

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

S.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chicago, IL, Employer**

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**Docket No. 12-1512
Issued: February 12, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On July 5, 2012 appellant filed a timely appeal of the January 20, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 established that she sustained an emotional condition in the performance of duty.

On appeal, appellant contends that being hit by a parcel thrown by Lynn Johnson, a supervisor, caused her emotional condition. She feared Ms. Johnson who followed her to a clinic where she was treated for her injury. Appellant also feared retaliation from Ms. Johnson as appellant had reported her to upper management, which caused Ms. Johnson to be removed from her position, had reported her to the police following this injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 9, 2011 appellant, then a 40-year-old distribution clerk, filed a traumatic injury claim alleging that on that date she sustained a left wrist and arm injury and experienced job stress and intimidation as a result of being struck by a parcel thrown by Ms. Johnson. In an accompanying narrative statement, she contended that previously on February 7, 2011 she had been hit in the right arm by a parcel thrown by Ms. Johnson. On February 9, 2011 she threw a parcel at appellant at “full and heavy force” which hit her left wrist. Following the February 9, 2011 incident, she felt threatened by Ms. Johnson who approached her and ordered her to return to work in a loud and intimidating voice. Ms. Johnson threatened to write her up for failure to follow instructions. She ignored appellant’s request for a union steward. Ms. Johnson pointed her finger at appellant and ordered her to get off the telephone with a union steward and report to her office. Appellant called 911, filed an incident report and drove herself to the clinic for medical treatment. She became frightened when Ms. Johnson arrived at the clinic.

Appellant submitted witness statements dated February 9, 2011. Robert Taylor, an employee, related that on February 9, 2011 that he observed Ms. Johnson throwing parcels. An employee whose signature is illegible observed that Ms. Johnson on February 7, 2011 hit appellant’s arm with a parcel. Crystal Flynn, a union representative, related that Ms. Johnson told her that on February 9, 2011 she had unintentionally hit appellant with a parcel.

A police document provided information about obtaining a warrant or summons for criminal charges. It stated that it was not an official police report.

In medical reports dated February 9 and 11, 2011, Dr. George M. Bridgeforth, a Board-certified internist, advised that appellant had a left wrist and forearm contusion and anxiety. An authorization for examination and/or treatment (Form CA-16) dated February 11, 2011 was not signed by the employing establishment. It was signed by Dr. Bridgeforth who advised that appellant had a left wrist and forearm contusion.

By letter dated February 24, 2011, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It addressed the factual evidence she needed to submit to establish her claim. Also, OWCP requested that the employing establishment submit medical evidence in response to appellant’s claim.

On March 4, 2011 appellant stated that she did not have a confrontation with Ms. Johnson on February 9, 2011 and there was no animosity between them. She contended that Ms. Johnson had a history of misconduct at work which was raised by other employees and addressed by upper management.

In reports dated February 9 through April 22, 2011, Dr. Bridgeforth reiterated his prior diagnoses of left wrist and forearm contusions and anxiety. He stated that appellant also had depression. On February 9, 2011 Dr. Bridgeforth prescribed physical therapy to treat appellant’s left wrist and forearm contusions.

In a February 21, 2011 report, John J. O’Leary, Ph.D., noted appellant’s problems which included fear of retaliation by her manager. He diagnosed occupational wrist contusions and adjustment disorder with mixed anxiety and depression mood.

In a March 17, 2011 letter, Ms. Johnson stated that on February 9, 2011 she hit appellant with a small parcel on her upper arm. She barely noticed what she had done because the package was light weight. Ms. Johnson stated “oops” and put her hand over her mouth. She had no indication that there was a problem so she continued to work. About 15 minutes later, Ms. Johnson noticed that appellant disappeared from her parcel rack assignment. She located her performing a previously assigned work task. Because appellant did not advise Ms. Johnson about her injury, she ordered her to report back to the rack assignment. In response, she became loud and uncooperative. Ms. Johnson then instructed appellant to come to her office. Appellant called a union representative. When Ms. Johnson arrived at her office, appellant was not there. She later found her on the telephone with a union representative and saw her red and swollen wrist. Ms. Johnson stated that employees were instructed to report all accidents to management immediately. Highly visible signs around the building also provided this instruction. Appellant told Ms. Johnson that she was afraid to report her injury to her or any other managers because of previous incidents. Ms. Johnson denied hitting her. She advised two union stewards that she planned to take disciplinary action against appellant for her one-hour disappearance. Ms. Johnson stated “oops” apologetically at the time of the hitting incident. She had no idea that appellant was going to call the police and there was no sign of any injury. Ms. Johnson noted that two hours before the incident appellant became loud and upset after being informed that she was not going to be paid for over one week of sick leave because she did not submit adequate medical documentation. She received a subpoena to appear in court on March 17, 2011 regarding battery charges.

In a March 28, 2011 report, Dr. Anil K. Gandhi, a Board-certified psychiatrist, obtained a history that a manager threw a parcel and hit appellant on the shoulder and on the left wrist. She advised that appellant had adjustment disorder with mixed emotional features and a right shoulder and left wrist injury secondary to occupational stresses.

By letter dated March 31, 2011, OWCP accepted appellant’s claim for contusion of the left wrist.

In an April 13, 2011 letter, appellant contended that on January 27, 2011 she submitted a leave slip to Ms. Johnson because she had walking pneumonia. On January 29, 2011 she called into work to get coverage for her absence through February 5, 2011. Appellant received a confirmation number for her call. She also received a case number for her request for leave under the Family and Medical Leave Act (FMLA). Appellant returned to work on February 7, 2011 and submitted medical documentation to Ms. Johnson. She later discovered that Ms. Johnson had changed her FMLA leave to absent without leave (AWOL) status. Appellant filed grievances against Ms. Johnson regarding the AWOL charge and the February 7 and 9, 2011 incidents.

In a January 27, 2011 disability certificate, a physician whose signature is illegible indicated that appellant was totally incapacitated through February 6, 2011.

In a June 24, 2011 decision, OWCP denied appellant's emotional condition claim on the grounds that she failed to establish any compensable employment factors.

On July 20, 2011 appellant requested an oral hearing before an OWCP hearing representative.

In a November 21, 2011 report, Dr. O'Leary stated that when he first saw appellant on February 21, 2011 she presented with depression, anxiety, poor sleep, appetite changes, crying spells, lack of energy and motivation and panic. Appellant related that she was fearful and afraid of her manager. She denied suicidal or homicidal thoughts. Appellant had no previous mental health treatment. Dr. O'Leary reiterated his diagnosis of adjustment disorder with depression and anxiety. He advised that appellant received mental health treatment for issues arising out of work-related stress at the employing establishment. In a December 19, 2011 report, Dr. O'Leary obtained a history that appellant was struck by a package thrown by her manager on February 7 and 9, 2011 at work. The manager followed her to the clinic and became loud with her. Dr. O'Leary advised that appellant's depression and anxiety were caused by these incidents.

In a January 20, 2012 decision, an OWCP hearing representative affirmed the June 24, 2011 decision.

LEGAL PRECEDENT

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by factors of his or her federal employment.² To establish that he or she sustained an emotional condition in the performance of duty, a claimant 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.³

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

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Gregorio E. Conde*, 52 ECAB 410 (2001).

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.⁶ However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.⁷ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.⁸

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.⁹ 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.¹⁰

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of several actions by her supervisor, Ms. Johnson. OWCP denied appellant's emotional condition claim on the grounds that she had not established any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

Appellant contended that on February 7 and 9, 2011 Ms. Johnson struck her in the right and left arm with parcels, threatened in a loud and intimidating voice to write her up for failing to follow instructions when ordered to return to work following the February 9, 2011 incident and unexpectedly appeared at the clinic where she was receiving medical treatment for the accepted February 9, 2011 physical injury. The Board has recognized the compensability of physical threats and verbal aggression in certain circumstances.¹¹ Regarding verbal aggression, compensability does not imply that every statement uttered in the workplace will give rise to

⁶ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

⁷ See *William H. Fortner*, 49 ECAB 324 (1998).

⁸ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁹ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁰ *Id.*

¹¹ See *Alton L. White*, 42 ECAB 666, 669-70 (1991) (recognizing the compensability of physical threats and verbal aggression).

coverage under FECA.¹² A raised voice in the course of a conversation does not, in and of itself, warrant a finding of verbal abuse.¹³ The statement from Mr. Taylor indicated that on February 9, 2011 he saw Ms. Johnson throw a parcel. However, the Board finds that this statement is general in nature and does not state whether Ms. Johnson hit appellant. Ms. Flynn's statement indicated that Ms. Johnson unintentionally hit appellant with a parcel on February 9, 2011. In the statement with an illegible signature, an employee witnessed Ms. Johnson throwing a parcel on February 7, 2011 which hit appellant's arm. This statement does not suggest Ms. Johnson's action was intentional. Ms. Johnson, in a March 17, 2011 letter, acknowledged that she hit appellant on the upper arm on February 9, 2011 with a small parcel, but she apologized for her action. She was not aware of appellant's injury as she had not reported it to her or any other managers as required. Ms. Johnson denied hitting appellant on any other occasion at work. She noted that two hours before the February 9, 2011 incident appellant became loud and upset after being informed that she was not going to receive pay for over one week of sick leave because she failed to submit adequate medical documentation to support her absence from work. Although Ms. Johnson received a subpoena to appear in court on battery charges filed by appellant, the record does not contain a judgment from the court finding her guilty of these charges. Appellant's contention that Ms. Johnson had a history of misconduct with other employees which was addressed by upper management is not specific to her allegation that Ms. Johnson acted inappropriately towards her on February 7 and 9, 2011. Further, there is no evidence corroborating that Ms. Johnson spoke to appellant in an unprofessional or a threatening manner or that, in a situation where she was not cooperating with supervisory instructions, the interaction with appellant rose to the level of verbal abuse or otherwise fell within the coverage under FECA. The Board finds that the weight of the evidence, including appellant's own statement that she did not have a confrontation with Ms. Johnson on February 9, 2011 or any animosity towards each other, does not support her allegation of a physical assault or verbal abuse. The history provided in the reports of Drs. O'Leary and Gandhi of retaliation, physical assault and verbal abuse by a manager is not supported by the record. The Board finds that appellant has not established a compensable factor of employment.

Appellant's allegations that Ms. Johnson ignored her request for union representation,¹⁴ requested additional medical documentation,¹⁵ charged her with being AWOL,¹⁶ threatened to take disciplinary actions for failing to follow instructions¹⁷ and followed her to the clinic are administrative matters and not compensable absent a showing of error or abuse on the part of the employing establishment. Ms. Johnson stated that appellant did call a union steward because no clerk union representatives were located in the station. She had requested additional medical documentation regarding appellant's sick leave because appellant previously had submitted

¹² See *Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783 (1991).

¹³ *Karen K. Levene*, 54 ECAB 671 (2003).

¹⁴ *Wanda G. Bailey*, 45 ECAB 835 (1994).

¹⁵ *James P. Guinan*, 51 ECAB 604, 607 (2000); *John Polito*, 50 ECAB 347, 349 (1999).

¹⁶ *T.G.*, 58 ECAB 189 (2006).

¹⁷ *Robert Breeden*, 57 ECAB 622 (2006).

inadequate medical documentation. Ms. Johnson had planned to take disciplinary action against appellant because she disappeared at work for one hour. Although appellant filed grievances regarding the AWOL charge and hitting incidents, the record does not contain a formal finding of error or abuse to establish these allegations of error or abuse in an administrative matter. She did not submit any evidence establishing that Ms. Johnson erred in the exercise of her supervisory duties by going to the clinic. There is no evidence in the record regarding the termination of Ms. Johnson. As there is no evidence that the employing establishment acted unreasonably in the above-stated administrative matters, the Board finds that appellant has not established a compensable factor.

Since appellant has not established a compensable work factor, the Board will not address the medical evidence.¹⁸

On appeal, appellant contended that being hit by a parcel thrown by Ms. Johnson on February 7 and 9, 2011 caused her emotional condition. She feared Ms. Johnson who followed her to the clinic where she received treatment for her February 9, 2011 injury. Appellant also feared retaliation by Ms. Johnson for reporting her to upper management, which removed her from her position on February 10, 2011, and she feared retaliation for reporting the incident to police. For reasons noted, the Board finds that appellant has not established a compensable factor of her employment.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has failed to establish that she sustained an emotional condition in the performance of duty, as alleged.

¹⁸ *Karen K. Levene*, 54 ECAB 671 (2003).

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board