

to factors of his federal employment. He attributed his condition to harassment by management. Appellant became aware of his condition and attributed it to factors of his federal employment on April 1, 2011. He was last exposed to the conditions identified as causing his condition on July 11, 2017, the date he stopped work.

In a development letter dated August 3, 2017, OWCP advised appellant of the factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding his alleged injury, including comments from a knowledgeable supervisor regarding the accuracy of his allegations and an explanation of any areas of disagreement. OWCP advised the employing establishment that, under 20 C.F.R. § 10.117(b), it could accept appellant's allegations as factual if it failed to provide a complete reply. It afforded both parties 30 days to submit the requested evidence.

In an August 31, 2017 response, appellant asserted that A.P., a manager, had harassed him for the last two years that he had worked in the intensive care unit (ICU). A.P. and A.S., another manager, had singled him out for discipline and created a hostile work environment. Appellant maintained that he was "maliciously assigned" to administrative work details during simple investigations and received excessive discipline in the form of a 14-day suspension. He related that he was discriminated against on the basis of race and that A.P. had harassed him in a public area. Appellant indicated that he had filed four Equal Employment Opportunity (EEO) complaints prior to August 2017. Management retaliated against him by failing to release him after he obtained another position in the employing establishment.

Appellant further related that A.S. had sent him six interrogating e-mails a day for eight or nine days without cause and that he was unjustly placed in nonregistered nurse positions. He advised that he had been detailed for eight months after an employee asked for his help disposing of a narcotic medication. Appellant asserted that "a Filipino nurse" had received a lesser disciplinary action for a significantly more serious infraction.

OWCP received a February 5, 2017 proposed 14-day suspension of appellant for failure to follow an instruction to transport a patient from the ICU and for failure to follow procedures by disposing of a syringe of morphine without a witness. On March 30, 2017 the employing establishment finalized the proposed 14-day suspension.

Appellant submitted evidence from his EEO complaint, including a letter from the employing establishment accepting a list of incidents for investigation. He also submitted an e-mail indicating that he had been tentatively offered and had accepted a registered nurse position and requesting information for the transfer.

In an October 31, 2017 development letter, OWCP again requested that the employing establishment review appellant's allegations and provide comments regarding their accuracy from a knowledgeable supervisor. It also explained that it could accept his allegations as factual under 20 C.F.R. § 10.117(b) if it did not fully respond to its request. OWCP requested a response within 30 days.

The employing establishment did not respond to OWCP's August 3 and October 31, 2017 requests for information.

By decision dated December 27, 2017, OWCP denied appellant's emotional condition claim. It found that he had not established any compensable employment factors.

On January 23, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.²

Following a preliminary review, by decision dated June 1, 2018, OWCP's hearing representative vacated the December 27, 2017 decision. She found that OWCP had not adequately developed the factual aspect of the case. The hearing representative instructed OWCP to provide appellant's August 31, 2017 letter to the employing establishment for review and comment and to obtain statements from the implicated individuals, including A.P. and A.S.

In a development letter dated June 4, 2018, OWCP requested that the employing establishment review and discuss an enclosed copy of appellant's August 31, 2017 statement and provide responsive statements from A.P. and A.S. regarding his allegations. It again advised that, under 20 C.F.R. § 10.117(b), it could accept his allegations as factual in the absence of a complete response from the employing establishment. OWCP afforded the employing establishment 30 days to submit the requested information.

On September 25, 2018 OWCP resent the employing establishment a copy of its June 4, 2018 development letter and requested a prompt response. It noted that it had previously sent development letters on August 3 and October 31, 2017, but had received no response. The employing establishment did not respond to OWCP's request for information.

By decision dated November 26, 2018, OWCP denied appellant's emotional condition claim, finding that he had failed to establish a compensable employment factor.

Thereafter, OWCP received an undated letter from appellant's attorney noting the employing establishment had repeatedly ignored its request for information.

On December 19, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.³

A telephonic hearing was held on April 25, 2019. At the hearing, appellant advised that he had filed a complaint with the Equal Employment Opportunity Commission (EEOC) regarding his 14-day suspension. In 2011, he began experiencing hostility from two Filipino coworkers, J.G. and M.L. J.G. had told a senior nurse to give appellant "hell." M.L. belittled him before his peers and because of this the other nurses did not want to watch his patients during breaks. Appellant requested reasonable accommodation, but the request was denied. In 2016, A.P. wanted him to report on a patient, but a physician told him to take another patient to nuclear medicine for an

² Appellant also submitted a subpoena request.

³ On February 12, 2019 appellant requested subpoenas be issued for a list of individuals at the employing establishment. On March 22, 2019 OWCP denied his subpoena request.

emergency scan. A.P. was angry and accused him of not properly transferring the other patient even though he had handed the patient off to other nurses. She came into the ICU where he was watching the critically ill patient and began yelling at him to return upstairs. J.A., a coworker, witnessed the incident. On one occasion a barcode scanner was not working on a medication so he gave the medication to another nurse when he handed off the patient. A.P. accused him of stealing medication and called the police. During the investigation, he was transferred from patient care. Appellant received a job offer within the employing establishment at a different location that was rescinded after management intervened.

Thereafter, appellant submitted a June 22, 2016 report of contact form. J.A., a coworker, advised that on that date a woman was “screaming at the top of her lungs at [appellant] who was seated in a chair next to the patient.” J.A. asserted that the behavior was not professional.

By letter dated July 20, 2016, the employing establishment notified appellant that it had detailed him from his registered nurse duties to patient transport.

In a statement dated June 5, 2017, L.S., a nurse, related that, in September 2015, she heard A.P. tell a nurse that she should write appellant up. The nurse declined, but A.P. stated that she would type up the report of contact. The nurse “eventually agreed after continued pressure.” L.S. thought the action was grievous.

On May 28, 2019 OWCP received a chronological list of the events from appellant that he maintained had resulted in his psychological injury. Appellant advised that, in September 2015, A.P. had written a report on another employee’s behalf in order to harass him. In June 2016, A.P. was verbally abusive when appellant was with a critically ill patient. He related that J.A., another employee, wrote a report of the incident indicating that A.P.’s actions were unprofessional. In August 2016, A.S. detailed him to transportation. He was told to transport patients and wait outside, but the nurses were upset that he did not assist them. A.S. sent appellant multiple e-mails about the situation. In November 2016, a Caucasian coworker failed to follow narcotic waste procedures, but received no discipline, but when it happened to appellant, he was removed from his duties as a nurse for six months. He got another job in February 2017, but the offer was rescinded. In March 2017, appellant informed the employing establishment that the notice of proposed suspension had mistakenly identified him as the individual who found the narcotic and that it was his cart. In April 2011, he had requested reasonable accommodation due to mental illness.

By decision dated July 9, 2019, OWCP’s hearing representative vacated the November 26, 2018 decision. He remanded the case for OWCP to obtain comments from the employing establishment with a copy of the hearing transcript and appellant’s post-hearing statement.

In a July 30, 2019 development letter, OWCP outlined appellant’s allegations at the hearing and in his post-hearing statement and requested that the employing establishment submit comments from a knowledgeable supervisor regarding the accuracy of his allegations. It further requested that it explain any aspects of disagreement and submit supporting evidence. OWCP again advised that without a reply it could accept appellant’s allegations as factual under 20 C.F.R. § 10.117(b).

By decision dated September 19, 2019, OWCP denied appellant's emotional condition claim as he had not established any compensable employment factors.

On October 21, 2019 appellant noted that the employing establishment had repeatedly failed to submit information as requested by OWCP.

On January 10, 2020 appellant requested reconsideration.

On February 3, 2020 OWCP provided the employing establishment with a copy of appellant's request for reconsideration and asked that it provide any comments.

The record contains a February 3, 2020 note from the employing establishment to OWCP, indicating that it had received its February 3, 2020 letter. No further response was received.

By decision dated May 13, 2020, OWCP denied modification of its September 19, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim,⁵ 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.⁶ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁷

To establish an emotional condition in the performance of duty, a claimant must submit: (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 accepted compensable employment factors are causally related to the diagnosed emotional condition.⁸

Workers' compensation law does not apply to each and every injury or illness that is somehow related to a claimant's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed

⁴ *Supra* note 1.

⁵ *S.S.*, Docket No. 19-1021 (issued April 21, 2021); *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁶ *S.S.*, *id.*; *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁷ 20 C.F.R. § 10.115; *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Michael E. Smith*, 50 ECAB 313 (1999).

⁸ *See S.K.*, Docket No. 18-1648 (issued March 14, 2019); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

compensable.⁹ However, disability is not compensable when it results from factors such as an employee's fear of a reduction-in-force, or frustration from not being permitted to work in a particular environment, or to hold a particular position.¹⁰

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.¹¹ 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.¹²

OWCP's procedures provide:

“An employee who claims to have had an emotional reaction to conditions of employment must identify those conditions. The [claims examiner] must carefully develop and analyze the identified employment incidents to determine whether or not they in fact occurred and if they occurred whether they constitute factors of the employment. When an incident or incidents are the alleged cause of disability, the [claims examiner] must obtain from the claimant, agency personnel and others, such as witnesses to the incident, a statement relating in detail exactly what was [stated] and done. If any of the statements are vague or lacking detail, the responsible person should be requested to submit a supplemental statement clarifying the meaning or correcting the omission.”¹³

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.¹⁴ Its procedures further provide in certain types of claims, such as a stress claim, a statement from the employer is imperative to properly develop and adjudicate the claim.¹⁵

⁹ *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

¹⁰ *Lillian Cutler, id.*

¹¹ *See R.B.*, Docket No. 19-0434 (issued November 22, 2019); *O.G.*, *supra* note 5.

¹² *Id.*

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17(j) (July 1997). *See S.L.*, Docket No. 17-1780 (issued March 14, 2018).

¹⁴ 20 C.F.R. § 10.117(a). *See M.T.*, Docket No. 18-1104 (issued October 9, 2019).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7(a)(2) (June 2011).

ANALYSIS

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

Appellant attributed his stress-related condition to various incidents from 2011 to 2017 that he maintained constituted harassment by management. He asserted that A.P. and A.S. had disciplined him unfairly and created a hostile work environment. Appellant alleged that A.P. had verbally abused him in a public setting. He maintained that he was assigned to long work details during simple investigations and received excessive discipline. Appellant contended that management had discriminated against him based on race and retaliated against him after he obtained another position. He further alleged that A.P. verbally harassed him and falsely accused him of stealing medicine. In support of his contentions, appellant submitted a June 22, 2016 report of contact form from J.P., who maintained that a woman had screamed at appellant in an unprofessional manner as he sat by a patient. He further submitted a June 5, 2017 statement from L.S., who advised that A.P. had pressured another nurse to discipline appellant in an inappropriate manner.

OWCP, in development letters dated August 3 and October 31, 2017, requested that the employing establishment review appellant's allegations, describe any points of disagreement, and provide comments from a knowledgeable supervisor regarding the accuracy of his statements. The employing establishment did not respond to OWCP's requests.

Following a preliminary review, by decision dated June 1, 2018, OWCP's hearing representative instructed OWCP to provide appellant's most recent statement describing the incidents to which he attributed his stress-related condition to the employing establishment for review and comment. She advised that OWCP should obtain statements from individuals implicated in the events, in particular A.P. and A.S.

In development letters dated June 4 and September 25, 2018, OWCP requested that the employing establishment review appellant's allegations and provide a response from a knowledgeable supervisor regarding their accuracy, explain any points of disagreement, and provide statements from A.P. and A.S. The employing establishment did not respond to OWCP's requests.

By decision dated July 9, 2019, an OWCP hearing representative remanded the case for OWCP to obtain comments from the employing establishment.

In a development letter dated July 30, 2019, OWCP described the allegations made by appellant at the hearing and in a post-hearing statement and requested comments from a knowledgeable supervisor regarding the accuracy of the contentions, and submitting any supporting evidence if it disagreed with any aspect of the claim. The employing establishment did not respond to OWCP's request.

As noted, OWCP's regulations provide that an employer with reason to disagree with any aspect of appellant's claim shall submit a statement describing its disagreement with a specific

allegation or argument and submit evidence such as witness statements supporting its position.¹⁶ OWCP's procedures provide that, if an employment establishment fails to respond to a request for comments on a claimant's allegations, OWCP's claims examiner may accept the claimant's statements as factual.¹⁷ OWCP has repeatedly attempted to obtain information from the employing establishment regarding appellant's allegations. It further has informed the employing establishment of the provisions of 20 C.F.R. § 10.117 and that it may accept appellant's allegations as factual if it failed to respond adequately to its request for information. The employing establishment has egregiously failed to respond to OWCP's request for information, only advising OWCP that it received their request. As the employing establishment has not complied with OWCP's multiple requests, nor proffered a reason for not doing so, the Board finds that appellant's allegations are accepted as factual.¹⁸

As appellant has established compensable factors of employment, OWCP must base its decision on an analysis of the medical evidence. The case will, therefore, be remanded to OWCP to analyze and develop the medical evidence.¹⁹ After this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has established compensable factors of employment. The Board further finds that the case is not in posture for decision regarding whether appellant sustained an emotional condition in the performance of duty. The case is remanded for further development of the medical evidence.

¹⁶ *Supra* note 14.

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5d(1) (June 2011). *See also M.T.*, *supra* note 14; *L.B.*, Docket No. 17-1671 (issued November 6, 2018).

¹⁸ *Id.* *See generally, C.E.*, Docket No. 07-2261 (issued November 24, 2008).

¹⁹ *See S.K.*, Docket No. 18-0705 (issued July 29, 2020); *C.S.*, Docket No. 19-0116 (issued January 10, 2020).

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2020 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 29, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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