Emotional injuries and OWCP, Part 2:
In-house injuries and the employee's burden of proof

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Last month's column made a distinction between in-house and out-of-house emotional injuries. This month's column will focus on in-house emotional injuries that arise from the injured worker's interactions with USPS management and will focus on those injuries that result from harassment or abusive behavior.

Workers' compensation law does not apply to each and every illness that is somehow related to a worker's employment. The Employees' Compensation Appeals Board (ECAB) made this statement in *Lillian Cutler*, 28 ECAB 125, the watershed case on emotional conditions that arise within the workplace.[1] And while *Lillian Cutler* established the compensability of workplace-generated emotional injuries, it also imposed a specific burden of proof on the employee claiming such an injury.

Establishing the first three basic elements of an in-house emotional reaction claim—1) time; 2) civil employee; and 3) fact of injury—is fairly straightforward. OWCP will readily accept in these claims both the fact that an incident or series of incidents occurred at work (fact of injury/work component) and a diagnosed emotional condition (fact of injury/medical component). The hard part comes with the fourth basic element: performance of duty.

According to *Lilian Cutler*, when an employee experiences emotional stress in carrying out assigned employment duties, or has fear and anxiety regarding the employee's ability to carry out these duties, a resulting injury (or occupational disease) is considered to have "arisen out of and in the course of employment" and comes within the coverage of the Federal Employees' Compensation Act (FECA). This is known as the Cutler rule. But in *Cutler*—a case where the employee became upset over not receiving an anticipated promotion—the ECAB held that the resulting disability was not compensable because her emotional reaction was self-generated and did not relate to her employment duties. In short, a self-generated reaction takes the employee out of performance of duty.

In the wake of *Lillian Cutler*, the ECAB in hundreds of cases has established the principle that in order for an emotional injury related to the conduct of the employer to be covered by FECA, the employee assumes an additional burden of proof to provide evidence that the injury resulted from agency error or abuse, and hence within performance of duty. Absent such evidence, OWCP will treat the emotional injury as self-generated.

So how does a claimant meet their burden of proof to establish agency error or abuse in emotional injury cases? First, claimants should be aware that OWCP is highly reluctant to be the party that determines whether or not agency error or abuse has occurred. Any NALC shop steward who has worked on Joint Statement, dignity and respect, or harassment grievances knows that these grievances can involve complex histories of interpersonal interactions, conflicting he said/she said statements, and mountains of evidence. It often takes an arbitrator sifting through the evidence, weighing conflicting statements, and observing the demeanor of witnesses to resolve the grievance. Witness statements are crucial to winning these grievances.

Not so with OWCP. It determined long ago that it does not have the time or resources to be the arbiter of workplace disputes. Even though ECAB precedent requires OWCP to develop the case file and obtain witness statements in order to establish fact of injury[2], it gives witness statements little probative weight in determining performance of duty.[3] It wants someone else—a neutral fact-finder in another forum, such as the grievance procedure, the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board—to establish whether or not agency error or abuse has occurred.

Because of this, letter carriers filing in-house emotional injury claims should pursue parallel grievances and/or EEO cases. The decisions and settlements from these other venues should specifically and unequivocally find that the alleged error or abuse did, in fact, occur. For example, OWCP would give little weight to a grievance settlement involving dignity and respect where the parties generically agree that "management will cease and desist violating the *M-39* 115.4 mandate to maintain an atmosphere of mutual respect." It requires something more specific along the lines of "the parties agree that the Agency errored when it allowed the abusive language to continue." Similarly, an effective EEO settlement should be fully citable and specifically find that agency error or abuse occurred.

Once the injured employee has met their burden of proof demonstrating agency error or abuse to establish that they were within performance of duty, they will still need their attending physician to provide a causal explanation as to how that error or abuse caused or contributed to their diagnosed emotional condition in order to establish the fifth basic element of their claim: causal relationship.

1 Note that if the claim involves a CA-2 occupational disease—as is the case for most in-house injuries—the medical evidence must come from a psychiatrist or licensed clinical psychologist.

2 "[OWCP's] procedures require that, in development of an emotional condition claim, it must obtain statements from witnesses, coworkers and supervisors, among others, before it makes a determination of whether the incidents alleged by a claimant occurred and whether such incidents or factors constitute compensable factors of employment." A.K. and U.S. Postal Service Docket No. 13-0079 (2013).

3 That being said, witness statements are very helpful in establishing the background optics of the abusive behavior and should be added to the OWCP file.