

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

T.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Washington, DC, Employer**

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**Docket No. 11-430
Issued: September 21, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2010 appellant filed a timely appeal from a September 16, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her traumatic injury claim and a December 3, 2010 nonmerit decision denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether OWCP properly denied her request for further merit review under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 22, 2010 appellant, then a 34-year-old mail clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained headaches and dizziness on that same date from the stress of constantly being harassed by her manager, Ethyl Taylor. The employing establishment controverted the claim stating that appellant was angry because she was going to receive administrative action for attendance issues.

By letter dated August 2, 2010, the employing establishment asserted the supervisor's actions were routine for employees with the same irregular attendance issues. It further stated that, though appellant might have experienced stress and hypertension because of her supervisor, those reactions were self-imposed and not compensable.

Appellant submitted treatment notes from Physical Medicine Rehabilitation Center dated July 14 to 21, 2010.

By letter dated August 16, 2010, OWCP informed appellant that the evidence of record was insufficient to support her claim. It requested additional factual and medical evidence and asked her to respond to the provided questions which was to be submitted within 30 days. No further evidence was submitted.

By decision dated September 16, 2010, OWCP denied appellant's claim finding that the evidence did not establish that the incident occurred as alleged. It specifically noted that she failed to provide a sufficient explanation of the incident that supported her claim of stress.

On November 17, 2010 appellant requested reconsideration of OWCP's decision.

Appellant's physician provided disability certificates dated July 16 and August 12, 2010, which found her totality incapacitated from employment stress.

Appellant submitted July 23 and August 5, 2010 postal service predisciplinary interview (PDI) letters informing her of her PDI appointments.

By letter dated August 25, 2010, appellant stated that she called in sick on August 23, 2010 and asked for three days off. Her supervisor informed her that she would need documentation for all three days. Appellant also reported that she underwent emergency surgery on August 24, 2010 and informed her supervisor that it would take three weeks to recover. She expected to return on September 20, 2010.

By letter dated August 31, 2010, appellant stated that she began working for her supervisor, Ms. Taylor, on May 24, 2010. When she first started her employment under Ms. Taylor, she had an accepted OWCP claim which required her to have doctor's appointments and physical therapy in claim No. xxxxxx949. Appellant alleged that her supervisor had threatened to suspend her many times for poor attendance even though the problem was due to her injury. She also stated that her supervisor would yell in her face, beat her fist against the palm of her hand and change her report times when she was angry. Appellant stated that the stress and harassment from her employment caused her to develop migraine headaches and depression.

In a September 17, 2010 medical note, Dr. Archana G. Leon-Guerrero, a Board-certified psychiatrist and Chief of Psychiatry, reported that appellant had been under his care since September 3, 2010 for major depression and anxiety disorder. He stated that the cause of her condition was a result of the stressful work situation. Dr. Leon-Guerrero reported that appellant had worked for the postal service for many years with good attendance at first. At some point she began to miss work frequently and built a reputation for poor attendance. As a result, appellant's supervisors did not take her doctor's medical recommendations for time off work seriously. This resulted in escalating tensions between her and her supervisor, which caused her depression and anxiety.

In a September 21, 2010 medical note, Dr. Rehana Hussain, a treating physician, diagnosed appellant with major depression, migraine and tension headaches.

In a September 22, 2010 treatment note, Dr. Leon-Guerrero stated that appellant's psychiatric condition was likely to recur if she was not transferred from her position at Landover Hills, MD.

By decision dated December 3, 2010, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included new and relevant evidence establishing fact of injury. It specifically noted that she failed to submit any evidence which established that an event occurred on July 22, 2010.

LEGAL PRECEDENT -- ISSUE 1

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.² There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.³

Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of FECA.⁴ On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of FECA.⁵

² See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

³ See *Ruth C. Borden*, 43 ECAB 146 (1991).

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Id.*

Workers' compensation does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.⁶ As a rule, however, a claimant's allegations alone are insufficient to establish a factual basis for an emotional condition claim.⁷ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.⁸ The primary reason for requiring factual evidence of allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by OWCP and the Board.⁹

The Board has recognized the compensability of verbal altercations or abuse when sufficiently detailed by the claimant and supported by the record. This does not imply, however, that every statement uttered in the workplace will give rise to compensability.¹⁰

ANALYSIS -- ISSUE 1

Appellant did not attribute her emotional condition to her regular or specially assigned duties under *Cutler*.¹¹ In this case, she attributed her condition to an incident alleged to have occurred on July 22, 2010. When describing the cause of her injury, appellant stated stress from constantly being harassed by management. She indicated a traumatic injury by filing a Form CA-1 but described an occupational disease. Under the circumstances of the case, the Board will treat this case as an occupational disease claim as it appears that appellant is alleging an injury produced by her work environment over a period longer than a single workday or shift.¹²

The initial question is whether appellant has alleged compensable employment factors as a cause of her condition.¹³ Thus, part of her burden of proof includes the submission of a

⁶ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon*, 42 ECAB 566, 572-73 (1991).

⁷ *See Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

⁸ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

⁹ *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Member).

¹⁰ *See David C. Lindsey*, 56 ECAB 263 (2005). The mere fact that a supervisor or employee may raise his or her voice during the course of an argument does not warrant a finding of verbal abuse. *Joe M. Hagedwood*, 56 ECAB 479 (2005).

¹¹ *See supra* at note 4.

¹² 20 C.F.R. § 10.5(x). The Board finds no evidence in this claim of events or circumstances which would make this a traumatic injury claim.

¹³ *Wanda G. Bailey*, 45 ECAB 835, 838 (1994).

detailed description of the specific employment factors or incidents which caused or aggravated the condition for which she claims compensation.¹⁴

The evidence received does not provide any details establishing that the events occurred as alleged. Appellant submitted a Form CA-1 which stated that she developed headaches and dizziness on July 22, 2010 from the stress of constantly being harassed by her manager, Ms. Taylor. She also submitted date of treatment notes from July 14 to 21, 2010. By letter dated August 16, 2010, OWCP informed appellant of detailed medical and factual evidence needed to support her claim and provided her with a series of questions; however, she did not respond to OWCP's request.

While the employing establishment controverted the claim by asserting that the actions taken towards appellant were in keeping with postal service guidelines, appellant has not supported her claim in the first instance. Other than an unsubstantiated claim that management harassed her, she has not established that any administrative or personnel action constituted error or abuse by her employer. Therefore these alleged events are not factors of employment. Appellant failed to describe the circumstances of her injury in detail and did not explain how or when she was harassed during the course of her employment.¹⁵ No witness statements were submitted, she failed to establish the events alleged to have occurred and did not provide OWCP with the additional factual evidence requested.¹⁶ The Board again notes that mere perceptions of harassment or discrimination are not compensable; an appellant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.¹⁷ Rather, appellant has provided generally stated assertions of dissatisfaction with a certain superior at work and these do not establish her allegations.¹⁸ As she failed to provide evidence to establish a compensable factor of employment, her claim was properly denied.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁹ Section 10.608(b) of OWCP regulations provide that, when an application for reconsideration does not meet at least one of the three

¹⁴ *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

¹⁵ *N.G.*, 111 LRP 9066 (2011).

¹⁶ *See Joel Parker, Sr.*, *supra* note 8 (the Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹⁷ *Curtis Hall*, 45 ECAB 316 (1994); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

¹⁸ *Supra* note 2.

¹⁹ *D.K.*, 59 ECAB 141 (2007).

requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.²⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly denied appellant's December 3, 2010 request for review, pursuant to 5 U.S.C. § 8128(a).

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In support of her reconsideration request, appellant submitted July 23 and August 5, 2010 postal service PDI letters informing her of her PDI appointments. By letter dated August 25, 2010, she stated that she called in sick on August 23, 2010 and her supervisor informed her that she would need documentation. Appellant also reported that she had emergency surgery on August 24, 2010 and informed her supervisor that she would need three weeks to recover and would return to work on September 20, 2010. By letter dated August 31, 2010, she stated that Ms. Taylor threatened to suspend her many times, would yell in her face, beat her fist against the palm of her hand and change her report times when she was angry. Appellant stated that the stress and harassment from her employment caused her to develop migraine headaches and depression.

In a September 17 and 22, 2010 medical note, Dr. Leon-Guerrero reported that appellant was under his care for major depression and anxiety disorder caused by her stressful work situation and tensions with her supervisor. He further stated that appellant's psychiatric condition was likely to recur if she was not transferred from her current position.

As previously stated, the Board will treat this claim as an occupational disease case as it appears that appellant is alleging an injury produced by her work environment over a period longer than a single workday or shift. Therefore, the underlying issue in this case is whether appellant has alleged compensable employment factors as contributing to her condition. This is a factual issue which must be addressed by relevant corroborating evidence or witness statements to establish that the actions actually occurred or statements were actually made. As appellant has provided evidence regarding the claimed occupational exposure, the Board finds her statements, medical notes and PDI letters to be relevant and pertinent new evidence not previously considered by OWCP and, therefore, sufficient to warrant further review of the case on the merits.²¹

The case will be remanded to OWCP for a decision on the merits of appellant's claim. On remand, OWCP should consider the new and relevant evidence, together with the previously submitted evidence of record, to determine if she has established that she developed an emotional condition in the performance of duty causally related to factors of her federal employment as a mail clerk.

²⁰ *K.H.*, 59 ECAB 495 (2008).

²¹ See *Donald T. Pippin*, 54 ECAB 631 (2003); *E.R.*, Docket No. 09-1655 (issued March 18, 2010); *R.M.*, Docket No. 08-734 (issued September 5, 2008).

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition causally related to factors of her employment as a mail clerk. OWCP however, improperly denied her request for a merit review pursuant to section 8128(a) of FECA. The case is remanded to OWCP to consider the additional evidence submitted and, following any necessary further development, issue an appropriate decision on the merits of the case.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated September 16, 2010 is affirmed but the December 3, 2010 decision is set aside and the case is remanded for further action consistent with this decision.

Issued: September 21, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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