

File Number:
HR10-D-H

RECEIVED JAN 31 2020

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

Date of Injury: ()
Employee: ()

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on . As a result of such hearing, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Your case file has been returned to the Boston District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 1 BOS
LONDON, KY 40742-8300

Sincerely,

Division of Federal Employees' Compensation

PAUL H FELSER
FELSER LAW FIRM PC
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, January 28, 2020

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of
Claimant; Employed by the _____ Case number _____
. A telephone hearing was held on _____

The issue for determination is whether the claimant suffered a work-related Occupational Injury as defined by the Federal Employees' Compensation Act (FECA).

_____, born _____, is employed as a _____ with the _____. She filed Form CA-2 for an Occupational Injury alleged to have been caused by factors of her federal employment. Reference was made to tension in the workplace including a _____ verbal altercation which took place during a team meeting. Ms. _____ noted that VA Police and Security were involved and members of the team were reassigned. She claimed post-traumatic stress disorder (PTSD) and exacerbation of "mood and anxiety." She became aware of her condition and realized that it was related to her employment on _____.

At the time the claim was filed, no accompanying evidence was received. Therefore, the Office wrote to Ms. _____ on _____ advising her of the factual and medical evidence needed to prove her claim for benefits. Thirty days were afforded for a reply. A separate letter was sent to the employing agency requesting their review and comment on the allegations documented by the claimant.

In response, the Office received a large volume of documentation including the following: A redacted VA Police Investigative Report dated _____ an _____ transcript of deposition before the Department of _____ e-mail exchanges between the claimant and other staff at the VA; the claimant's response to the Office's questionnaire; an undated typed statement from the claimant (received _____); medical records from _____ M.D.; Report of Contact forms; documentation relative to an FOIA request; and an undated document entitled "Response to DOL" (received _____).

On _____ the Office wrote to the employing agency again. They were asked to address the statement submitted by _____ and address any/all points of disagreement. Additional information was also requested relative to the events of _____.

In response, additional medical evidence was received including treatment notes from _____ M.D. ranging from _____.

An e-mail response dated _____ was also received from _____ of the employing agency. There was some confusion regarding the claimant's testimony because it appeared to abruptly end and pick up with the discussion of the _____ incident. However, he concluded by _____.

stating, "My position regarding the 'Response to DOL' portion of the ' pt 1' document remains the same—it appears accurate."

On the Office formally denied the claim on the basis that the evidence failed to establish a diagnosed medical condition causally related to the accepted compensable factors of employment.

The claimant disagreed with this decision and requested an oral hearing. A telephone hearing was held on Ms. was not in attendance however she was represented at the proceeding by her retained counsel, Paul Felser, Esq.

Mr. Felser described the claimant's interaction with her Supervisor and argued that this resulted in heightened anxiety, depression and symptoms of post-traumatic stress disorder. He acknowledged that she had a history of prior emotional problems however this was reportedly controlled with medication. Mr. Felser indicated that additional medical evidence had been requested relative to the claim and he asked that the record be held open for 30 days. However, he argued that at a minimum, the evidence of record was sufficient to establish a *prima facie* case, thus warranting further development.

During the hearing, Mr. Felser was asked to obtain a statement from Ms. post-hearing within which she provided additional information relative to her history of pre-existing mental health problems.¹

At the conclusion of the proceeding, Mr. Felser was advised of the medical evidence necessary to substantiate Ms. claim for an emotional condition.

The record remained open for 30 days in order to afford the claimant the opportunity to submit additional evidence. As required by Office procedures, a copy of the hearing transcript was forwarded to the employing agency to afford them the opportunity to comment on the claimant's testimony. No comments have been received and the time allotted to all parties for the submission of additional evidence has now passed.

Based upon the hearing testimony, together with the written evidence of record, I find that the decision should be *SET ASIDE and REMANDED*.

An employee seeking benefits under the Federal Employee's Compensation Act² has the burden of establishing the essential elements of her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

¹ Following the hearing, a statement was received from the claimant. She confirmed that she was prescribed medication for depression and anxiety by a psychiatrist in however she fully recovered. In and again in her primary care physician prescribed medication to help her feel calm but it was not intended for long term use. She did not require formal mental health treatment and she discontinued medication. However, she started with the VA in and by the stress from her work environment prompted her to seek treatment for anxiety and depression. She sought treatment with Dr. in She also began attending therapy with Dr. She was prescribed (

² 5 U.S.C. §§ 8101-8193.

³ Gabe Brooks, 51 ECAB 184 (1999).

Causal relationship is a medical issue,⁴ and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established factors of employment. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established factors of employment.⁵ The mere concurrence of a condition with a period of employment does not raise an inference of causal relation between the two.⁶

The instant case was filed for an Occupational Disease alleged to have been caused by factors of the claimant's federal employment. Following development, the District Office denied the claim on the basis that the medical evidence failed to establish a causal connection between the claimant's diagnosed condition and the accepted compensable work factors. This is the issue on appeal.

In the Office's decision, they made a finding of fact regarding the events and circumstances implicated in the claim and whether they constituted factors of employment for compensation purposes. This is outlined below:

Accepted Event(s) That Are Factors of Employment:

1. *_____ began working for the _____ as a _____ in _____ Her supervisor was _____ She claimed that the working environment created by Ms. _____ was unprofessional and hostile at times due to the supervisor's inappropriate behavior towards her subordinates and interpersonal boundary issues. _____ claimed that she shared an office with Supervisor _____ and noted that often times she smelled of alcohol during the work day and, on at least one occasion, she observed her crying, yelling and swearing. She would tell the claimant of her plan to get "stoned" over the weekend, and her desire to have a couple of drinks while on her lunch break. On one occasion she sounded impaired while speaking with Ms. _____ by telephone and she admitted to drinking alcohol while teleworking from home.*

The supervisor told the claimant and others in the workplace that she had lost her license on account of a second DUI offense. As a result, Ms. _____ turned to Ms. _____ and other subordinates for transportation needs including, but not limited to, driving her to and from work and to meetings. She expressed anger when the claimant was unable to accommodate her transportation requests. On days she did agree to drive her to work she often was not ready when Ms. _____ arrived at her residence. On one occasion she came out of her house wearing a bathrobe and retorted that "she did not care" when the claimant expressed concern over being late for a meeting. She would also often times ask Ms. _____ what was for lunch, insinuating that she was going to pick up or bring her to lunch. Supervisor _____ would talk to the claimant in private and also in public regarding other employees and do so in a derogatory manner. She also shared personal information regarding employees and discussed their performance appraisals. She spoke of how she was responsible for initiating the firing of an employee during his probationary period and commented on how employees should not get on her bad side, essentially implying that she could have them fired. These comments made Ms. _____ uncomfortable because she was still within her probationary period at the time. This same supervisor would routinely use profanity at work which the claimant found offensive. Supervisor _____ told Ms. _____ of her marital problems and other personal/legal matters involving _____

⁴ Mary J. Briggs, 37 ECAB 578 (1986).

⁵ Victor J. Woodhams, 41 ECAB 345 (1989).

⁶ Robert M. Sanford, 27 ECAB ___115, 1975.

her family. Supervisor [redacted] also talked about the claimant in an unfavorable light to others after she disagreed with her over a job-related matter.

While no formal ruling was made available to the Office following the investigation concerning Supervisor [redacted] the evidence suggests that she was removed from her supervisory role. The employing agency responded by statement dated [redacted] that the testimony provided was accurate. Therefore, the Office accepted as factual that the claimant was subjected to a hostile work environment created by Supervisor [redacted]

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.' Difficult relationships with supervisors/managers when sufficiently detailed and supported by the record, may constitute compensable factors of employment.

In the present case, Supervisor [redacted] expressed concurrence with the testimony contained in Ms. [redacted] deposition before the Administrative Investigations Board. Therefore, the Office accepts that she was exposed to a hostile working environment while under the supervision of Ms. [redacted]

2. Ms. [redacted] alleged that on [redacted] she witnessed a verbal altercation between two colleagues during a team meeting. This prompted the sounding of a panic alarm to summon security and VA police. At the claimant's urging, Supervisor [redacted] gave directions during this meeting to those present that team members are to speak a common language in the work area. That prompted one employee to voice disagreement and another employee to comment that it was a Civil Rights issue. That remark prompted a third employee to inquire about the Final Call Islamic Newsletter in his office. The claimant stated that the employee to whom the remark was directed "exploded verbally and physically" and called his colleague an [expletive] racist who had no business in his [expletive] office.

The file contains a VA Police Incident Report dated [redacted] which documents that a verbal altercation occurred between two employees over the topic of foreign language utilization in the workplace. The VA police report documents that one employee questioned the other regarding the nation of Islam, eluding to a "Final Call" Islamic newspaper found in the employee's office, and that employee responded by standing and advancing toward the other shouting and calling him a racist. Supervisor [redacted] physically placed himself between the two employees in an attempt to calm them down and when that failed he asked for security. While the Police Incident Report was heavily redacted it did convey that all staff members present gave a consistent reporting of the incident and expressed concern over the built-up tension within their workgroup. The VA police turned the matter over to Human Resources. The incident as claimed is accepted as factual and Ms. [redacted] reaction to this is a compensable factor of employment.

Accepted Event(s) That Are Not Factors of Employment:

1. Ms. [redacted] claimed that she was alienated by colleagues [redacted] and [redacted]. She stated that they spoke exclusively in Spanish while in her presence. This had been a longstanding issue that had been reported. It was accepted as factual that [redacted] and [redacted] spoke Spanish while in the claimant's presence. It is further noted that the claimant spoke to supervisor Jim [redacted] on [redacted] relative to this. The following day he issued a memorandum regarding the policy as it related to language in the workplace. While the evidence accepts that the above individuals spoke Spanish in the claimant's presence, there is no evidence to support that this was done in a discriminatory manner nor did it interfere with work performance. The claimant's reaction to this was considered self-generated.

2. Ms. [redacted] sent [redacted] an e-mail and requested a commitment to huddle together as a group each Tuesday or Thursday to address veteran care as a team. She claimed that Ms. [redacted] response was hostile and demeaning. The evidence supports that Mr. [redacted] replied to the claimant's e-mail, although this response was not considered hostile. He replied, "We were all willing and huddling consistently until..., we can discuss at the next meeting. Let's not paint the picture that you have been willing and others have not when the reverse is in fact true." While this response was perceived to be hostile and demeaning, it does not rise to the level of a compensable factor of employment. Mere perceptions of harassment are not compensable under the Act.⁷

3. Ms. [redacted] claimed anxiousness when she learned that [redacted] was back on the campus. This was after he had been reassigned to a different VA facility following the verbal altercation with another co-worker on [redacted]. The claimant wrote to her supervisor on [redacted] asking if the plan to have Mr. [redacted] reassigned, had changed. In a response of [redacted] explained that nothing had changed, but that there were situations where patient care demands a particular location and all such situations require discussion and review with the supervisor. The evidence of record supports that Mr. [redacted] was permitted to return to the Campus only when the situation warranted his return and only after he reviewed each situation with the supervisor and received temporary permission to return. Based upon this, no error or abuse in the administration of a personnel related matter has been demonstrated on the part of the employing agency by allowing Mr. [redacted] back on premises for the purpose of ensuring "timely and veteran-centric care delivery." The Board has held that administrative functions of the employing establishment that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.

Incident(s) Alleged Which the Office Finds Did Not Occur

1. The claimant alleged that [redacted] would make negative remarks about her work. He also made public comments meant to berate and humiliate her. However, no evidence was submitted to corroborate this allegation.

2. The claimant alleged that co-workers would shut doors in her face. She also claimed that [redacted] would use body language which suggested that she was not welcome as a colleague. Another co-worker, [redacted] reportedly gave intimidating looks when she passed him in the hall. However, these allegations had been unsubstantiated by the evidence of record.

3. The claimant alleged that [redacted] turned against her, calling her a white racist. Again, no corroborating evidence has been received to substantiate this allegation.

As explained in detail above, the Office found that Ms. [redacted] had identified compensable factors of employment. This was described in detail in the [redacted] denial decision and is incorporated herein by reference. However, the case was denied based upon deficiencies in the medical evidence. Specifically, the claimant failed to submit a rationalized medical opinion regarding what effect, if any, the accepted events had on her diagnosed emotional conditions.

In order for a medical condition to be covered under the FECA, medical evidence must demonstrate that it is related to the accepted injury. A physician must explain how the work event(s) caused or affected your condition, based upon an accurate factual and medical history, citing objective findings in support of the opinion.

⁷ J.H., 42 ECAB 818, 827 (1991).

It is important to note that there are specific requirements under the FECA as it relates to acceptable medical evidence in claims for an emotional condition. Specifically, a claim for an emotional condition must be supported by an opinion from a psychiatrist or clinical psychologist before the condition can be accepted. Because clinical psychologists are not licensed to treat physical disorders or prescribe medication, an opinion from a psychiatrist must be obtained where a non-mental component is present, a functional overlay is implicated, and/or medication is used.⁸

In the instant case, the medical evidence of record supports that Ms. [redacted] has a history of an emotional condition and had taken medication relative to this. Specifically, in an report from Dr. [redacted], the assessment included "anxiety/depression." In a subsequent note of Dr. [redacted] indicated that the claimant was taking Lorazepam. Current medical documentation in file also supports that Ms. [redacted] continues to take medication for her emotional condition. Therefore, an opinion from a psychiatrist is required to establish causation. However, any physician as defined by the Act can establish a prima facie case. A prima facie claim is one that on first appearance demonstrates entitlement to compensation and which always requires further development if it is not accepted.⁹

The file contains a large volume of medical evidence, including treatment notes from primary care physician Dr. [redacted]. These notes range from [redacted] through [redacted] and reflect the claimant's complaints of depression of anxiety. She had been prescribed medication relative to this.

Dr. [redacted] completed FMLA paperwork on [redacted]. He noted that the claimant had been referred to psychiatrist [redacted], M.D. for depression.

The file contains [redacted] and [redacted] notes from Dr. [redacted] within which he indicated that the claimant was undergoing treatment for her mood and anxiety disorders under FMLA. Dr. [redacted] also completed a separate form report on [redacted] relative to a reasonable accommodation request. He noted that the claimant was suffering from anxiety and extreme depression.

The file contains a [redacted] note from Dr. [redacted] within which he stated that the claimant had been traumatized at work and she felt unsafe. She had symptoms of depression, anxiety and PTSD.

In a note of [redacted] Dr. [redacted] indicated that he had been treating Ms. [redacted] for several years for "mood and anxiety disorders." She was said to have been the subject of harassment at work. Dr. [redacted] stated, "She presented after that clear symptoms of PTSD that were not part of her original presentation. The trauma has resulted in symptoms of irritability, depression, anxiety, nightmares, flashbacks and feelings of detachment." Due to the diagnosis of PTSD, she was unable to report to work. An OWCP-5a form was completed on [redacted] to this effect.

The file contains treatment notes from Ms. [redacted] regular appointments with Dr. [redacted]. These are dated [redacted].

[redacted] He diagnosed PTSD, moderate major depression, major depressive disorder, and panic disorder with agoraphobia. The claimant's medications were listed as Wellbutrin, Cymbalta, Ativan and Lorazepam.

⁸ (FECA Procedure Manual, Chapter 2-0805 3,d,c).

⁹ Robert P. Bourgeois, 45 ECAB (Docket No. 93-1155, issued July 1, 1994).

In a note of _____ Dr. _____ stated that the claimant presented with clear symptoms of PTSD that were not part of her original presentation. He indicated that she had been the subject of harassment at work. However, no further explanation was offered relative to causation. Specifically, there was no discussion of the accepted compensable factors of employment and what effect, if any, this had on Ms. _____ diagnosed conditions. Medical conclusions based on inaccurate or incomplete histories are of little probative value.¹⁰

The above noted medical evidence has been reviewed but deemed insufficient to satisfy the Causal Relationship element. Specifically, there has been no well-reasoned opinion addressing the cause for the claimant's diagnosed emotional condition. This is especially important given Ms. _____ pre-existing history of anxiety and depression.

Chapter 2-0805(3)(e) of the FECA Procedure Manual addresses evidence needed if an underlying condition exists. It states that in any case where a pre-existing condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration or precipitation, the physician must provide rationalized medical opinion which differentiates between the effects of the work-related injury or disease and the pre-existing condition. Such evidence will permit the proper kind of acceptance (e.g., temporary vs. permanent aggravation).

However, following the _____ hearing the Office received additional medical evidence which is considered *prima facie* sufficient to warrant further development. First, a narrative note dated _____ was received from Dr. _____. He reviewed the claimant's medical history and acknowledged her pre-existing physical and mental health conditions which included anxiety and depression. He also made reference to a hostile work environment and exposure to workplace violence. He noted that the claimant had been under his care since _____ and her diagnoses included major depression and moderate panic disorder with agoraphobia. He stated that the onset of acute symptoms of PTSD were diagnosed in _____ following an incident on _____. Dr. _____ opined that the claimant's work environment "highly likely" contributed to and exacerbated her pre-existing conditions of depression and panic disorder. Additionally, cumulative work related stressors, which increased on _____ resulted in the diagnosis of PTSD.

A report dated _____ was also received from _____ Ph.D. He noted that the claimant had been receiving trauma based psychotherapy since _____. He diagnosed PTSD and major depressive disorder. Dr. _____ opined that incidents in the claimant's employment and a hostile work environment caused her PTSD and exacerbated her pre-existing major depressive disorder. She experienced intrusive thoughts and nightmares which included the incident on _____ where a co-worker became verbally and physically aggressive.

Most recently, a narrative dated _____ was received from Dr. _____. He noted that the claimant initially presented to him on _____ with symptoms of an emotional condition. At that time, she made reference to work stressors. Specific reference was made to her supervisor who was creating a hostile work environment and targeted workers including Ms. _____. He stated that the constant progression of work related stress contributed to her diagnoses. Dr. _____ went on to state, "The onset of acute symptoms of PTSD were diagnosed _____ following an explosive experience _____ Ms. I _____ describes a coworker verbally and physically charged toward the direction of a coworker in close proximity to Ms. _____ leading Ms. _____ to push a "Call for help" button to secure assistance from police." Dr. _____ stated that the exposure to workplace violence

¹⁰ Beverly R. Jones, 55 ECAB (Docket No. 03-1210, issued March 26, 2004); Mary J. Summers, 55 ECAB (Docket No. 04-704, issued September 29, 2004).

aggravated her condition and precipitated a trauma response consistent with PTSD. In conclusion, he opined that the claimant's work environment highly likely contributed to and exacerbated her preexisting conditions of depression and panic disorder. Dr. further stated that cumulative work hostilities that heightened on prompted a diagnosis of PTSD.

While correct at the time issuance, I find that the decision of the District Office must be set aside based upon receipt of above noted medical narratives from Dr. and Dr. While these reports are not sufficiently rationalized to warrant outright acceptance of the claim, they are considered *prima facie*¹¹ sufficient to command further development as they support an uncontroverted inference between Ms. diagnosed conditions and the accepted compensable factors of employment.

The Employees' Compensation Appeals Board has consistently found that once an employee has established a *prima facie* case, i.e. when he or she has submitted evidence supporting the essential elements of his or her claim, including evidence of causal relationship, the Office has the responsibility to take the next step, either of notifying the employee what additional evidence is needed to fully establish the claim, or of developing evidence in order to reach a decision on the employee's entitlement to compensation.¹²

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹³ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and has the obligation to see that justice is done.¹⁴

In the case of William J. Cantrell¹⁵ the Board opined: "If the medical evidence supports the claimant's claim, even though it is insufficient to discharge claimant's burden of proving by the weight of reliable, substantial, and probative evidence that the condition was causally related to the work related injury, it does constitute sufficient evidence in support of claimant's claim to require further development by the Office."

Upon return of the case file, the Office should prepare a Statement of Accepted Facts (SOAF). They must then refer Ms. for a second opinion examination with a Board Certified specialist. The Office should supply the accepted definitions of causal relationship as outlined in Chapter 2-0805(2) of the FECA Procedure Manual. The examiner should then be asked to address whether the claimant suffered a work related emotional condition either by direct cause, aggravation, acceleration or precipitation. The medical evidence of record supports that has a history of anxiety and depression. Therefore, the examiner must differentiate between any pre-existing conditions and the effects (if any) of the accepted compensable factors of employment. However, the physician must be advised that it is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relation. If the medical evidence reveals that an employment factor contributes in any way to the employee's condition, such condition would be considered employment-related for purposes of compensation under the Act.¹⁶ Medical rationale and a discussion of the objective evidence of record must be supplied to support the opinions rendered.

¹¹ A *prima facie* claim is one that on first appearance demonstrates entitlement to compensation and which always requires further development if it is not accepted. Robert P. Bourgeois, 45 ECAB (Docket No. 93-1155, issued July 1, 1994).

¹²Linda L. Mendenhal, 41 ECAB 1408, (1990).

¹³See Vanessa Young, 55 ECAB 575 (2004).

¹⁴See Richard E. Simpson, 55 ECAB 490 (2004).

¹⁵William J. Cantrell, 34 ECAB 1233, (1983)

¹⁶Arnold Gustafsan, 41 ECAB 7 (Docket No. 89-0438 issued October 30, 1989).

Following receipt and review, the Office should take any further development action deemed necessary and issue a *de novo* decision addressing | claim for an emotional condition.

Consistent with the above findings, the decision of the District Office dated is hereby set aside and *remanded* for further development. The case file is returned for further processing as noted.

ISSUED:

WASHINGTON, D.C.

Hearing Representative
Branch of Hearings and Review
for
Director, Office of Workers'
Compensation Programs