

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

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**P.D., Appellant**

**and**

**U.S. POSTAL SERVICE, LAKEWOOD POST  
OFFICE, Denver, CO, Employer**

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**Docket No. 13-1142  
Issued: August 16, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On April 5, 2013 appellant filed a timely appeal from an October 12, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her emotional condition claim.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (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 sustained an emotional condition in the performance of duty.

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<sup>1</sup> Under the Board's *Rules of Procedure*, if using the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 5, 2013, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On February 28, 2012 appellant, then a 59-year-old part-time city carrier, filed a traumatic injury claim alleging that on February 3, 2012 her supervisor yelled at her and slapped her across the left cheek. She stopped work on February 10, 2010 and did not return.

In a statement dated February 3, 2012, appellant related that when she arrived at work that day Diane Vert, a supervisor, was concerned that the federal center would close. Ms. Vert told her to scan boxes and take them off the line but later told her not to scan the boxes. When she finished her route, appellant told Ms. Vert that she did not scan the boxes. Ms. Vert began yelling at appellant. Catherine McLaury, a coworker, stood watching them with a smirk on her face. When Ms. Vert told appellant to stop yelling, appellant replied that she was raising her voice to match Ms. Vert's voice level. Ms. Vert told appellant that she would slap her if she did not stop yelling. Appellant stated:

“Anyway, she [raised] her full right hand, then folded the two little fingers and brought the two fore fingers down hard on my cheek, like a whipping of my cheek. It stung and brought tears to my eyes. I was shocked [and] stunned. I could [not] believe she did that. I was also very hurt, humiliated [and] demeaned emotionally.”

Appellant believed that she had been “ambushed” and “set up to fail.”

In an undated e-mail, Ms. Vert stated that on February 3, 2012 she asked appellant why she had not scanned a collection box at the federal center. She related, “[Appellant] started screaming at me and she got very close to my face. I took my finger and motioned with my finger to my face to quit screaming.”

In a statement dated February 8, 2012, Ms. McLaury related that on February 3, 2012 she went to the dock to complete mail sorting. She could see everyone on the dock. Ms. McLaury heard Ms. Vert tell appellant that she was supposed to scan the federal center mail. Appellant screamed at Ms. Vert and leaned forward. Ms. Vert moved the index finger of her hand right to left while asking her to stop screaming and then walked inside. Appellant began telling people that Ms. Vert had struck her in the face.

In a statement dated February 13, 2012, appellant noted that the employing establishment initially told her that she could not file a traumatic injury claim and questioned whether she had been injured.

In a February 17, 2012 investigative interview, Ms. Vert noted that she instructed appellant to give her the boxes that needed to go to the federal center. She informed appellant that she had missed a box. Ms. Vert denied touching appellant.

On February 28, 2012 Nancy K. Solano, the station manager, related that appellant informed her that on February 3, 2012 Ms. Vert slapped her. Ms. Solano investigated the matter and concluded that there was no physical contact between appellant and Ms. Vert. She noted that there had been a history of bad blood between all the parties involved.

On February 28, 2012 the employing establishment controverted the claim based on the conflicting account of the alleged work incident and the lack of medical evidence.

In an undated statement received by OWCP on February 29, 2012, Doug Hillman, a coworker, related that appellant and Ms. Vert got into a loud argument about instructions Ms. Vert had given to appellant earlier that day. He stated, "Immediately after [Ms. Vert] left, [appellant] told me that [Ms. Vert] had slapped her in the face. [Appellant] asked me if there was a red mark on her face. I examined her face and did notice that there was a red mark on her left cheek." Mr. Hillman related that Ms. McLaury witnessed the incident but that she was unreliable as she was Ms. Vert's friend and did not like appellant. He questioned why Ms. McLaury was on the dock at that time and related that it "seemed as if she were there to be a witness to what transpired."

By letter dated March 14, 2012, OWCP requested that appellant submit additional factual and medical evidence in support of her claim. In a March 21, 2012 response, appellant related that after she was slapped in the face she felt shocked and humiliated.<sup>3</sup> Since that time she experienced anxiety and paranoia. Appellant knew that Ms. Vert and Ms. McLaury were going to lie about what happened. She asserted that Ms. McLaury should not have been on the dock and believed that the incident may have been planned. Appellant did not report the slap right away to the station manager because she wanted to let her union know first and did not know or trust the station manager.

By decision dated April 18, 2012, OWCP denied appellant's claim finding that she did not establish that the February 3, 2012 incident occurred as alleged.

On May 14, 2012 appellant requested an oral hearing. In an accompanying memorandum, she related that Ms. Vert and Ms. McLaury were friends and neighbors. Appellant stated:

"The slap in the face did not happen in a vacuum; it followed our years of documented verbal abuse, harassment, and a gossip campaign, with management ignoring it or even showing biased favoritism. It culminated in escalating violence and myself being slapped with a win-win situation for the culprits, no matter what course of action I took. I think it was premeditated and planned, but they thought I probably would not report it, given Catherine was the only eyewitness...."

Appellant noted that Ms. Vert refused to provide the police with a statement.

In a February 10, 2012 police report, an officer indicated that on February 3, 2012 appellant and Ms. Vert argued about an assignment. Ms. Vert held her index and middle fingers up and the other fingers folded and hit her across the cheek. Appellant informed the employing establishment of the incident but was "not happy with the way the incident is being handled." In a supplemental report, the police officer noted both Ms. Vert and Ms. McLaury refused to speak with him as they had spoken with an inspector from the employing establishment. He received a

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<sup>3</sup> Appellant submitted medical evidence in support of her claim.

statement from Ms. McLaury that Ms. Vert “wagged her finger in front of [appellant’s] face but did not hit her.” The officer found “insufficient probable cause to proceed with charges in this case.”

At the August 6, 2012 hearing, appellant related that on February 3, 2012 Ms. Vert asked her to find out if the federal center was going to close because of snow. After she called the federal center, she told Ms. Vert that they did not know if they were going to close, and that she stated to get the mail but not to scan it. When appellant returned to the employing establishment, Ms. Vert asked if she had scanned the boxes and appellant replied that she had told her not to scan. Ms. Vert told appellant to stop yelling or she would slap her. She whipped her cheeks with two of her fingers and appellant began to cry. Ms. McLaury witnessed the incident. Appellant told Mr. Hillman that she had been slapped by Ms. Vert and he confirmed that her cheek was “kind of red.” He recommended that she tell the union steward on Monday. Ms. Vert denied slapping appellant when she mentioned it to her later that date. She told Ms. Solano, who initially refused to let her file a traumatic injury claim. Mr. Hillman, who was present at the hearing, related that he witnessed Ms. Vert “verbally barrage” appellant and then leave and return with Ms. McLaury. He questioned Ms. McLaury’s motivation and mental stability and noted that she had previously made false accusations. After Ms. Vert left, appellant told him that she had slapped her. Mr. Hillman saw a red mark on her cheek.

In a decision dated October 12, 2012, OWCP’s hearing representative affirmed the April 18, 2012 decision. He found that appellant had not submitted sufficient evidence to establish that the February 3, 2012 incident occurred as alleged.

On appeal appellant related that she was unsatisfied with the employing establishment’s response to her complaint of violence in the workplace. She maintained that the parties should have been interviewed by an employing establishment inspector rather than the station manager.

### **LEGAL PRECEDENT**

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by factors of his or her federal employment.<sup>4</sup> To establish that he or she sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; (2) medical evidence establishing that he or she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.<sup>5</sup>

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment. 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. Where the disability results from an employee’s

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<sup>4</sup> See *Pamela R. Rice*, 38 ECAB 830 (1987).

<sup>5</sup> See *S.J.*, Docket No. 12-1512 (issued February 12, 2013).

emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.<sup>6</sup> 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 his or her frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>7</sup>

Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute factors of employment. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.<sup>8</sup> Additionally, physical contact by a coworker or supervisor may give rise to a compensable work factor, if the incident is established factually to have occurred as alleged.<sup>9</sup>

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.<sup>10</sup> 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, OWCP must base its decision on an analysis of the medical evidence.<sup>11</sup>

### ANALYSIS

Appellant has not attributed her emotional condition to her regular work duties under *Cutler*. Her allegations do not relate to such factors as overwork or any claim of an inability to perform the duties required in her position.<sup>12</sup> Instead, appellant maintained that she sustained an emotional condition due to her supervisor, Ms. Vert, slapping her in the face on February 3, 2012.

Appellant alleged that on February 3, 2012 Ms. Vert initially asked her to scan numbers of packages but subsequently told her not to scan the items. She alleged that Ms. Vert later yelled at her because she did not scan the boxes. Ms. Vert asked appellant to stop yelling. Appellant informed her supervisor that she was matching her own voice level. Ms. Vert told

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<sup>6</sup> 5 U.S.C. § 8101 *et seq.*; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>7</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>8</sup> *Marguerite J. Toland*, 52 ECAB 294 (2001).

<sup>9</sup> *Denise Y. McCollum*, 53 ECAB 647 (2002); *Helen Casillas*, 46 ECAB 1044 (1995).

<sup>10</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>11</sup> *Id.*

<sup>12</sup> See *Lillian Cutler*, *supra* note 6.

appellant that she would slap her if she did not stop yelling. Appellant asserted that Ms. Vert raised two fingers on her right hand and struck her across the cheek.

Although physical contact may constitute a compensable work factor, there must be probative factual evidence supporting that such contact actually occurred.<sup>13</sup> The record contains no witness statements or other evidence sufficient to establish that Ms. Vert slapped appellant. Ms. Vert denied any physical contact with appellant. The only witness to the incident, Ms. McLaury, related that Ms. Vert moved the index finger of her hand right to left in front of her own face while requesting that appellant stop yelling. In a February 28, 2012 statement, Ms. Solano, the station manager, noted investigating the incident and found no physical contact. She noted that the parties had a history of “bad blood.” A police officer reviewed the evidence and concluded that there was insufficient probable cause to bring charges. In a statement received February 29, 2012 and at the hearing, Mr. Hillman noted that appellant told him immediately after the alleged incident that Ms. Vert slapped her. He asserted that she had a red mark on her cheek. While Mr. Hillman’s statement provides some support it is insufficient to overcome the statement of the eyewitness. The employing establishment found that there was no physical contact between the parties and the police determined that there was insufficient evidence to bring charges. Consequently, appellant has not established that the February 3, 2012 employment incident occurred as alleged.<sup>14</sup>

Appellant also alleged that Ms. Vert yelled at her for not scanning a box. The Board has recognized the compensability of verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will be covered under FECA.<sup>15</sup> A raised voice in the course of a conversation does not, in and of itself, warrant a finding of verbal abuse.<sup>16</sup> Mr. Hillman related that both appellant and Ms. Vert were in a loud argument and that Ms. Vert “barraged” her verbally. Appellant asserted that she raised her voice because Ms. Vert’s voice was raised. She has not, however, described any statements that would rise to the level of verbal abuse by her supervisor and thus has not established a compensable work factor.

The Board finds that appellant did not meet her burden of proof to establish a claim for an emotional injury. As the factual element of the claim has not been established, the Board will not address the medical evidence.<sup>17</sup>

On appeal appellant argues that an investigator with the employing establishment rather than the station manager should have questioned the parties involved in the February 3, 2012 incident. She also questions the adequacy of the employing establishment’s response to her

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<sup>13</sup> See *Marilyn Jones*, Docket No. 05-382 (issued January 19, 2006); see also *C.G.*, Docket No. 07-1375 (issued November 5, 2007) (no witness statements supported appellant’s allegation that she was pushed by a coworker).

<sup>14</sup> See *B.B.*, Docket No. 12-695 (issued November 16, 2012).

<sup>15</sup> *Cyndia R. Harrill*, 55 ECAB 522 (2004); *Beverly R. Jones*, 55 ECAB 411 (2004).

<sup>16</sup> *Karen K. Levene*, 54 ECAB 671 (2003).

<sup>17</sup> See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

allegation of violence in her workplace. The Board's jurisdiction, however, is limited to reviewing final adverse decisions of OWCP arising under FECA.<sup>18</sup> It has no jurisdiction over internal employing establishment matters.

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 and 20 C.F.R. §§ 10.605 through 10.607.

**CONCLUSION**

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 2013  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>18</sup> 20 C.F.R. §§ 501.2(c) and 501.3(a).