

**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

JANET D. LEWIS,)	
)	
Plaintiff,)	3:06-cv-00053-JWS
)	
vs.)	ORDER AND OPINION
)	
MICHAEL B. DONLEY, Secretary of the United States Air Force; the UNITED STATES OF AMERICA,)	[Motion at Docket 203]
)	
Defendants.)	
)	

I. MOTION PRESENTED

At docket 203, plaintiff Janet D. Lewis appeals a decision of the Merit Systems Protection Board (“MSPB”) dated March 13, 2008. The appeal brief is styled as a motion for summary judgment. At docket 206, defendants Michael B. Donley and the United States of America (the “government”) oppose the motion. Lewis replies at docket 208. Oral argument was not requested and would not assist the court.

II. BACKGROUND

The parties are well versed in the facts underlying Lewis’ claims. Lewis was an employee of the United States Air Force, 3rd Wing, at Elmendorf Air Force Base (“Elmendorf” or “EAFB” or the “agency”) in Anchorage, Alaska, where she worked until her termination on February 27, 2007. In November 2006, Lewis notified her supervisor of her intent to take 120 days sick leave based on her post-traumatic stress disorder

and continuing treatment by a therapist.¹ At the time of her leave request, Lewis was informed by both her supervisor, Kathy DeShasier, and a human resources technician, Nancy Barlow, that she must submit medical certification supporting her illness.² DeShasier contacted Lewis approximately one week after Lewis applied for FMLA leave to inform her that her failure to submit supporting medical certification would result in a finding that Lewis was AWOL.³ In response, Lewis provided a short doctor's note, dated November 16, 2006, which stated that Lewis needed to be off work for 120 days.⁴ DeShasier advised Lewis that this note was insufficient under federal regulations and Air Force policy.⁵ At this time, DeShasier appears to have provided Lewis with a so-called "Title 5 Form," which outlined the medical certification requirements under the FMLA.⁶

Shortly thereafter, DeShasier received a letter from Dr. Beverly Hendelman, Lewis' psychiatrist, dated November 21, 2006, which indicated that Lewis was being treated for PTSD, "adjustment disorder mixed," anxiety, and depression.⁷ Dr. Hendelman also indicated that Lewis "has been released from work for 120 days while u[n]dergoing treatment, effective November 16, 2006."⁸ Lewis also completed and submitted a Form WH-380, Certification of Health Care Provider, in which Dr. Hendelman indicated that Lewis was "suffering from PTSD . . . needs to be in

¹Administrative Record ("AR") 2642.

²AR 2620, 2626, 2640, 2647.

³AR 2621 and 2638; *see also* AR 2715.

⁴*Ibid.*

⁵AR 2647 (referencing 5 C.F.R. Part 339 and Air Force Instruction ("AFI") 36-815, Attachment 1).

⁶*Id.*

⁷AR 2650.

⁸*Id.*

therapy, have medical follow up, [and] bed rest.”⁹ After reviewing the WH-380 and the other materials submitted, DeShasier concluded that Lewis had not submitted sufficient information, and once again contacted Lewis to ask her to comply fully with the requirements.¹⁰ On November 27, 2006, Lewis contacted Barlow seeking information regarding additional required materials.¹¹ Barlow replied that Lewis needed to provide a medical certification supporting her need for leave; Lewis responded that she felt uncomfortable providing her supervisor with such information, citing the Privacy Act and the Health Insurance Portability and Accountability Act (“HIPAA”).¹² Barlow referred Lewis to Al Anderson, a senior employee in the Civilian Personnel Office (“CPO”).¹³

On November 30, 2006, Lewis submitted Office of Personnel Management Form 71 requesting leave for six hours on November 29, 2006, as well as compensatory time off and leave without pay.¹⁴ Lewis also invoked the Family Medical Leave Act of 1993 (“FMLA”), 29 U.S.C. § 2601, *et seq.*, on the basis of a serious health condition.¹⁵ On December 12, 2006, DeShasier granted Lewis 18 hours of compensatory time, but denied the remainder of the leave request on the ground that Lewis “still was not in an approved leave status.”¹⁶ The next day, Lewis e-mailed DeShasier and suggested that Dr. Hendelman had provided all of the required medical information regarding Lewis’ condition, which DeShasier denied.¹⁷ On December 15, 2006, DeShasier indicated in response that because Lewis had failed to provide sufficient medial certification, her

⁹AR 2642.

¹⁰AR 2621.

¹¹AR 1236, 1241.

¹²*Ibid.*

¹³AR 1241.

¹⁴AR 2627.

¹⁵*Id.*

¹⁶Docket 206 (citing AR 2627).

¹⁷AR 2685.

sick leave would be converted to AWOL status and that Lewis would remain in that status until a more detailed certification was received.¹⁸ In February 2007, DeShasier began proceedings to remove Lewis from her position because of her unauthorized medical leave, prior disciplinary record, and declining performance.¹⁹ Lt. Col. Michael Borgert concurred in DeShasier's findings and, on February 27, 2007, removed Lewis from her position effective March 12, 2007.²⁰

Lewis timely appealed her termination to the MSPB. After a hearing conducted on January 29 and 30, 2008, Administrative Law Judge Franklin M. Kang ("ALJ Kang") of the MSPB affirmed Lewis' termination in an initial decision dated March 13, 2008. ALJ Kang reasoned that because "it is undisputed that [Lewis] was absent from the workplace [from November 17, 2006 to February 9, 2007,]" and that her absence was unauthorized, Lewis was rightly classified as AWOL during the entire period alleged.²¹ Moreover, ALJ Kang concluded that

the agency appropriately required [Lewis] to submit medical evidence to support her FMLA leave request. In particular, [Lewis'] submission of the November 16, 2006 note, November 21, 2006 letter, and the largely incomplete WH-380 with a conclusory diagnosis, unexplained prognosis, and nonspecific treatment plan, failed to set forth sufficient medical facts regarding the condition claimed, as requested by the agency and as set forth in question 4 of the WH-380.²²

Although Lewis submitted additional medical evidence to the MSPB during her appeal, ALJ Kang continued that "the Board has previously ruled that employees may not ignore an employing agency[']s request for FMLA medical evidence, then attempt to present evidence to support the leave request for the first time in a Board appeal."²³ ALJ Kang

¹⁸*Id.*

¹⁹AR 2663-65, 2676, 1326.

²⁰AR 2583-84.

²¹AR 417.

²²AR 424-25 (citing, *inter alia*, 5 U.S.C. § 6383(b)(3) and 29 C.F.R. § 825.306(b)).

²³AR 423.

then concluded that the agency had shown by a preponderance of the evidence that her leave request was properly denied.²⁴

III. STANDARD OF REVIEW

In ruling on an appeal from a decision of the MSPB, this court must review the record and hold unlawful any Air Force action, findings, or conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule or regulation having been followed; or (3) unsupported by substantial evidence.²⁵ The court will affirm the Board's findings so long as they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²⁶ This court's review "must determine whether, considering the record as a whole, the agency's evidence is sufficient to be found by a reasonable factfinder to meet the evidentiary burden applicable to the particular case."²⁷ The question "is not how the court would rule upon a de novo appraisal of the facts of the case, but whether the administrative determination is supported by substantial evidence in the record as a whole."²⁸

IV. DISCUSSION

In her opening brief, Lewis addresses the following assignments of error: (1) that the ALJ erred as a matter of law by concluding that the agency itself could determine what constitutes administratively acceptable evidence supporting an FMLA leave request; (2) that the ALJ erred as a matter of law by concluding that the agency had provided Lewis with the statutory minimum amount of time to file her certification; and

²⁴AR 425.

²⁵5 U.S.C. § 7703(c); *Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008) (court of appeals views "agency's decision from the same position as the district court").

²⁶*Haebe v. Dep't of Justice*, 288 F.3d 1288, 1298 (Fed. Cir. 2002) (quoting *Brewer v. United States Postal Serv.*, 647 F.2d 1093, 1096 (Ct. Cl. 1981)).

²⁷*Jacobs v. Dep't of Justice*, 35 F.3d 1543, 1545 (Fed. Cir. 1994) (quoting *Bradley v. Veterans Admin.*, 900 F.2d 233, 234 (Fed. Cir. 1990)).

²⁸*Haebe*, 288 F.3d at 1298 (citing *Hayes v. Dep't of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984)).

(3) that the ALJ made various findings unsupported by substantial evidence. The court addresses each issue in turn.

A. Sufficiency of Medical Certification

Lewis first argues that ALJ Kang misapplied the law governing the certification requirements to obtain leave under the FMLA. Under the FMLA, federal employees are “entitled to a total of 12 administrative workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the employee’s position.”²⁹ As defined in the statute, “the term ‘serious health condition’ means an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.”³⁰ An employing agency may require that a request for leave under subparagraph (C) or (D) of section 6382(a)(1) be supported by certification issued by the health care provider of the employee, [who] shall provide, in a timely manner, a copy of such certification to the employing agency.”³¹

A certification provided under subsection (a) will be considered statutorily sufficient if it includes:

- (1) the date on which the serious health condition commenced; (2) the probable duration of the condition; (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; . . .
- (B) for purposes of leave under section 6382(a)(1)(D), a statement that the employee is unable to perform the functions of the position of the employee; and (5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment.³²

²⁹5 U.S.C. § 6382(a)(1)(D).

³⁰*Id.* § 6381(5).

³¹*Id.* § 6383(a)

³²*Id.* § 6383(b).

Once the employee provides the above information, the agency cannot require the employee to provide any additional information.³³ “However, a health care provider representing the agency, including a health care provider employed by the agency or under administrative oversight of the agency, may contact the health care provider who completed the medical certification, with the employee's permission, for purposes of clarifying the medical certification.”³⁴ If the agency doubts the certification, the agency has the option to seek a second or third opinion from other health care providers.³⁵ The Department of Labor regulations generally restate the statutory requirements for FMLA leave requests.³⁶

With respect to Lewis' Form WH-380, ALJ Kang expressly found that the responses provided were insufficient. Specifically, ALJ Kang concluded that the form did not describe the nature of the treatments Lewis was to receive, did not set forth the prescription drug regimen to be used, and listed only the conclusory diagnosis of “PTSD” without specifying the therapy or treatment which Lewis purportedly required.³⁷ As a result, ALJ Kang was unable to conclude that sufficient medical facts necessary to sustain a finding of a “serious health condition” were listed on Lewis' Form WH-380 and, for that reason, the agency was correct in concluding that no medical certification had been submitted. Based on a review of Lewis' Form WH-380, the court agrees that it fails to provide sufficient detail supporting FMLA leave, and therefore cannot conclude that ALJ Kang's decision in this regard was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

Furthermore, Lewis' argument that the agency improperly attempted to require more information than necessary under the FMLA by providing her with a Title 5 Form is

³³5 C.F.R. § 630.1207(c).

³⁴*Id.*

³⁵5 U.S.C. § 6383(c)(1).

³⁶5 C.F.R. § 630.1207(b).

³⁷AR 421-22.

likewise without merit. Both the agency and ALJ Kang found that Lewis had failed to provide the bare minimum medical certification in her Form WH-380 or in any of the other communications from her medical providers. Although the agency's Title 5 Form contains additional documentation requirements beyond the requirements of the WH-380, the fact that Lewis failed to provide appropriate medical certification on her WH-380 renders this argument toothless.³⁸ The government has cited to authority addressing this very issue. In *Burge v. Dep't of the Air Force*, the MSPB found that even where an agency "letter and the medical certification that the FMLA requires shows that the agency's requirements are more specific and detailed than the FMLA . . . the agency's more specific leave requirements did not harm the appellant's rights under the FMLA because not only did the appellant fail to comply with the agency's request for medical documentation, but he also failed to comply with the medical certification requirements under FMLA regulations."³⁹ Therefore, the court cannot conclude that ALJ Kang's failure to find that the Title 5 Form violated the FMLA was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Finally, Lewis argues that ALJ Kang erred in finding that the agency had the right to require Lewis to submit "administratively acceptable documentation" in support of her FMLA leave request. Specifically, Lewis argues that an agency may not require "administratively acceptable documentation" in the case of leave requests based on serious health conditions under 5 C.F.R. § 630.1203(a)(4). This argument fails for the same reasons noted above. While Lewis is correct that 5 C.F.R. § 630.1206(f) only permits an agency to seek "administratively acceptable documentation" in the case of leave requests based on the birth or adoption of a child, Lewis was never subjected to

³⁸Lewis' attempt to distinguish between medical certification and medical documentation is similarly unavailing. Although DeShasier and others appear to have used the terms interchangeably, ALJ Kang found that Lewis failed to submit a sufficient medical certification as required by 5 C.F.R. § 630.1207(b), let alone any documentation supporting her certification. AR 421. ALJ Kang recognized that "the agency may not request more information than that on the WH-380," but such a rule only applies where an employee first supplies the information required under the FMLA and answers the questions on the WH-380, which Lewis failed to do. *Id.*

³⁹82 M.S.P.R. 75, 85 (1999).

this additional requirement. Although ALJ Kang appears to have cited authority holding that an agency may seek such documentation in support of leave requests based on serious health conditions, the remainder of the decision supports the conclusion that Lewis was denied leave on the basis of her insufficient medical certification, and not on her failure to provide documentation beyond that required by the FMLA. Rather, Lewis failed to submit the minimum medical certification required by the FMLA and 5 C.F.R. § 630.1207(b). ALJ Kang's legal conclusions regarding the medical certification requirements are therefore sound.

B. Timing of Medical Certification

Lewis next alleges that the agency violated the FMLA by failing to provide a full 15 days to submit a medical certification, as required by 5 C.F.R. § 630.1207(h). Section 630.1207(h) states, in pertinent part, that

[a]n employee must provide the written medical certification required by paragraphs (a), (d), (e), and (g) of this section, signed by the health care provider, no later than 15 calendar days after the date the agency requests such medical certification. If it is not practicable under the particular circumstances to provide the requested medical certification no later than 15 calendar days after the date requested by the agency despite the employee's diligent, good faith efforts, the employee must provide the medical certification within a reasonable period of time under the circumstances involved, but no later than 30 calendar days after the date the agency requests such medical certification.

The timing of the agency's requests for Lewis' certification was not addressed by ALJ Kang. DeShasier granted Lewis provisional leave status from November 16, 2006 until December 15, 2006, at which time she indicated that Lewis' leave status would be converted to AWOL status as a result of her failure to submit a sufficient medical certification. Because DeShasier provided Lewis with provisional leave for 30 days, Lewis was afforded the appropriate amount of time under the regulations.

C. Factual Findings

Lewis next argues that several of ALJ Kang's factual findings were unsupported by substantial evidence. Specifically, Lewis contends that (1) there was no evidence presented that any agency employee asked Lewis to provide more complete answers on her Form WH-380, (2) the agency did not provide Lewis with accurate information

with respect to the requirements for medical certification under the FMLA, (3) Lewis did submit her medical documentation to the agency, and (4) Lewis had the right to FMLA leave and was not in AWOL status. The court addresses each of these arguments in turn.

1. Request for More Complete Answers

Lewis first claims that ALJ Kang's conclusion that "DeShasier informed [Lewis] that the WH-380 required completed answer" is unsupported by the evidence. This argument borders on the frivolous. Both DeShasier and Anderson testified that they told Lewis that her WH-380 was insufficient,⁴⁰ and the contemporaneous evidence shows that Lewis was informed on several occasions that the form was incomplete.⁴¹ Lewis' own testimony confirms that she was told by DeShasier and Anderson that the form was incomplete.⁴² Therefore, ALJ Kang's finding that Lewis was informed that her WH-380 was incomplete was supported by substantial evidence.

2. Accuracy of Information Provided Regarding Medical Certification

Lewis next argues that the record lacks substantial evidence that she was provided accurate information regarding the FMLA requirements. Specifically, Lewis claims that she was misled when her supervisors provided her with the Title 5 Form. However, as noted above, both the agency and ALJ Kang found that Lewis had failed to provide the bare minimum medical certification in her Form WH-380 or in any of the other communications from her medical providers, let alone the additional documentation requirements contained in the Title 5 Form. As the Board noted in the *Burge* decision, providing an employee with "more specific leave requirements does not harm the appellant's rights under the FMLA because. . . [where] the appellant [not only] failed to comply with the agency's request for medical documentation, but . . . also failed to comply with the medical certification requirements under FMLA regulations."⁴³ Here,

⁴⁰AR 57, 76, 83, 199-201, 203.

⁴¹AR 2621, 2653.

⁴²AR 342-43, 370-71.

⁴³82 M.S.P.R. 75, 85 (1999).

it is evident that Lewis' medical certification was deficient, and therefore, this court will not disturb the factual findings of the ALJ.

3. Lewis' Submissions to the Agency

Lewis next argues she did, in fact, submit medical documents to the agency's CPO in support of her worker's compensation application, and that ALJ Kang's finding that no documents were submitted to the agency in response to calls for additional information to support her FMLA leave request was not supported by substantial evidence. Although Lewis submitted medical documents in support of her worker's compensation claim, the record reveals that neither Lewis nor Barlow, who was in charge of processing worker's compensation claims, informed DeShasier or anyone else that her worker's compensation records could be used to support her FMLA claim. Indeed, Lewis specifically told Barlow that her medical records were confidential, and that she did not want those records in the possession of DeShasier.⁴⁴ Lewis' worker's compensation records do, on the whole, provide more information than the WH-380, and it is unclear to the court why Lewis did not submit the same in support of her FMLA, privacy concerns aside. Nevertheless, because Lewis did not, in fact, submit the evidence in support of her FMLA request, the ALJ's finding was supported by substantial evidence.

4. Lewis' Right to Leave and AWOL Status

Finally, Lewis again challenges ALJ Kang's finding that Lewis failed to provide adequate information on her Form WH-380 medical certification. For all of the reasons noted in Section IV.A, the court will not disturb that finding or the conclusions drawn therefrom.

⁴⁴AR 1241.

V. CONCLUSION

For the above reasons, Lewis' motion at docket 203 is **DENIED**. The initial decision of ALJ Kang dated March 13, 2008 is **AFFIRMED**.

DATED at Anchorage, Alaska, this 15th day of June 2010.

/s/ JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE