

**United States Department of Labor
Employees' Compensation Appeals Board**

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| A.B., Appellant |) | |
| |) | |
| and |) | Docket No. 21-1170 |
| |) | Issued: August 28, 2023 |
| DEPARTMENT OF VETERANS AFFAIRS, |) | |
| MARTINEZ VA MEDICAL CENTER, |) | |
| Martinez, CA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 27, 2021 appellant filed a timely appeal from an April 29, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ The Board notes that, during the pendency of this appeal, OWCP issued an August 5, 2021 decision which denied a July 14, 2021 request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. The Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). 20 C.F.R. §§ 501.2(c)(3), 10.626; *see J.W.*, Docket No. 19-1688, n.1 (issued March 18, 2020); *J.A.*, Docket No. 19-0981, n.2 (issued December 30, 2019); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990). Consequently, OWCP's August 5, 2021 decision is set aside as null and void.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the April 29, 2021 decision, OWCP received additional evidence. 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 an emotional condition in the performance of duty on February 1, 2021 as alleged.

FACTUAL HISTORY

On March 7, 2021 appellant, then a 34-year-old accountant, filed a traumatic injury claim (Form CA-1) alleging that on February 1, 2021 she sustained trauma, panic attack, anxiety, depression, and post-traumatic stress disorder while in the performance of duty. She indicated that she was verbally attacked, harassed, bullied, and humiliated during an audit by D.C., an employing establishment administrative finance officer (AFO) while A.S., the chief of the employing establishment's accounting section, was present. On the reverse side of the claim form, A.S. indicated that she and D.C. disagreed with appellant's description of events. Appellant stopped work on February 4, 2021.

In support of her claim, appellant submitted an undated statement alleging that on February 2, 2021 A.S. and D.C. asked to speak with her in her office and then advised her that they would be conducting an unannounced audit. She indicated that the audit lasted approximately four hours without a break, and that D.C. was disrespectful, demanding, and bullying. Appellant asserted that D.C. mishandled paperwork, tormented her, belittled her, and discriminated against her based upon her race.

In a report dated February 22, 2021, Dr. Christine Chang Lim, a psychiatrist, indicated that appellant related symptoms of stress, anxiety, depression, headache, and sweating which she attributed to an AFO bullying, harassing, and discriminating against her, and searching through her personal belongings during an audit. After the incident appellant felt that she could not trust any person at her job, that her privacy was invaded, and that her work environment was hostile. Dr. Lim noted a history of prior psychiatric issues and treatment, including that appellant was taking an anti-depressant medication.

In a work excuse note dated February 22, 2021 and a Family and Medical Leave Act certification of health provider form dated February 24, 2021, Dr. Lisa Mieko Nakata, a psychiatrist, recommended that appellant remain out of work from February 27 through March 29, 2021.

In a March 18, 2021 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of medical and factual evidence needed. OWCP provided appellant with a questionnaire for her completion. It afforded her 30 days to respond. No additional evidence was received.

By decision dated April 29, 2021, OWCP denied appellant's emotional condition claim finding that the incident occurred as alleged, but that she had not provided medical evidence of a diagnosed condition in connection with the February 1, 2021 incident. It further found that she had not substantiated a compensable factor of employment. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,⁵ that an injury was sustained in the performance of duty as alleged, and that any disability or medical 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 upon a traumatic injury or an occupational disease.⁷

To establish a claim for an emotional condition in the performance of duty, an employee must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; (2) medical evidence establishing that he or she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.⁸

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,⁹ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage of FECA.¹⁰ When disability results from an emotional reaction to regular or specially assigned work duties, or to a requirement imposed by the employing establishment, the disability is deemed compensable.¹¹

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

⁴ *Supra* note 2.

⁵ *S.S.*, Docket No. 19-1021 (issued April 21, 2021); *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued December 13, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *L.N.*, Docket No. 22-0126 (issued July 15, 2023); *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *S.D.*, Docket No. 23-0898 (issued July 13, 2023); *R.B.*, Docket No. 19-0343 (issued February 14, 2020).

⁹ 28 ECAB 125 (1976).

¹⁰ *See L.Y.*, Docket No. 21-0344 (issued June 15, 2023); *M.R.*, Docket No. 18-0305 (issued October 18, 2018); *Robert W. Johns*, 51 ECAB 136 (1999).

¹¹ *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, *supra* note 9.

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.”¹²

OWCP’s regulations provide that an employing establishment 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.¹³ Its regulations further provide in certain types of claims, such as a stress claim, a statement from the employing establishment is imperative to properly develop and adjudicate the claim.¹⁴

ANALYSIS

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

In her statement, appellant indicated that on February 2, 2021 A.S. and D.C. asked to speak with her in her office and then advised her that they would be conducting an unannounced audit. She indicated that the audit lasted approximately four hours without a break, and that D.C. was disrespectful, demanding, and bullying. Appellant asserted that D.C. mishandled paperwork that she had not yet completed, and tormented her, belittled her, and discriminated against her based upon her race. In a February 22, 2021 medical note, Dr. Lim also documented that she related that D.C. searched appellant’s personal belongings and that she described the work environment as hostile.

In a development letter dated March 18, 2021, OWCP requested that appellant complete a questionnaire. However, it did not contact the employing establishment directly to request that it provide comments from a knowledgeable supervisor on the accuracy of the allegations and any additional information such as witness statements.

The Board finds that it is unable to make an informed decision in this case as OWCP did not request information from the employing establishment.¹⁵ As discussed, OWCP’s procedures provide that, in emotional condition cases, a statement from the employing establishment is necessary to adequately adjudicate the claim.¹⁶

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17j (July 1997); *see also J.R.*, Docket No. 20-1382 (issued December 30, 2022); *G.K.*, Docket No. 20-0508 (issued December 11, 2020); *S.L.*, Docket No. 17-1780 (issued March 14, 2018).

¹³ 20 C.F.R. § 10.117(a); *G.K., id.; D.L.*, Docket No. 15-0547 (issued May 2, 2016).

¹⁴ *Supra* note 12 at Chapter 2.800.7(a)(2) (June 2011).

¹⁵ *J.R.* *supra* note 12; *G.I.*, Docket No. 19-0942 (issued February 4, 2020); *V.H.*, Docket No. 18-0273 (issued July 27, 2018).

¹⁶ *Supra* note 14; *see also M.T.*, Docket No. 18-1104 (issued October 9, 2019); *D.L.*, Docket No. 15-0547 (issued May 2, 2016).

In this case, further findings by OWCP are needed.¹⁷ Although it is appellant's burden of proof to establish 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.¹⁸ It shares responsibility to see that justice is done.¹⁹

The case will accordingly be remanded for OWCP to further develop the evidence. On remand, OWCP shall obtain a signed detailed statement and relevant evidence and/or argument regarding appellant's allegations from the employing establishment.²⁰ After this and such other further development as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2021 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: August 28, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁷ *A.O.*, Docket No. 19-1612 (issued April 8, 2021); *N.S.*, Docket No. 16-0914 (issued April 10, 2018).

¹⁸ *L.J.*, Docket No. 20-0998 (issued December 14, 2022); *R.A.*, Docket No. 17-1030 (issued April 16, 2018); *T.B.*, Docket No. 19-0323 (issued August 23, 2019).

¹⁹ *M.T.*, *supra* note 16.

²⁰ *A.O.*, *supra* note 17; *G.K.*, *supra* note 12; *R.V.*, Docket No. 18-0268 (issued October 17, 2018).