where it was not true. Appellant related, "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 carrier who worked overtime. Appellant worried that if she reported the situation her coworkers might lose their positions.

In a February 27, 2012 statement, R.M. advised that appellant requested his assistance in 2010 because the postmaster, H.W., had changed appellant's work hours such that she could not easily attend Employees' Assistance Program (EAP) sessions. After R.M. became postmaster in 2011, the location had fewer employees but more work, and there was pressure to make sure the carriers stopped work at 5:00 p.m. R.M. "gave direct orders to [appellant] to ensure that any employee who worked over 10 hours would fill out a 1260 stating their end tour time was 10 hours or less." He 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 direct orders 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 she told me that she had been told not to do that by [a manager], I told her to still do it anyway. When she finally refused to do it anymore, I assigned that task to my morning supervisors."

In September and October 2011, appellant claimed that R.M. instructed her to "falsely manually input any missing scans" on parcels not sorted before carriers left on their routes. In

³ Docket No. 14-0433 (issued July 3, 2014); Docket No. 16-0161 (issued May 24, 2016).

October 2011 she claimed that he instructed her to enter a coworker's absence as sick rather than annual leave.

On February 29, 2012 appellant again described the actions to which she attributed her condition. She provided the dates from October through November 2011 that R.M. told her to change clock rings for carriers to avoid overtime.

OWCP, by decision dated April 13, 2012, denied appellant's claim because she had not established any compensable employment factors. On May 11, 2012 she requested an oral hearing. A hearing was held on October 25, 2012. Counsel asserted that R.M. had confirmed appellant's allegation that management ordered her to change data to meet standards.

Dr. David P. Shaw, an attending Board-certified psychiatrist, evaluated appellant on November 12, 2012. He obtained a history from appellant of management asking her to break the rules or overlook rule breaking, noting that R.M. had told her to manually input inaccurate data. Appellant had explained that managers performed personal business at work, misrepresented vacation days, and changed appellant's schedule. She claimed that she had an additional 40 employees when she returned to work in March 2011 after the death of her mother, and that customers were angry because they had not received their packages. Dr. Shaw diagnosed moderate major depression, anxiety disorder with panic attacks, and post-traumatic stress disorder in part due to work stressors and opined that appellant was unable to perform her usual employment.

In a January 2, 2013 decision, an OWCP hearing representative set aside the April 13, 2012 decision. She found that R.M.'s ordering appellant to inaccurately fill out 1260 forms showing carriers worked 10 hours or less in July and August 2011 and to falsify scans on express mail in October and November 2011 were compensable work factors. OWCP found that appellant had established error or abuse in July, August, September, and October 2011, when she was to input false information regarding carrier time, scanning express mail delivery, delivery confirmation and leave. OWCP was instructed to prepare a statement of accepted facts (SOAF) describing the compensable and noncompensable work factors and refer appellant for a second opinion examination.

OWCP prepared a January 18, 2013 SOAF indicating that R.M. had ordered appellant to alter express mail scans and carrier clock rings, instructed her to hand out 1260s, and had ordered appellant to approve leave under the FMLA when it was not warranted. It referred her to Dr. Douglas Robinson, a Board-certified psychiatrist, for a second opinion examination.

On February 28, 2013 Dr. Robinson reviewed appellant's work history and the factors to which she attributed her condition. He noted that she had nonwork-related stress, including a custody dispute over grandchildren. Dr. Robinson diagnosed recurrent major depressive disorder, panic disorder with agoraphobia, and some obsessive-compulsive personality traits unrelated to compensable work factors. He noted that appellant's condition began before October 2011 and that she had not experienced recurrent depression or a panic disorder until the onset of nonwork-related stress. Dr. Robinson found that it was not clear from the SOAF whether she had established her allegations of wrongdoing by her supervisor.

By decision dated April 25, 2013, OWCP denied appellant's emotional condition claim. It found that Dr. Robinson's opinion represented the weight of the medical evidence and established that she had not sustained any condition due to the accepted work factors. On April 30, 2013 counsel requested a review of the written record.

Dr. Shaw, in a report dated May 20, 2013, diagnosed a single episode of moderate major depression, anxiety disorder with panic attacks, and post-traumatic stress disorder. He noted that appellant's supervisor instructed her to ignore or break the rules. Dr. Shaw related:

"Thus, as I have said before, work factors have certainly contributed to [appellant's] emotional condition. Her 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."

In a November 5, 2013 decision, an OWCP hearing representative affirmed the April 25, 2013 decision. She determined that the weight of the evidence established that appellant had not established an emotional condition due to compensable work factors.

Appellant appealed to the Board. In a July 3, 2014 decision, the Board set aside the November 5, 2013 OWCP decision.⁴ It noted that OWCP had accepted that appellant's supervisor, R.M., erred in instructing her to improperly input scans on Express Mail, telling her to place a coworker on sick leave, and requiring her to indicate on forms that carriers worked under 10 hours. Dr. Robinson, however, found that she had not shown misconduct by her supervisor and thus did not base his opinion on the SOAF. The Board directed OWCP to prepare a SOAF clearly describing the compensable work factors and to further develop the medical evidence.⁵

On July 17, 2014 OWCP prepared an amended SOAF. It provided as compensable work factors that, in October and November 2011, R.M. instructed appellant to alter scans on express mail and delivery packages and ordered her to change clock rings to avoid overtime penalties. It also indicated that in November 2011 R.M. erroneously told her to hand out 1260 forms to carriers out after 6:00 p.m. and told appellant to approve leave which was not appropriate.

By letter dated July 17, 2014, OWCP requested that Dr. Robinson review the SOAF and address whether appellant had sustained a diagnosed condition causally related to the accepted work factors. Dr. Robinson, in a supplemental report dated August 26, 2014, noted that the events listed as compensable in the SOAF occurred in October and November 2011, after the onset of symptoms. He advised that his opinion had not changed and that her condition was not related to the compensable work factors.

⁴ Docket No. 14-0433 (issued July 3, 2014).

⁵ The Board found that appellant had not established as compensable factors that her schedule changed unreasonably, she was forced to give up a bid position, she was overworked, or she had to deal with angry customers.

In a decision dated September 30, 2014, OWCP denied appellant's claim after finding that Dr. Robinson's opinion constituted the weight of the evidence. On October 22, 2014 counsel requested a telephone hearing, which was held on June 18, 2015. By decision dated September 4, 2015, OWCP's hearing representative affirmed the September 30, 2014 decision.

Appellant appealed to the Board. In a decision dated May 24, 2016, the Board set aside the September 4, 2015 decision.⁶ The Board found that Dr. Robinson, in his August 26, 2014 supplemental report, discussed the compensable work factors set forth in the SOAF and noted that the incidents occurred in October and November 2011, significantly later than the start of appellant's psychiatric condition. Dr. Robinson opined that her condition was "not directly" related to the compensable work factors. The Board determined that Dr. Robinson based his conclusion on an incomplete SOAF that failed to set forth that R.M. erroneously told appellant to manually input incorrect information on express mail scans and delivery confirmation packages in July and August 2011. The Board thus found that Dr. Robinson based his conclusion that her condition was unrelated to work factors as it began well before the occurrence of the compensable work factors in November 2011 on an inaccurate history. The Board further found that Dr. Robinson's opinion that compensable work factors did not directly cause appellant's condition was insufficient to negate causal relationship, noting that, if a work factor contributed in any way to appellant's condition, such condition is employment related. It remanded the case for OWCP to prepare an updated SOAF and refer her for a new second opinion examination.

On remand OWCP prepared a June 29, 2016 SOAF setting forth the accepted work factors as follows:

"The claimant alleged in July 2011, August 2011, October 2011, and November 2011, [R.M.] made her change the scans on express mail and delivery confirmation packages. She alleged [R.M.] gave her direct orders to alter overtime forms during an unspecified period from March 2011 to January 2012. This is a compensable factor of her employment."

"The claimant alleged on November 23, 2011 several carriers were out past 6:00; and [R.M.] told her to hand out 1260's. [OWCP] received a statement from [R.M.] that substantiated this allegation."

"The claimant alleged on October 10, 2011, [R.M.] told her to give [J.C.] FMLA when she was n[o]t entitled to it. [OWCP] received a statement from [R.M.] that substantiated this allegation."

For the factors of employment not accepted as compensable, OWCP provided, "The claimant eventually refused to do improper scans or alter carrier's penalty overtime, but did not like disobeying orders from her supervisor. There is no evidence that any adverse action resulted due to [her] refusal, therefore her emotional reaction to this refusal is not directly related to her duties." It further listed the events not established as factually occurring.

⁶ Docket No. 16-0161 (issued May 24, 2016).

On July 7, 2016 OWCP referred appellant to Dr. Aaron Hunt, Board-certified in psychiatry and forensic psychiatry, for a second opinion examination.

In a July 26, 2016 report, Dr. Hunt reviewed the SOAF and the medical evidence of record. He discussed the SOAF with appellant and she advised that a prior supervisor had written a statement confirming that the events occurred. Dr. Hunt noted that the statement from the supervisor was not in the record that he received. He indicated that appellant had family problems related to a custody dispute and estrangement with family members. Appellant had relocated to Mexico where she continued to receive psychological treatment. Dr. Hunt diagnosed an adjustment disorder with mixed anxiety and depressed mood with "limited evidence of problems due to workplace rules violations," recurrent major depression "primarily aggravated by factors outside the industrial claim," and anxiety disorder not related to employment. He further diagnosed a personality disorder not otherwise specified impacting the other diagnoses. Dr. Hunt related, "While [appellant] maintains she was forced or coerced to 'lie, cheat and steal,' there is simply no evidence that I have seen suggesting her behavior was anything but volitional. There was no evidence that she was coerced in such a fashion that she would not have the ability to willingly refuse to do something she found to be contradictory to her value system...." Dr. Hunt noted that appellant's condition ultimately deteriorated due to conflicts with her supervisor over "these and other issues." He found that there was no verification of her allegations except for a statement from a manager who had retired, and that there were issues assuming her account of events was completely accurate. Dr. Hunt concluded that "factors outside of the industrial injury played a substantial role in her continued deterioration and it is not the fact that she had the 'injury event occur' but rather the fact that she finally had enough of the conflicts that she was having within the workplace. This is evidenced by the ongoing problems she had after leaving work, and her eventual hospitalization in 2015." Dr. Hunt opined that appellant's confrontational personality and lack of flexibility led to difficulty and conflicts. He noted that a supervisor "apparently supported her version of events" but he did not have the letter, noting that it was accepted under the SOAF. Dr. Hunt related:

"In the mind of this examiner, [appellant's] problems are primarily associated [with] adjustment[-]related problems to a plethora of stresses that have occurred in her life and not solely due to these events that occurred. Being asked to change employees' time cards, alter Express Mail scans and other issues, which she considered to be 'illegal' or at best contrary to administrative policy, did not cause her to become depressed, anxious or overtly stressed to the point of evident difficulty performing her work[-]related duties."

He concluded that appellant's depression began before the events set forth as compensable in the SOAF and that those events did not cause her condition to deteriorate but rather that stress due to relationships in the workplace worsened her condition and arose as a result of her personality. Dr. Hunt related, "While [appellant] may have elements of major depression, this does not appear to accurately capture the entirety of what she has experienced that may be work related. Appellant's work-related problems are adjustment related, the major depression that she has then subsequently developed is related to preexisting and nonindustrial[-]related factors."

In an August 31, 2016 decision, OWCP denied the emotional condition claim. It found that Dr. Hunt's opinion constituted the weight of the evidence and established that she did not have a psychiatric condition causally related to a compensable employment factor.

On appeal counsel argues that Dr. Hunt did not rely on the compensable work factors to frame his opinion and used an improper standard for causation, noting that Board case law provided that it was not necessary to show a work factor was solely responsible for a condition to establish causal relationship. He requests a new second opinion examination.

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.⁷ 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.⁸

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.⁹ 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.¹⁰

Causal relationship is a medical issue, and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹¹ The opinion of the physician must be based on a complete factual and medical background of the claimant,¹² must

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

⁸ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁹ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁰ *Id.*

¹¹ *John J. Montoya*, 54 ECAB 306 (2003).

¹² *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

be one of reasonable medical certainty¹³ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁴

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.¹⁵ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹⁶ Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.¹⁷

ANALYSIS

In prior appeals, the Board found that appellant had established as compensable work factors that R.M. told her to inaccurately input Express Mail scans, improperly indicate that a coworker was on sick leave, and fill out forms incorrectly showing that carriers did not work overtime. The Board determined that the medical evidence was insufficient to resolve the issue of whether she experienced a diagnosed condition as a result of the compensable work factors and remanded the case for further development of the medical evidence.

On July 7, 2016 OWCP referred appellant to Dr. Hunt for a second opinion examination. The Board finds, however, that Dr. Hunt's opinion is insufficiently rationalized to resolve the medical issue presented.

In his July 26, 2016 report, Dr. Hunt discussed the SOAF with appellant and indicated that while she maintained that a supervisor wrote a letter confirming her account of events, the letter was not in the record. He opined that she could have refused to lie at work and noted that only one manager verified her description of what happened. Dr. Hunt questioned the truthfulness of appellant's account, again asserting that he did not have the letter from the supervisor that "apparently supported" her version. While acknowledging that OWCP had accepted the supervisor's statement as factual, in his report he examined the accuracy of the accepted factors, repeatedly noting that he did not have a copy of the supervisor's statement. The Board finds that it was improper for Dr. Hunt to question OWCP's factual findings as a physician's function is only to provide an opinion on the medical questions, not to determine facts.¹⁸ OWCP provided him with a SOAF to ensure his report was based on a proper factual

¹³ *John W. Montoya*, *supra* note 11.

¹⁴ *Judy C. Rogers*, 54 ECAB 693 (2003).

¹⁵ *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹⁶ 20 C.F.R. § 10.121.

¹⁷ *Melvin James*, 55 ECAB 406 (2004).

¹⁸ See *M.C.*, Docket No. 09-1880 (issued June 21, 2010); *George Tseko*, 40 ECAB 948 (1989).

background.¹⁹ To the extent that Dr. Hunt's opinion is outside the framework of the statement of accepted facts, it is based on an inaccurate history and, thus, of diminished probative value.²⁰

Additionally, Dr. Hunt diagnosed an adjustment disorder with mixed anxiety and depression with "limited evidence" of a link to violation of rules at work, major depression "primarily aggravated" by factors outside the claim, and anxiety disorder unrelated to employment. He found that appellant's condition was "primarily associated" with various life stressors and "not solely" due to the compensable work factors. The Board notes that there is no requirement that the work factors be the only cause of the diagnosed conditions. If work-related exposure cause, aggravated, or accelerated a condition, appellant is entitled to compensation.²¹

As discussed, once OWCP undertakes development of the medical evidence it has the responsibility to do so in a manner that will resolve the relevant issues in the case.²² Upon return of the case record, it should obtain a reasoned opinion addressing whether she sustained an emotional condition caused or aggravated by the compensable employment factors. Following such further development as OWCP deems necessary, it should issue a *de novo* decision.

CONCLUSION

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

¹⁹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990) (when OWCP's medical adviser, second opinion specialist or referee physician renders a medical opinion based on a statement of accepted facts which is incomplete or inaccurate or does not use the statement of accepted facts as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether).

²⁰ See *Douglas M. McQuaid*, 52 ECAB 382 (2001) (medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value).

²¹ See *Beth P. Chaput*, 37 ECAB 158 (1985).

²² See *M.C.*, *supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the August 31, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.²³

Issued: December 13, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

²³ Colleen Duffy Kiko, Judge, participated in the original decision but was no longer a member of the Board effective December 11, 2017.