

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

M.H., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Orlando, FL,
Employer**

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**Docket No. 12-130
Issued: December 4, 2012**

Appearances:

*C.B., Weiser, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 11, 2011 appellant, through her attorney, filed a timely appeal from a May 10, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying her occupational disease claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

This case was previously before the Board. In a February 23, 2011 decision, the Board set aside a February 9, 2010 OWCP decision denying appellant's January 22, 2010 request for

¹ 5 U.S.C. § 8101 *et seq.*

reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.² The Board found that the request was timely filed and remanded the case to OWCP for a review of the claim under the proper standard of review. The facts of the case as set forth in the Board's prior decision are incorporated by reference.

Appellant, a 53-year-old air transportation specialist, filed a claim for an emotional condition on December 20, 2009. She attributed her condition to harassment, excessive work assignments and schedule changes by Samuel Glover, the transportation manager. Appellant alleged that he assigned her deadline work while she was on vacation and to tasks outside of her work area. On April 13, 2007 she felt threatened when Mr. Glover allegedly used aggressive movements and a raised voice. Mr. Glover noted that the employing establishment controverted the claim and that appellant had stopped work on May 8, 2007.

Appellant submitted a May 3, 2007 letter of warning for failing to follow up on errors in distribution tables on April 9, 2007 and failing to leave an April 13, 2007 meeting to which she had been invited but was later instructed not to attend. In a June 6, 2007 memorandum, an employing establishment official and a union official noted that the letter of warning would not be removed or modified as she failed to attend an appeal meeting.

In a January 31, 2008 statement, Mr. Glover noted that on the morning of April 13, 2007 he stopped at the door to appellant's office and informed her that she did not need to attend the service meeting. Appellant responded abruptly that he put it in writing. Mr. Glover stated that he reiterated that she did not attend the meeting and spoke to her in a stern tone of voice as she had shrugged her head and shoulders. He submitted a statement from Juan Collazo, a shipment clerk situated in a nearby office. Mr. Collazo noted that, during his conversation with appellant, Mr. Glover had raised his voice about three times stating "what part do n[o]t you understand so I can explain it to you." Mr. Glover noted that on April 9, 2007 a teleconference was held concerning a three-day conference with Atlanta during which it was determined that the distribution tables were not correct. This required a subsequent three-hour separate teleconference to make corrections. Mr. Glover noted this could have been avoided had appellant followed up with several individuals during the prior week by telephone. Appellant had relied on certain e-mails but had not made verbal contact as suggested.

In a May 21, 2007 report, Dr. Gregory P. Samano, an attending osteopath, diagnosed severe anxiety due to an abusive situation at work. Gerard E. Boutin, Ph. D., an attending clinical psychologist, submitted reports dated November 7, 2007 to January 22, 2008 reports diagnosing anxiety disorder, acute stress disorder and depressive disorder. He found appellant totally disabled for work from May 8, 2007 through May 8, 2008 due to panic attacks related to severe stress with the assignments provided and changed at work.

In a June 24, 2008 decision, OWCP denied appellant's claim. As to April 13, 2007, which resulted in a disciplinary letter, the evidence did not establish that she was threatened by Mr. Glover. The witness statement did not confirm aggressive behavior on his part, as alleged. The May 3, 2007 letter of warning was based on incorrect distribution tables noted during an April 9, 2007 conference call. It was also based on appellant attending the April 13, 2007

² Docket No. 10-1456 (issued February 23, 2011).

meeting and failing to follow instructions for which she was charged with unsatisfactory performance. No error in this administrative action was found. As to her remaining allegations, OWCP found that appellant submitted insufficient evidence to establish a compensable work factor. Appellant did not corroborate her account of work being assigned to her while she was on vacation, that her duties were changed on short notice or that she was assigned work outside of her area.

Counsel requested an oral hearing, held on November 7, 2008. At the hearing, appellant asserted that a manager approved her request to use annual leave from September 4 to 8, 2006, but deliberately assigned work on September 5, 2006 so she would not be able to meet a September 13, 2006 deadline. The manager also criticized her on September 11, 2006 for failing to meet the deadline. Appellant alleged that, while on vacation in October 2006, Mr. Glover deleted her work e-mails, thereby denying information needed to timely complete her work. On December 11, 16 and 22, 2006 Mr. Glover changed her work schedule and days off, resulting in back-to-back shifts from December 22 to 23, 2006. Appellant contended that she had insufficient training regarding changes in distribution procedures and was accused of not notifying him of the difficulties with the new plan. Dr. Boutin testified that she related accounts of a hostile work environment competent to cause the diagnosed anxiety and depression.

Following the hearing, appellant submitted leave forms approving her request for annual leave from September 4 to 8, 2006, an e-mail from Mr. Glover sent on September 5, 2006 instructing her to complete reports by September 13, 2008, timekeeping forms showing changes to her shift schedule and days off on December 11 and 22, 2006 and April 2007 e-mails regarding changes in distribution table procedures.³

In a December 3, 2008 statement, Mr. Glover responded that mail was assigned to designated modes of transportation based on a one time or several times a week frequency. Appellant was assigned to track the mail volume being assigned, a task that took about 10 to 15 minutes to complete. There were several computer applications used to perform this task to which she had access and training. As to the mail volumes in December 2006, Mr. Glover noted that it increased due to the Christmas season. He noted that appellant worked little overtime for the two to three weeks prior to the holidays and let it be known that she expected two days off. Mr. Glover stated that he tried to oblige her request. He sent an e-mail to his staff on December 2, 2006 advising of the schedule changes effective December 11, 2006. Mr. Glover stated that appellant was aware of the schedules ahead of time and of the need for her to work on T-3 from 2:00 p.m. to 10:30 p.m. to assist mail processing in case there were issues assigning express mail. He noted that he followed up by e-mail to assure that she received pay for working her day off on December 16, 2006. Mr. Glover noted that appellant also received verbal notification concerning the schedule changes by e-mail of December 15, 2006. He stated that she took it upon herself to change her reporting time on December 23, 2006, one of the days with the heaviest volumes of outgoing mail assigned to air transportation. Mr. Glover denied that he required her to work back-to-back shifts as alleged.

³ The employing establishment submitted an August 5, 2008 report from Dr. Jeffrey A. Danziger, a Board-certified psychiatrist, performing a fitness-for-duty examination for the employing establishment, opining that appellant could not return to work in her date-of-injury position due to anxiety, depression and panic attacks.

Mr. Glover addressed the process for monitoring mail distribution tables in the computer with windows that allowed various functions. Appellant's responsibility was to assure that correct modes of transportation were assigned to the mail handing unit being processed, distinguishing between ground and air transportation. Once a particular designation was assigned, it was locked and could not be changed unless management was notified. Similarly, destination codes were locked in order to assure that the proper transportation mode was available and assigned. Mr. Glover noted that appellant's job required monitoring and correcting discrepancies by notifying team support by telephone. When there was a change in operations, surface routings and air transports were monitored to assure correct mail assignments. Mr. Glover noted that he determined that appellant was not properly following up by telephone but was sending e-mails with no reply. He intervened by following up on messages, making telephone calls and holding a telephone conference with the nine districts of the Southeast area. While eight of the districts did not have concerns, it was determined that the mail distribution tables were not correct for one district and it took approximately three hours to correct. Mr. Glover stated that appellant failed to make verbal contact with the support team in the district.

As to certain e-mails when appellant was on leave in September 2006, Mr. Glover noted that she had delegated mail transportation responsibility to James Pierson, the schemes and schedules clerk. He requested that Mr. Pierson advise when he next had access to the e-mails, as he wanted to locate a copy of an e-mail on which she was included but he had deleted. When Mr. Glover subsequently reviewed the e-mails, he noted duplicate messaging that he deleted in order that she not feel overwhelmed on her return to work. He noted that the deletion of duplicative messages would not cause any type of delays in appellant's work as an air transportation specialist. Mr. Glover did not delete any message or file containing information that she needed in the course of her work.

By decision dated and finalized January 26, 2009, an OWCP hearing representative affirmed the June 24, 2008 decision, finding that a compensable employment factor was not established. The hearing representative found that appellant was not given last minute assignments with unreasonable deadlines, assigned work outside of her area or that she could not timely complete work due to schedule changes. The hearing representative further found that changes to her work schedule and the letter of warning were administrative actions not in the performance of duty and that no error or abuse was shown. The hearing representative found that appellant did not establish her allegations of supervisory harassment as factual.

In a January 22, 2010 letter, counsel requested reconsideration. He submitted the June 30, 2009 and January 13, 2010 reports of Dr. Boutin, who discussed appellant's account of workplace events and noted psychological test results.

By decision dated February 9, 2010, OWCP denied reconsideration on the grounds that appellant's January 22, 2010 request for reconsideration was not timely filed and failed to present clear evidence of error. Counsel then appealed to the Board, which remanded the case to OWCP for merit review.

By decision dated May 10, 2011, OWCP denied appellant's emotional condition claim on the grounds that she failed to establish any compensable factors of employment.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. 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.⁴ On the other hand, the disability is not covered where 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.⁵

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.⁶ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. 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.⁷

ANALYSIS

In the present case, appellant alleged that she sustained a stress condition as a result of a number of employment incidents, which OWCP found to be noncompensable. The Board must review whether the alleged incidents are compensable employment factors under the terms of FECA.

Appellant alleged a general pattern of harassment by management. Incidents of harassment, discrimination or retaliation by supervisors and coworkers, if established as occurring and arising from the employee's performance of his or her regular duties, could constitute employment factors.⁸ To give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment did in fact occur.⁹ Mere perceptions of

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ See *Norma L. Blank*, 43 ECAB 384. (1992).

⁷ *Id.*

⁸ *Janice I. Moore*, 53 ECAB 777 (2002). See *David W. Shirey*, 42 ECAB 783 (1991).

⁹ *Marlon Vera*, 54 ECAB (2003).

harassment are not compensable under FECA.¹⁰ Appellant did not submit evidence, such as witness statements, corroborating her allegations of harassment. The statement of Mr. Collazo noted only that Mr. Glover had raised his voice during a discussion with appellant on April 13, 2007. Mr. Glover stated that he spoke to her from her office doorway. The evidence does not establish that he yelled at appellant or harassed her. The Board has held that the raising of a voice during the course of a conversation does not warrant a finding of verbal abuse.¹¹ Appellant has not established a compensable employment factor under FECA with respect to the claimed harassment.

Appellant also attributed her condition to a May 3, 2007 letter of warning. The Board has characterized supervisory disciplinary matters as administrative or personnel matters of the employing establishment, which are covered only when a showing of error or abuse is made.¹² In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹³ To support such a claim, a claimant must establish a factual basis by providing probative and reliable evidence.¹⁴ In this case, appellant did not submit evidence corroborating her allegation that the letter was improperly issued. As she did not establish that the disciplinary letter constituted error or abuse, she has thus failed to establish a compensable factor of employment in this respect.

Appellant also attributed her condition to schedule changes in December 2006. She submitted documentation of certain changes. The Board has held that work assignments and schedules are administrative functions of the employing establishment, actions not considered compensable employment factors in the absence of error or abuse.¹⁵ Mr. Glover addressed the mail volumes for December 2006 and noted that he attempted to accommodate appellant's requests for days off. He noted that he followed up to make sure she was paid for work on December 16, 2006. Appellant did not submit any evidence to establish that the employing establishment erred in her work schedule in December 2006. Mr. Glover noted that she was notified of the T-3 work schedule by e-mail in early December 2006 and she did not establish that she was required to work back-to-back shifts. Appellant did not establish error or abuse in her supervisor's assignment of work or handling of her leave request.¹⁶ Therefore, she has not established a compensable factor of employment.

Appellant also attributed her condition to being made to work outside of her work area. However, she did not submit evidence corroborating such assignments. The Board has held that

¹⁰ *Kim Nguyen*, 53 ECAB 127 (2001).

¹¹ *Carolyn S. Philpott*, 51 ECAB 175 (1999).

¹² *Roger W. Robinson*, 54 ECAB 846 (2003).

¹³ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁴ *See Barbara J. Nicholson*, 45 ECAB 843 (1994).

¹⁵ *V.W.*, 58 ECAB 428 (2007).

¹⁶ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably. *Brian H. Derrick*, 51 ECAB 417 (2000).

mere allegations, in the absence of factual corroboration, are insufficient to meet a claimant's burden of proof.¹⁷ Appellant has failed to establish this allegation as factual.

Appellant also alleged that her manager assigned time value work to her while he knew she was on vacation in order to cause her to miss the deadline. She submitted leave records showing that the manager approved her leave request for September 4 to 8, 2006 and a September 5, 2006 e-mail from Mr. Glover assigning reports due on September 13, 2006 after her return to work. The fact of the work assignment made on September 5, 2006 does not establish error. The deadline for the work to be completed was September 13, 2006, approximately a week after her return to duty. Appellant has not adequately explained how the work assignment rises to error or abuse by her supervisor. She has not established that the assigned deadline was abusive or erroneous.¹⁸

Appellant also attributed her emotional condition to her manager deleting certain e-mails from her work computer while on vacation in October 2006. Mr. Glover submitted a statement addressing the assignment of work at various districts by which mail was designated for distribution by ground or air transportation. He noted that several aspects of the distribution tables provided locks for such items as particular destinations or assignment of transportation methods. These aspects were, in turn, reviewed by management. During her absence, appellant's work was assigned to a schemes and schedules clerk. Mr. Glover acknowledged that he reviewed various e-mails but only deleted those that were duplicative and not essential to appellant's work as an air transportation specialist. He addressed his supervision of appellant's work and the occasional need that she follow up on certain assignments by telephone calls to assigned teams, rather than send e-mails. The Board finds that Mr. Glover, as her supervisor, monitored her work in making entries for ground or air transportation of mail and her communications with the relevant teams in the various districts. Appellant has not established that her supervisor erred or was abusive in this regard.

CONCLUSION

The Board finds that appellant did not establish that she sustained an emotional condition due to a compensable factor of her federal employment.

¹⁷ *Bonnie Goodman*, 50 ECAB 139 (1998).

¹⁸ *V.W.*, *supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 4, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board