United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 21-0690**
	)	**Issued: December 9, 2021**
U.S. POSTAL SERVICE, WEWAHITCHKA POST OFFICE, Wewahitchka, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 28, 2021 appellant filed a timely appeal from a November 9, 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 to consider the merits of this case.[2]

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the November 9, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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.

FACTUAL HISTORY

On August 12, 2019 appellant, then a 27-year-old part-time flexible clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained an anxiety disorder on or before April 26, 2019 while in the performance of duty. She attributed her condition to an April 26, 2019 discussion with postmaster, S.J. about maternity leave, a July 19, 2019 text message from S.J. requesting that she return to work from maternity leave on July 29, 2019 instead of August 5, 2019 as previously agreed, and a July 24, 2019 employing establishment letter indicating that she would be placed in absent without leave (AWOL) status commencing July 20, 2019 until she returned to work. Appellant explained that her attending physician diagnosed anxiety on August 12, 2019.

In support of her claim, appellant submitted a screen capture of text messages between S.J. and appellant dated July 19 through 22, 2019. On July 19, 2019 S.J. indicated that a work schedule for July 29, 2019 was under preparation and requested appellant's input. Appellant responded on July 21, 2019 that she was under medical care for an employment-related wrist condition[3] and would remain off work until a scheduled August 5, 2019 appointment. S.J. replied on July 22, 2019 that appellant must submit proper documentation of her work absence, including an updated duty status report from her physician.

Appellant also submitted an unsigned August 12, 2019 patient information form, and an August 12, 2019 prescription note signed by Donna Jane Thomson, a nurse practitioner and certified nurse midwife.

In an August 14, 2019 statement, the employing establishment controverted the claim. It contended that appellant had not established that she sustained a condition while in the performance of duty as she submitted insufficient medical documentation to establish that the diagnosed anxiety was work related.

In a development letter dated August 19, 2019, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of medical and factual evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In response, appellant submitted statements dated August 2 through 30, 2019. She contended that in April 2019, S.J. urged her to take maternity leave well before her May 19, 2019 due date so that she could return to work in July 2019 before a coworker planned to take extended leave to assist her daughter with childcare, and S.J. left for a planned vacation in August 2019. Appellant gave birth on May 11, 2019. During July 8 and 10, 2019 telephone calls, S.J. again insisted that appellant return to work before the end of her authorized leave on July 29, 2019, and discussed appellant's apparent relocation to Indiana. On July 11, 2019 appellant reported to the employing establishment for two hours to count her cash drawer. S.J. refused to sign and return her leave slips. On July 24, 2019 she placed appellant in AWOL status commencing July 20, 2019. Appellant contended this was administrative error as she had been approved for Family and

[3] Under OWCP File No. xxxxxx071, appellant filed an occupational disease claim (Form CA-2) alleging that on or before April 15, 2019, she sustained left carpal tunnel syndrome due to repetitive motion while in the performance of duty. OWCP denied the claim. Appellant's claims have not been administratively combined.

Medical Leave Act (FMLA) leave through July 29, 2019. On July 29, 2019 she requested an extension of FMLA leave. S.J. then sent appellant an August 8, 2019 letter notifying her that she had exhausted her FMLA leave effective August 4, 2019. Appellant alleged that on August 13, 2019 S.J. refused to complete a revised claim form and duty status report (Form CA-17), or acknowledge medical evidence appellant submitted at S.J.'s request to support her continued work absence. S.J. sent appellant an August 23, 2019 letter again charging her as AWOL, but accepted an August 13, 2019 disability slip from Blythe H. Smith, a counselor, holding appellant off work. Appellant noted that she had filed an Equal Employment Opportunity (EEO) complaint regarding the AWOL charge and denial of FMLA leave.

In an August 30, 2019 witness statement, L.C., appellant's coworker and mother, noted that she had also been under S.J.'s supervision. She contended that on July 10, 2019 she overheard a telephone conversation between appellant and S.J. in which appellant noted that she had requested a transfer to Indiana, where she had lived prior to residing in Florida. S.J. instructed appellant to report to the employing establishment to count her cash drawer, and to return to duty on July 20, 2019 because of staffing issues. Appellant responded that she had been granted leave through August 5, 2019, but reported to the employing establishment for two hours on July 11, 2019 to count her cash drawer. S.J. subsequently placed appellant in AWOL status effective July 20, 2019. On July 29, 2019 appellant telephoned S.J. to ascertain why she had listed as AWOL although she had FMLA leave approved through July 27, 2019. S.J. indicated that appellant did not meet the 1,250 annual work-hour requirement to claim FMLA leave and was, therefore, properly charged as AWOL. L.C. then explained to S.J. that supervisors had the option to override the 1,250 hour requirement, and that S.J. had not complied with a three-letter pretermination notice requirement. On August 12, 2019 she accompanied appellant to the employing establishment to submit medical documentation requested by S.J. S.J. refused to accept the documents or complete a revised claim form.

Appellant submitted factual and medical evidence in support of her claim. In an April 15, 2019 designation notice under FMLA, her leave request was approved for scheduled medical appointments through July 3, 2019, and total work absence for the period July 3 through September 25, 2019. On May 26, 2019 appellant completed leave requests to use 148 hours sick leave for intermittent periods from April 26 through July 31, 2019, and a combination of sick and annual leave from July 14 through 29, 2019.

In a July 11, 2019 note, appellant requested to be paid for the maximum hours allowed for reporting to the employing establishment that day to count her cash drawer as directed by S.J.

In a July 24, 2019 letter, S.J. notified appellant that she had failed to properly document her work absence commencing July 20, 2019, and no longer qualified for FMLA leave as she had not worked 1,250 hours in the year prior to her leave request. She advised that failure to respond to the letter within five days of receipt would "result in immediate action being taken to terminate" her.

In an August 7, 2019 designation notice under FMLA, appellant's leave request was approved for the period May 11 through August 3, 2019.

In an August 8, 2019 letter, S.J. notified appellant that she was in AWOL status as she had exhausted her FMLA leave effective August 4, 2019 and had not provided documentation of her subsequent work absence. She directed appellant to return to duty on her first scheduled workday after receipt of the notice, or provide acceptable documentation that she was incapacitated for work and the anticipated date she would return to work. S.J. advised that failure to respond to the notice within five days of receipt would result in "immediate action being taken to terminate" appellant.

An August 9, 2019 pay slip noted that appellant had been charged 42 hours of AWOL for the period July 20 through August 2, 2019.

Appellant also submitted August 13 and 22, 2019 reports by Ms. Smith, a licensed clinical professional counselor, holding appellant off work commencing August 1, 2019.

In an August 14, 2019 FMLA designation notice, appellant was advised that she had exhausted her FMLA leave entitlement in the applicable 12-month period effective July 26, 2019.

In an August 15, 2019 letter, the employing establishment notified appellant that a decision had been made on her FMLA leave request. In an undated statement written on the decision letter, appellant requested clarification on the effect of her August 13, 2019 request for an extension of her FMLA case on leave granted to her on August 7, 2019 for the period May 11 through August 3, 2019. She alleged that the August 15, 2019 letter was a "tactic to cover" S.J.

In an August 22, 2019 report, Dr. Nitin Thapar, a Board-certified psychiatrist, summarized appellant's account of the leave issues with S.J. He diagnosed generalized anxiety disorder and prescribed medication.

An August 23, 2019 earnings statement indicated that appellant was listed as AWOL for 25 hours from August 3 through 16, 2019.

In an August 23, 2019 letter, S.J. notified appellant that she was charged with AWOL for the period July 27 through August 11, 2019. She explained that the medical documentation appellant submitted on August 13, 2019 was unacceptable as it did not indicate when she would be able to resume full duty. S.J. granted appellant LWOP in lieu of sick leave for the period August 13 through September 13, 2019.

By decision dated October 8, 2019, OWCP denied appellant's claim, finding that she had not established any compensable factors of employment. It accepted as factual, but not compensable, that S.J. inquired about appellant's return to work following maternity leave and the exhaustion of FMLA leave, that S.J. did not grant leave as requested by appellant, that S.J. inquired regarding appellant's relocation out of state, and that appellant had filed a FECA claim for tendinitis.

OWCP received an October 11, 2019 attending physician's report (Form CA-20) by Dr. Thapar diagnosing generalized anxiety disorder.

On December 11, 2019 appellant requested reconsideration. She alleged that S.J. harassed her on July 11, 2019 by requiring her to return to work before the end of her FMLA maternity leave. Appellant contended that S.J. had the discretion to override the expiration of her FMLA

leave. Alternatively, she contended that the 1,250-hour rule was separate and distinct from determining whether an employee's FMLA entitlement had been exhausted.[4]

In an April 8, 2019 FMLA notice of rights and responsibilities, appellant was advised that she was eligible for FMLA leave, but needed to submit additional documentation.

In a report dated October 11, 2019, Dr. Thapar held appellant off work through January 10, 2020 due to generalized anxiety disorder.

In a November 22, 2019 letter, S.J. notified appellant to appear for an investigative interview on December 3, 2019 to discuss her absence and failure to submit appropriate documentation. She noted that failure to report for the interview would "force [her] to make a decision regarding [appellant's] continued employment without input from" appellant. Appellant did not attend the interview.

In a December 3, 2019 letter, S.J. notified appellant that a rescheduled investigative interview would be held on December 11, 2019. She reiterated that, if appellant failed to report for the investigative interview or participate by telephone as directed, it would "force [her] to make a decision regarding" appellant's continued employment. In response, appellant submitted October 10 and November 7, 2019 reports by Ms. Smith finding her disabled from work commencing August 1, 2019.

In e-mails dated December 9 and 14, 2019, appellant alleged that a November 13, 2019 invoice from S.J. for $710.95 to repay AWOL was in retaliation for requesting a transfer to Indiana. She contended that the November 22 and December 3, 2019 interview notices were harassment and intimidation.

In statements dated December 9 and 27, 2019, L.C. alleged that S.J. did not understand that the 1,250 work-hour rule was not a bar to FMLA eligibility.

In a December 12, 2019 e-mail, appellant alleged that she was not selected for reassignment because of attendance and safety issues.

In a notice dated December 19, 2019, S.J. informed appellant that she would be removed from the employing establishment for failure to maintain a regular work schedule, as her FMLA leave entitlement ended on July 26, 2019, but appellant had remained off work in LWOP status. Furthermore, appellant failed to report for scheduled December 3 and 11, 2019 investigative interviews.

By decision dated January 14, 2020, OWCP denied modification of the October 8, 2019 decision. It found that FMLA usage was an administrative matter not within the performance of duty, and that appellant had not substantiated her allegations of managerial harassment as factual.

[4] Appellant also submitted September 11 and November 14, 2000 employing establishment statements on FMLA eligibility.

On August 22, 2020 appellant requested reconsideration. In an August 13, 2020 statement, she alleged that she should not have been listed as absent from scheduled overtime while on FMLA July 22 through 26, 2019. Appellant submitted timekeeping records listing unscheduled FMLA leave from July 20 through August 16, 2019, which she asserted was equivalent to AWOL.

In an August 28, 2019 letter, S.M., a human resources manager, noted that an investigation of the FMLA leave matter established that S.J.'s actions were consistent with existing rules and regulations.

OWCP received work absence slips from Ms. Smith dated from September 23, 2019 through January 23, 2020, and an October 11, 2019 report by Dr. Thapar, holding appellant off from work. Dr. Thapar noted an anticipated return to work on January 10, 2020.

In an October 30, 2019 letter, T.B., an employing establishment official, asserted that appellant had exhausted her FMLA entitlement on or about July 26, 2019. A review of leave records indicated that appellant's FMLA leave request and transfer request had been consistent with existing agreements, rules, and regulations.

In a November 1, 2019 letter, L.O., an employing establishment district reasonable accommodations committee official, noted that an October 31, 2019 request to have the scheme requirement removed from a reassignment position as a sales and services distribution associate was denied as her physician found her disabled from work through January 10, 2020, and there were no effective accommodations available.

In chart notes dated November 7, 2019 through February 3, 2020, Dr. Thapar found appellant disabled from work due to generalized anxiety disorder precipitated by her interactions with S.J. regarding the FMLA and transfer issues.

In a December 5, 2019 letter, the employing establishment's Indiana district denied appellant's transfer request due to her unacceptable attendance and safety record.

In a December 9, 2019 letter, the U.S. Department of Labor's Wage and Hour Division informed appellant that its investigation of the employing establishment's processing of her FMLA leave request found no violations. It noted that, while appellant did not meet the 1,250-hour requirement, the employing establishment had approved FMLA leave. The case file would be administratively closed with no further action.

OWCP received e-mails and tracking forms dated from January 23 through May 5, 2020 regarding an application for a position in the employing establishment's Greater Indiana District.

In a January 23, 2020 Step 2 grievance settlement agreement, the employing establishment agreed to pay appellant for two hours of work on July 11, 2019, and to convert AWOL status for the period July 29 through August 9, 2019 to unscheduled LWOP. Appellant submitted revised earnings statements showing conversion of the AWOL to unscheduled LWOP.

By decision dated November 9, 2020, OWCP denied modification of the January 14, 2020 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim,[6] including that he or she sustained an injury in the performance of duty, and that any specific condition or disability from work for which he or she claims compensation is causally related to that employment injury.[7] 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.[8]

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.[9]

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 compensable.[10] 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.[11]

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.[12] Where, however, the evidence demonstrates that the employing establishment either erred or acted abusively in

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[5] *Supra* note 1.

[6] *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).

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

[8] 20 C.F.R. § 10.115; *R.S.*, Docket No. 20-1307 (issued June 29, 2012); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Michael E. Smith*, 50 ECAB 313 (1999).

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

[10] *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).

[11] *Lillian Cutler*, *id*.

[12] *See R.M.*, Docket No. 19-1088 (issued November 17, 2020); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[13]

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.[14] 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.[15]

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.[16] Its regulations 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.[17]

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

ANALYSIS

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

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

[14] *See R.B.*, Docket No. 19-0434 (issued November 22, 2019); *O.G.*, *supra* note 6.

[15] *Id*.

[16] 20 C.F.R. § 10.117(a); *D.L.*, Docket No. 15-0547 (issued May 2, 2016).

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

[18] *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).

[19] 20 C.F.R. § 10.121.

[20] *S.S.*, *supra* note 8; *R.B.*, Docket No. 18-1270 (issued September 4, 2020); *F.V.*, Docket No. 19-0006 (issued September 19, 2019).

Appellant has not attributed her emotional condition to the performance of her regular duties as a clerk or to any special work requirement arising from her employment duties under *Cutler*.[21] Rather, she has attributed the basis of her emotional condition to administrative and personnel actions on the part of her supervisor, including alleged interference with a requested transfer, denial of FMLA leave, refusal to sign leave slips, being asked to return to work before a period of approved leave had expired, two letters advising her to report for an investigative interview or face termination, and a termination notice. Appellant also alleged that these administrative actions constituted a pattern of harassment.

On August 19, 2019 OWCP requested that appellant provide additional factual and medical evidence in support of her claim, and provided a questionnaire for her completion. It did not, however, request additional information from the employing establishment, including a statement from appellant's supervisor, S.J., or another knowledgeable supervisor, concerning appellant's allegations. As discussed, OWCP's procedures provide that, in emotional condition cases, a statement from the employing establishment is necessary to adequately adjudicate the claim.[22] Furthermore, the case record contains a December 9, 2019 letter noting that an investigation of the handling of one of appellant's FMLA leave requests had found no wrongdoing. However, that investigative report is not of record.

Although it is a claimant's burden of proof to establish his or 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.[23]

This case will therefore 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 each of appellant's allegations materials from the FMLA leave request investigation and the grievance settlement. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[21] *Supra* note 11.

[22] *Supra* note 18; *S.S.*, *supra* note 8; *M.T.*, Docket No. 18-1104 (issued October 9, 2019).

[23] *R.A.*, Docket No. 17-1030 (issued April 16, 2018); *K.W.*, Docket No 15-1535 (issued September 23, 2016) (remanding the case for further development by OWCP when the employing establishment did not provide an investigative memorandum in an emotional condition claim based on sexual harassment).

ORDER

IT IS HEREBY ORDERED THAT the November 9, 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: December 9, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board