

FACTUAL HISTORY

On September 22, 2010 appellant, then a 44-year-old sheet metal worker, filed a traumatic injury claim alleging that on May 27, 2010 she sustained post-traumatic stress. Appellant's supervisor, Edwin Lindsey, indicated that he could not confirm or dispute appellant's claim as he was on leave at the time of the alleged incident. Appellant did not stop work.

On September 30, 2010 OWCP advised appellant that the evidence was not sufficient to establish that she experienced any incidents or employment factors alleged to cause injury. It noted that she did not describe how the claimed injury occurred. OWCP requested that appellant submit additional information including a detailed description of the employment factors or incidents which she believed had contributed to her claimed illness and a comprehensive medical report from her treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by her had contributed to her claimed emotional condition.

Appellant submitted an August 12, 2010 incident report noting that, on May 27, 2010, while working on her computer, a coworker told her that she did not know what she was doing and could not perform her work duties, that she was stupid and did not have a brain and that it was a good day for a killing and she was a likely candidate. She alleged that she experienced stress and anxiety from the threats and referenced a witness named Bob.² In the medical provider section, Dr. Marvin Taylor, a psychiatrist, indicated that appellant was treated on August 12, 2010 for anxiety from a threat that exacerbated her post-traumatic stress disease.

In a June 30, 2010 report, Dr. Deepti Bhasin, a Board-certified psychiatrist, noted that appellant was unable to work outside the home until July 6, 2010 due to post-traumatic stress symptoms. On July 6, 2010 he returned her to work on July 12, 2010. On August 9, 2010 Dr. Bhasin diagnosed post-traumatic stress disorder exacerbated by recent events at work and recommended that appellant not be in proximity to a coworker who threatened her. In reports dated September 9 and 14, 2010, he noted that she was suffering from aggravated post-traumatic stress disorder and should be placed in a permanent light-duty position away from the flight line. Appellant submitted medical evaluation of work status forms prepared by Dr. Taylor dated August 12 to September 30, 2010. Dr. Taylor noted that she was to avoid stress and should not work in close proximity to the coworker specified in the incident of May 27, 2010.

In a decision dated November 8, 2010, OWCP denied appellant's claim finding that appellant had not established that the claimed events occurred as alleged.

On November 18, 2010 appellant requested reconsideration. She submitted a January 11, 2011 report from Dr. Bhasin, who diagnosed major depressive disorder, single episode with psychotic features. Dr. Bhasin noted that one of the primary causes of her depression was workplace sexual and verbal harassment by a coworker on May 27, 2010. He opined that to a reasonable degree of medical certainty the workplace stress and perceived harassment intensified appellant's experience with depression and led to a decreased ability to function.

² The last name of the witness is illegible.

In a decision dated February 3, 2011, OWCP denied modification of the November 8, 2010 decision. It found that appellant had not provided a detailed description of the incidents that she believed caused or contributed to her condition and did not establish a compensable employment factor.

On May 11, 2011 appellant requested reconsideration. She submitted an April 29, 2011 report from Dr. Bhasin who diagnosed major depressive disorder, single episode with psychotic features, post-traumatic stress disorder and panic disorder. Dr. Bhasin related that appellant reported that the cause of her post-traumatic stress disorder was harassment by her coworker on May 27, 2010. Appellant reported receiving assurances from her supervisors that they would restrict the movements of the coworker or remove him from her workspace; however, no action was taken. Dr. Bhasin opined that to a reasonable degree of medical certainty the workplace stress and perceived harassment and ongoing lack of response intensified her experience with depression and led to a decreased ability to function.

In a May 24, 2011 decision, OWCP denied appellant's reconsideration request finding that the request was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the 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. In the case of *Lillian Cutler*,⁴ 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.⁵ 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 by the employing establishment or by the nature of the work.⁶ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁷ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with

³ *George H. Clark*, 56 ECAB 162 (2004).

⁴ 28 ECAB 125 (1976).

⁵ See *Robert W. Johns*, 51 ECAB 137 (1999).

⁶ *Lillian Cutler*, *supra* note 4.

⁷ *J.F.*, 59 ECAB 331 (2008).

probative and reliable evidence.⁸ Personal perceptions alone are insufficient to establish an employment-related emotional condition.⁹ 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.¹⁰

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 the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.¹¹ 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 the matter establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.¹²

ANALYSIS -- ISSUE 1

Appellant alleged an emotional condition as a result of being harassed, ridiculed and threatened by a coworker and working in a hostile work environment. The Board must thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA. Appellant has not attributed her emotional condition to the regular or specially assigned duties of her position as a sheet metal worker. Therefore, she has not alleged a compensable factor under *Cutler*.¹³

Appellant alleged that on May 27, 2010 an unidentified coworker told her that she did not know what she was doing, unable to perform her work duties, was stupid and threatened her stating that it was a good day for a killing and she was a likely candidate. To the extent that incidents alleged as constituting harassment or a hostile environment by a coworker are established as occurring and arising from her performance of her regular duties, these could constitute employment factors.¹⁴ For harassment to give rise to a compensable disability under

⁸ *M.D.*, 59 ECAB 211 (2007).

⁹ *Roger Williams*, 52 ECAB 468 (2001).

¹⁰ See *Lillian Cutler*, *supra* note 4.

¹¹ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹² *Id.*

¹³ See *supra* note 4.

¹⁴ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

FECA, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under FECA.¹⁵

The factual evidence fails to support appellant's claim for harassment. The evidence currently of record does establish that she was harassed or worked in a hostile work environment. General allegations of harassment are not sufficient.¹⁶ In this case, appellant failed to submit sufficient evidence to establish harassment by her coworker.¹⁷ Although she generally alleged that a coworker ridiculed, harassed and verbally abused her, she did not identify the coworker or submit evidence from any other coworkers who may have witnessed the interactions alleged on May 27, 2010.¹⁸ On September 30, 2010 OWCP asked appellant to provide a detailed description of the incident but, other than the August 12, 2010 incident report, she did not provide any factual evidence further describing the incident that gave rise to the claimed injury. Appellant did not identify the person who harassed her or give any additional context regarding the claimed incident. She did not explain why she did not report the alleged incident for over two months. Appellant provided no other evidence detailing how the claimed incident occurred, who it involved and who may have witnessed it. The medical evidence, such as reports from Dr. Bhasin, merely noted that work stress and harassment contributed to her condition. No report provided any further detail about the May 27, 2010 incident sufficient to corroborate or establish a compensable work factor. Appellant has not established a compensable employment factor under FECA with respect to the claimed harassment or hostile work environment.

To the extent that appellant alleged a verbal abuse and threats by a coworker, the Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.¹⁹ The Board finds that the facts of the case, noted above in the analysis of the allegation of harassment, does not support that appellant was threatened by a coworker. Appellant did not provide a detailed statement describing the claimed incident and she did not provide corroborating evidence such as witness statements to establish her allegations.²⁰ She has not otherwise shown how a coworkers comments or actions rose to the level of verbal abuse or otherwise fell within coverage of FECA.²¹

¹⁵ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991). See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹⁶ See *Paul Trotman-Hall*, 45 ECAB 229 (1993).

¹⁷ See *Joel Parker, Sr.*, *supra* note 15.

¹⁸ See *William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

¹⁹ *Charles D. Edwards*, 55 ECAB 258 (2004).

²⁰ See *William P. George*, *supra* note 18.

²¹ See *Judy L. Kahn*, 53 ECAB 321 (2002) (the fact that a supervisor was angry and raised her voice does not, by itself, support a finding of verbal abuse).

Consequently, appellant has not established her claim for an emotional condition as she has not attributed her claimed condition to any compensable employment factors.²²

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,²³ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(1) Shows that OWCP erroneously applied or interpreted a specific point of law;
or
- (2) Advances a relevant legal argument not previously considered by [OWCP]; or
- (3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”²⁴

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.²⁵

ANALYSIS -- ISSUE 2

OWCP denied appellant’s claim because she submitted insufficient factual information regarding the alleged May 27, 2010 incident to establish a compensable employment factor. On May 24, 2011 it denied her May 11, 2011 reconsideration request, without a merit review. 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.

The Board finds that appellant did not provide any relevant or pertinent new evidence to the issue of whether she established a compensable employment factor. Appellant did not submit evidence to show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered.

In her May 11, 2011 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law and she did not advance a new and relevant legal argument. She placed a checkmark next to the work “reconsideration” but she did

²² As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

²³ 5 U.S.C. § 8128(a).

²⁴ 20 C.F.R. § 10.606(b)(2).

²⁵ *Id.* at § 10.608(b).

not explain why she sought reconsideration and she did not provide any statement or evidence responsive to why OWCP denied her claim, the lack of factual information describing the claimed May 27, 2010 incident.

Although appellant submitted an April 29, 2011 report from Dr. Bhasin, asserting that her condition was employment related, the underlying issue in the case is not medical in nature. As she failed to establish a compensable employment factor, medical evidence regarding the cause of her condition is not relevant.²⁶ Therefore, OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). OWCP properly denied merit review of the claim.

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. The Board further finds that OWCP properly denied her request for reconsideration.

²⁶ See *supra* note 22.

ORDER

IT IS HEREBY ORDERED THAT the May 24 and February 3, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 17, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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