

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

S.B., Appellant)	
)	
and)	Docket No. 12-1715
)	Issued: August 7, 2013
DEPARTMENT OF THE NAVY, NAVY)	
REGION SOUTHWEST HUMAN RESOURCES)	
OFFICE, San Diego, CA, Employer)	

Appearances: *Case Submitted on the Record*
Brett E. Blumstein, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 14, 2012 appellant, through her attorney, filed a timely appeal from a June 28, 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 met her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of her federal employment.

On appeal, appellant's attorney asserts that the medical evidence is sufficient to establish that her work duties contributed to her stress and that OWCP should send her for a second opinion.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 17, 2011 appellant, then a 46-year-old transportation assistant, filed an occupational disease claim alleging that factors of her employment caused stress. In a March 15, 2011 statement, she described incidents beginning in May 2009 through March 4, 2011 that caused stress. Appellant, who is diabetic, indicated that in May 2009 that she requested a personal refrigerator to store her insulin, but this was denied by her second-line supervisor, Frances Thomas-Lee; that in July 2009 staff participation in a wellness program was cancelled by Ms. Thomas-Lee; and that the work area was inappropriately sprayed for insects in August or September 2009. She noted disagreeing with Ms. Thomas-Lee on September 3, 2009 over clerical instructions and on September 10, 2009 when Ms. Thomas-Lee informed her that she had been scheduled for a mandatory physician's appointment that day without prior notice. Appellant further asserted that she unfairly received a reprimand letter for being late on September 25, 2009; leave was inappropriately denied on October 22, 2009; her desk was inappropriately moved in the spring of 2010; on June 4, 2010 she was confronted by Ms. Thomas-Lee regarding work; she was inappropriately given a notice of a five-day suspension following a verbal altercation with Ms. Thomas-Lee on July 1, 2010, that was finalized in an August 6, 2010 decision; and on March 4, 2011 she was inappropriately given a counseling document by Supervisors Maria G. Rosko and Maria Ferrer.²

The record includes documentation including: e-mails dated June 5, 2009 to March 15, 2011; personnel action notices; information about the mandated physician's appointment; a September 28, 2009 reprimand letter concerning insubordinate behavior on September 25, 2009; a November 3, 2009 decision denying appellant's grievance about the September 28, 2009 letter of reprimand; statements regarding a May 7, 2010 incident when appellant became ill at work; documentation about the July 1, 2010 confrontation including a July 8, 2010 proposed five-day suspension based on July 1, 2010 events; witness statements including a statement dated July 1, 2010 in which Bailey M. Ward attested that he heard and witnessed appellant become angry with Ms. Thomas-Lee and that appellant yelled and cursed at her; an August 6, 2010 five-day suspension letter given to appellant for disrespectful conduct and use of profanity towards her supervisor; a July 2, 2010 statement in which Ms. Thomas-Lee explained that appellant came into her office and then stormed out; a September 1, 2010 denial of reasonable accommodation for a schedule change based on her diabetes; information regarding the March 4, 2011 incident including a counseling document dated February 24, 2011; an incident report and witness statements; and literature regarding hypoglycemia, appellant's leave analysis, photographs of the refrigerator where her insulin was stored and an office seating diagram. In an October 19, 2009 letter to appellant, Ms. Thomas-Lee noted approving appellant's request for reasonable accommodation by allowing her to use the communal refrigerator for safe insulin storage.

Appellant also submitted medical reports dated from August 6, 2009 to March 29, 2011. These included reports by Drs. Norma Elizabeth Macias and Cynthia Lisette Sierra, Board-certified family physicians, who diagnosed acute stress reaction and medical reports regarding the March 4, 2011 incident.

² Appellant indicated that she fainted after reading the counseling document at her desk. She has a separate claim for this aspect of the March 4, 2011 incident, adjudicated under file number xxxxxx812. The instant claim is adjudicated under file number xxxxxx816.

By letter dated May 5, 2011, OWCP informed appellant of the type of evidence needed to develop her claim. Appellant submitted additional medical reports dated April 5 to 22, 2011. In a September 15, 2011 decision, OWCP found that she did not establish a compensable factor of employment and denied her claim that she sustained an emotional condition in the performance of duty.

In November 2011, appellant filed a second occupational disease claim, alleging that work factors caused a severe, recurrent, major depressive disorder and a panic disorder without agoraphobia. In a December 9, 2011 statement, Ms. Rosko, a supervisor, described appellant's job duties and replied to a statement made by appellant. She attached copies of the September 15, 2011 decision and OWCP's May 5, 2011 decision and medical reports. OWCP doubled the November 2011 claim and the instant claim.

On March 30, 2012 appellant, through her attorney, requested reconsideration and submitted an August 9, 2011 statement in which she described her job duties. She submitted additional evidence and a Notification of Personnel Action indicating that she retired on disability effective December 31, 2011. Appellant also provided e-mails regarding events that occurred in July, August and December 2011 and an Individual Development Plan dated September 30, 2011. In an October 24, 2011 report, Rosalie J. Easton, Ph.D., a licensed psychologist, noted appellant's report of stress from work duties, from supervisors and from her disability due to diabetes. She diagnosed: major depressive disorder, severe, recurrent; panic disorder without agoraphobia; diabetes mellitus, insulin-dependent; and occupational problems. Dr. Easton advised that appellant's "work duties themselves and the stress they generate, her perceived lack of adequate training in performing her work duties, her repeated experiences of humiliating public reprimands and hostility during supervision meetings, have resulted in her current psychiatric condition."³

In a decision on the merits of appellant's claim dated June 28, 2012, OWCP denied modification of the September 15, 2011 decision.

LEGAL PRECEDENT

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has 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.⁴ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.⁵ When the matter asserted is a compensable factor of employment and the evidence of record establishes

³ Appellant also submitted duplicates of evidence previously of record.

⁴ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁵ *Dennis J. Balogh*, 52 ECAB 232 (2001).

the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.⁶

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*,⁷ 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.⁸ 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.⁹ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.¹⁰ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹¹ Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹²

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.¹³ 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.¹⁴

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.¹⁵

⁶ *Id.*

⁷ 28 ECAB 125 (1976).

⁸ See *Robert W. Johns*, 51 ECAB 137 (1999).

⁹ *Lillian Cutler*, *supra* note 7.

¹⁰ *J.F.*, 59 ECAB 331 (2008).

¹¹ *M.D.*, 59 ECAB 211 (2007).

¹² *Roger Williams*, 52 ECAB 468 (2001).

¹³ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹⁴ *Kim Nguyen*, 53 ECAB 127 (2001).

¹⁵ *James E. Norris*, 52 ECAB 93 (2000).

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 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 co-employees or workers. Mere perceptions and feelings of harassment will not support an award of compensation.¹⁶

When working conditions are alleged as factors in causing disability, OWCP as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment, which may be considered by a physician when providing an opinion on causal relationship and which are not deemed compensable factors of employment and may not be considered. 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, then OWCP must base its decision on an analysis of the medical evidence.¹⁷

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that she sustained a stress-related condition in the performance of duty causally related to factors of her federal employment.

Appellant has not attributed her emotional condition to the performance of her regular work duties or to any special work requirement arising from her employment duties under *Cutler*.¹⁸ Rather, her claim pertains to administrative actions that occurred beginning in May 2009 and allegations that she was harassed and treated in an abusive manner employing establishment supervisors.

Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee’s regular or specially assigned work duties, do not fall within coverage of FECA.¹⁹ Absent evidence establishing error or abuse, a claimant’s disagreement or dislike of such a managerial action is not a compensable factor of employment.²⁰ The Board finds that appellant’s allegations that she was improperly denied participation in a wellness program, that her desk was improperly moved and that leave was improperly denied were reasonable administrative functions and there is no indication of error or abuse in these matters.

¹⁶ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁷ *J.F.*, *supra* note 10.

¹⁸ *See James E. Norris*, *supra* note 15.

¹⁹ *J.C.*, 58 ECAB 594 (2007).

²⁰ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

As to her allegation that appellant was denied reasonable accommodation in the fall of 2009 when she requested a personal refrigerator for her insulin supplies, in October 19, 2009 correspondence, Ms. Thomas-Lee explained that a communal refrigerator was in the workplace and appellant could store her insulin there in a safe manner. Regarding her request to change her schedule as a reasonable accommodation in the fall of 2010, while this was denied on September 1, 2010, Ms. Thomas-Lee advised appellant that a liberal use of leave was approved for medical reasons related to her diabetic condition. These too would be considered administrative functions and, again, appellant submitted no evidence that error or abuse occurred in these matters.

Regarding appellant's allegation that she was forced to attend a physician's appointment in September 2009, on September 3, 2009 appellant sent an e-mail message to Ms. Thomas-Lee in which she stated that she was experiencing high volumes of stress and anxiety and increased sugar levels "that could be dangerous to myself and others around me." In response, on September 10, 2009, Ms. Thomas-Lee informed appellant that, due to the nature of the e-mail, under the Civilian Employee Assistance Program, she had been scheduled for a doctor's appointment that day. 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.²¹ The Board finds that, based on the language used by appellant in her September 3, 2009 e-mail, it was reasonable for Ms. Thomas-Lee to schedule a medical examination for appellant. The record also contains a September 28, 2009 letter of reprimand concerning insubordinate behavior by appellant on September 25, 2009. A grievance appellant filed in regard to the letter of reprimand was denied in a November 3, 2009 decision. Thus, the record contains no evidence of error and abuse with regard to this letter of reprimand.

Appellant also asserted that she was verbally abused by supervisors and managers. While verbal altercations, when sufficiently detailed by the claimant and supported by the evidence, may constitute compensable employment factors,²² in this case she submitted no evidence to support her claim of verbal abuse when, for example, she was reprimanded for being late. As to the five-day suspension dated August 6, 2010 for disrespectful conduct towards Ms. Thomas-Lee and using profanity, there are several witness statements that verify that there was an exchange of words between appellant and Ms. Thomas-Lee on July 1, 2010, including a statement by Mr. Ward who indicated that appellant used profanity. In a July 2, 2010 statement, Ms. Thomas-Lee explained that appellant came into her office and then stormed out. Appellant submitted no evidence to show that Ms. Thomas-Lee acted inappropriately. She thus did not establish a factual basis for her allegation of verbal abuse.²³

²¹ *Id.*

²² *See J.F., supra* note 10.

²³ *See T.G., 58 ECAB 189 (2006).*

As to the events of March 4, 2011, as noted above, appellant filed a separate claim regarding the incident.²⁴ The incident began when she was given counseling documentation dated February 24, 2011 in the presence of Ms. Rosko and Ms. Ferrer, employing establishment supervisors, regarding work errors made by appellant. Reprimands, counseling sessions and other disciplinary actions are administrative matters that are not covered under FECA unless there is evidence of error or abuse.²⁵ The evidence indicated that the employing establishment attempted to correct appellant's actions with counseling. There was no evidence of error or abuse by the employing establishment and no compensable factor was established in this regard.²⁶ The record therefore supports that discussions and correspondence with appellant were reasonable supervisory duties. The record contains no evidence that any employing establishment supervisor or manager committed error or abuse in discharging management duties.²⁷

Regarding appellant's general contention that she was harassed by employing establishment management, 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 In the case at hand, again appellant submitted nothing to support specific actions by employing establishment management 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

The Board concludes that appellant did not meet her burden of proof to establish that she sustained a stress-related condition in the performance of duty causally related to factors of her federal employment.³² Appellant's emotional reaction must be considered self-generated, in that it resulted from her perceptions about employing establishment management actions.³³

²⁴ *Supra* note 2.

²⁵ *Andrew Wolfgang-Masters*, 56 ECAB 411(2005).

²⁶ *Id.*

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

²⁸ *James E. Norris*, *supra* note 15.

²⁹ *Id.*

³⁰ *Beverly R. Jones*, *supra* note 16.

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

³² *Leslie C. Moore*, *supra* note 4.

³³ *See V.W.*, 58 ECAB 428 (2007). Appellant may file a new claim regarding additional employment factors alleged in the March 30, 2012 reconsideration request.

As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record.³⁴

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 did not establish that she sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 7, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

³⁴ See *Katherine A. Berg*, 54 ECAB 262 (2002).