United States Department of Labor
Employees' Compensation Appeals Board

L.A., Appellant	)	
and	)	**Docket No. 23-0167**
	)	**Issued: December 18, 2023**
DEPARTMENT OF VETERANS AFFAIRS, CARL T. HAYDEN VA MEDICAL CENTER, Phoenix, AZ, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 15, 2022 appellant, through counsel, filed a timely appeal from a November 2, 2022 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] The Board notes that following the November 2, 2022 decision, appellant submitted additional evidence to OWCP. 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a stress-related condition in the performance of duty on August 16, 2012, as alleged.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances of the case as set forth in the Board's prior orders are incorporated herein by reference. The relevant facts are as follows.

On September 14, 2012 appellant, then a 38-year-old psychiatrist, filed a traumatic injury claim (Form CA-1) alleging that on August 16, 2012 she sustained acute stress disorder due to hearing a threatening message that had been left on her office telephone by one of her patients while in the performance of duty.[5] A staff assistant, S.G., indicated that the message was received on July 20, 2012, but that she had not listened to appellant's messages for weeks and then called appellant on August 16, 2012, to report the contents of the office telephone voicemail. At that time, appellant was on leave under the Family and Medical Leave Act (FMLA) for a nonemployment-related illness.[6] Employing establishment police investigated the recorded message and forwarded the recording to appellant to try and identify the caller. In an October 20, 2012 statement, appellant indicated that she identified the caller as a patient at work after listening to the voicemail that was forwarded to her by the employing establishment police. She stated that, since she knew of the caller's criminal past, gun possession, and alcohol dependence, she declined to press charges because she was fearful that he would retaliate. Appellant indicated that she knew that the caller had slashed his neighbor's tires and advised that he previously had argued with her when she confronted him about his non-compliance regarding medications she had prescribed. She related that she felt unsafe and, as a result was unable to return to work. Appellant further advised that, whenever she went on leave, she provided patients a telephone number to be used if they needed medication refills or questions regarding their treatment.

Appellant submitted medical evidence in support of her claim, including reports of Dr. David S. Burgoyne, a Board-certified psychiatrist.

On November 5, 2012 OWCP received a transcript of the message left on July 20, 2012, which read as follows:

> "Hi Dr. [appellant's last name], well[,] being how my [unintelligible] medicine are not acting like placebos anymore, I got a little more sleep and I've been able to think about the two days I went through your clinic and those two harassing phone calls I got on my [cell phone]. And I can remember the last time I was at the reservation and this cop was driving by and started slowing down and Monte yelled

[4] *Order Remanding Case*, Docket No. 13-2150 (issued May 2, 2014); *Order Remanding Case*, Docket No. 19-1248 (issued April 16, 2020).

[5] OWCP assigned the claim OWCP File No. xxxxxx500. Appellant later claimed that she sustained post-traumatic stress disorder (PTSD) as result of hearing the message.

[6] The record indicates that appellant last worked on July 19, 2012 and was removed by the employing establishment effective June 29, 2013.

> at the top of his lungs "You can get [f-ing] murdered too" and he took off for his life. And then he looked at me and said if anybody ever mess with me I can murder them too. And I don't ever want to have to resort to something like that to keep anybody from harassing me on my [cell phone], doctor. But what I haven't told you, I don't think, is the county declared me bipolar and the state declared me severely mentally insane. And believe me, since the 15th I've been really going through a lot. So I just don't want to have to make that trip when I get my paycheck because I can't even afford to put gas in my jeep. So have a good day doctor and I miss your friends. My phone number is …. Thank you very much."

By decision dated January 9, 2013, OWCP denied the claim, finding that the message was left by a patient of appellant, but that appellant had not established a compensable factor of employment.

On January 31, 2013 appellant, through her then-representative, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. She submitted additional medical evidence in support of her claim. During the hearing held on May 14, 2013 appellant testified that her work as a psychiatrist required her to receive and respond to messages from patients, and advised that S.G. contacted her on August 16, 2012, because she believed the message from her patient was "very serious" and required her attention.

By decision dated July 29, 2013, the hearing representative affirmed the January 9, 2013 decision.[7] The OWCP claims examiner and the hearing representative only reviewed a transcript of the recorded message and did not listen to the recording itself before rendering their decisions.

Appellant appealed to the Board and, by order dated May 2, 2014, the Board remanded the case to OWCP to obtain the actual audio recording of the voicemail message and for further reconstruction and assemblage of the claim file as deemed necessary, to be followed by a *de novo* decision on the merits of appellant's claim.[8]

On remand, by decision dated May 18, 2015, OWCP noted that it had listened to the actual audio recording approximately 10 times and concluded that the message did not constitute a direct threat against appellant. It further found that, although the message could appear to be related to factors of employment as it was left for appellant by a patient, she was not performing factors of employment at the time she listened to the message because she was on FMLA leave. OWCP denied the claim, finding that appellant was not in the performance of duty at the time of the alleged injury.

[7] The hearing representative acknowledged that appellant's receipt of the message at home while on leave could be considered incidental to her employment, but stated that the content of the message failed to support her allegation that there was a direct or implied threat to her.

[8] *Supra* note 4. On May 11, 2015 appellant filed a Form CA-2 in which she alleged that her work duties caused an aggravation of her preexisting depression. OWCP adjudicated that claim under OWCP File No. xxxxxx954. It accepted major depression, recurrent, with features of PTSD, and paid appellant retroactive wage-loss compensation on the supplemental rolls, effective August 20, 2012. OWCP placed appellant on the periodic rolls, effective May 28, 2017, and administratively combined OWCP File Nos. xxxxxx500 and xxxxxx954, the latter serving as the master file.

On April 12, 2016 appellant, through her then-representative, filed a timely request for reconsideration. She submitted additional medical evidence in support of her claim. By decision dated November 15, 2018, OWCP denied modification of the May 18, 2015 decision. It noted that the voicemail recording itself and a transcript had been reviewed. OWCP found the voicemail incidental to employment, but that the content of the voicemail failed to support the contention that there was a direct or implied threat directed toward appellant.

Appellant appealed to the Board and, by order dated April 16, 2020, the Board remanded the case to OWCP to obtain the actual audio recording of the voicemail message and for further reconstruction and assemblage of the claim file as deemed necessary, to be followed by a *de novo* decision on the merits of appellant's claim.[9]

On remand, by decision dated November 2, 2022, OWCP noted that it had previously listened to the actual audio recording "several times" and concluded that the message did not constitute a direct threat against appellant. It further found that, although the message could appear to be related to factors of employment as it was left for appellant by a patient, she was not performing factors of employment at the time she listened to the message because she was on FMLA leave. OWCP denied the claim, finding that appellant was not in the performance of duty at the time of the alleged injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA[10] 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 disability or specific condition for which compensation is claimed is causally related to the employment injury.[11] 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.[12]

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.[13]

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

[9] *Supra* note 4.

[10] *Supra* note 2.

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

[12] 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).

[13] *See S.K.*, Docket No. 18-1648 (issued March 14, 2019); *M.C.*, Docket No. 14-1456 (issued December 24, 2014); *Debbie J. Hobbs*, 43 ECAB 135 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

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 compensable.[14] 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.[15]

The term "in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law, "arising out of and in the course of employment."[16] The phrase "course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[17] This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.[18]

OWCP's procedures address off-premises injuries sustained by workers who perform service at home, noting that, ordinarily, the protection of FECA does not extend to the employee's home, but there is an exception when the injury is sustained while the employee is performing official duties. In situations of this sort, the critical problem is to ascertain whether at the time of injury the employee was in fact doing something for the employer.[19]

ANALYSIS

The Board finds this case not in posture for decision.

Appellant attributed her stress-related condition to a recorded threatening telephone message that had been left on her office telephone by one of her patients who discussed the medical treatment he received from appellant, and referenced murder multiple times in the context of an

[14] *A.B.*, Docket No. 18-0635 (issued August 14, 2020); *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).

[15] *A.B., id.*; *Cutler, id.*

[16] *Bernard D. Blum*, 1 ECAB 1, 2 (1947).

[17] *C.Y.*, Docket No. 21-1009 (issued May 1, 2023); *M.T.*, Docket No. 19-1546 (issued March 5, 2020); *see J.B.*, Docket No. 17-0378 (issued December 22, 2017).

[18] *K.M.*, Docket No. 21-1306 (issued April 28, 2023); *Eugene G. Chin*, 39 ECAB 598 (1988).

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5f (August 1992); *see also S.F.*, Docket No. 09-2172 (issued August 23, 2010).

agitated emotional state.[20] The Board notes that appellant's allegations relate to her regular or specially assigned duties under *Lilian Cutler*.[21]

The relationship of the incident to appellant's employment is established by the fact that the threatening message was left by appellant's patient, and that appellant had after-hours professional obligations, including the duty to listen to messages from patients. The Board therefore finds that at the time when appellant listened to the threatening message, she met the requirements that an employment incident occur at a time when appellant may be reasonably said to have been engaged in the master's business, at a place where she may reasonably have been expected to be in connection with the employment, and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.[22] Although appellant was at home when she heard the threatening message, the establishment of an employment factor is not precluded because she was doing something for the employer at the time of the time of the claimed injury.[23] Thus, the Board finds that appellant sustained a compensable employment factor upon hearing her patient's threatening message on August 16, 2012.

As OWCP found there were no compensable employment factors, it did not analyze or develop the medical evidence. Thus, the Board will set aside OWCP's decision, and remand the case for consideration of the medical evidence to determine whether appellant has established an emotional condition causally related to the compensable employment factor. After this, and such other further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's emotional condition claim.

CONCLUSION

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

[20] *See J.Z.*, Docket No. 19-1156 (issued July 28, 2020) (compensable employment factor found when mine operator made social media comments alleging that the claimant, a mine inspector, improperly put his sand pit out of business, and alluded to the use of firearms when stating that inspectors would be met with resistance).

[21] *Supra* note 14.

[22] *See supra* note 15.

[23] *See supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2022 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 18, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board