

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

L.J., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
REGIONAL OFFICE, Houston, TX, Employer**

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**Docket No. 11-631
Issued: December 9, 2011**

Appearances:
Fernando E. Grajales, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 7, 2011 appellant, through her representative, filed a timely appeal from a July 13, 2010 decision of the Office of Workers' Compensation Programs (OWCP) regarding the denial of her traumatic injury emotional condition 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 has established that she developed an emotional condition in the performance of duty on October 21, 2009.

On appeal appellant and her representative contend that the evidence of record establishes that the confrontation that occurred on October 21, 2009 is a compensable factor of employment and that she has established that her multiple panic attacks were caused by her federal employment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 26, 2009 appellant, then a 36-year-old loan specialist, filed a traumatic injury claim alleging that her multiple panic attacks were due to being threatened by John Duplessis, coworker and union steward, on October 21, 2009 when in her role as a chief union steward she assigned him the task of reviewing performance standards. Specifically she alleged that Mr. Duplessis yelled and threatened he would get her which she found to be terroristic and her fear of being murdered.

By letter dated November 2, 2009, OWCP informed appellant that the evidence of record was insufficient to support her claim and advised her as to the evidence required to support her claim. Appellant was given 30 days to provide the requested information.

Subsequently OWCP received evidence in support of appellant's claim. In an October 21, 2009 e-mail, Stephanie Alexander, a loan servicing officer, detailed what occurred on October 21, 2009, which she stated was "a follow up to the union[-]related incident." Mr. Duplessis stated that while he was at his desk appellant "requested that he handle some union assignments in an unprofessional manner." At this point, he informed her that her manner was inappropriate and "he was not going to tolerate her tone of voice." After appellant left his desk, Mr. Duplessis went over to her workstation "and had words with her which escalated to the use of foul language on" his part. Jo Staggers, a coworker, overheard the altercation and escorted Mr. Duplessis away in order to avoid any further outburst from Mr. Duplessis. While discussing the incident with appellant, she stated that she did not use foul language when discussing union matters with Mr. Duplessis and would not advise what part of her conversation with Mr. Duplessis caused his anger towards her.

On October 21, 2009 Dr. Theron R. Bowers, Jr., a treating Board-certified psychiatrist, saw appellant for panic attacks. He diagnosed anxiety due to a coworker's verbal assault. Appellant related that a coworker verbally assaulted her and that after the incident she was left alone and became fearful of what the coworker would do to her.

In an October 23, 2009 counseling memorandum for disrespectful conduct, Ms. Alexander stated that Mr. Duplessis had engaged in a disrespectful and rude exchange on October 21, 2009 with a coworker.

In an October 26, 2009 response to the counseling memorandum, Mr. Duplessis provided his version as to the October 21, 2009 incident with appellant. He stated that appellant approached him while he was at his desk in a very rude manner and that he asked her several times to leave and take the contents she placed on his desk with her. Mr. Duplessis stated that appellant continued to ask nonbusiness-related questions and made an unprofessional comment as she went back to her desk. At this point, he followed her to her desk and informed her that her rude manner and the comments she made to him as she left his work area were not appreciated. Mr. Duplessis stated that he then told appellant to either e-mail him or make an appointment for his convenience. In concluding, he commented that she was not his supervisor the last time he checked.

In an October 27, 2009 report, Dr. Bowers diagnosed multiple panic attacks due to a personal attack by a coworker at work on October 21, 2009. He recommended 45 days of convalescent leave for appellant.

In an October 28, 2009 e-mail witness statement, Ms. Stagers, a coworker, provided information regarding the event of October 21, 2009. She stated that she overheard angry talk and saw Mr. Duplessis walking away from appellant's desk. Ms. Stagers related that James Buford later talked with Mr. Duplessis. She related that there was no injury to her knowledge.

In an October 28, 2009 e-mail witness statement, James Buford, a coworker and union steward, related that Mr. Duplessis approached appellant in a hostile and confrontational manner and that he overheard him using obscenities towards appellant. He stated that he attempted to calm the situation by physically inserting himself between appellant and Mr. Duplessis, but was ignored by Mr. Duplessis. Lastly, Mr. Buford stated that Darryl Brady, Assistant Director, motioned to Mr. Duplessis to come over to him and then was escorted out of appellant's area by another employee.

In an October 28, 2009 e-mail witness statement, Mr. Brady stated that on October 21, 2009 he witnessed Mr. Duplessis talking in a loud tone to appellant, but that he could not hear what was said. He did state that the tone used by Mr. Duplessis was harsh and loud with a confrontational manner. Mr. Brady stated that he asked several times for Mr. Duplessis to lower his voice until he was led away by another coworker who he believed was Ms. Stagers.

In an October 28, 2009 report, Denise Gabino, human resources liaison, detailed information from appellant and Fernando Grajales, president of the local union, regarding the confrontation between appellant and Mr. Duplessis. Mr. Grajales contacted her on October 26, 2009 when he indicated that he came to discuss the disagreement² between appellant and Mr. Duplessis which he stated "became aggressive and potentially violent." He related that appellant was receiving treatment for her anxiety and fear as a result of the incident as a result of this traumatic injury. Ms. Gabino related that appellant contacted her in the afternoon of October 26, 2009 to provide information as to what had occurred. Appellant related that she went to assign union work to Mr. Duplessis at this desk on behalf of Mr. Grajales. Mr. Duplessis followed her back to her desk following the assignment and according to appellant "walked up on her in a terroristic state and was pointing at [her]" when Mr. Buford interposed himself between them. She alleged that Mr. Duplessis threatened her when he stated that he was "going to get your ass straight right now" and that she was to "keep your ass away from me and away from my desk." Appellant also alleged that Mr. Duplessis continued to yell at her as he was taken away by other employees. She stated that she was unable to return to work because of her panic attack, terrible fear and shaken mental state as a result of this confrontation. Appellant informed Ms. Gabino "that she is simply too traumatized to return to work right now" and that she was afraid of being murdered by Mr. Duplessis.

In an October 30, 2009 e-mail witness statement, Teresa Gonzalez, loan technician, stated that she overheard the conversation with Mr. Duplessis at his desk as she sits near him. She

² October 1, 2009 was listed as the date of the injury, but this appears to be a typographical error as the confrontation between appellant and Mr. Duplessis occurred on October 21, 2009.

related that appellant threw papers on Mr. Duplessis' desk and instruct "him in a louder than normal conversation voice that 'he had to do it.'" At this point, Mr. Duplessis stated that he was going to talk with Fernando and appellant replied by raising her voice saying "'you don't have to talk to Fernando. I said you have to do it.'" Mr. Duplessis reiterated that he was going to check with Fernando and appellant in a louder voice instructed appellant to do what she instructed him to do and that Fernando did not need to be contacted. Ms. Gonzalez stated that at no time during the conversation with appellant did Mr. Duplessis raise his voice and it was apparent he was trying to restrain himself.

In a November 30, 2009 response to OWCP's request for additional information, appellant related that on October 21, 2009 Mr. Duplessis verbally attacked her and threatened her with physical harm. She also alleged that Mr. Buford prevented Mr. Duplessis from striking her by holding him back. In addition appellant alleged that Mr. Brady attempted several times to get Mr. Duplessis to leave the area and be quiet due to his unprofessional and inappropriate behavior. According to appellant Mr. Duplessis continued his assault of her and disregarded direct orders to cease his behavior until being removed by another employee.

In December 7, 2009 letters, the employing establishment instructed both appellant and Mr. Duplessis to have no written or verbal contact with each other. Both appellant and Mr. Duplessis signed their respective letters.

By decision dated December 14, 2009, OWCP denied appellant's claim on the grounds that she had not established any compensable factor of employment.

On January 13, 2010 appellant requested an oral hearing before an OWCP hearing representative, which was held on April 26, 2010. She contended that she established that the altercation was in the performance duty as she was attacked at work by a coworker. Appellant stated that the altercation with Mr. Duplessis arose from his hostility and anger at having to take union assignments from her in her capacity as chief steward. The union assignment she gave him involved reviewing performance standards.

Appellant submitted email evidence showing that Mr. Duplessis had been removed from his job as steward by the union as a result of the October 21, 2009 altercation with appellant. She also submitted a copy of an October 19, 2009 e-mail in which she was instructed to assign review of the proposed performance standards to a group which included Mr. Duplessis.

On February 19, 2010 OWCP received evidence from the employing establishment regarding the October 21, 2009 altercation between appellant and Mr. Duplessis. In a December 8, 2009 report of contact, Darryl Brady and Kevin Nelson noted that none of the witness' statements or reports concerning the October 21, 2009 altercation stated that appellant's life had been threatened by Mr. Duplessis. In addition none of the witness' statements support appellant's allegations that she was threatened verbally or physically by Mr. Duplessis.

In a June 21, 2010 report, Dr. Bowers opined that appellant's preexisting depression had been aggravated by the October 21, 2009 incident with Mr. Duplessis. On October 21, 2009 appellant alleged that Mr. Duplessis attempted to physically attack her, but was stopped by another coworker and that as a result she became fearful that she would never see her children

again. Dr. Bowers related that appellant stated that she had been “subjected to terroristic threatening by” Mr. Duplessis. He diagnosed anxiety attacks, anxiety and chronic depression.

By decision dated July 13, 2010, an OWCP hearing representative affirmed the denial of her claim.

LEGAL PRECEDENT

To establish a claim that she sustained an emotional condition in the performance of duty, an employee must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric 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 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.⁴ 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.⁵ Where the disability results from an employee’s emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁶ 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.⁷

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.⁸ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.⁹ When the matter asserted is a compensable factor of employment and the evidence of

³ V.W., 58 ECAB 428 (2007); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ L.D., 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006)

⁵ A.K., 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

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

⁷ J.F., 59 ECAB 331 (2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁸ D.L., 58 ECAB 217 (2006); *Jeral R. Gray*, 57 ECAB 611 (2006).

⁹ K.W., 59 ECAB 271 (2007); *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.¹⁰

ANALYSIS

Appellant did not attribute her emotional condition to her regular or specially assigned duties under *Cutler*. Rather, she attributed her condition to confrontations with Mr. Duplessis on October 21, 2009. Appellant's primary allegation is that she was threatened with physical harm by Mr. Duplessis. The Board finds that she did not establish a compensable factor of employment in this regard.

Appellant also alleged that a hostile confrontation with Mr. Duplessis occurred in the workplace on October 21, 2009 which caused her anxiety and panic reaction. She alleged that Mr. Duplessis terrorized her and verbally assaulted her at her workstation. Appellant also alleged that Mr. Buford prevented Mr. Duplessis from striking her by holding him back. In addition she alleged that several attempts were made by Mr. Brady to get Mr. Duplessis to leave the area and be quiet due to his unprofessional and inappropriate behavior. Lastly appellant alleged that Mr. Duplessis continued his assault of her and disregarded direct orders to cease his behavior until being removed by another employee.

It is well established that verbal altercations, difficult relationships or abuse in the workplace, if proven, may constitute a compensable factor of employment.¹¹ This includes exchanges between an employee and his supervisor, or between coworkers.¹² This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.¹³ In the context of disputes or difficult relationships alleged between coworkers, mere perceptions or generally stated assertions of dissatisfaction with coemployees will not support a claim for an emotional disability.

This case is unlike *Donald L. Eaton*¹⁴ in which the Board found a compensable factor of employment had been established with respect to an altercation between Mr. Eaton and a coworker. In that case the verbal exchange occurred initially due to an internal union matter, but developed into a loud verbal exchange took place between Mr. Eaton and Mr. McGregor. In *Eaton*, the evidence of record supported that Mr. Eaton was subjected to a hostile verbal confrontation accompanied by an assaultive gesture by Mr. McGregor, which Mr. McGregor did not dispute. In the present case, the record contains no evidence that appellant was physically threatened or assaulted by Mr. Duplessis. The employing establishment noted an investigation had been performed and there was no evidence that Mr. Duplessis had threatened appellant or was a threat to her. Similarly, the witness statements do not support appellant's allegations of

¹⁰ *Robert Breeden*, 57 ECAB 622 (2006).

¹¹ *See J.F.*, 59 ECAB 331 (2008); *C.S.*, 58 ECAB 137 (2006); *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

¹² *Denise Y. McCollum*, 53 ECAB 647 (2002).

¹³ *T.G.*, 58 ECAB 189 (2006).

¹⁴ Docket No. 96-1393 (issued August 20, 1998).

threats or verbal abuse and contain contradictory information. Mr. Buford stated that Mr. Duplessis used obscenities towards appellant and approached her in a hostile and confrontational manner. Ms. Staggars on the other hand stated that she overheard angry talk and makes no mention of any obscenities. She also noted that she saw Mr. Duplessis walk away while Mr. Buford stated that Mr. Duplessis was taken away by another employee. Mr. Buford also related trying to calm Mr. Duplessis down by inserting himself between appellant and Mr. Duplessis, but does not state that he did so to prevent Mr. Duplessis from physically harming appellant. Similarly, Mr. Brady stated that he overheard Mr. Duplessis talking in a loud tone which he described as harsh and in a confrontational manner. Mr. Brady stated that he asked Mr. Duplessis several times to lower his voice and that Mr. Duplessis was led away by another coworker, who he believed was Ms. Staggars. None of the statements given by Mr. Brady, Mr. Buford or Ms. Staggars address the specifics of appellant's allegations that she was verbally abused and threatened by Mr. Duplessis. Thus, they are insufficient to establish any verbal abuse or threats.

The record also contains a counseling memorandum to Mr. Duplessis for unprofessional behavior, Mr. Duplessis' response which alleged that appellant acted rudely and unprofessionally toward him and an October 28, 2009 report regarding the incident between Ms. Gabino, human resources liaison and Mr. Grajales, president of the local union, regarding the confrontation between appellant and Mr. Duplessis. Mr. Grajales contacted Ms. Gabino on October 26, 2009 to discuss the disagreement between appellant and Mr. Duplessis which he stated "became aggressive and potentially violent." Mr. Grajales was not present at the time of the October 21, 2009 confrontation between appellant and Mr. Duplessis. Thus, his characterization of Mr. Duplessis' actions towards appellant potentially violent and aggressive is not based on firsthand knowledge. Appellant has not established a compensable employment factor under FECA in this respect.

Consequently, appellant has not established her claim for an emotional condition as she has not attributed her claimed condition to any compensable employment factors.¹⁵

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 the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

¹⁵ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. See *L.C.*, 58 ECAB 493 (2007); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 13, 2010 is affirmed.

Issued: December 9, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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