United States Department of Labor
Employees' Compensation Appeals Board

D.P., daughter of A.P., Appellant,	)	
and	)	
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Chicago, IL, Employer	)	**Docket No. 15-0086** **Issued: March 8, 2017**

Appearances:
Daniel J. Santana, Esq., for the appellant[1]
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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 14, 2014 appellant filed a timely appeal from a May 30, 2014 merit decision and an August 21, 2014 nonmerit decision of the Office of Workers' Compensation Programs

[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.

(OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the survivor's claim.[4]

ISSUES

The issues are: (1) whether the employee's July 24, 2012 death occurred in the performance of duty; and (2) whether OWCP properly denied appellant's July 22, 2014 request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The employee, a 64-year-old mail handler at the time of her death, passed away on July 24, 2012. She had worked for the employing establishment since December 1993.[5] The death certificate identified the cause of death as hypertensive cardiovascular disease, with diabetes mellitus listed as a significant condition contributing to death.

A July 24, 2012 employing establishment incident report prepared by T.A., a supervisor, indicated that the decedent-employee arrived 15 minutes late to an employee service talk that had been scheduled for 12:40 p.m. T.A., who conducted the meeting at his desk on the workroom floor, asked the decedent-employee why she was late, and she replied that she would tell him later. As he concluded that the meeting and instructed employees to return to work, T.A. heard the decedent-employee and two female coworkers "exchanging words." He identified the two coworkers as R.M. and M.K. T.A. asked the decedent-employee to go to Room 188 (the tour office), while he stayed behind and spoke with R.M. and M.K. about the employing establishment's "zero tolerance" policy. Following their conversation, T.A. had another discussion with a group of managers. At that same time, T.A. observed the decedent-employee approaching with a coworker, J.M. T.A. noted that the decedent-employee looked sick. As he walked towards the two women, J.M. asked him to call emergency services ("911") because the decedent-employee complained of chest pain. T.A. also reported that J.M. took asthma medication from the decedent-employee's bag and gave it to her. While someone called 911, other employees attended to the decedent-employee. T.A. left the area to assist in retrieving a wheelchair, and when he returned he noticed W.G., a coworker, performing compressions on the decedent-employee. T.A. estimated that the ambulance arrived at 1:35 p.m., and that it left the facility with the decedent-employee at 2:00 p.m.

[2] Appellant was not represented by counsel when she filed her application for review (Form AB-1) in October 2014.

[3] 5 U.S.C. § 8101 *et seq*.

[4] With her AB-1, appellant submitted, *inter alia*, a witness statement that was not part of the case record at the time OWCP issued its August 21, 2014 decision. Since the initial filing, both appellant and counsel have submitted additional factual and/or medical evidence that was not previously part of the record. The Board however is precluded from considering evidence that was not already included in the record when OWCP rendered its final decision. Thus, this evidence cannot be considered in this appeal. 20 C.F.R. § 501.2(c)(1).

[5] There is no record of the decedent-employee having filed a FECA claim during her lifetime.

The employee's death certificate indicated that she was dead on arrival at the hospital. The reported time of her death was 2:00 p.m., July 24, 2012.

W.P., acting plant manager, prepared a July 25, 2012 preliminary death investigation report. He indicated that at approximately 1:10 p.m. on July 24, 2012, the decedent-employee was observed walking across the workroom floor. W.P. noted that it was alleged she had clutched her chest and complained of pain. The decedent-employee also yelled for someone to bring her purse so that she could take medication. W.P. indicated that paramedics were called and the decedent-employee later collapsed and lost consciousness. He stated that the decedent-employee was taken to the hospital emergency department, where doctors were unable to revive her. The approximate time of death was 2:00 p.m.

W.P. contacted the Postal Inspection Service (PIS) at approximately 5:00 p.m. on July 24, 2012. PIS prepared a July 27, 2012 memorandum regarding its investigation of the employee's July 24, 2012 death. W.P. advised PIS that on July 24, 2012 at approximately 1:00 p.m., the decedent-employee became ill on the workroom floor after a safety talk given by T.A. W.P. indicated that he had been told to contact PIS because some words were exchanged between the decedent-employee and R.M., a coworker. The memorandum noted that "[W.P.] was not aware of what exactly was said, but he was sure no threats were made by either party." W.P. also informed PIS that the decedent-employee was known to have health-related issues, which included asthma and diabetes. The PIS memorandum further noted that the decedent-employee reportedly stated that she was having trouble breathing prior to collapsing on the workroom floor. Because no threats had been made, PIS advised W.P. that there was nothing for it to investigate.

PIS's memorandum further noted that T.A. had conducted a safety talk on the workroom floor with approximately 10 employees in attendance. The decedent-employee arrived at 12:55 p.m., which was approximately 15 minutes after the safety talk began. When T.A. commented that it was unlike her to be late, the decedent-employee replied that she would discuss it with him later. After the safety talk concluded, employees were returning to their respective work areas when R.M. and M.K. had words with the decedent-employee "regarding personal issues." T.A. then instructed the decedent-employee to go to Room 188, while he talked to R.M. and M.K. about their conversation with the decedent-employee. According to the PIS memorandum, T.A. stated that the three coworkers "were talking about personal issues." The memorandum also noted that T.A. spoke with R.M. and M.K. regarding the agency's "zero tolerance" policy. Because their conversation involved "personal issues," T.A. thought "it best to make the Zero Tolerance Policy clear to all three." The PIS memorandum also indicated that according to T.A., there was no physical altercation between the decedent-employee and any of her coworkers either during or after the security talk. Before going to speak with the decedent-employee, T.A. had a conversation with W.P. on the workroom floor. During that conversation, T.A. noticed the decedent-employee walking across the workroom floor, accompanied by J.M. The decedent-employee was complaining of chest pains. T.A. and other managers reportedly called 911. The decedent-employee was made to sit down and medication was retrieved from her purse. Shortly after taking her medication, she was assisted to the floor and she appeared to be in distress. The PIS memorandum noted that emergency services arrived and the decedent-employee was transported to the hospital "while still alive." She subsequently died at the hospital of "apparent natural causes."

The PIS memorandum further noted that emergency response team (ERT) inspectors confirmed that there was no video coverage in the area in question. Also, there were no reports of threats or assaults involving R.M., M.K., and the decedent-employee. W.P. advised inspectors that the decedent-employee was in good spirits when he observed her at 9:00 a.m. on July 24, 2012. Additionally, W.P. and other employees informed ERT personnel that the decedent-employee had "several heated cellphone conversations (5) with what appeared to be family members prior to the [July 24, 2012] safety talk…."

The PIS memorandum also noted that the employee's death "appears to be natural and not related to any type of criminal act while working as a postal employee at the IPR Plant."

On July 26, 2012 the PIS interviewed both R.M. and M.K. There is mention of a memorandum of interview (MOI) having been prepared with respect to both witnesses, but the July 27, 2012 PIS memorandum included only a brief summary of their respective remarks. R.M. was present when the decedent-employee arrived late to the safety talk, but reportedly did not say anything to her. M.K. also acknowledged her presence at the safety talk when the decedent-employee arrived late. She further stated that when T.A. asked why the decedent-employee arrived late, "everyone laughed." M.K. indicated that the decedent-employee looked at both her and R.M. and stated "Nosy bitches," and then said to T.A. she would tell him later why she was late. M.K. further indicated that after the talk, T.A. made her and R.M. stay behind, while he sent the decedent-employee to the tour office. According to M.K., the decedent-employee returned and stated to R.M., "I hate you," to which R.M. replied, "I hate you too." M.K. indicated no threats were made.

Both R.M. and M.K. were aware of rumors that the decedent-employee's family held them accountable for her death. M.K. feared retaliation and asked W.P. to change her schedule so that she could come to work with her husband. W.P. was noted to have agreed to the change of schedule.

In the July 27, 2012 PIS memorandum also referenced having "received additional employee statements" on "Wednesday, August 1, 2012."

On November 5, 2013 appellant, the decedent-employee's adult daughter filed a claim for compensation by widow, widower, and/or children (Form CA-5). She alleged that her mother suffered a heart attack on July 24, 2012 due to work-related emotional stress and negligent supervision. Appellant attributed her mother's death to an intense verbal altercation with a coworker, who was known to be hostile.[6] She also alleged that T.A.'s belated corrective actions contributed to her mother's July 24, 2012 death.

In a March 18, 2014 letter to OWCP, appellant noted that her mother died on the workroom floor on July 24, 2012 immediately after an intense altercation with coworkers. She contended that the employing establishment had prior knowledge of long-standing harassment, as well as her mother's multiple pleas for relief. Appellant alleged that instead of resolving these serious issues, the employing establishment failed to investigate and abate the harassment, which

[6] Appellant and her mother worked at the same postal facility.

lead to an otherwise avoidable fatality. She reiterated her contention that her mother's July 24, 2012 death was due to negligent supervision.

In a May 30, 2014 decision, OWCP denied appellant's survivor's claim as she had failed to establish fact of injury. It noted, *inter alia*, that the statements submitted by employing establishment personnel "do not include specific reference to an incident on [July 24, 2012] nor is there [a] description of ... other stress-inducing actions on behalf of [the decedent-employee's] former colleagues and/or her supervisor(s)." Consequently, OWCP found the evidence insufficient to establish that an event/incident occurred as alleged.

On July 22, 2014 appellant requested reconsideration of the merits of her claim.

By decision dated August 21, 2014, OWCP denied reconsideration of the merits pursuant to 5 U.S.C. § 8128(a). The decision noted appellant's allegation that her mother was verbally harassed and/or abused by coworkers, which contributed to the heart attack that caused her death. OWCP also noted appellant's contention that management had not taken appropriate or effective action in diffusing the hostile work environment that precipitated her mother's fatal heart attack. It found that appellant's allegations were "too vague to be actionable." OWCP determined that merit review was unwarranted because appellant's recent submission remained insufficient to support that there was an argument or altercation between the decedent-employee and any colleague on July 24, 2012. Appellant also failed to establish negligence on the part of management in addressing workplace harassment.

LEGAL PRECEDENT

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[7] Verbal altercations and difficult relationships with coworkers and supervisors/managers, when sufficiently detailed and supported by the record, may constitute compensable factors of employment.[8] However, this does not imply that every ostensibly abusive or threatening statement uttered in the workplace will give rise to coverage under FECA.[9]

Proceedings under FECA are nonadversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden to establish entitlement to compensation; however, OWCP shares responsibility in the development of the evidence to see that justice is done.[10]

OWCP's procedure manual provides that, in cases of alleged workplace harassment, initial reports often may not provide sufficient information to determine whether the alleged incidents of coworker harassment and/or teasing actually occurred. Under such circumstances, OWCP should develop the evidence by obtaining, *inter alia*, a statement from the employee

[7] 5 U.S.C. §§ 8102(a) and 8133.

[8] *Marguerite J. Toland*, 52 ECAB 294, 298 (2001).

[9] *Fred Faber*, 52 ECAB 107, 109 (2000).

[10] *William J. Cantrell*, 34 ECAB 1223 (1983).

describing in detail the alleged incidents of harassment, the frequency of their occurrence, and their effect on the employee.[11] OWCP should also obtain statements from coworkers allegedly involved in the harassment describing in detail their version of events.[12] Factual development should also include obtaining a statement from the employee's supervisor regarding whether she/he was aware of the situation as described by the employee and coworkers, and describing any supervisory action taken.[13] Lastly, OWCP should obtain statements from any other persons who may have knowledge of the alleged harassment, stating what they know and how they obtained such knowledge.[14]

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.[15]

ANALYSIS

OWCP denied survivor's benefits based on appellant having failed to establish fact of injury. Appellant alleged, *inter alia*, that a July 24, 2012 incident between her mother and two coworkers, R.M. and M.K., precipitated the employee's fatal heart attack. The record establishes that at approximately 12:55 p.m. on July 24, 2012, there was an incident between the decedent-employee, and her coworkers, R.M. and M.K. The incident occurred on the workroom floor at or near the conclusion of an all-employee service talk conducted by T.A. In his July 24, 2012 incident report, T.A. indicated that he heard the three coworkers "exchanging words." The incident report further noted that T.A. told the decedent-employee to go to the tour office (Room 188), while he remained on the workroom floor discussing the employing establishment's zero tolerance policy with R.M. and M.K. Soon afterward, the employee returned to the workroom floor and collapsed after complaining of chest pain. By 2:00 p.m. she was pronounced dead on arrival at a nearby hospital.

The Board finds that the case is not in posture for decision because OWCP has yet to fully develop the factual record. While appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[16] The issue is not whether an incident occurred on July 24, 2012, but whether the reported exchange of words and/or verbal altercation between the decedent-employee, and her coworkers, R.M. and M.K., rose to the level of compensable verbal abuse. As noted, verbal altercations and difficult relationships with coworkers and supervisors/managers, when

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.12c(1) (January 1997).

[12] *Id.* at Chapter 2.804.12c(2).

[13] *Id.* at Chapter 2.804.12c(3).

[14] *Id*. at Chapter 2.804.12c(4).

[15] 20 C.F.R. § 10.118.

[16] *Supra* note 11.

sufficiently detailed and supported by the record, may constitute compensable factors of employment.[17]

It is evident that there was some interaction between the decedent-employee and her coworkers, R.M. and M.K. However, what exactly transpired at the conclusion of the all-employee service talk is unclear. Of the four principal participants, one is deceased and unable to provide a statement, and the other three provided limited details and/or their statements are absent from the record. In his July 24, 2012 incident report, T.A. stated that he heard the three "exchanging words," but he did not describe what he actually heard. He also did not offer any insight as to why the reported exchange warranted a discussion of the agency's zero tolerance policy.

The Board notes that the record does not include signed statements from either R.M. or M.K. The July 27, 2012 PIS memorandum indicated that both were interviewed on July 26, 2012. The PSI memorandum included a brief summary of their respective statements, and referenced separate "MOI" for "more details." However, the MOIs have not been included in the record. According to the PIS memorandum, M.K. stated that the decedent-employee looked at her and R.M. and stated, "Nosy bitches." R.M. claimed not to have said anything to the decedent-employee. In contrast, M.K. indicated that R.M. told the decedent-employee that she hated her, too. Whether this was the full extent of their exchange remains to be seen. Again, the more detailed MOIs and/or witness statements from M.K. and R.M. have not been made a part of the record.

The July 24, 2012 service talk was attended by at least 10 employees, but there is scant information from other coworkers regarding what transpired between the decedent-employee, R.M. and M.K. The PIS memorandum referenced having "received additional employee statements" on August 1, 2012, but those additional statements have not been submitted to the record. As noted, 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.[18] The employing establishment cannot withhold information to its employee's detriment.[19]

Because the record lacks sufficient evidence for the Board to render an informed decision, the case shall be remanded to OWCP for further development. On remand, OWCP shall apprise the employing establishment of its responsibility for submitting all relevant and probative factual and medical evidence in its possession. After OWCP has developed the record consistent with the above-noted directive, it shall issue a *de novo* decision regarding appellant's claim for survivor's benefits.

[17] *Supra* note 9.

[18] 20 C.F.R. § 10.118.

[19] As evidence appearing in the employer's files is not generally available to claimants, the employing establishment must assemble and submit such evidence. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4(b) (June 2011).

CONCLUSION

The Board finds the case not in posture for decision.[20]

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2014 decision of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further action consistent with this decision.[21]

Issued: March 8, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[20] Given the Board's disposition of the merits of the survivor benefits claim, OWCP's August 21, 2014 decision denying reconsideration of the merits is moot.

[21] James A. Haynes, Alternate Judge, participated in the original decision but is no longer a member of the Board effective November 16, 2015.