United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 18-0537**
	)	**Issued: September 12, 2018**
DEPARTMENT OF VETERANS AFFAIRS, LOMA LINDA HEALTHCARE SYSTEM, Loma Linda, CA, Employer	)	

Appearances:
Appellant, pro se
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 18, 2018 appellant filed a timely appeal from an October 24, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] Appellant timely requested oral argument before the Board. By order dated June 18, 2018, the Board exercised its discretion and denied the request as the matter could be adequately addressed based on a review of the case record. *Order Denying Oral Argument*, Docket No. 18-0537 (issued June 18, 2018).

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that appellant submitted additional evidence after OWCP rendered its October 24, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an injury to her chest in the performance of duty on September 30, 2016, as alleged; (2) whether she has met her burden of proof to establish an emotional condition in the performance of duty on September 30, 2016, as alleged; and (3) whether OWCP properly denied appellant's request for the issuance of subpoenas.

FACTUAL HISTORY

On October 19, 2016 appellant, then a 56-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that, on September 30, 2016, she sustained emotional stress and a contusion of the sternum while in the performance of duty. She asserted that a table hit her after a coworker slammed her hands on it, moving it toward her chest. The employing establishment indicated on the form that appellant was not in the performance of duty as the incident occurred when she was in the breakroom.

OWCP, in a December 14, 2016 development letter, requested that appellant provide additional factual and medical information in support of her claim, including a detailed description of the claimed September 30, 2016 work incident and a medical report from her attending physician addressing the causal relationship between any diagnosed condition and the alleged work incident.

OWCP thereafter received a September 30, 2016 voluntary witness statement form completed by appellant. Appellant related that she was sitting in the breakroom with P.N., a coworker, when K.D., another coworker, came in and asked what they were doing. She replied in a joking manner that they were minding their own business. K.D. yelled at appellant and pushed the table into her chest. Appellant asserted that the table struck her with sufficient force that she hit a locker. She maintained that she sustained a chest injury, tension at L4 and L5, and psychological trauma due to the incident. Appellant believed that K.D. intended to cause her harm.

K.D. also completed a voluntary witness statement form on September 30, 2016. She advised that appellant "blew up" when she walked into the breakroom and asked what she was doing. Appellant continued to raise her voice after K.D. told appellant that she should not speak in that manner so K.D. "leaned on the table and told her to shut up talking…."

P.N. provided a voluntary witness statement to the employing establishment on October 1, 2016. She related that at the time of the incident she was making coffee and cleaning out her locker in the breakroom. Appellant and another coworker, S.B., were talking when K.D. came in and asked them what was happening. S.B. left the room. Appellant spoke to K.D. defensively and refused to stop. P.N. related, "Then [K.D.] put her hands on the table and it moved towards [appellant]…." K.D. told appellant to shut up and that she should not speak to people in that manner, and appellant "kept talking in an inappropriate [and] very loud manner." She left the room and appellant related that she was going to the employing establishment's police, relating that she did not "have to take this."

In an October 1, 2016 e-mail, C.M., a supervisor, advised that appellant had notified her that on the previous evening that K.D. had attacked her, that P.N. had witnessed the incident, and that she was filing a complaint with the police. She spoke with P.N., who related that she was with appellant in the breakroom when K.D. entered and greeted them. Appellant replied that they were minding their own business and continued to speak in a similar manner until K.D. told appellant that she was tired of her and "slammed her hands on the table which inadvertently shifted the table startling [appellant]."

C.M. further related that she went to the emergency department (ED) to speak with appellant, who told her the same version of events as set forth by P.M., except that appellant asserted that she was joking when she told K.D. to mind her own business. She advised, "[Appellant] also stated that after this response she was quiet and astounded because [K.D.] became upset, yelled at her, and shoved the table into her. She stated that she had suffered a chest injury so I had her evaluated in the ED. [Appellant] was told to return to me to complete the CA-1 [form,] but went home stating that she had already spoken to me." C.M. advised that she had spoken with the police who "determined that this is not a case of assault…."

On October 12, 2016 C.M. provided a recorded statement to A.Y., a supervisor. She related that appellant had telephoned her on September 30, 2016 and alleged that she had been assaulted. C.M. spoke with P.N. who advised that she was sarcastic to K.D., and K.D. hit the table with her palms. She related that P.N. told her that the table did not hit appellant. C.M. walked with appellant from the police area to the ED.

P.N. completed a report of contact form for the employing establishment on October 27, 2016. She asserted that on September 30, 2016 she saw K.D.'s hands "go down on the table and it moved about 1.5 inch[s]. However, I [did not] see it hit [appellant]. [Appellant] was putting on make-up and the make-up was still on the table. She got up and [stated] I am going to the police. [Appellant] did not say anything about going to the emergency room."

In an October 13, 2016 fact-finding memorandum, V.V., a manager, discussed appellant's assertion that K.D. had pushed a table into her injuring her chest causing emotional trauma and tension at L4-5. She noted that she maintained that her chest pain aggravated a prior back injury, but that x-rays obtained that date were normal. K.D. advised that she unintentionally moved the table about an inch and a half and that the table did not touch appellant, who continued talking. V.V. indicated that P.N. witnessed the table moving, that it startled appellant, but that she did not see the table strike her. She noted that K.D.'s statement was consistent with that of the witness.

In a November 21, 2016 work status report, Dr. Jonathan Lam Yuen Watt, a Board-certified psychiatrist, diagnosed a stress reaction and occupational problems or work circumstances. He found that appellant could not work from November 21 to December 1, 2016 due to a cognitive impairment.

On December 6, 2016 Dr. Asheena Keith, a psychiatrist, obtained a history of appellant being assaulted at work and noted that the employing establishment might suspend both involved parties. She diagnosed an adjustment disorder with depressive and anxiety feature as a result of work stress.

V.V., in a December 28, 2016 e-mail, related that the written statements indicated that both appellant and K.D. engaged in a verbal altercation. She noted that appellant alleged that K.D. assaulted appellant and K.D. asserted that the table moved when she put her hands on it, but that the table did not strike appellant. V.V. related, "There was only one witness present when it happened and the witness stated that she did not see the table hit [appellant]. The table moved a little bit and [her] make-up [was] still on the table per the witness."

By decision dated January 18, 2017, OWCP denied appellant's traumatic injury claim. It found that she had not factually established the occurrence of the alleged September 30, 2016 employment incident.

In a January 24, 2017 progress report, Dr. Trixy Syu, an osteopath, obtained a history of appellant experiencing sternal pain after being hit by a table. In a January 25, 2017 attending physician's report (Form CA-20), she diagnosed costochondritis and opined that appellant was unable to work. Dr. Syu also noted that she experienced stress due to work.

Appellant, on January 28, 2017, requested an oral hearing before an OWCP hearing representative. In March 2017, she requested that OWCP's hearing representative subpoena P.N. and two other coworkers, G.M. and S.B. Appellant maintained that P.N. mistakenly stated that S.B. was in the area instead of G.M. and that S.B. could verify she was not in the area where the incident occurred, and that G.M. could verify that she heard a thump and witnessed the table pushed about 10 inches apart.[4]

On July 11, 2017 OWCP's hearing representative denied appellant's request for subpoenas. She found that P.M., B.M., and S.B. could provide evidence through a written statement or affidavit.

At the telephone hearing, held on July 18, 2017, appellant related that K.D. had previously touched her on two separate occasions, but that she did not file a complaint regarding either incident. She sought treatment at the emergency room after the September 30, 2016 incident. Appellant subsequently experienced anxiety and sternum pain. She alleged that K.D. pushed the table against her with sufficient force that she slid into the lockers that were three-feet behind the table and caused the two tables that had been pushed together to separate. Appellant related that the witnesses were afraid to provide statements for fear of reprisal. She advised that she received a three-day suspension as a result of the incident.

On August 3, 2017 appellant requested that OWCP's hearing representative issue subpoenas to obtain K.D.'s employee records documenting her misconduct.

By decision dated October 24, 2017, OWCP's hearing representative affirmed the January 18, 2017 decision. She found that appellant had not factually established that the incident occurred as alleged due to inconsistencies in the witness statements. The hearing representative further denied her request for subpoenas, finding that she had not established that she was unable to obtain the information through other means.

[4] Appellant also submitted additional medical evidence.

On appeal appellant contends that a coworker assaulted her at work and that management disciplined her even though she supported her absences with medical documentation. A coworker told her that she was afraid to submit a supporting statement.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim, including the fact that he or she 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 or specific condition for which compensation is claimed is causally related to the employment injury.[6] 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.[7]

An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[8] An employee has not met his or her burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[9] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast serious doubt on an employee's statements in determining whether a *prima facie* case has been established.[10] An employee's statement regarding the occurrence of an employment incident is of great probative value and will stand unless refuted by strong or persuasive evidence.[11]

ANALYSIS -- ISSUE 1

The Board finds that the evidence of record does not contain inconsistencies sufficient to cast serious doubt that, on September 30, 2016, K.D. put her hands on a table moving it about an inch and a half and striking appellant on the chest. Shortly, after the incident, appellant advised C.M., a supervisor, that K.D. had attacked her, sought treatment in the emergency room, and also notified the police. She confirmed that appellant sought treatment at the emergency room on September 30, 2016 and reported the incident to the police, noting that the police did not find that the incident rose to the level of an assault. C.M. related that she spoke with P.N. who informed

[5] *Supra* note 2.

[6] *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

[7] *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

[8] *See Betty J. Smith*, 54 ECAB 174 (2002).

[9] *Id*.

[10] *Linda S. Christian*, 46 ECAB 598 (1995).

[11] *Gregory J. Reser*, 57 ECAB 277 (2005).

her that the table did not strike appellant. In an October 1, 2016 statement, P.N., advised that on September 30, 2016 she was in the breakroom cleaning out her locker and making coffee. She related that appellant spoke in a sarcastic manner to K.D., who slammed her hands on the table moving it toward appellant. In an October 27, 2016 report of contact form, P.N. advised that on September 30, 2016 she witnessed K.D.'s hands hit the table and move it about an inch and a half. She related that she did not see the table strike appellant.

An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong and persuasive evidence.[12] PN. confirmed that K.D. struck the table with her hands moving it about an inch and a half, and related that she did not see the table strike appellant. She did not, however, specifically indicate that the table did not strike appellant and thus her statement does not directly contradict appellant's allegation that the table hit her in the chest when it moved. While C.M. advised that P.N. had told her that the table did not hit appellant, in her written statements P.N. indicated only that she did not see the table strike appellant.

Appellant's course of action was consistent with her account of the facts of the case and that there are no discrepancies, inconsistencies, or contradictions in the evidence which cast serious doubt that K.D. moved the table towards her hitting her in the chest.[13] Under the circumstances of this case, the Board finds that her allegations have not been refuted by strong or persuasive evidence and that there are no inconsistencies sufficient to cast serious doubt on the occurrence of the September 30, 2016 employment incident.[14]

The Board finds, however, that appellant has not established that two tables pushed together in the breakroom moved 10 inches apart or that she was pushed back into the locker by the force of the table. P.N. advised in two separate statements that the table moved about an inch and a half, and that she saw appellant get up from the table and say that she was going to the police. The evidence, therefore, does not establish that K.D. struck the table with sufficient force to separate two tables by 10 inches or push her into lockers.

As OWCP denied appellant's claim as she had not established the occurrence of an employment incident on September 30, 2016, it did not consider the medical evidence. The case will be remanded for OWCP to evaluate the medical evidence and determine whether she sustained a medical condition or disability due to the accepted September 30, 2016 work incident.[15] After such development as it deems necessary, it shall issue a *de novo* decision.

[12] *See Allen C. Hundley*, 53 ECAB 551 (2002).

[13] *See L.B.*, Docket No. 17-1515 (issued February 22, 2018).

[14] *See V.M.*, Docket No. 08-2304 (issued May 21, 2009).

[15] *See e.g., T.J.*, Docket No. 17-0831 (issued November 7, 2017) (the Board found that the claimant established employment-related exposure and remanded the case to enable OWCP to issue a *de novo* decision on his occupational disease claim).

LEGAL PRECEDENT -- ISSUE 2

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 factors of his or her federal employment.[16] To establish that an emotional condition is in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) medical evidence establishing an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the diagnosed emotional condition.[17]

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.[18] 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.[19]

ANALYSIS -- ISSUE 2

Appellant alleged that she experienced stress on September 30, 2016 after a coworker shoved a table towards her and submitted supporting medical evidence. OWCP, however, failed to develop the emotional aspect of her claim. It is required to make findings of fact and a statement of reasons regarding the material facts of the case.[20] In this case, OWCP made no specific factual findings regarding the claimed emotional condition. Its procedures provide:

> "An employee who claims to have had an emotional reaction to conditions of employment must identify those conditions. The CE [claims examiner] must carefully develop and analyze the identified employment incidents to determine whether or not they in fact occurred and if they occurred whether they constitute factors of the employment. When an incident or incidents are the alleged cause of disability, the CE must obtain from the claimant, agency personnel and others, such

[16] *See W.M.*, Docket No. 15-1080 (issued May 11, 2017); *Pamela R. Rice*, 38 ECAB 838 (1987).

[17] *Id.*, *see also Donna Faye Cardwell*, 41 ECAB 730 (1990).

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

[19] *Id.*

[20] 20 C.F.R. § 10.126; *see also Beverly Dukes*, 46 ECAB 1014 (1995).

as witnesses to the incident, a statement relating in detail exactly what was said and done."[21]

On remand, OWCP should develop the evidence regarding the claimed emotional condition in accordance with its procedures and issue an appropriate decision on the emotional condition claim.[22]

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she sustained an injury to her chest causally related to the accepted September 30, 2016 employment incident, as alleged, or whether she met her burden of proof to establish an emotional condition in the performance of duty on September 30, 2016.[23]

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17(j) (July 1997).

[22] *See M.S.*, Docket No. 06-0974 (issued December 18, 2006).

[23] In light of the Board's disposition of the merits of the case, the issue of whether OWCP properly denied appellant's request for the issuances of subpoenas is moot.

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part as modified and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 12, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board