

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

J.M., Appellant)	
)	
and)	Docket No. 16-0312
)	Issued: June 22, 2016
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL MEDICAL CENTER BUTNER, Butner, NC, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 8, 2015 appellant filed a timely appeal from an October 27, 2015 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 501.3,² the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish an emotional condition in the performance of duty, causally related to factors of her federal employment.

On appeal, appellant asserts that the evidence of record establishes her claim and maintains that she has submitted supportive medical evidence to OWCP.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted evidence with her appeal to the Board. The Board, however, cannot consider this evidence as its jurisdiction is limited to the evidence that was before OWCP at the time it issued its final decision. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

FACTUAL HISTORY

On September 4, 2014 appellant, then a 30-year-old nursing assistant, filed an occupational disease claim (Form CA-2) stating that events at work caused severe emotional distress that affected her entire body. She indicated that she first became aware of the condition and its relation to her employment on August 31, 2014, and she stopped work on September 2, 2014. In support of her claim appellant submitted a Family and Medical Leave Act (FMLA) request, in which Dr. Mohammed S. Khader, a Board-certified family physician, diagnosed depression, anxiety, and stress from work. He advised that she could not perform her regular job duties due to severe emotional distress. Dr. Khader estimated that appellant would be unable to work for two months.

In a letter dated September 18, 2014, OWCP informed appellant of the evidence needed to establish her claim and afforded her 30 days to submit additional evidence. By separate letter dated September 18, 2014, it requested additional information from the employing establishment.

In two undated statements, appellant alleged that her emotional condition was caused by racial discrimination, bullying, harassment in the form of a schedule change, not receiving her scheduling, involuntary reassignment, lack of communication with management, and her placement on harder units in retaliation. She also asserted that, time and attendance records were inaccurate, she had overwhelming job duties, she was unable to bid for permanent positions, and she was denied promotions. Further, appellant alleged that her schedule was not electronically posted and that she was closely observed by management. She stated that she had been retaliated against because she filed two Equal Employment Opportunity (EEO) claims, was bullied at a staff meeting about her job performance, and harassed and treated differently than other staff members. Appellant alleged that she was assigned to more difficult units that required heavy work and at times had to work two units, and that on September 1 and 2, 2014 she had panic attacks while thinking about work difficulties. She also related that she had crying spells, lethargy, body aches, stomach problems, headaches, mood swings, lack of interest in activities and self-care, insomnia, exhaustion, lack of motivation, depression, frequent crying, and stress, in addition to panic attacks. Appellant described perceived disparate treatment when she was assigned harder jobs on harder units than other nursing assistants. She indicated that staff would laugh at her and talk about her, that her job performance was downgraded, and that she felt singled out because she was Caucasian when most of the staff was African-American. Appellant added that she was previously treated for depression in 2007-08 because her parents had separated and because she had broken up with her fiancé. She also advised that her home was broken into on August 15, 2014, but nothing was stolen.

Appellant submitted a December 6, 2013 letter of acknowledgement that an EEO claim was accepted for investigation. This was regarding her allegations of improper assignment, being ridiculed, and a downgraded performance evaluation. In a June 10, 2014 memorandum regarding her EEO claim, appellant alleged that she was retaliated against for filing a claim by being placed on more difficult units, schedule changes, inaccurate leave and pay, and being overworked. A June 11, 2014 union memorandum, addressed to the employing establishment, maintained that her schedule was improperly changed. An August 27, 2014 letter acknowledged that an EEO claim was accepted for investigation regarding ongoing harassment in the form of schedule change, involuntary reassignment, denied schedule request, lack of communication,

inaccurate time and attendance records, prohibited access to electronic file, and for not being compensated for work performed.

By decision dated November 3, 2014, OWCP denied the claim. It found that appellant established no compensable factors of employment and had submitted no medical evidence which diagnosed a medical condition due to the claimed employment factors.

Appellant timely requested a hearing, which was held on July 13, 2015. She testified that she had to work harder than other employees, noting that she would be assigned to two units, had to work seven days in a row, would be called to work while on break, and was not given a regular work assignment although less senior nursing assistants were. Appellant maintained that she was improperly written up as absent-without-leave and was denied FMLA leave and leave bank leave. She stated that she felt racially discriminated against by six African-Americans who sat around and talked about her and who degraded her at a meeting when she was the only Caucasian present. Appellant asserted that she was harassed and treated differently than other employees. She noted that she had filed two EEO complaints, but no final decision had been issued. Appellant indicated that she had returned to a modified assignment and was diagnosed with mild depression and anxiety. Daniel Spillman, a Caucasian correctional officer at the employing establishment, also testified. He stated that he saw appellant when she was very upset about work and had personally seen lists of work chores for her. Appellant's mother also testified that appellant was very upset and depressed. Appellant asserted that she had submitted a lot of medical evidence that was not of record.

After the hearing, appellant submitted a signed affidavit from Mr. Spillman, taken on February 14, 2014 for an EEO claim. Mr. Spillman related that he had been a nursing assistant until January 2014. He acknowledged that he had discussed appellant's EEO claim with her, but that he was not present when she claimed she was ridiculed in a staff meeting. Mr. Spillman indicated that his shift would change and that on occasion he covered two units during a night. He maintained that it seemed as if he and appellant were moved more frequently than others, perhaps based on their race, and on one occasion witnessed appellant being moved to another unit. Mr. Spillman concluded that it appeared that African-American nursing assistants were given assignments on the easier units.

In a signed affidavit taken on March 5, 2014 for an EEO claim, Candice Toy, a Caucasian registered nurse at the employing establishment and a union representative, related that she did not work directly with appellant, but had in the past. She indicated that appellant told her she was being ganged up on, especially in a meeting with no union representative, and that she herself had been discriminated against because of race. Ms. Toy explained that nursing assistants were supposed to rotate equally and voiced her belief that a nurse manager did not fairly treat Caucasians. She indicated that she was not present at the meeting where appellant claimed she was ridiculed.

Edwin Kirton, an African-American correctional officer at the employing establishment and union vice president, provided a signed affidavit taken on October 20, 2014 for an EEO claim. He related that it would not surprise him that appellant was retaliated against because of EEO activity because a pattern existed at the employing establishment. Mr. Kirton advised that she filed a complaint with the union that her schedule was not electronically posted, and that he assumed this was corrected. He indicated that the union and the employing establishment were

negotiating to have all nursing assistant assignments converted to bid posts, but this had not been done yet, and he considered this offensive conduct. Mr. Kirton acknowledged that appellant appeared to be under a lot of stress, that she had reported harassment, that others had filed similar charges against employing establishment nurses, and that the employing establishment retaliated when an EEO claim complaint was filed, such as with appellant. He also acknowledged awareness of her complaint that she had to work long shifts consecutively. Mr. Kirton related that appellant had a prior accepted claim and management would not give her time off for medical appointments. He stated that a number of employees had problems with getting proper pay and that a grievance had been filed.

In a signed affidavit taken on November 7, 2014 for an EEO claim, Cheryl Daniel, an employing establishment health systems specialist and union vice president, related that she had dealt with appellant both with the union and the employing establishment regarding EEO claims. She concurred that appellant was retaliated against for EEO activity and that appellant was placed on units that required a heavier workload. Ms. Daniel indicated that appellant had a previous workers' compensation claim and that when she returned to work she was retaliated against and treated offensively. She acknowledged that appellant sought union assistance regarding being humiliated at a meeting, and that the union was actively engaged in trying to resolve issues regarding bid positions and regarding incorrect pay of appellant and other employees. Ms. Daniel concluded that she believed that appellant was harassed and treated in an offensive manner by employing establishment management.

Appellant also submitted one page of employing establishment policy stating that an employee "may" be eligible for FECA benefits for employment-related stress.

By decision dated October 27, 2015, an OWCP hearing representative found no compensable factors of employment and affirmed the November 3, 2014 decision. The hearing representative noted that appellant did not meet her burden of proof to establish that she was overworked, had not established error or abuse with regard to administrative matters such as assignment of work, and that the affidavits submitted did not establish harassment, or discrimination under FECA.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,³ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under FECA.⁴ When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed

³ 28 ECAB 125 (1976).

⁴ See *Robert W. Johns*, 51 ECAB 137 (1999).

by the employing establishment or by the nature of the work.⁵ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁶ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.⁷ Personal perceptions alone are insufficient to establish an employment-related emotional condition.⁸

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.⁹ Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.¹⁰

To establish a claim that he or she sustained an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her stress-related condition.¹¹ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.¹² 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.¹³

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations that the harassment occurred with probative and reliable evidence.¹⁴ With regard to emotional claims arising under FECA, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other agencies, such as the Equal Employment Opportunity Commission, which is charged with statutory authority to

⁵ *Supra* note 3.

⁶ *J.F.*, 59 ECAB 331 (2008).

⁷ *M.D.*, 59 ECAB 211 (2007).

⁸ *Roger Williams*, 52 ECAB 468 (2001).

⁹ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹⁰ *Kim Nguyen*, 53 ECAB 127 (2001).

¹¹ *Leslie C. Moore*, 52 ECAB 132 (2000).

¹² *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹³ *Id.*

¹⁴ *James E. Norris*, 52 ECAB 93 (2000).

investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under FECA, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or coworkers. Mere perceptions and feelings of harassment will not support an award of compensation.¹⁵

ANALYSIS

The Board finds that appellant has not established an employment-related emotional condition in the performance of duty. She has not established a compensable factor of employment.

As to appellant's allegation that she was overworked because she would be assigned two harder units, and had to work seven days in a row, the Board has held that overwork, when substantiated by sufficient factual information to corroborate the claimant's account of events, may be a compensable factor of employment.¹⁶ In this case, however, appellant submitted no evidence to substantiate these allegations, such as earnings and leave statements, a daily work roster, or statements from other employees confirming disparate scheduling and assignments. As with all allegations, overwork must be established on a factual basis to be a compensable employment factor.¹⁷ Because appellant has not submitted any evidence corroborating this, overwork cannot be deemed compensable factors of employment.

Appellant also alleged that her emotional condition was caused by a schedule change, not receiving her scheduling, involuntary reassignment, inaccurate time and attendance records, not being able to bid for permanent positions, not being promoted, that her schedule was not electronically posted and that she was closely observed by management. As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of FECA.¹⁸ The Board has long held that disputes regarding leave,¹⁹ the assignment of work,²⁰ assessment of work performance,²¹ denial of a promotion,²² and a change in a duty shift,²³ are administrative functions of the employing establishment and, absent error or abuse, are not compensable.²⁴ Appellant submitted no evidence sufficient to establish the alleged instances of error or abuse.

¹⁵ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁶ *Bobbie D. Daly*, 53 ECAB 691 (2002).

¹⁷ *Sherry L. McFall*, 51 ECAB 436 (2000).

¹⁸ *Carolyn S. Philpott*, 51 ECAB 175 (1999).

¹⁹ *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

²⁰ *Robert W. Johns*, 51 ECAB 137 (1999).

²¹ *Elizabeth W. Esnil*, 46 ECAB 606 (1995).

²² *Martha I. Watson*, 46 ECAB 407 (1995).

²³ *Peggy R. Lee*, 46 ECAB 527 (1995).

²⁴ *Supra* note 9

Absent evidence establishing error or abuse, her dislike of these managerial actions is not a compensable factor of employment.²⁵

Appellant also alleged that employing establishment management treated her disrespectfully. Generally, complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by FECA. This principle recognizes that a supervisor or manager, in general, must be allowed to perform his or her duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error or abuse.²⁶ Here again, the record contains no evidence that any employing establishment supervisor or manager treated appellant in a disrespectful manner at a particular time and place. Error or abuse in discharging management duties has not been established, and this allegation is therefore not compensable.²⁷

Appellant contended that she was harassed and bullied at work by supervisors and coworkers who talked about her and treated her in a disrespectful, discriminatory manner. Mere perceptions of harassment or discrimination are not compensable under FECA,²⁸ and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.²⁹ Although appellant indicated that she had filed EEO complaints, the record does not contain an EEO decision making findings about particular assertions that are at issue in her workers' compensation claim. Although she submitted several affidavits from coworkers and union officials, these statements alone are insufficient to meet appellant's burden of proof. While each of the affidavits generally supported appellant's contentions, none provided specific dates or described situations with sufficient degree of specificity. Appellant, thus, submitted insufficient evidence to show a persistent disturbance, torment, or persecution, *i.e.*, mistreatment by employing establishment management.³⁰ She therefore did not establish a factual basis for her claim of harassment by probative and reliable evidence.³¹

Thus, contrary to appellant's assertions on appeal, she has not established any compensable employment factors under FECA and therefore has not met her burden of proof in establishing an emotional or stress-related condition in the performance of duty. As appellant

²⁵ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

²⁶ *Id.*

²⁷ *See David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

²⁸ *Supra* note 14.

²⁹ *Id.*

³⁰ *Supra* note 15.

³¹ *See Robert Breeden*, 57 ECAB 622 (2006).

has not established any compensable employment factors, the Board need not consider the medical evidence of record.³²

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 not met her burden of proof to establish an emotional condition in the performance of duty causally related to factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the October 27, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 22, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

³² See *Margaret S. Krzycki*, 43 ECAB 496 (1992). As to appellant's assertion on appeal that she submitted medical evidence to OWCP, it is not found in the record before the Board.