

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

V.H., Appellant)	
)	
and)	Docket No. 19-0827
)	Issued: November 20, 2019
U.S. POSTAL SERVICE, WEATHERS POST)	
OFFICE, Swansea, IL, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 5, 2019 appellant filed a timely appeal from a November 16, 2018 merit decision and a February 21, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an emotional condition in the performance of duty, as alleged; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 16, 2016 appellant, then a 55-year-old supervisor of customer services, filed a traumatic injury claim (Form CA-1) alleging that on September 15, 2016 she developed anxiety, panic attacks, and depression when she was "suddenly informed that [she] would be returning to a hostile and abusive work environment -- after the postmaster told [her] that [she] would not be returning back there."³

On September 16, 2016 the employing establishment provided appellant with an authorization for examination and/or treatment (Form CA-16) regarding her alleged emotional condition. Dr. Michael A. Hinz, a clinical psychologist, completed the physician's portion of the form on September 16, 2016 and diagnosed anxiety and panic disorder. He checked a box marked "yes" indicating that her diagnosed conditions were caused or aggravated by her history of being returned to a hostile and abusive work environment. Dr. Hinz opined that appellant was totally disabled from work.

In development letters dated October 4, 2016, OWCP requested additional factual evidence and medical evidence from appellant. It also requested additional factual evidence from the employing establishment. OWCP requested that a knowledgeable supervisor respond regarding the accuracy of the statement provided by appellant, provide her position description noting any stressful activities in the position, a listing of the accommodations made for her due to her stress, along with various information regarding staffing at the postal establishments. It afforded both parties 30 days to respond.

The employing establishment responded on October 7, 2016 and submitted an e-mail from appellant's supervisor, P.N., who noted that appellant received an e-mail directing her to return to the employing establishment. Appellant asserted that the postmaster had informed her that she would not be returning to the employing establishment. She became very upset, crying hysterically. P.N. reported, "All I know is [appellant] was not supposed to return to [the employing establishment] where this all started with [C.G.] the manager." Appellant further noted that an initial management inquiry process (IMIP) was conducted, but that she was unaware of the outcome.

On October 15, 2016 appellant responded to OWCP's request for factual information. She noted that she had previously been prescribed medication for an emotional condition, but was not currently taking medication. Appellant indicated that she had been seeing a psychologist weekly

² Docket No. 18-0273 (issued July 27, 2018).

³ The record indicates that appellant has two prior emotional condition claims under OWCP File Nos. xxxxxx802 and xxxxxx658, both of which were denied by OWCP. In OWCP File No. xxxxxx535, OWCP accepted her occupational disease claim for a single episode of major depression on April 13, 2001. Appellant's claims have not been administratively combined.

for depression concerning pain and recovering from mistreatment from previous managers. She alleged that she had an ongoing issue with the manager of the employing establishment where she was directed to return. Appellant noted that she had left the employing establishment in mid-February 2016 because of a hostile situation in which the manager threatened her job on a daily basis. She asserted that the postmaster assured her that she would not be returning to the same employing establishment facility. On September 15, 2016 appellant received a schedule from the manager of the employing establishment directing her to report back on September 17, 2016. Upon receipt of this schedule, she became nervous, panicky, fearful, nauseated, and began crying uncontrollably.

In a note dated October 26, 2016, Dr. Hinz reported that he had treated appellant since August 6, 2007 due to a previously accepted work-related claim for major depression. He attributed her current condition of panic disorder to a work injury on September 15, 2016 when she was informed that she would be reassigned back to her previous workstation where the manager had harassed, emotionally abused, and demeaned her, creating a hostile work environment.

On October 26, 2016 Dr. Hinz completed a form report and diagnosed anxiety and panic attack symptoms. He attributed these conditions to a fear reaction and feelings of vulnerability and helplessness as appellant was faced with having to return to a hostile work environment and to work under a manager who had engaged in harassment and emotionally abusive behaviors toward her in the past. Dr. Hinz opined that her anxiety and panic worsened her depressive symptoms and increased her chronic pain levels.

By decision dated January 24, 2017, OWCP denied appellant's emotional condition claim, finding that her emotional reaction to being directed to return to the employing establishment was not compensable. It also found that appellant had not submitted any evidence corroborating her allegation that hostile conditions existed at the employing establishment.

On February 3, 2017 appellant requested reconsideration of the January 24, 2017 OWCP decision. In support of this request, she contended that she was in fact at work, during work hours when her anxiety attack occurred, that her manager confirmed the change of assignment and provided her with the Form CA-16, and that she was directed to report to the employing establishment on September 16, 2016.

By decision dated May 4, 2017, OWCP reviewed the merits of appellant's claim, but denied modification of the January 24, 2017 decision. It found that she failed to provide evidence corroborating her allegations that she was inappropriately reassigned to the employing establishment, that she experienced a hostile work environment at the employing establishment, or that the postmaster provided her with assurances that she would not return to the employing establishment where she previously worked.

On June 20, 2017 appellant requested reconsideration of the May 4, 2017 merit decision. She provided a letter from her supervisor, P.N., that appellant worked at the employing establishment during the month of September 2016. P.N. noted that when appellant received confirmation that she was to report back to the employing establishment, she became upset.

By decision dated September 11, 2017, OWCP denied modification of its May 4, 2017 decision finding that appellant had not implicated a compensable factor of employment on September 15, 2016 to which she attributed her emotional condition.

Appellant appealed the September 11, 2017 OWCP decision to the Board. In its July 27, 2018 decision, the Board found that the employing establishment did not adequately respond to the October 4, 2016 development letter. It noted that the response from P.N. suggested that the employing establishment should have documentation regarding the events at the employing establishment and should have documentation addressing P.N.'s assertion that appellant was not to return to the employing establishment. The Board, on remand, directed OWCP to obtain additional information from the employing establishment about appellant's allegations of error or abuse and a hostile work environment, including information about the employment incidents and the IMIP.

On remand OWCP sent a September 18, 2018 development letter to the employing establishment requesting that it provide documents regarding the events at the employing establishment involving appellant and C.G. It noted that in the absence of a full reply, it may accept her allegations as factual and afforded 30 days for a response.

In an e-mail dated October 18, 2018, C.V., the postmaster, denied telling appellant that she would never have to return to the employing establishment. On October 19, 2018 P.N. reported that she did not know who told appellant that appellant would never go back to the employing establishment and that she was not involved in that conversation.

By decision dated October 26, 2018, OWCP denied appellant's claim, finding that the evidence of record did not establish that she was told that she would never have to return to the employing establishment. Thus, the requirements had not been met for establishing an emotional condition arising during the course of employment and within the scope of acceptable work factors as defined by FECA. OWCP issued an amended decision dated November 16, 2018, finding that there was no evidence of administrative error or abuse in her reassignment to the employing establishment.

On November 30, 2018 appellant requested reconsideration. She contended that the employing establishment's response was untimely and did not comply with the requests from OWCP and the Board.

By decision dated February 21, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim in accordance with 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual 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

⁴ *Supra* note 1.

disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵ 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.⁶

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) medical evidence establishing that he or she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.⁷

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.⁸ 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 under FECA. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the concept or 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.¹¹ On the other hand, when an injury or illness results from an employee's feelings of job insecurity *per se*, fear of a reduction-in-force, his or her frustration from not being permitted to work in a particular environment or to hold a particular position, unhappiness with doing work, or frustration in not given the work desired, such injury or illness falls outside FECA's coverage because they are found not to have arisen out of employment.¹²

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 compensable factors of

⁵ *A.J.*, Docket No. 18-1116 (issued January 23, 2019); *Gary J. Watling*, 52 ECAB 278 (2001).

⁶ 20 C.F.R. § 10.115(e); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *see T.O.*, Docket No. 18-1012 (issued October 29, 2018); *see Michael E. Smith*, 50 ECAB 313 (1999).

⁷ *S.K.*, Docket No. 18-1648 (issued March 4, 2019); *George H. Clark*, 56 ECAB 162 (2004)

⁸ *T.L.*, Docket No. 18-0100 (issued June 20, 2019); *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁹ 28 ECAB 125 (1976).

¹⁰ *S.K.*, *supra* note 7; *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

¹¹ *Supra* note 9; *O.P.*, Docket No. 19-0445 (issued July 24, 2019); *Trudy A. Scott*, 52 ECAB 309 (2001).

¹² *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *William E. Seare*, 47 ECAB 663 (1996).

employment and may not be considered.¹³ If an employee does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. If a compensable factor of employment is substantiated, OWCP must base its decision on an analysis of the medical evidence which has been submitted.¹⁴

OWCP's Federal (FECA) Procedure Manual provides that, if an employing establishment fails to respond to a request for comments on a claimant's allegations, OWCP's claims examiner may usually accept the claimant's statements as factual. However, acceptance of the claimant's statements as factual is not automatic in the absence of a reply from the employing establishment, especially in instances where performance of duty is questionable. OWCP's Federal (FECA) Procedure Manual further notes that the Board has consistently held that allegations unsupported by probative evidence are not established and that OWCP's claims examiner should consider the totality of the evidence and evaluate any inconsistencies prior to making a determination.¹⁵

ANALYSIS -- ISSUE 1

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

In its prior decision, the Board found that appellant had attributed her emotional condition to error and abuse in administrative matters. As a general rule, administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regularly or specially assigned work duties of the employee and are not covered under FECA.¹⁶ In *Thomas D. McEuen*,¹⁷ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of an employee. However, the Board has also held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, such action will be considered a compensable employment factor.¹⁸ In determining whether the employing establishment erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹⁹

¹³ *B.S., id.*; *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁴ *S.K., supra* note 7; *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5d(1) (June 2011). See also *L.B.*, Docket No. 17-1671 (issued November 6, 2018); *R.B.*, Docket No. 14-1663 (issued September 29, 2015) (citing Chapter 2.800.5d(1)).

¹⁶ *S.K., supra* note 7; *Matilda R. Wyatt*, 52 ECAB 421 (2001).

¹⁷ 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹⁸ *S.K., supra* note 7; *William H. Fortner*, 49 ECAB 324 (1998).

¹⁹ *S.K., id.*; *Ruth S. Johnson*, 46 ECAB 237 (1994).

Appellant has attributed her emotional condition to actions of the employing establishment including: notification on September 15, 2016 of her transfer back to the employing establishment on September 16 or 17, 2016, that she was inappropriately reassigned to the employing establishment on September 15, 2015 after the postmaster provided her with assurances that she would not return to the same employing establishment facility, and that she experienced a hostile work environment at the employing establishment.

In its July 27, 2018 decision, the Board set aside OWCP's September 11, 2017 decision and remanded the case for further development. The Board found that appellant had provided evidence of error or abuse, specifically the October 7, 2016 statement of her supervisor, P.N., who reported, "All I know is [appellant] was not supposed to return to [the employing establishment] where this all started with [C.G.] the manager." Appellant further noted that an IMIP was conducted by the employing establishment, but that she was unaware of the outcome. The Board directed OWCP, on remand, to obtain additional information from the employing establishment about her alleged employment incidents and the IMIP. The Board also directed OWCP, after carrying out such development, to issue a *de novo* decision regarding appellant's emotional condition claim.

In response to OWCP's inquiries on September 18, 2018, the employing establishment did not provide the basis for P.N.'s October 7, 2016 statement and did not provide any information regarding the IMIP. It provided minimal information with a statement from C.V. dated October 18, 2018 in which she denied telling appellant that she would never have to return to the employing establishment. In an October 19, 2018 statement, P.N. reported that she did not know who told appellant that she would never have to go back to the employing establishment and that she was not involved in that conversation. The Board finds that these statements are not responsive to the queries from the Board and OWCP. Both C.V. and P.N.'s responses were incomplete and focused only on whether and by whom appellant was told that she "never" had to return to the employing establishment. The employing establishment response did not address the results of the investigation mentioned by P.N., nor the basis of P.N.'s previous statement that she knew that appellant was not supposed to return to the employing establishment where "this all started with [C.G.] the manager." In order to address whether appellant has established error or abuse, the Board requires that the employing establishment produce a detailed statement describing the investigation and findings regarding appellant's interactions at the employing establishment.

The Board therefore finds that the case shall again be remanded to OWCP for further development. On remand OWCP should obtain the additional evidence from the employing establishment necessary for development of the present claim as set forth in the Board's decisions. If after carrying out such further development, it receives a full and satisfactory response addressing each question raised, then OWCP shall issue a *de novo* decision on appellant's emotional condition claim evaluating the new factual evidence presented. If the employing establishment fails to respond or fails to provide full and clear responses, OWCP shall accept her account of events as factual and accept her allegations of error and abuse as compensable factors of employment, proceeding with an evaluation of the medical evidence in its *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.²⁰

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2019 and November 16, 2018 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded to OWCP for further action consistent with this decision.

Issued: November 20, 2019
Washington, DC

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

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

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

²⁰ In light of the Board's disposition of issue 1, issue 2 is rendered moot.