

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

L.G., Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Boston, MA, Employer**

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**Docket No. 17-0160
Issued: May 1, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 1, 2016 appellant, through counsel, filed a timely appeal from an August 23, 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 met her burden of proof to establish an emotional condition in the performance of duty on July 11, 2015.

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. § *et seq.*

On appeal counsel asserts that the August 23, 2016 decision is contrary to law and fact.

FACTUAL HISTORY

On August 10, 2015 appellant, then a 65-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on July 11, 2015 she witnessed a verbal altercation between coworkers while working, and that this frightened her. She stopped work on July 13, 2015. M.S., a supervisor of distribution operations at the employing establishment, indicated on the claim form that no fist fight or altercation occurred on the workroom floor during any tour when appellant was working.

In a formal controversion of the claim, M.D., an employing establishment health and resource management (HRM) specialist, noted that appellant did not report any incident on July 11, 2015, and that on the claim form the supervisor noted that no fight or altercation occurred. The HRM specialist advised that appellant had an additional claim for carpal tunnel syndrome and myofascial pain syndrome, adjudicated by OWCP under File No. xxxxxx012, and had returned to full duty under that claim on July 9, 2009.³

In correspondence dated July 16, 2015, addressed to the employing establishment, Dr. Susan Biener Bergman, a Board-certified physiatrist, advised on July 16, 2015 that appellant was under her care for carpal tunnel syndrome and myofascial pain syndrome, with additional symptoms of headaches, dizziness, nausea, visual changes, and a number of unexplained falls. She noted that appellant had been on a six-week medical leave of absence earlier that year and upon her return, reported that coworkers were creating an unsafe environment. Dr. Bergman described appellant's report that the previous week she witnessed a violent fist fight, including a very aggressive coworker who made threats and this caused appellant to fear that he would bring a weapon to work.

By letter dated September 2, 2015, OWCP informed appellant of the evidence needed to support her emotional condition claim. It asked that she respond to a questionnaire detailing how the claimed work incident occurred as well as her description of how her emotional condition developed.

In an August 10, 2015 report, Dr. John P. Hennessy, a psychologist, indicated that appellant had been under his care for several years for anxiety, depression, and stress. He related that on July 11, 2015 she was confronted by two employees who shouted loudly with a very real potential of a violent episode. Dr. Hennessey advised that the traumatic event of July 11, 2015 resulted in an acute stress disorder caused by intense fear, helplessness, and horror such that appellant now had difficulty sleeping, poor concentration, and an exaggerated startle response. He concluded that appellant continued under intensive cognitive/behavioral psychotherapy as the result of the symptoms caused by this incident.

Dr. Bergman provided a duty status report (Form CA-17) on July 27, 2015 with physical restrictions. She also noted that appellant could not be around loud noises or anyone coming up

³ OWCP adjudicated the instant claim under File No. xxxxxx938. File No. xxxxxx012 is not presently before the Board.

behind her. Dr. Bergman advised that appellant had post-traumatic stress disorder (PTSD) symptoms, triggered by loud noises and threatening gestures, noting that appellant was frightened by a threatening gesture from a coworker. She diagnosed severe depression, fibromyalgia with muscle pain, and headaches. Dr. Bergman indicated that appellant could return to work on August 27, 2015.

By decision dated October 14, 2015, OWCP denied the claim. It noted that appellant had not responded to the development questionnaire and found that the evidence submitted was insufficient to support that the claimed event occurred.

Appellant, through counsel, timely requested a hearing with OWCP's Branch of Hearings and Review. In an August 27, 2015 report, Dr. Bergman reported that appellant had been under her care for eight years for episodic myofascial pain, upper extremity overuse, fibromyalgia, and severe depression. She advised that appellant could return to part-time work on August 28, 2015 on a trial basis provided that she was protected from loud noises, sudden approaches, or aggressive gestures.⁴ On October 13, 2015 Dr. Bergman noted that appellant had been on medical leave and had requested medical retirement. She advised that appellant had chronic myofascial pain and PTSD and again advised that appellant could return to part-time modified duty on a trial basis. On October 6, 2015 Dr. Hennessy reported that appellant was fit for light duty with the restrictions he provided on March 24, 2015.⁵

At the hearing, held on June 13, 2016, the hearing representative noted that appellant did not respond to OWCP's development questionnaire. Appellant testified that she had retired in December 2015. She described the July 11, 2015 incident, stating that she heard someone say, "don't push me," looked up and saw two men physically fighting. Appellant indicated that when she told her supervisor, M.S., she replied that everything was fine, so that appellant herself reported it to security, who came to investigate and, again, M.S. indicated that everything was fine. Appellant noted that no coworker would provide a witness statement and that she stopped work because she became fearful of the workplace, noting that the workers argued and talked loudly and made fighting motions, and that nothing was done by management. She felt it was an unsafe environment. Appellant noted that she had been treated by Dr. Hennessy since 2003 for anxiety, depression, and PTSD. The hearing representative asked that she provide records from Dr. Hennessy and obtain the security report. The record was left open 30 days.

By decision dated August 23, 2016, an OWCP hearing representative found that appellant had not established a compensable factor of employment and affirmed the October 14, 2015 decision.

LEGAL PRECEDENT

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or

⁴ Only the first page of the report is found in the case record.

⁵ A March 24, 2015 report is not found in the case record.

incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her stress-related condition.⁶ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.⁷ 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.⁸

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,⁹ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.¹⁰ When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an 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 results from her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.¹¹ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.¹² Where the claimant alleges compensable factors of employment, she must substantiate such allegations with probative and reliable evidence.¹³ Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁴

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an emotional condition in the performance of duty on July 11, 2015.

Appellant has not attributed her emotional condition to the performance of her regular work duties or to any special work requirement arising from her employment duties under

⁶ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁷ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁸ *Id.*

⁹ 28 ECAB 125 (1976).

¹⁰ *See Robert W. Johns*, 51 ECAB 137 (1999).

¹¹ *Lillian Cutler*, *supra* note 9.

¹² *J.F.*, 59 ECAB 331 (2008).

¹³ *M.D.*, 59 ECAB 211 (2007).

¹⁴ *Roger Williams*, 52 ECAB 468 (2001).

Cutler.¹⁵ Rather, her claim pertains to events that occurred on July 11, 2015 in which she alleges that she witnessed a physical and verbal altercation between two male coworkers and that this caused an unsafe work environment which led to her PTSD, anxiety, and depression.

The Board finds that the claimed incident of July 11, 2015 did not occur as alleged. Appellant submitted no evidence, such as a statement from a witness, corroborating that the incident on July 11, 2015 occurred as claimed. M.S., a supervisor, advised that no fist fight or altercation occurred on the workroom floor during any tour when appellant was working. OWCP, by letter dated September 2, 2015, informed appellant of the evidence needed to support her claim. It asked that she respond to a questionnaire describing how the claimed incident occurred and how her emotional condition developed. Appellant did not respond with the information requested in the September 2, 2015 development letter, nor did she furnish the information requested by the hearing representative at the June 13, 2016 hearing.¹⁶

Appellant submitted no evidence to support her allegations regarding the claimed July 11, 2015 incident.

For the foregoing reasons, the Board finds that appellant has not established that the claimed incident occurred as alleged. Therefore, she has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty. As appellant did not establish a compensable employment factor, the Board need not consider the medical evidence of record.¹⁷

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this decision regarding the merits of appellant's claim, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an emotional condition in the performance of duty on July 11, 2015.

¹⁵ See *James E. Norris*, 52 ECAB 93 (2000).

¹⁶ See *David S. Lee*, 56 ECAB 602 (2005).

¹⁷ See *Katherine A. Berg*, 54 ECAB 262 (2002).

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2017
Washington, DC

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

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

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