United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 19-0443**
	)	**Issued: November 15, 2019**
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, OFFICE OF FAIR HOUSING & EQUAL OPPORTUNITY, Los Angeles, CA, Employer	)	

Appearances:
Stephanie Leet, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 21, 2018 appellant, through counsel, filed a timely appeal from a June 27, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

[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.

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]

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 June 29, 2017 appellant, then a 50-year-old equal opportunity specialist, filed a traumatic injury claim (Form CA-1) alleging that on June 5, 2017 she sustained an emotional condition due to actions of G.C., her first-line supervisor. She related that on June 5, 2017 G.C. informed her by e-mail that she was being investigated for a workplace violation. G.C. provided no other details and informed her that a meeting would be held in four days. Appellant reported that she felt violated by her supervisors who had previously denied her reasonable accommodations request one month earlier despite having provided two doctor's notes. On the reverse side of the claim form, J.B., a supervisor, controverted the claim noting that appellant was claiming an emotional reaction to an e-mail notice which requested a meeting. She argued that appellant's emotional reaction was self-generated and did not arise out of or in the course of employment.[4]

In support of her claim, appellant submitted medical reports dated May 4 through July 7, 2017 which discussed her psychiatric conditions in relation to employment-related factors.

By development letter dated July 17, 2017, OWCP informed appellant that the evidence of record was insufficient to support her claim. It advised appellant of the factual and medical evidence needed. OWCP requested that she clarify whether she was claiming a traumatic injury or occupational disease and provided a questionnaire for completion. It afforded appellant 30 days to submit the necessary evidence.

In an August 12, 2017 narrative statement, appellant responded to OWCP's development letter and reiterated that she was claiming a traumatic injury which occurred on June 5, 2017. She reported while the continued mistreatment from her supervisors was both unfair and stressful, she filed a Form CA-1 due to the e-mails and other events that occurred on June 5, 2017. Appellant

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that following the June 27, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

[4] The Board notes that appellant has a prior occupational disease claim which had been separately adjudicated under OWCP File No. xxxxxx818. In that claim appellant alleged an eye strain and post-traumatic stress disorder (PTSD) due to her managers' failure to provide accommodation and to stereo-type her as lazy. By decision dated December 18, 2017 appellant's occupational disease claim was denied. This file has been combined with File No. xxxxxx224 with File No. xxxxxx818 serving as the master file.

explained that about a year ago, she had filed an Equal Employment Opportunity (EEO) claim against her first, second, and third-line supervisors for failure to promote her and the preferential hiring of G.C. Her first-line supervisor was G.C. and her second-line supervisor was D.Q. Appellant explained that since G.C. became her supervisor, he had routinely sent her threatening e-mails and randomly subjected her to acts of disparate treatment when compared to her peers. She stated that she had recently requested a medical transfer from G.C.'s unit based on his lack of understanding and inability to accommodate her severe anxiety and depression. Appellant reported that she was working from home and awaiting the transfer. However, she went into the office on Friday, June 2, 2017 because G.C. insisted. Appellant reported that on Monday, June 5, 2017 at 10:30 a.m., she was working from home on her regularly scheduled tour of duty when she received an e-mail from G.C. informing her that he needed to meet with her on June 8, 2017 to conduct an investigation and ask her questions regarding a workplace matter. He further informed her that she had a right to have a union representative present. Appellant stated that employees who were teleworking were not usually bothered unless it was a serious matter. She related that she did not understand the purpose of the meeting and why G.C. was contacting her at home since she had just been in the office on Friday. Appellant further contended that working for the employing establishment over the course of nine years, she could not recall ever receiving a notice of possible discipline which related that she could have a union representative present. She reported that because she was advised that a union representative could be present, she was terrified that she was in trouble, even though she had done nothing wrong, and feared that this was some new form of retaliation for her transfer request. Appellant responded to G.C.'s e-mail at 11:46 a.m. and asked him when the matter to be discussed occurred. G.C. responded to her stating that the details of the matter would be discussed at the meeting on Thursday. Appellant then e-mailed G.C. at 11:56 a.m. informing him that this was triggering her anxiety and major depression and that four days was too long to wait to address the issue. She asked that he please provide her details so that she could know what the matter was about and prepare as not knowing was aggravating her disability and triggering her PTSD. Appellant reported that she received no response to her last e-mail. She tried to continue to work but her anxiety kept mounting as she could not figure out what she had done, and she felt all of the past abuse by her supervisors rush back to her. Appellant reported that this caused a panic attack as her face began to burn and became numb, her breathing was short and quick, her chest tightened, and her head hurt. At 1:45 p.m. she again e-mailed G.C. informing him that he had triggered a panic attack and she needed to go to urgent care. G.C. responded that if she was in need of urgent care then she should go seek medical assistance. Appellant went to urgent care at Facey Medical Center and informed them that she was having a nervous breakdown due to actions of the employing establishment. The treating providers told her that because she alleged her condition was caused by the employing establishment, they could not treat her unless the employing establishment agreed. Appellant provided them with the contact information for her second-line supervisor, D.Q. However, D.Q. refused to authorize her treatment, despite appellant protesting that it was a medical emergency. Appellant reported leaving urgent care without medical treatment and self-medicated with her own anti-depressants and anti-anxiety medications. She reported that she had previously been treated for general anxiety disorder, major depressive disorder, and beginning in 2016, PTSD as a result of interacting with rogue supervisors G.S., D.Q., and A.Q. who discriminated against her in hiring, promotions, reasonable accommodations, and other retaliatory actions. Appellant reported that she had never been hospitalized for an emotional condition. She further stated that she was previously prescribed anti-depressants in 2005 after her son was born but stopped taking the

medication around 2008. Appellant had a period of wellness with no medication for several years but then had to resume taking medication after she began working for the employing establishment and the stress mounted from her job. She further stated that many of her medications were not prescribed until after she began working for the employing establishment due to depression, anxiety, prolonged stress, high blood pressure, and sleep deprivation.

In support of her claim, appellant provided the June 5, 2017 e-mail correspondence with G.C. The record reflects that on June 5, 2017 at 11:02 a.m., G.C. e-mailed appellant relating that, "I need to meet with you on Thursday, June 8, 2017 at 10:30 a.m. to conduct an investigation and ask questions regarding a workplace matter. Please note that you have a right to have a union representative present. Thursday is one of your telework days, therefore I will provide you with a call-in number." At 11:37 a.m., appellant responded to G.C. and asked, "When did the matter occur?" G.C. replied at 11:46 a.m. and stated, "The details of the matter will be discussed at the meeting on Thursday."

At 11:54 a.m., appellant replied to G.C. and stated:

> "You are creating anxiety. I didn't want to come into the LA Office because of the drama that you guys create. I requested 100% telework. I came because you directed me to. Now you are triggering anxiety and major depression that is going to require me to take additional medication. Four days is too long to wait to address the issue. Please provide details, so that I can know what is going on and be prepared. At this point you are aggravating my disability and triggering PTSD, with your 'secrets.'" No reply was received and appellant replied again at 1:45 p.m. stating, "You have triggered a panic attack. I need to go to urgent care." G.C. replied at 1:55 p.m. stating, "Yes, if you are in need of urgent care, please go seek medical assistance right away."

Appellant also submitted medical reports documenting treatment for her emotional condition.

In a July 28, 2017 report from Facey Medical Foundation, Vanessa Jimenez, the workers' compensation coordinator, explained that appellant visited their urgent care facility on June 5, 2017 but that there was no medical report available as she was not seen by the provider. She reported that appellant came into the office on that date with complaints of chest pain, shortness of breath, stress, and anxiety. Appellant was provided with a short form to complete with the reason for the visit, which included whether the visit was for a work-related condition. The receptionist noticed that it was not checked off and she verbally asked appellant if her illness was work related to which appellant responded "yes." At that time the receptionist explained the workers' compensation process and let her know that, in order to treat her, they needed to obtain authorization from her supervisor. If she was not able to obtain authorization, she would have to be referred to the nearest emergency department for treatment as her insurance would not cover work-related visits and she would end up with a bill. The receptionist then called appellant's supervisor in an attempt to get the verification needed for treatment. The supervisor informed her that he would not be able to authorize it at that moment since the authorization had to come from Washington and it was already too late. She reported that appellant was very frustrated and clearly

having a hard time. Nurses were in the receptionist area trying to assist her, as well making sure that she was stable enough to go to the emergency department.

By decision dated October 26, 2017, OWCP denied appellant's traumatic injury claim finding that her alleged June 5, 2017 injury did not occur in the performance of duty. It accepted that on June 5, 2017 she received an e-mail from G.C. regarding a June 8, 2017 investigation. However, OWCP found that this event was not a compensable factor of employment because the e-mail was administrative and the employing establishment had the right to perform the investigation absent abuse.

On November 25, 2017 appellant requested an oral hearing before an OWCP hearing representative.

A hearing was held on May 16, 2018. During the hearing, appellant described prior interactions with her supervisors who discriminated against her and treated her unfairly, her requests for reasonable accommodations, and the circumstances surrounding the June 5, 2017 employment incident.

Counsel subsequently submitted a brief in support of appellant's emotional condition claim, along with additional factual and medical evidence, including a July 10, 2017 final decision from the employing establishment's reasonable accommodations committee (RAC). The RAC responded to appellant's May 5, 2017 request to be reassigned and to telework full time, which D.Q. and G.C had previously denied. The RAC approved in part appellant's request to telework, but found that she had to appear in the office one day per week. It further denied her request for reassignment.

By decision dated June 27, 2018, OWCP's hearing representative affirmed the October 26, 2017 decision finding that appellant failed to establish a compensable employment factor in the performance of duty.

LEGAL PRECEDENT

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.[5] To establish that he or she sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; (2) medical evidence establishing that he or she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.[6]

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

[5] *See Pamela R. Rice*, 38 ECAB 830 (1987).

[6] *See C.M.*, Docket No. 17-1076 (issued November 14, 2018); *S.J.*, Docket No. 12-1512 (issued February 12, 2013).

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]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer, not the regularly or specially assigned work duties of the employee, and are not covered under FECA.[9] 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.[10] 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.[11]

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.[12] If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.[13] 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.[14]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.[15] The nonadversarial policy of proceedings

[7] *Lillian Cutler*, 28 ECAB 125 (1976).

[8] *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005).

[9] *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[10] *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *William H. Fortner*, 49 ECAB 324 (1998).

[11] *E.M.*, Docket No. 16-1695 (issued June 27, 2017); *Ruth S. Johnson*, 46 ECAB 237 (1994).

[12] *K.S.*, Docket No. 18-0845 (issued October 26, 2018); *D.L.*, 58 ECAB 217 (2006); *Jeral R. Gray*, 57 ECAB 611 (2006).

[13] *B.B.*, Docket No. 19-0682 (issued September 9, 2019)*; David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

[14] *K.J.*, Docket No. 17-1851 (issued September 25, 2019); *Robert Breeden*, 57 ECAB 622 (2006).

[15] *K.S.*, *supra* note 12.

under FECA is reflected in OWCP's regulations at section 10.121.[16] Once OWCP undertakes to develop the evidence, it has the responsibility to do so in a proper manner.

ANALYSIS

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

The Board notes initially that appellant's allegations do not pertain to her regular or specially assigned duties on June 5, 2017, under *Lillian Cutler*.[17]

The record reflects that on June 5, 2017 appellant's supervisor G.C. advised her of a meeting on June 8, 2017 in order to conduct an investigation and ask questions regarding a workplace matter. G.C. further advised appellant that she had a right to have a union representative present. Appellant requested that G.C. provide further information regarding the matter but he declined and stated that the matter would be discussed in the meeting on Thursday. She again requested that he provide some information pertaining to what the investigation was about and stated that she could not wait four days as this was triggering her anxiety and major depression. However, instead of advising appellant as to why she was part of an investigation regarding a workplace matter, G.C. refused to provide her any information despite her repeated requests. This refusal was contemporaneous with appellant's treatment for stress-related conditions on June 5, 2017 as evidenced by the medical reports. Appellant further alleged that supervisor D.Q. denied authorization of her medical treatment on that date when asked by the medical provider. She provided a June 5, 2017 report from Facey Medical Foundation validating her claim that she attempted to seek treatment on that date but could not be treated as authorization for medical treatment was denied by her supervisor. Appellant submitted evidence which revealed that the employing establishment was aware of her previously diagnosed emotional condition through her requests for reasonable accommodations. When an employing establishment's actions in an administrative matter are shown to be erroneous or abusive, the claim is compensable.[18] OWCP, however, failed to obtain further information from the employing establishment regarding these June 5, 2017 allegations before denying appellant's claim.

In *B.G., widow of M.G.*,[19] the Board set aside OWCP's decision finding that appellant had not established a compensable employment factor. The record revealed that on May 1, 2014 a supervisor advised the employee that an investigation of his behavior was complete and informed him of a meeting on May 5, 2014 regarding potential disciplinary action. However, the supervisor refused to inform the employee of the results of the investigation and made him wait until May 5, 2014, the following Monday for a meeting. This refusal was contemporaneous with the employee's treatment for stress-related conditions. The Board found that there was sufficient

[16] 20 C.F.R. § 10.121.

[17] *Supra* note 7; *see also F.V.*, Docket No. 19-0006 (issued September 19, 2019).

[18] *Id.*

[19] Docket No. 18-1080 (issued March 26, 2019).

evidence of record to establish that the actions of the supervisor from May 1 to 5, 2014 constituted error or abuse on the part of the employing establishment.[20]

In this instance, appellant has submitted evidence which supports that the employing establishment was aware of her emotional condition through her previous requests for reasonable accommodations and EEO complaints. She submitted evidence which established that on June 5, 2017, her supervisor notified her of a workplace investigation to be held on June 8, 2017, and that she had a right to have a union representative present. The corresponding e-mails also showed that the supervisor refused to provide her any information regarding the investigation despite her repeated requests and alerting him that this was triggering her anxiety and depression. Medical evidence establishes that appellant went to urgent care that same date but that her supervisor refused to authorize the medical treatment, causing her to go home untreated.

OWCP's procedures recognize that in certain types of claims, such as a stress claim, a statement from the employer is imperative to properly develop and adjudicate the claim.[21] Although it is appellant's burden to establish her claim, OWCP is not a disinterested arbiter, but rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[22] OWCP failed to develop the evidence by requesting information from the employing establishment regarding appellant's allegations of abuse. It also did not request that the employing establishment submit evidence of its policy regarding notifying employees of meetings regarding investigations and possible disciplinary actions.

The Board finds that because OWCP failed to send a claim development letter to the employing establishment requesting the required information, the present claim has not been properly developed.[23] Based on the case record before it, the Board cannot determine whether the administrative actions on the part of the employing establishment amounted to error or abuse.

For these reasons, the case will be remanded to OWCP to obtain additional information from the employing establishment regarding the June 5, 2017 work-related incident.[24] After carrying out such further development, OWCP shall issue a *de novo* decision, containing adequate findings of fact and a statement of reasons, with respect to appellant's emotional condition claim.[25]

[20] *See M.C.*, Docket No. 14-1135 (issued June 7, 2016) (the Board found error or abuse on the part of the employing establishment where a security officer testified that another security officer did not follow its own de-escalation policy when he placed the claimant in a control hold and escorted her off the premises).

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7(a)(2) (June 2011).

[22] *C.F.*, Docket No. 18-1607 (issued March 12, 2019); *D.M.*, Docket No. 14-0460 (issued February 11, 2016); *C.S.*, Docket No. 14-1994 (issued January 21, 2015).

[23] *C.S.*, Docket No. 18-1733 (issued May 24, 2019).

[24] *L.B.*, Docket No. 17-1671 (issued November 6, 2018).

[25] *L.B.*, Docket No. 15-0905 (issued September 19, 2016).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.[26]

Issued: November 15, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[26] Upon remand OWCP shall administratively combine File No. xxxxxx209 (accepted for unspecified subjective visual distances (eye strain) and aggravation (temporary) of convergence insufficiency) with File Nos. xxxxxx818 and xxxxxx224.