United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No. 20-0998**
	)	**Issued: December 14, 2022**
U.S. POSTAL SERVICE, POST OFFICE, Greensboro, NC, Employer	)	

Appearances:
Daniel F. Read, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 3, 2020 appellant, through counsel, filed a timely appeal from an October 28, 2019 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.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish exposure to fumes at work in the performance of duty on January 9, 2018, as alleged; and (2) whether appellant

[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*.

has met her burden of proof to establish an emotional condition in the performance of duty on January 9, 2018, as alleged.

FACTUAL HISTORY

On January 23, 2018 appellant, then a 51-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that at approximately 8:20 a.m. on January 9, 2018 she experienced dizziness, sickness, and nausea when she was exposed to gas fumes from a furnace while in the performance of duty. On the reverse side of the claim form, A.K., appellant's supervisor, acknowledged that she was injured while in the performance of duty. Appellant stopped work on January 9, 2018.

In a January 10, 2018 statement, appellant explained that she arrived at work at 8:15 on the morning of January 9, 2018 and at some point smelled "gas or something that smelled funny." She felt woozy and queasy, her sinuses became congested, and she had trouble breathing. Appellant walked outside to get some air and when she went back inside, she felt as if she was going to pass out. She went to the pharmacy next door to get her blood pressure checked and the next thing she remembered was an ambulance taking her to the hospital.

A January 11, 2018 after visit summary indicated that Drs. Kimberly Alford and Marina Boushra, both Board-certified in emergency medicine, evaluated appellant for difficulty breathing and diagnosed a cough. They reported that appellant completed several medical tests, including a blood count, computerized tomography scan of the head, an electrocardiogram, and an x-ray of the chest. Drs. Alford and Boushra explained that appellant's blood count was normal and that her diagnostic tests showed no concerning changes.

Appellant submitted an undated statement from J.B., a coworker. J.B. related that she thought she smelled "something like rotten eggs" near the Route 2 case. She got a slight headache and went outside for fresh air. J.B. went with appellant to the pharmacy to have her blood pressure checked.

In a January 17, 2018 medical note, a nurse practitioner advised that appellant should not work until January 23, 2018.

On January 19, 2018 Dr. Dana E. Brindisi, a chiropractic neurologist, found that appellant should not drive or work.

In a statement dated January 23, 2018, the employing establishment controverted appellant's claim. It asserted that another employee might have smelled something and had experienced a mild headache, but was otherwise fine. The employing establishment advised that no other employee had experienced appellant's symptoms, and that the emergency department (ED) report found that she did not have carbon monoxide poisoning.

In a development letter dated February 1, 2018, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a factual questionnaire for her completion. OWCP afforded appellant 30 days to respond.

Subsequently, OWCP received a January 9, 2018 emergency medical services report. The emergency medical technicians (EMT) related that appellant had reported a funny smell at work around 8:15 a.m. The EMTs indicated that appellant was slow to respond and transported her to the ED.

In a January 9, 2018 medical report, Dr. Lloyd Smith, Board-certified in emergency medicine, evaluated appellant for nausea and headaches that had occurred after she spent over an hour in a room at work that smelled like rotten eggs.[3] He found that her blood pressure was above normal. Dr. Smith advised that appellant did not have carbon monoxide poisoning, and that her symptoms may have occurred from inhaling other gaseous fumes. He diagnosed the toxic effect of propane.

In a January 19, 2018 duty status report (Form CA-17), Dr. Brindisi diagnosed pseudo-epilepsy due to the alleged January 9, 2018 employment incident and advised that appellant was not able to return to work. In a work note of even date, Dr. Brindisi found that appellant was unable to drive and required rest.

In a January 20, 2018 statement, D.W., appellant's coworker, related that at 7:00 a.m. on January 9, 2018 he arrived at work and noticed that the heat was not working. He did not smell any fumes or feel light-headed or sick. Appellant arrived at approximately 8:05 a.m., and a few minutes later indicated that she smelled something like a gas smell by her letter case. The carriers went over and noted that they "kind of smelled something" so D.W. went over and again stated that he could not smell anything. Appellant indicated that she felt woozy and the doors were opened. Thereafter, two other employees complained of headaches.

In an ED report dated January 21, 2018, Dr. Israel Landa, Board-certified in emergency medicine, evaluated appellant for a seizure. He obtained a history of appellant being exposed to a gas leak on January 9, 2018, with multiple employees developing headaches. Appellant subsequently experienced multiple seizures in front of a health care provider. Dr. Landa noted that appellant had undergone a brain magnetic resonance imaging (MRI) scan on January 15, 2018 which revealed no intracranial pathology. On examination, he found that she was in an altered mental state with her eyes crossed and that she failed to respond to painful stimuli. Dr. Landa diagnosed an unspecified altered mental state.

In a January 22, 2018 statement, S.S., a coworker, advised that when she arrived at work on January 9, 2018 at 8:00 a.m. she noticed that the heat was working again after having issues the prior week. Appellant requested that she come to her case to see if she smelled anything and S.S. responded that she "thought maybe but nothing too bad." J.B. told appellant that she may have smelled something like rotten eggs. Approximately 20 minutes later, appellant and J.B. went to the pharmacy so that appellant could have her blood pressure checked. J.B. later informed S.S. that appellant's blood pressure was high, and the ambulance was called.

[3] On January 10, 2018 a nurse practitioner noted that appellant had been taken to the hospital after exposure to toxic fumes from a heater at work. She diagnosed dizziness, weakness of the left side of the face, mixed hyperlipidemia, vitamin D deficiency, anxiety, gastroesophageal reflex disease with esophagitis, upper extremity weakness, facial weakness, and essential hypertension.

In a February 27, 2018 letter, Dr. Monica McGill, a psychiatrist, diagnosed nonepileptic spells or pseudo-seizures according to her review of recent paperwork. She referred appellant for continuation of psychotherapy and recommended that she be referred to a neurologist to rule out cognitive impairment and/or deficits if her symptoms continued.

In an undated statement, appellant advised that immediately after the incident she felt dizzy and/or nauseated, and as if she might pass out. She did not remember much after she left the building until she received oxygen at the hospital. Appellant began having episodes that were like seizures almost every day. On January 21, 2018 she experienced the seizures every half-hour and sought treatment at the hospital. An evaluation found non-epileptic seizures. Appellant attributed the seizures to her brain receiving reduced oxygen the day she inhaled the gas fumes. In another statement, she related that she had no health issues prior to her exposure to fumes. Appellant noted that a coworker who was not in her vicinity also had a headache.

By decision dated March 7, 2018, OWCP denied appellant's traumatic injury claim. It accepted that the January 9, 2018 employment exposure occurred as alleged, but denied the claim finding that the evidence of record was insufficient to establish a valid medical diagnosis in connection with the accepted employment exposure. OWCP therefore concluded that appellant had not met the requirements to establish an injury as defined by FECA.

Subsequently, appellant submitted a report dated January 19, 2018 from Dr. Brindisi, who evaluated appellant for episodes which caused her to "space out," but not lose consciousness after exposure to a gas leak at work. Dr. Bindisi recommended that appellant undergo an electroencephalogram (EEG) test and functional neurological rehabilitation.[4]

On March 14, 2018 Dr. McGill noted that, prior to appellant's February 5, 2018 appointment, she had not been diagnosed with conversion disorder or "pseudo-seizures."

In a March 23, 2018 form report, Dr. Brindisi indicated that appellant's condition had begun on January 9, 2018 and opined that, due to her condition, appellant was unable to drive because of her severe spasms. She ruled out a seizure disorder because appellant did not lose consciousness during the seizure episodes, although she was unable to move or respond verbally. Dr. Brindisi asserted that she was unable to perform the duties of her position.

In a March 25, 2018 neurodiagnostic report, Dr. Annie Jackson, a Board-certified neurologist, advised that appellant had undergone an EEG test on March 13 and 15, 2018 for evaluation of possible seizures. She found that appellant's EEG was abnormal and opined that her findings were "very suspicious for potentially epileptogenic activity in the left mid temporal lobe."

In an April 4, 2018 neuropsychological evaluation, Dr. Tom Bundick a Board-certified neuropsychologist, evaluated appellant's cognitive abilities. He referenced the January 9, 2018 employment incident in which she encountered gas-like fumes at work and subsequently felt "loopy" and nauseous. Dr. Bundick diagnosed anxiety disorder with some elements of post-traumatic stress disorder, a history of major depressive disorder, mild neurocognitive disorder due

[4] In progress reports dated January 19 to March 21, 2018. Dr. Brindisi noted that appellant was exposed to gas at work and experienced pseudo-seizures related to the January 9, 2018 employment incident.

to emotional distress, and a probable learning disorder in reading. He opined that appellant's profile was most consistent with the effects of emotional distress on working memory, with secondary effects of some memory tasks. Dr. Bundick advised that her left-sided weakness and numbness and other symptoms "may most parsimoniously be interpreted as a conversion-type symptom." He found that appellant had not sustained cognitive losses caused by the January 2018 employment incident.

On April 6, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on September 12, 2018. Counsel recounted the events of the January 9, 2018 employment exposure and detailed appellant's subsequent medical history. Appellant asserted that she had sustained a psychiatric or emotional condition as a result of the January 9, 2018 employment incident. She indicated that she was tested for carbon monoxide exposure after she had already received oxygen.

Thereafter, counsel submitted medical reports dated February 5 to August 13, 2018 from Dr. McGill. Dr. McGill diagnosed pseudo-seizures and noted previous diagnoses of major depressive disorder, insomnia, as well as severe anxiety.

By decision dated November 9, 2018, OWCP's hearing representative modified the March 7, 2018 decision to find that appellant had not established the occurrence of the claimed exposure to carbon monoxide, gas, or other fumes at work on January 9, 2018.

On May 2, 2019 appellant, through counsel, requested reconsideration. Counsel argued that the evidence of record contained multiple statements from her coworkers which acknowledged a strange smell at the employing establishment and that multiple employees developed headaches on the date of the alleged employment incident. He explained that documentation submitted along with the request for reconsideration demonstrated that a heating, ventilation, and air conditioning (HVAC) technician found cracked burner cells in the furnace, which was close to appellant's case at work. Counsel argued that technical documents from the HVAC industry demonstrated that cracked burner cells were a serious health risk because they can allow toxic gas to escape into living spaces and suggested that this was the cause of her injury on January 9, 2018.

A February 20, 2018 invoice indicated that, on January 9, 2018, an HVAC technician evaluated the gas furnace at appellant's work location and found at least three cracker burner cells, an overheating connector switch, a bad heat exchanger, a bad limit switch, and a bad flame rollout. The technician further found that the fresh combustion air and exhaust flue were glued at the furnace and that unit did not have enough return air. No leaks were found. The technician performed repairs to the furnace and installed carbon monoxide detectors.

Counsel also submitted information from an internet search explaining that the cracked combustion chamber on a furnace can allow gasses to enter a living area and present a toxic hazard to the occupants.

By decision dated October 28, 2019, OWCP denied modification of the November 9, 2018 decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[5] 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, than 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.[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 determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.[8] Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred at the time and place, and in the manner alleged.[9] The second component is whether the employment incident caused a personal injury.[10]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[11] A physician's opinion on whether there is a causal relationship between the diagnosed condition and the accepted employment incident must be based on a complete factual and medical background.[12] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and the specific employment incident.[13]

[5] *Supra* note 2.

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

[7] 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).

[8] *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *T.H.*, 59 ECAB 388 (2008).

[9] *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[10] *Id*.

[11] *S.K.*, Docket No. 22-0432 (issued June 27, 2022); *E.G.*, Docket No. 20-1184 (issued March 1, 2021); *T.H.*, 59 ECAB 388 (2008).

[12] *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

[13] *B.C.*, Docket No. 20-0221 (issued July 10, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

ANALYSIS -- ISSUE 1

The Board finds that appellant has met her burden of proof to establish exposure to fumes at work in the performance of duty on January 9, 2018, as alleged.

On her January 23, 2018 CA-1 form, appellant related that on the morning of January 9, 2018 she experienced dizziness and nausea when exposed to fumes from a gas furnace. OWCP found that she failed to establish exposure to carbon monoxide, gas, or other fumes at work on January 9, 2018 and, thus, had not demonstrated that the January 9, 2018 employment incident occurred as alleged.

In her January 10, 2018 statement, appellant described the events of the alleged January 9, 2018 employment incident. She asserted that she arrived at work at approximately 8:20 a.m. and subsequently smelled "gas or something that smelled funny" near her case, which caused her to feel woozy and queasy and have trouble breathing. An ambulance transported appellant to a hospital.

The evidence of record contains multiple witness statements from appellant's coworkers who confirmed that she complained of a headache and nausea the morning of January 9, 2018 before eventually being escorted to the hospital by ambulance. Coworkers J.B. and S.S both thought that they smelled something odd near appellant's work location. D.W. related that other employees had also complained of headaches the morning of January 9, 2018. Upon being notified of these complaints, the employing establishment opened doors to circulate fresh air. A technician who inspected the employing establishment's furnace on that date found multiple problems with the unit, including three broken furnace cells, a bad heat exchange, and the lack of sufficient return air. Further, the contemporaneous medical evidence of record all substantiates appellant's contention that she had encountered a strange smell at work. Although a specific gas or fume could not be identified, the Board finds that appellant has submitted reliable and supportive evidence corroborating that she was exposed to a gas or fume-like substance on January 9, 2018.[14]

As appellant has established that the claimed occupational exposure on January 9, 2018 occurred as alleged, the question becomes whether the exposure caused an injury.[15] As OWCP found that she had not established the claimed exposure in the performance of duty, it did not evaluate the medical evidence. The case must, therefore, be remanded for consideration of the medical evidence of record.[16] After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish an injury causally related to the accepted January 9, 2018 employment incident.

[14] *See Y.G.*, Docket No. 20-0688 (issued November 13, 2020); *R.S.*, Docket No. 20-0471 (issued October 7, 2020).

[15] *See J.T.*, Docket No. 20-0713 (issued July 11, 2022); *M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

[16] *D.F.*, Docket No. 21-0825 (issued February 17, 2022); *L.D.*, Docket No. 16-0199 (issued March 8, 2016); *Betty J. Smith*, 54 ECAB 174 (2002).

LEGAL PRECEDENT -- ISSUE 2

To establish an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) medical evidence establishing that he or she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.[17]

Workers' compensation law does not apply to each and every injury or illness that is somewhat related to an employee's employment.[18] There are situations where an injury or an illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.[19] On the other hand, the disability is not covered when it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.[20]

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."[21]

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

[17] *See W.F.*, Docket No. 18-1526 (issued November 26, 2019); *C.M.*, Docket No. 17-1076 (issued November 14, 2018); *C.V.*, Docket No. 18-0580 (issued September 17, 2018); *Kathleen D. Walker*, 42 ECAB 603 (1991).

[18] *T.G.*, Docket No. 19-0071 (issued May 28, 2019); *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

[19] *L.H.*, Docket No. 18-1217 (issued May 3, 2019); *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[20] *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Gregorio E. Conde*, 52 ECAB 410 (2001).

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17j (July 1997). *See G.K.*, Docket No. 20-0508 (issued December 11, 2020); *S.L.*, Docket No. 17-1780 (issued March 14, 2018).

argument with which it disagrees and provide evidence or argument to support that position.[22] 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.[23]

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision regarding whether appellant has met her burden of proof to establish an emotional condition in the performance of duty on January 9, 2018, as alleged.

OWCP has not adequately developed appellant's emotional condition claim. During the telephonic hearing, appellant alleged that she had sustained a psychological condition due to her workplace exposure to fumes from a furnace on January 9, 2018. OWCP's hearing representative denied appellant's claim, finding that she had not established any compensable factors of employment. OWCP, however, did not provide her with a development letter identifying and requesting the information needed to adjudicate her emotional condition claim in accordance with its procedures.[24] Additionally, as noted, a statement from the employing establishment is necessary to properly develop and adjudicate an emotional condition claim.[25] OWCP shall then determine whether the implicated employment factors actually existed or occurred and distinguish between those workplace activities and circumstances which are factors of employment and those which are outside the scope of employment.[26] 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.[27]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[28] While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.[29] As OWCP did not follow its procedures with respect to the development of the emotional

[22] 20 C.F.R. § 10.117(a). *See R.S.*, Docket No. 20-1307 (issued June 29, 2021); *G.K., id.*; *M.T.*, Docket No. 18-1104 (issued October 9, 2019).

[23] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7a(2) (June 2011); *R.M.*, Docket No. 19-1520 (issued September 15, 2021); *R.S., id.*

[24] *Id.* at 2.800.5b(1).

[25] *Supra* note 23.

[26] These should be labeled as accepted events that are factors of employment, accepted events that are not factors of employment, and incidents alleged which OWCP finds did not occur. *See* Federal (FECA Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.6 (November 2012).

[27] *Robert Breeden*, 57 ECAB 622 (2006).

[28] *See L.S.*, Docket No. 18-1208 (issued April 30, 2020); *Phillip L. Barnes*, 55 ECAB 426 (2004).

[29] *A.F.*, Docket No. 20-1635 (issued June 9, 2022); *N.S.*, 59 ECAB 422 (2008).

condition aspect of appellant's claim, the case is not in posture for decision on this issue. After this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has met her burden of proof to establish exposure to fumes at work in the performance of duty on January 9, 2018, as alleged, but that the case is not in posture for decision with regard to causal relationship. The Board further finds that the case is not in posture for decision regarding whether appellant has met her burden of proof to establish an emotional condition in the performance of duty on January 9, 2018, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2019 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 14, 2022
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