United States Department of Labor
Employees' Compensation Appeals Board

G.I., Appellant	)	
and	)	**Docket No. 19-0942**
	)	**Issued: February 4, 2020**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Memphis, TN, Employer	)	

Appearances:
Sara Kincaid, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 28, 2019 appellant, through counsel, filed a timely appeal from an October 1, 2018 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.

[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.*

ISSUE

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

FACTUAL HISTORY

On July 25, 2017 appellant, then a 62-year-old registered nurse, filed an occupational disease claim (Form CA-2) alleging that she experienced an exacerbation of her mental health conditions, including post-traumatic stress disorder (PTSD), major depressive disorder, severe insomnia, and severe anxiety, due to factors of her federal employment. Specifically, she attributed her emotional conditions to performing double duty as a result of chronic understaffing, as well as witnessing patients suffering, dying, and receiving inadequate care. Appellant indicated that she first became aware of her conditions and their relation to her federal employment on October 17, 2014.

In a September 5, 2017 development letter, OWCP advised appellant of the deficiencies of her claim. It requested additional factual and medical evidence and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond. In a separate letter of even date, it requested that the employing establishment address the accuracy of her allegations and claims.

On October 3, 2017 appellant completed OWCP's development questionnaire and again attributed her emotional condition to performing double duty due to chronic understaffing and witnessing inadequate patient care. She noted that she was the "infection control champion" and that there were serious infection control issues that put patients at significant risk. Appellant also had concerns about "bowel training" protocol for spinal cord patients. She noted that she was unable to locate a working pulse oximeter when needed. Appellant also alleged several traumatic incidents, including being required to call rapid responses for a patient on three occasions and, after his physician did not respond, the patient ended up in the intensive care unit (ICU) and did not recover. Thereafter, a second patient died in another unit when the boots needed to prevent blood clots following surgery were not used and, in a third incident, a patient was treated for a year in appellant's unit, discharged, and sought treatment in another hospital where he was diagnosed with cancer, which was not diagnosed by the employing establishment. Appellant also noted that she had a previous history of PTSD and depression related to prior traumatic experiences.

In an e-mail dated January 4, 2014, appellant noted that on that date her unit was staffed at the rate of 5 patients per nurse while another unit had only 2.5 patients per nurse. On February 10, 2014 she alleged difficulties in obtaining help due to understaffing. On February 11, 2014 appellant alleged that there were three nurses and four other staff for 20 patients on her unit. On February 17, 2014 she alleged that staff numbers were askew. On April 9, 2014 appellant agreed in writing to working six consecutive days and split days for one schedule to help out.

On June 24, 2016 Dr. Amy Balentine, a licensed clinical psychologist, diagnosed exacerbation of preexisting chronic PTSD and major depressive disorder. She noted that, beginning in October 2014, appellant attributed her condition to mistreatment of patients and chronic understaffing. Dr. Balentine submitted an additional report on September 8, 2017, indicating that her PTSD was exacerbated by her work conditions.

In a letter dated November 7, 2017, the employing establishment responded and disputed appellant's allegations and claims. It noted that she had not submitted evidence, which substantiated that her workload was double in comparison to the workload of other staff members. The employing establishment also noted that appellant had not provided documentation to support any of her other allegations. On November 16, 2017 it denied that she was requested to work double duty. The employing establishment further denied that appellant's job could be considered stressful as she received similar assignments to other nurses. It noted that from time to time there were staffing shortages related to staff illness, but that those shortages were corrected with overtime and compensatory time.

By decision dated December 7, 2017, OWCP denied appellant's emotional condition claim, finding that she had not established a compensable factor of employment. It noted that the employing establishment had denied her allegation of overwork and that she had not submitted corroborating evidence regarding patient negligence.

On July 27, 2018 appellant, through counsel, requested reconsideration. She reiterated her prior allegations regarding chronic understaffing and inadequate care of patients. Appellant resubmitted Dr. Balentine's September 8, 2017 report. She also provided an additional narrative statement dated July 14, 2017, noting that she began working in the spinal cord unit at the employing establishment in 2009 and that, due to chronic understaffing, she carried double the allowable patient load under Paralyzed Veterans of America (PVA) regulations. Appellant alleged that patient-to-nurse ratios were often seven or eight to one. She also worked as head or charge nurse at least three days a week and was the infection control champion, while continuing her regular patient load. Appellant described her duties in these positions. She alleged that chronic understaffing created a safety hazard for patients leading to inadequate, improper, and neglectful patient care that led to patient injury and/or death. Appellant also noted that there were severe infection control issues at the employing establishment that put both patients and staff at risk of harm. She noted that she reported these issues to management and experienced retaliation and harassment as a result. Appellant alleged that patients were shamed and ridiculed by staff for using the call button or when their ventilator alarms sounded. She also alleged that a physician came to work under the influence of alcohol, would not answer his after-hours calls, failed to examine patients, and berated nurses. This particular physician also locked his office and slept while on duty. Appellant noted that this particular physician failed to respond to her rapid responses, which resulted in her patient entering the ICU. She stopped work in October 2014 due to stress and panic attack as a result of these issues.

In a witness statement, B.T., a coworker in the spinal cord unit, confirmed that the unit was understaffed and that this put patients and staff at risk. She asserted that nursing staff were frequently assigned six to eight patients each in violation of PVA regulations. B.T. also asserted that the physician was drinking while on duty, failed to return pages, and failed to examine patients. She alleged that this physician's lack of care resulted in the death of a patient. B.T. also described a patient that was misdiagnosed and sent home with cancer.

A December 18, 2008 employing establishment directive indicated that the spinal cord unit required minimal nurse staffing calculated based on 71 full-time employees per 50 staffed beds or 1.42 nurses per patient. This directive provided that, when acuity levels exceed the national average, nursing staffing needed to be increased according.

In an e-mail dated November 11, 2013, B.W., reported that the unit was short-staffed by scheduling and left with only two nurses. She asserted that most weekends the unit did not have adequate staffing for the acuity of patients and that the nurses stayed over to finish shift duties and were not compensated. On November 12, 2013 B.W. requested four nurses on the evening shift. She noted that she was left with only one other nurse to care for 19 patients. On December 17, 2013 B.W. reported that there were three nurses who were responsible for six or seven patients each. On January 23, 2014 she reported that she and appellant did not receive a break during their shift. On April 10, 2014 B.W. reported that there were 21 patients and three nurses. On April 17, 2014 she reported 22 patients with three nurses while on April 16, 2014 there were 22 patients with four nurses. On May 21, 2014 B.W. reported 21 patients and three nurses. On May 22, 2014 she reported 20 patients and three nurses.

On August 22, 2018 the employing establishment asserted that shortage of staff was corrected by overtime. It also noted that appellant was terminated from the employing establishment on July 11, 2017.

By decision dated October 1, 2018, OWCP denied modification of the December 7, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence[4] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[5] Those 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 an employment factor or incident alleged to have caused or contributed to his or her claimed emotional condition; (2) medical evidence establishing that he or she has a diagnosed emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[7]

[3] *Supra* note 2.

[4] *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[5] *O.G., id.; M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[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] *O.G., supra* note 4; *George H. Clark*, 56 ECAB 162 (2004).

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 hold a particular position, unhappiness with doing work, or frustration in not given the work desired or hold a particular position, such injury or illness falls outside FECA's coverage because they are found not to have arisen out of employment.[12]

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.[13] 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.[14]

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 employment and may not be considered.[15] If an employee does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. If a

[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.*, Docket No. 18-1648 (issued March 4, 2019); *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

[11] *Cutler*, *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).

[13] *T.L.*, *supra* note 8; *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).

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

[15] *B.S.*, *supra* note 12; *Dennis J. Balogh*, 52 ECAB 232 (2001).

compensable factor of employment is substantiated, OWCP must base its decision on an analysis of the medical evidence which has been submitted.[16]

OWCP's regulations provide that an employer who has reason to disagree with an aspect of the claimant's allegation should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.[17] Its regulations further provide in certain types of claims, such as a stress claim, a statement from the employing establishment is imperative to properly develop and adjudicate the claim.[18]

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.[19] The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.[20] Once OWCP undertakes to develop the evidence, it has the responsibility to do so in a proper manner.[21]

ANALYSIS

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

Appellant alleged that she experienced an exacerbation of her preexisting PTSD and anxiety due to overwork, witnessing failures in patient care, harassment, and retaliation. OWCP denied her claim, finding that she had not established 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.

Appellant has attributed her emotional condition to performing her regular or specially assigned duties of her position. She alleged that she was overworked as her unit was chronically understaffed. 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.[22]

In support of her claim, appellant submitted a December 18, 2008 employing establishment directive, which indicated that the minimal nurse staffing was to be 1.42 nurses per patient. On

[16] *O.G., supra* note 4; *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[17] 20 C.F.R. § 10.117(a); *D.L.*, Docket No. 15-0547 (issued May 2, 2016).

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

[19] *D.B.*, Docket No. 19-0443 (issued November 15, 2019); *K.S.*, Docket No. 18-0845 (issued October 26, 2018); *D.L.*, 58 ECAB 217 (2006); *Jeral R. Gray*, 57 ECAB 611 (2006).

[20] 20 C.F.R. § 10.121.

[21] *F.V.*, Docket No. 19-0006 (issued September 19, 2019); *Cutler, supra* note 9.

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

January 4, 2014 she reported that her unit was staffed at five patients per nurse. In a February 10, 2014 e-mail, appellant reported staff shortages. On February 11, 2014 she reported that there were three nurses for 20 patients. On February 17, 2014 appellant again reported staffing issues. She also provided an e-mail dated April 9, 2014 in which she agreed in writing to work six consecutive days. Appellant submitted a statement from B.T., a coworker, who confirmed that the unit was understaffed and frequently in violation of staffing regulations. She also submitted a series of e-mails from B.T. detailing the understaffing on specific dates from November 11, 2013 through May 22, 2014.

On September 5, 2017 OWCP requested that the employing establishment address the accuracy of appellant's allegations and claims. The employing establishment generally confirmed staffing shortages due to illness, but alleged that these shortages were corrected through overtime and compensatory time. Its response, however, did not focus on whether she was overworked. The employing establishment also failed to respond to appellant's allegations regarding the maintenance of the appropriate percentage of nurses to patients. The Board finds that the employing establishment did not fully respond to the September 5, 2017 development letter. Moreover, OWCP did not request further information from the employing establishment that is normally in the exclusive control of the employing establishment (*e.g.*, time schedules, nurse-to-patient ratios, incident reports). As discussed, OWCP's procedures provide that, in emotional condition cases, a statement from the employing establishment is necessary to adequately adjudicate the claim.[23]

The Board finds that it is unable to make an informed decision in this case as the employing establishment did not adequately respond to the request for comment made by OWCP in the September 5, 2017 development letter.[24]

Although it is appellant's burden of proof 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.[25]

This case will accordingly be remanded to OWCP for further development of the evidence. OWCP shall request that the employing establishment provide a detailed statement and relevant evidence and/or argument regarding appellant's allegations. Following this and any necessary further development, it shall issue a *de novo* decision regarding whether appellant has established an emotional condition in the performance of duty.

CONCLUSION

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

[23] *Supra* note 18; *M.T.*, Docket No. 18-1104 (issued October 9, 2019).

[24] *V.H.*, Docket No. 18-0273 (issued July 27, 2018).

[25] *R.A.*, Docket No. 17-1030 (issued April 16, 2018); *K.W.*, Docket No 15-1535 (issued September 23, 2016).

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2018 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: February 4, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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