United States Department of Labor
Employees' Compensation Appeals Board

C.D., Appellant	)	
and	)	**Docket No. 21-0162**
	)	**Issued: September 8, 2023**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH CARE SYSTEM, West Haven, CT, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 9, 2020 appellant filed a timely appeal from a September 2, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish an emotional condition in the performance of duty on November 13, 2012, as alleged.

[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 December 10, 2012 appellant, then a 53-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on November 13, 2012 she experienced fear, anxiety, and shock when her supervisor informed her that she was no longer covered by workers' compensation.[3] She stopped work on November 13, 2012. The employing establishment controverted the claim, indicating that it had instructed appellant to properly request leave.

Appellant, in a November 4, 2012 e-mail, requested annual leave and sick leave for 24 hours of work time. She indicated that she was in a leave without pay (LWOP) status for the remaining work hours and received compensation from OWCP. In a November 4, 2012 response, A.B., an injury specialist, informed appellant that she needed to complete claims for compensation (Form CA-7) to obtain wage-loss compensation from OWCP. She advised, "It is not an automatic payment. You will also need to provide medical [evidence] to justify your absence(s)." A.B. indicated that she told the timekeeper that appellant was not on OWCP leave as that was an incorrect term. She advised appellant that she had to provide CA-7 forms to claim wage-loss compensation due to her injury.

In a November 8, 2012 e-mail, D.V., appellant's supervisor, related that appellant's work hours were from 8:00 a.m. until 4:30 p.m. and she was on duty for 24 hours per week. She advised that appellant could submit LWOP requests to human resources for up to 30 hours per year. D.V. indicated that appellant could subsequently use annual or sick leave.

In an e-mail dated November 13, 2012, appellant notified D.V. that she felt like she did in 2004 when a patient wanted to kill her, and no one could tell her what to do. She advised that she had called for medical assistance, but everyone was at lunch. Appellant related that she was scared, confused, and embarrassed and requested clear communication.

In a report of contact dated November 13, 2012, D.V. related that she had returned a telephone call from appellant on that date around 11:30 a.m. Appellant asked her why she had to request LWOP as she received compensation from OWCP. D.V. "suggested she reread the information sent on time and leave and offered to re-forward the information." Appellant telephoned her at 11:55 a.m. and told her that she had too much to do, including "e[-]mail, notes to cosign, [and] trainings to complete since she had been out for so long." D.V. responded that she should take two days and catch up. At 1:05 p.m., appellant e-mailed that she did not understand what needed to be done and that she was in crisis with PTSD. D.V. telephoned appellant who

[2] Docket No. 14-168 (issued April 22, 2014); Docket No. 17-0322 (issued July 13, 2017).

[3] OWCP had previously accepted that appellant sustained post-traumatic stress disorder (PTSD) under OWCP File No. xxxxxx838. Appellant returned to modified part-time work on May 27, 2009, but continued to receive compensation from OWCP for intermittent disability from work. On January 23, 2013 OWCP informed her that it had found that her December 13, 2012 notice of recurrence (Form CA-2a) claiming disability under OWCP File No. xxxxxx838 was a new injury claim, which would be adjudicated under the current file number.

related that "she was distraught, no one was helping her, she could not do the request for leave or enter her time[;] it was too much coming back after being gone since August." They discussed the process for obtaining LWOP and D.V. told her she could use sick or annual leave in the meantime. After she received an e-mail from appellant indicating that she did not feel safe, D.V. telephoned appellant and on speakerphone requested that a coworker take her to the emergency room.[4]

On December 18, 2012 the employing establishment advised that appellant had resumed work on November 13, 2012 after being absent from August to November 2012 assisting her father-in-law. Appellant experienced a "crisis event" on November 13, 2012 after a discussion about leave.

In an undated statement received on January 23, 2013, appellant related that she had returned to part-time limited-duty employment in 2009 following a work injury. She subsequently increased her work time to 28 hours per week. Appellant indicated that on November 13, 2012 D.V. informed her that she could not use LWOP but instead had to use sick or annual leave. She did not understand why she had to enter her time as 40 hours per week when she was working a 24-hour a week schedule. Appellant felt unsafe because no one assisted her when she was crying.

By decision dated January 29, 2013, OWCP denied appellant's emotional condition claim. It found that she had not established any compensable work factors.

On February 14, 2013 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. In an accompanying statement, she asserted that on November 13, 2012 D.V. had told her that she must work full time and that she was not approved for the 16 hours of LWOP that she had been getting from OWCP since she had returned to work in 2009. Appellant advised that A.B. had informed her that any requests for LWOP over 30 days in a year required the approval of higher-level management. She maintained that D.V. had told her that she no longer had coverage under OWCP and that she had to work full time or request sick and annual leave. Appellant related that A.B. instructed her to complete a Form CA-7 but she knew that she could only complete a Form CA-7 if she used LWOP.

A telephonic hearing was held on May 20, 2013. Appellant questioned why the employing establishment, on November 13, 2012, had not allowed her to use LWOP and had told her that she was no longer entitled to receive benefits from OWCP. She knew that she had to enter LWOP to submit a Form CA-7 to OWCP. Appellant related that OWCP accepted that she sustained PTSD in 2004 and paid her compensation for 24 hours per week. She received numerous e-mails about taking LWOP when she returned to work on November 13, 2012 after being off work on family leave. D.V. told her that she could no longer approve her leave requests without consent from an unidentified person. Appellant requested specific guidance and then broke down crying. The employing establishment later approved her request for LWOP.

Subsequently OWCP received a November 13, 2012 e-mail from appellant to A.B. and D.V. She informed A.B. and D.V. that she had returned to work, but was confused about matters regarding pay and time and asked whether her OWCP status had changed. In another

[4] The record indicates that appellant received treatment at the emergency room on November 13, 2012.

November 13, 2012 e-mail, appellant notified D.V. that she had "absolutely no understanding of what needs to be done" and was in crisis with PTSD.

In a June 11, 2013 statement, A.B. advised that on May 27, 2009 appellant had returned to modified full-time work after an employment injury. Appellant intermittently requested leave without pay using CA-7 forms. She was off work from August 13 through November 13, 2012 caring for her father-in-law. Appellant took her work laptop but did not enter leave. On November 13, 2012 appellant's supervisor informed her of leave procedures. A.B. noted that a second opinion examination under another OWCP file number had indicated that when she improved, she could return to work full time.

By decision dated July 15, 2013, OWCP's hearing representative affirmed the January 29, 2013 decision.

Appellant appealed to the Board.[5] By decision dated April 22, 2014, the Board affirmed the July 15, 2013 decision. The Board found that appellant had not established error or abuse by the employing establishment.

On March 14, 2015 appellant requested reconsideration. She related that on November 13, 2012 she returned to work after an 11-week absence. Appellant indicated that she reviewed conflicting e-mails. A.B. verbally informed her that she was no longer covered by workers' compensation and had to work full time. She refused to explain why appellant could not resume her previous position after being away on family leave. Appellant attributed her injury to A.B. and D.V. informing her that she had to work full time and could no longer receive benefits from OWCP.

Appellant submitted evidence from A.B. challenging her physical restrictions from her accepted emotional condition claim in OWCP File No. xxxxxx838. She also submitted a medical report from a referral physician in OWCP File No. xxxxxx838 and information about employing establishment policies for requesting leave under the Family and Medical Leave Act (FMLA). Appellant asserted that on November 13, 2012 she had not requested leave under FMLA as she was told that she had to work full time. She submitted employing establishment policies regarding injured employees.

In another statement received March 14, 2015, appellant advised that on November 13, 2012 A.B. and D.V. had told her to read the policy when she requested clarifications of e-mails. She questioned why she was not informed in 2009 that she had to ask for LWOP every 30 days. Appellant maintained that it was an attempt to remove her from employment.

Appellant submitted the second page of a Form CA-2a submitted under OWCP File No. xxxxxx838. D.V. noted on the form that appellant had called a crisis hotline on November 13, 2012 about leave requests, an administrative issue. Appellant further submitted a January 17, 2013 letter, wherein A.B. informed her that to consider her request for LWOP, she had to provide the

[5] Docket No. 14-168 (issued April 22, 2014).

anticipated date she would resume work. A.B. noted that appellant was on full-time employment and thus had to account for 80 hours per pay period.

By decision dated May 29, 2015, OWCP denied modification.

On April 3, 2016 appellant requested reconsideration. She asserted that A.B. failed to assist her with her workers' compensation claim and wanted her to return to full-time employment. Appellant related that she had experienced a crisis not because of leave usage but because of receiving inappropriate directions. She advised that she had requested LWOP for three years until November 13, 2012, when she was told she was no longer eligible to receive benefits from OWCP. Appellant resubmitted e-mails and correspondence from 2012 and 2013, and some documentation from OWCP File No. xxxxxx838.

On April 1, 2013 OWCP advised A.B. that appellant had been on part-time limited-duty when she stopped work and filed her recent traumatic injury claim, and thus was entitled to compensation for partial disability.

By decision dated August 31, 2016, OWCP denied modification.

Appellant appealed to the Board. By decision dated July 13, 2017, the Board affirmed OWCP's August 31, 2016 decision.[6]

In an undated statement received by OWCP on November 28, 2017, appellant asserted that medical evidence supported that she was unable to work beginning the date of injury due to receiving conflicting messages and not having a work laptop. She questioned why the events of November 13, 2012 were administrative in nature. Appellant advised that she had experienced a "significant negative reaction" on November 13, 2012 as a result of receiving e-mails with conflicting instructions. She noted that she had previously sustained an injury in 2004 because of multiple e-mails she received about a homicidal patient. Appellant related that she should have filed an occupational disease claim.

Appellant submitted witness interrogatories relevant to her Equal Employment Opportunity (EEO) claim for disability and reprisal. In her EEO claim, she contended that the employing establishment had forced her to use LWOP and had not provided OWCP with the information necessary to process her claim for 24 hours of partial disability from November 13, 2012 through March 2014.

In a March 11, 2016 witness interrogatory, T.H., an employing establishment workers' compensation specialist, related that she had worked on appellant's workers' compensation claim since September 2014. She indicated that, from November 13, 2012 through March 2014, A.B. was the workers' compensation specialist for appellant's claim. T.H. asserted that A.B. had spoken with OWCP on April 22, 2013 and advised that light-duty work was available. She noted that medical evidence established appellant could work 24 hours per week and OWCP would pay the remaining 16 hours but that A.B. had told appellant that she had to work full time. A.B. and another man notified appellant by e-mail "that she needed to return to work full time or not at all."

[6] Docket No. 17-0322 (issued July 13, 2017).

T.H. did not recall the date of the e-mail except that it was prior to April 2013. She related that from November 13, 2012 through March 20, 2014 appellant received 16 hours of workers' compensation from OWCP but was not paid 24 hours per week by the employing establishment because she was not provided with a light-duty position. T.H. affirmed that appellant was "erroneously forced to request personal leave and LWOP for the period November 13, 2012 through March 20, 2014." She asserted that the employing establishment should have provided her with an assignment or informed OWCP that it was unable to offer suitable employment.

In a March 18, 2016 witness interrogatory, C.D., a supervisor, addressed appellant's allegation that the employing establishment delayed her return to work after mediation in December 2013. He related that A.B. had completed a report of work status (Form CA-3) indicating that appellant had resumed full-time employment even though she had only returned to work for 24 hours per week. C.D. related:

> "Based on the fact that [appellant] was returning to the same amount of hours work from a previous return to work [A.B.] was under the impression it was a return to work full duty. This was an error. In fact [appellant] returned to work part time with modified duty. By correcting the CA-3 [form], it notified OWCP that [appellant] was entitled to some lost wages. I had instructed [A.B.] to take that action. She was resistant to taking this action. She was under the impression because [appellant] returned to a modified part[-]time position that was [appellant's] full duty when [appellant] is a 40-hour per week employee."

C.D. advised that A.B. should have informed OWCP that appellant had returned to part-time modified work and provide that she worked 24 hours per week.

In an April 18, 2016 letter, issued under OWCP File No. xxxxxx838, OWCP advised that appellant had returned to part-time work on May 27, 2009 working 24 hours per week. It indicated that she received wage-loss compensation for 16 hours per week and that there was no indication that the employing establishment had withdrawn her limited-duty position.

On June 10, 2018 appellant asserted that A.B. and D.V. erred in making a job offer in 2007, demonstrating that A.B. and D.V. frequently made mistakes.

On July 7, 2018 appellant requested reconsideration. She asserted that she had submitted time sheets showing that as of November 13, 2012 she had been charged with using 40 hours per week of annual and sick leave. Appellant advised that she had returned to work with restrictions in 2009 after a prior injury, contrary to the assertions of A.B. and D.V. She indicated that when she resumed work on November 13, 2012 her work duties had changed and her laptop confiscated. Appellant listed prior mistakes by management. She contended that she had established error in a personnel matter as she had sustained flashback to her original injury as both had occurred while she was performing her assigned duties.

Appellant submitted the second page of a Form CA-7, completed by A.B. on December 11, 2012. A.B. indicated that appellant worked 40 hours per week and had returned to her full-time usual employment on May 27, 2009. She advised that appellant had returned to work for one day on November 13, 2012 and then stopped work.

Appellant further submitted time and attendance records showing that she used eight hours of sick and annual leave from November 18 through December 7, 2012.

In a statement dated December 18, 2019, the employing establishment asserted that the evidence provided by appellant was not relevant to the date of the claimed injury, November 13, 2012. It noted that her EEO claim "did not proceed to the point of a decision" and that, except for November 13, 2012, was relevant only to dates after the claimed injury. The employing establishment maintained that time and attendance matters were within its administrative purview. It noted that all employees had to have 80 hours of leave for timekeeping purposes. The employing establishment referenced the November 8, 2012 e-mail from D.V. providing that appellant was returning to work for 24 hours per week and acknowledging that she had a workers' compensation claim. It advised that D.V. made a typographical error that only 30 hours of LWOP could be granted. The employing establishment indicated that the dates from 2007 and 2009 referenced by appellant was not pertinent to this claim. It maintained that there was no wrongdoing in leave matters that occurred on November 13, 2012.

By decision dated September 2, 2020, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] 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.[8] 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.[9]

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.[10]

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

[7] *Supra* note 1.

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

[9] 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).

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

assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.[11] 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.[12]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[13] Where, however, the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[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 factors of employment and may not be considered.[15] 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.[16]

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's August 31, 2016 decision. The Board considered this evidence in its July 13, 2017 decision and found it was insufficient to establish her emotional condition claim. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[17]

[11] *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).

[12] *Lillian Cutler, id*.

[13] *See R.M.*, Docket No. 19-1088 (issued November 17, 2020); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[14] *M.A.*, Docket No. 19-1017 (issued December 4, 2019).

[15] *See R.B.*, Docket No. 19-0434 (issued November 22, 2019); *O.G.*, Docket No. 18-0359 (issued August 7, 2019).

[16] *Id*.

[17] *See P.B.*, Docket No. 20-0124 (issued March 10, 2021); *I.S.*, Docket No. 19-1461 (issued April 30, 2020); *B.R.*, Docket No. 17-0294 (issued May 11, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

Following OWCP's August 31, 2016 decision, appellant submitted evidence supporting her allegation that A.B. informed her on November 13, 2012 that she had to work full time. In a witness interrogatory obtained in connection with an EEO claim, T.H. asserted that A.B. had told appellant that she had to work full time even though the medical evidence established that she could only work 24 hours per week. T.H. related that beginning November 13, 2012, the employing establishment did not pay her 24 hours per week or inform OWCP that it could not offer suitable employment. She asserted that appellant was erroneously required to use leave and LWOP from November 13, 2012 through March 20, 2014. In a witness interrogatory dated March 18, 2016, C.D., a supervisor, advised that A.B. had completed a Form CA-3 indicating that appellant had returned to full-time employment even though she had only returned to work for 24 hours per week. He maintained that A.B.'s action was in error. Appellant also submitted a December 11, 2012 Form CA-7 in which A.B. advised that she worked 40 hours per week and had returned to her usual employment on May 27, 2009 even though the evidence supports that she had only returned to part-time modified work.

On December 18, 2019 the employing establishment indicated that D.V.'s finding that she could only use 30 hours of LWOP was a typographical error and generally asserted that it had not committed wrongdoing in leave matters on November 13, 2012. The employing establishment did not address the allegations by T.H. that appellant had been erroneously required to use personal leave and LWOP beginning November 13, 2012 or comment on T.H.'s contention that A.B. had told appellant that she had to work full time. C.D., in a March 18, 2016 report, referenced evidence from OWCP File No. xxxxxx838 supporting that A.B. had erroneously advised OWCP that she had resumed full-time employment.

The Board finds that the witness statements from T.H., C.D., and D.V. are sufficient to establish error or abuse by the employing establishment in informing appellant that she had to work full time when she resumed work on November 13, 2012 and instructing her to use leave for hours not worked.[18] As appellant has established a compensable factor of employment, the case must be remanded for an evaluation of the medical evidence regarding the issue of causal relationship.[19] After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[18] *See D.L.*, Docket No. 22-0237 (issued April 18, 2023); *R.B.*, Docket No. 21-0643 (issued February 9, 2023) (finding error and abuse by the employing establishment in administrative matters).

[19] *E.G.*, Docket No. 20-1029 (issued March 18, 2022); *M.D.*, Docket No. 15-1796 (issued September 7, 2016).

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2020 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: September 8, 2023
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