United States Department of Labor
Employees' Compensation Appeals Board

T.L., Appellant	)	
and	)	**Docket No. 18-0100**
	)	**Issued: June 20, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Madison, AL, Employer	)	

Appearances:
Lauren Shine, Esq., for the appellant[1]
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 October 17, 2017 appellant, through counsel, filed a timely appeal from a September 26, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). 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] 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.*

[3] Together with her appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated March 14, 2018, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 18-0100 (issued March 14, 2018).

ISSUE

The issue is whether appellant has met her burden of proof to establish an emotional condition in the performance of duty.

FACTUAL HISTORY

On January 4, 2016 appellant, then a 52-year-old sales services distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on December 7, 2015 she suffered a stroke while in the performance of duty due to stress caused by Postmaster R.G. She stated that on the date of injury she worked for 6 hours, took a 10-minute break, and then worked for an additional 5½ hours prior to developing the blood clot on the left side of her brain which caused her stroke. Appellant has not returned to work.

On January 14, 2016 the employing establishment controverted appellant's claim. It disagreed with the factual allegations, noting that the events "do not seem to be work related." An employing establishment representative, R.L., noted that no medical documentation had been submitted which supported appellant's claim.

In a development letter dated January 22, 2016, OWCP advised appellant of the factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. It afforded her 30 days to submit additional evidence and respond to its inquiries.

In response, appellant submitted a hospital report dated December 7, 2015 indicating that she had been diagnosed with acute left frontal lobe cerebrovascular accident and expressive aphasia.

A December 8, 2015 magnetic resonance imaging (MRI) scan of the brain revealed a small area of evolving left front lobe infarct.

In reports dated January 12 and 14, 2016, Dr. Amit Arora, a Board-certified neurologist, diagnosed left middle cerebral artery stroke and released appellant to part-time, limited-duty work.

In a series of narrative statements appellant made general allegations relating to her treatment by the employing establishment and more specifically R.G. She claimed that she had a stroke on December 7, 2015 due to stress caused by the actions of R.G.[4] Appellant noted several

[4] Appellant claimed that several facts and items supported her claim including: (1) that appellant was placed on light duty by the employing establishment; (2) documents regarding the employing establishment's guidance on harassment issues; (3) appellant cut her lunch break short because she was so busy; (4) no one went to the hospital with appellant to tell them what happened; (5) R.G. tried to get another employee to do appellant's bid job; (6) R.G. was trying to make jobs for people without following the bidding process; (7) a coworker received a lot of favoritism and was pressuring R.G. to get appellant to do her job; (8) appellant asked to take a refresher course for the window; (9) appellant could not get any help from the employing establishment regarding workers' compensation paperwork; (10) R.G. did not complete an accident report; (11) appellant was not shown any acknowledgement for her contribution in a Thanksgiving event; (12) R.G. stood and watched the group throw parcels; (13) R.G. asked appellant questions about Family and Medical Leave Act (FMLA); (14) appellant told R.G. that someone was smoking on the back dock; (15) R.G. told staff about him being drunk and walking up "next to a fat girl" and saying that he had to get out of there; (16) R.G. introduced a new staff member and stated that appellant was reassigned because she did not have FMLA, had a good work record, and did not file grievances; and (17) R.G. called appellant into his office for 40 minutes before letting her leave the office.

events on the date of her work shift during which she had her stroke, as causative factors. She noted that: on that date she was provided only 1 break limited to 10 minutes; appellant had arrived at work at midnight and had a break at 6:00 a.m.; and that R.G. denied appellant a lunch, a break, or even time to get something to eat or drink. Appellant noted that, after being taken to the break room when falling ill, the paramedics were called, and she was in disbelief that nobody was sent to ride in the ambulance with her.

Appellant also made several allegations regarding the treatment she had received as an employee under R.G. in the period of time leading up to the date of her stroke which coincided with the busy holiday season. She generally noted that her schedule was constantly changing, breaks were denied, she had been singled out in having her breaks denied, she was bullied, that he put his arm on her, and that her blood pressure rose when she was bullied.[5]

Appellant submitted additional medical evidence dated September 9, 2013 through August 12, 2015 in support of her claim.

By decision dated April 12, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish an emotional condition arising from a compensable factor of employment.

Appellant subsequently submitted medical evidence dated January 5, 2010 through March 28, 2016.

On April 28, 2016 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

On June 7, 2016 appellant submitted copies of largely illegible text messages to support her claims against R.G.

By decision dated September 2, 2016, the hearing representative found that the case was not in posture for review and remanded the case for OWCP to make findings of fact as to whether

[5] Appellant made numerous allegations specifically against R.G. in a subsequent statement, including that: (1) several mornings before her stroke R.G. would play with her hours, (2) R.G. never told anyone to take another break or go to lunch, (3) R.G. knew what he was doing by changing her work hours almost every day; (4) she was the only one whose start hours were changed; (5) on the day of her stroke, R.G. did not allow the employees to get anything to eat or drink; (6) R.G. admitted to appellant and her female coworker that his fault was women; (7) R.G. was back to his bullying self; (8) D.W. stated that he would not allow R.G. to bully him; (9) J.K. claimed that he would not take R.G.'s mouth; (10) appellant was seeking monetary settlement to stop R.G. from bullying because he tried to pick fights with her and he enjoyed making her feel as if she did something wrong; (11) appellant arrived to work at midnight and did not get a break until 6:00 a.m.; (12) R.G. would change her hours from midnight to 4:00 a.m.; (13) appellant was the only clerk whose hours were changed; (14) appellant's blood pressure went up after R.G. started harassing her; (15) everywhere R.G. went he had trouble; (16) the Alabama District knew R.G. was trouble; (17) appellant considered R.G. to be the biggest bully she had ever known and he used his position to account for his actions of bullying, he kept calling her out in front of people, fussed at her on the floor, talked to her like trash, she claimed to be his "Cinderella," and was fed up with his bullying and the longer he was there the more afraid of him she got; (18) appellant knew R.G. was the reason for her stroke; (19) R.G. was a sexual harassment big bully; (20) R.G. walked up behind appellant and put his arm around her neck and asked her, "How are you today?"; (21) R.G. stated that appellant was pretty in uniform; (22) R.G. stated that, "Isn't it about time for you to leave?"; (23) R.G. told carriers how stupid they were; and (24) R.G. had been on appellant's case ever since he met a person named M.B.

the evidence submitted established the alleged incidents had occurred and whether the incidents were compensable factors of employment.

Appellant submitted an August 25, 2016 progress report from Dr. Arora who indicated that appellant denied new stroke-like symptoms since her last office visit.

Appellant submitted additional narrative statements dated January 9, 2015 reiterating her allegations and documentation dated January 7 and 9, September 25, and October 16, 2015 related to her two Equal Employment Opportunity (EEO) complaints that she had filed.

In a witness statement dated September 29, 2016, K.T. indicated that appellant came in at midnight the day of her stroke, December 7, 2015, when her usual time was 4:00 a.m. The coworker stated that R.G. was having appellant come in "at all crazy hours" and that he did not give breaks or lunches on the day of her stroke. K.T. claimed that R.G. not only denied lunches or breaks, but he told employees that they would "have to earn them." He noted that at 6:00 a.m. a coworker, D.W., stated that he was going to go get breakfast and he returned from "Jack's" and had gotten everyone something to eat. K.T. stated that he saw appellant standing over the trash can for maybe 10 minutes trying to eat a biscuit, but the supervisor kept "hurrying [appellant] up to get back to work." He also noted that he had previously been involved in appellant's second EEO complaint and he had testified that she or R.G. had to be removed or something bad was going to happen and a few weeks thereafter she had her stroke.

In a statement dated October 4, 2016, R.G. indicated that the allegations made against him by appellant were totally false. He stated that she was not mandated by him to work 12 hours, no one was denied a break at any time, and no one was mandated to work without having a break. R.G. indicated that he had not called appellant "stupid," nor had he called her any other names. He stated that no hours had been changed, both EEO complaints had no findings of wrong-doing by him, and the information she had provided was not factual as breaks and lunches were allowed.

In an October 13, 2016 e-mail message, R.L., a subsequent Postmaster at the employing establishment, stated that she heard nothing that would make her think R.G. had done anything other than try to make a difference in his employing establishment and that his efforts were met with severe opposition from the employees.

In an e-mail message dated October 20, 2016, D.M. stated that she "was involved with" the employing establishment from March 2015 until February 2016 and was aware that several employees did not like R.G. She indicated that during that time she never witnessed R.G. "targeting" or "bullying" an employee. D.M. noted that many employees had excessive attendance issues and, to her knowledge, R.G. had chosen to attempt to "coach" employees concerning performance/attendance issues.

By decision dated January 5, 2017, OWCP denied appellant's claim, finding that the evidence of record failed to establish an emotional condition arising from a compensable factor of employment. It found that none of the alleged incidents were compensable factors of her federal employment.

On February 7, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

The hearing was held on July 12, 2017. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence. OWCP did not receive additional evidence.

By decision dated September 26, 2017, OWCP's hearing representative affirmed the January 5, 2017 decision.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit (1) medical evidence establishing that he or she has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or 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. 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.[9] 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.[10]

To the extent that disputes and incidents alleged as constituting harassment by coworkers are established as occurring and arising from a claimant's performance of his or her regular duties, these could constitute employment factors.[11] However, for harassment to give rise to a compensable disability under FECA there must be evidence that harassment did, in fact, occur. Mere perceptions of harassment are not compensable under FECA.[12]

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[6] *M.C.*, Docket No. 18-1354 (issued April 2, 2019); *Leslie C. Moore*, 52 ECAB 132 (2000).

[7] *B.G.*, Docket No. 18-1080 (issued March 26, 2019); *Dennis J. Balogh*, 52 ECAB 232 (2001).

[8] *Id*.

[9] *Supra* note 2; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[10] *See D.B.*, Docket No. 18-1025 (issued January 23, 2019); *Gregorio E. Conde*, 52 ECAB 410 (2001).

[11] *See M.R.*, Docket No. 18-0304 (issued November 13, 2018); *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[12] *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[13] However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[14] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[15]

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 employment factors.[16] 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.[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

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

Appellant alleged that she suffered a stroke as a result of a number of employment incidents and conditions. OWCP denied her claim finding that she had failed to establish a compensable employment factor. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

[13] *See C.A.*, Docket No. 18-0824 (issued November 15, 2018); *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[14] *I.P.*, Docket No. 17-1178 (issued June 12, 2018); *William H. Fortner*, 49 ECAB 324 (1998).

[15] *J.W.*, Docket No. 17-0999 (issued September 4, 2018); *Ruth S. Johnson*, 46 ECAB 237 (1994).

[16] *M.R.*, Docket No. 16-0125 (issued October 2, 2017); *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[17] *A.C.*, Docket No. 18-0484 (issued September 7, 2018); *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[18] *L.Y.*, Docket No. 18-1619 (issued April 12, 2019); *F.K.*, Docket No. 17-0179 (issued July 11, 2017); *S.W.*, Docket No. 15-1260 (issued November 4, 2015).

[19] *Id.*

The Board notes that appellant's allegations do not pertain to her regular or specially assigned duties under *Cutler*.[20] Rather, appellant has alleged that she was stressed due to a hostile work environment and harassment by R.G., in addition to instances of overwork and changes in her work hours and break times resulting in her suffering a stroke while at work. The Board has found that administrative or personnel matters are considered to be compensable employment factors where the evidence shows error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[21]

Regarding appellant's general contention that she was subjected to harassment at work, particularly by the R.G., the Board has held that mere perceptions of harassment or discrimination are not compensable under FECA,[22] and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.[23] Although appellant indicated that she had filed two EEO complaints, the record does not contain documentation in support of such a complaint being successful in establishing harassment or other misconduct by R.G. The Board has long held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[24] The Board finds that the employing establishment's report of its investigation of R.G., is not a finding of harassment. It is not for OWCP or the Board to prejudge matters which appear to still be pending such as EEO matters.[25] In the absence of such a decision, the evidence as it currently stands is insufficient to discharge appellant's burden of proof to substantiate her allegations of harassment in the workplace. Appellant submitted nothing other than her own statements which might show a persistent disturbance, torment, or persecution, *i.e.*, mistreatment by employing establishment management.[26] As such the Board finds that she has not met her burden of proof to establish a factual basis for her general claims of harassment by probative and reliable evidence.[27]

[20] *See Lillian Cutler supra* note 9.

[21] *L.D.*, Docket No. 15-0706 (issued May 9, 2016).

[22] *D.F.*, Docket No. 17-1324 (issued April 24, 2018); *James E. Norris*, 52 ECAB 93 (2000).

[23] *Id*.

[24] *G.R.*, Docket No. 15-0052 (issued September 22, 2017); *Parley A. Clement*, 48 ECAB 302 (1997).

[25] *See C.O.*, Docket No. 12-1435 (issued January 15, 2013) (where the record did not contain any supportive witness statements, any evidence regarding the findings of an EEO investigation or a final EEO decision that would establish harassment); *T.F.*, Docket No. 12-0439 (issued August 20, 2012) (where the Board found that without a formal final decision that a coworker's actions did, in fact, violate the employing establishment's zero tolerance policy on threats, assault and violence, an investigative report was not sufficient to discharge the claimant's burden of proof to substantiate his allegations of harassment by the coworker and error by management).

[26] *Z.S.*, Docket No. 16-1783 (issued August 16, 2018); *Beverly R. Jones*, 55 ECAB 411 (2004).

[27] *R.V.*, Docket No. 18-0268 (issued October 17, 2018); *Robert Breeden*, 57 ECAB 622 (2006).

Appellant has also alleged that she was overworked and denied breaks on the day of her stroke and that these acts, along with R.G. "messing around" with her hours, occurred in the time immediately prior to December 7, 2015 when she suffered her stroke.

The Board has held that overwork, when substantiated by sufficient factual information to corroborate appellant's account of events, may be a compensable factor of employment.[28] In this case, appellant made specific statements relating to being overworked during the holiday period and having her hours changed and generally extended by R.G. Her statements are substantiated by the statement of her coworker, K.T. who confirmed that R.G. was having her come in "at all crazy hours" and that R.G. had not provided breaks or lunches on the day of her stroke. K.T. stated that while he did notice appellant attempting to eat a biscuit over a trashcan, he also indicated that her supervisor kept "hurrying her up to get back to work." Moreover, in R.G.'s October 4, 2016 statement he acknowledged that she worked 12-hour shifts, but stated that these hours were not mandatory. The record substantiates appellant's contentions that she was overworked, especially on December 7, 2015 when she was instructed to arrive at work 4 hours early, was then required to work 6 hours prior to a 10-minute break, and she was denied a break or even sufficient time to eat or drink. The Board therefore finds that she has established a compensable employment factor relating to overwork.

On appeal counsel contends that OWCP has improperly developed the claim as an occupational disease claim. Rather, she contends that OWCP should have developed the claim as a traumatic injury claim in which appellant sustained a stroke because, on the night of the stroke, appellant was not allowed to take appropriate breaks, including meal breaks after enduring incredibly long overtime hours on the days leading up to her stroke at work. The Board has found that appellant has established a compensable employment factor for an occupational disease claim, leaving the issue of causal relationship between the accepted factor of overwork and the stroke. The Board does find, however, that counsel's contention has merit and thus, on remand to OWCP, it should also consider whether appellant has, in the alternative, met her burden of proof to establish a stroke causally related to a traumatic incident on December 7, 2015.

By denying appellant's claim, OWCP has not reviewed the medical opinion evidence submitted on the issue of causal relationship. The Board will therefore set aside OWCP's September 26, 2017 decision and remand the case for review of the medical evidence as it relates to the accepted compensable factor of employment and in relation to a traumatic employment incident.[29] After such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[28] *See supra* note 14.

[29] *See E.M.*, Docket No. 16-1695 (issued June 27, 2017); *Tina E. Francis,* 56 ECAB 180 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: June 20, 2019
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