

with regard to harassment were specific and that she submitted witness statements in support of her allegations.

FACTUAL HISTORY

On August 27, 2010 appellant, a 47-year-old sales service distribution associate, filed an occupational disease claim alleging that she suffered from an emotional condition. She noted that, on August 24, 2010 her coworker, Alberto Torres, constantly made sarcastic remarks about her being lazy and wasting too much time. Appellant also alleged that Mr. Torres forcefully pushed a mail cart towards her that morning and that the cart hit her on the left side. She contended that the abusive and hostile behavior of Mr. Torres towards her caused her extreme anxiety and emotional stress to the point that she feared for her safety. In support of her claim, appellant submitted a note from Dr. Jesus Rivera Guevara, a psychiatrist, who indicated that he was referring appellant to a partial hospitalization program due to her current precarious emotional state. Dr. Guevara noted that her emotional state had been recently reignited by a coworker who was abusive and hostile towards her and that she felt physically threatened at her workplace.

By letter dated August 31, 2010, OWCP asked appellant to submit further information.

In a September 1, 2010 statement, Gerald Fonseca, appellant's supervisor, indicated that on August 27, 2010 she received a facsimile from the safety office with appellant's claim form. He stated that she did not notify him of any incident with her coworker on that specific day, but rather continued working her regular tour without any complaints and went home at 2:00 p.m. Mr. Fonseca noted that, on a prior occasion, appellant alleged the same behavior towards her from the same coworker and that he spoke to both of them separately and agreed to have them work in separate areas to the extent that was possible, but that it was a small office and that some days they did have to work in the same area until the next employee arrived.

In a letter dated September 24, 2010, appellant responded that for the past seven years she has feared for her safety when working with Mr. Torres. She alleged that he has violent outbursts and disrespectful behavior towards her. Appellant alleged that Mr. Torres is short tempered and is the type of person that kicks, throws, gets upset for the minimal things and is intimidating to her. She stated that, when it is time to distribute the mail, Mr. Torres moves the mail containers forcefully without even looking to see if anyone is around. Appellant noted that on August 24, 2010 while she was sorting letters he forcefully pushed the mail carrier without advising her and that it hit her on the left side. She stated that she did not tell anyone because previous statements to others have "played deaf ears" and allowed Mr. Torres to continue with the same conduct. Appellant stated that, after the incident with him, her mood changed for the duration of the day and that at the end of her shift she decided to go to her psychiatrist due to stress.

Appellant submitted a September 14, 2010 statement by Nancy Jimenez who stated that she worked as a sales service distribution associate at the same branch of the employing establishment as appellant. Ms. Jimenez noted that she was present different times and noted that appellant was a responsible and competent worker and was respectful with all her coworkers. She noted that appellant used to have a smile but now she appears to be depressed,

isolated and sad. Ms. Jimenez noted that appellant told her many times that Mr. Torres created a hostile work environment and was disrespectful to her. She noted that, while she was working with appellant, he would pass by and pass gas and forcefully kick the mail containers. Ms. Jimenez further stated that, on more than one occasion, appellant has expressed her concerns to management but management ignored her complaints.

In further support of her claim, appellant submitted a September 21, 2010 report wherein Dr. Guevara diagnosed her with major depressive affective disorder recurrent episode severe degree, panic disorder without agoraphobia and generalized anxiety disorder. Dr. Guevara opined that her ability to concentrate and persist at work-related tasks and the completion of stated tasks in a normal workday setting without interruptions is gravely impaired and it is very unlikely that she will be able to maintain gainful employment going forward. He further opined that appellant's disability was permanent in nature due to the extent of her symptoms and their prolonged state which can be directly attributed to work-related stress.

By decision dated February 23, 2011, OWCP denied appellant's claim as there was no evidence to substantiate that the claimed incidents occurred.

On February 14, 2012 appellant, through counsel, requested reconsideration. Appellant's counsel argued that an employee's version of the facts stands unless refuted by strong and persuasive evidence, that appellant stated with great specificity the incidents of harassment, that the employing establishment was informed of the incidents, that witness statements supported her recitation of the facts, that OWCP failed to conduct fact finding with regard to the claim, that harassment by a coworker is covered under FECA and that the medical evidence established that she sustained an emotional condition related to her employment.

In support of her reconsideration request, appellant submitted a copy of a March 16, 2010 letter she wrote to Antonio Guzman, a safety manager for the employing establishment. In this letter, she alleged that Mr. Torres does not treat her with respect. Appellant alleged specific incidents. In this regard, she noted that on October 10, 2009 she was working with a Mr. Sierra in the distribution area and that she had a tray full of flats and that Mr. Torres kicked the flats all over the floor and walked away. Appellant noted that, on October 19, 2009 while distributing flats with a Mr. Oliveras, Mr. Torres went by the area and kicked a tray full of flats for the second time that day. She stated that on October 13, 2009 she could not get a parcel from a high shelf and that Mr. Torres would not help her. Appellant noted that on March 3, 2010 she had to use the shredder and that he was resting his feet on a chair and she asked him if she could get by and he stood up and was upset and stated that she was always bothering him. She indicated that a Mr. Maldonado witnessed the incident. Appellant asked Mr. Guzman for assistance with these situations. She also submitted a letter that she wrote on September 11, 2010 to the president of her union discussing the emotional stress she felt due to the hostile work environment and requested that a grievance be filed against management.

In further support of her request for reconsideration, appellant submitted a statement by Nelson Torres Ramirez dated September 15, 2010. Mr. Ramirez stated that she mentioned to him on many occasions that she fears for her safety due to the fact that her coworker, Mr. Torres, created a hostile work environment and was disrespectful to her but that her complaints were ignored. He also noted that, on many occasions while working, Mr. Torres would pass by and

forcefully kick mail containers from where they were sorting mail. Mr. Ramirez also noted that he was present on many occasions when Mr. Torres would walk by and pass gas in their presence. He further noted that appellant's facial features always appeared depressed, intimidated and isolated.

By decision dated May 14, 2012, OWCP modified the prior decision as it found that appellant had established an injury. However, the claim remained denied as she had not met the requirements for establishing that she had an injury sustained in the performance of duty.

LEGAL PRECEDENT

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 to establish that the 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 specifically 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 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

As a general rule, a claimant's allegations alone are insufficient to establish a factual basis for an emotional claim.⁶ 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.⁷ 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

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.*

⁶ 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).

⁷ *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).

opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by OWCP and the Board.⁸

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.⁹

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that she sustained an employment-related emotional condition.

When appellant filed her claim, she alleged that she suffered from an emotional condition due to the behavior of Mr. Torres on August 24, 2010. She alleged that on that date Mr. Torres constantly made sarcastic remarks about her being lazy and wasting too much time. Appellant also alleged that on that date Mr. Torres forcefully pushed a mail cart towards her and that the cart hit her on the left side. Appellant's supervisor, Mr. Fonseca noted in a September 1, 2010 statement that appellant had made complaints about the same coworker on prior occasions. However, he indicated that appellant made no mention of these incidents on August 24, 2010 and that she finished her shift on that date. In a follow-up letter dated September 24, 2010, appellant alleged that Mr. Torres had violent outbursts and was disrespectful toward her. She noted that he moved mail containers forcefully without looking to see if anyone was around. Appellant reiterated that on August 24, 2010 Mr. Torres pushed a mail carrier and it hit her on the left side. She indicated that she did not report this incident because no action was taken on her prior complaints.

For harassment to give rise to a compensable disability under FECA, there must be evidence that the harassment did in fact occur. Mere perceptions of harassment are not compensable under FECA.¹⁰ Appellant alleged that her coworker, Mr. Torres, harassed her on August 24, 2010 in that he constantly made sarcastic comments on that date about her being lazy and wasting too much time. She also alleged that on that date he pushed a cart and it hit her in the left side. Finally, appellant made general allegations about mistreatment by her coworker. However, she submitted no evidence in support of her harassment claim for incidents that occurred on August 24, 2010. Unsubstantiated allegations of harassment are not determinative of whether such harassment or discrimination occurred.¹¹ Appellant did submit witness statements; however, these statements do not support her specific allegations with regard to the incidents of August 24, 2010. Ms. Jimenez, primarily restates what appellant told her. Although she did note that she observed Mr. Torres forcefully kick mail containers and pass gas while she

⁸ S.C., Docket No. 11-1608 (issued September 13, 2012).

⁹ See *Joe M. Hagewood*, 56 ECAB 479 (2005). *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 abuse.

¹⁰ S.C., *supra* note 8.

¹¹ *James E. Norris*, 52 ECAB 93 (2000).

was working with appellant, she did not address appellant's specific allegations with regard to August 24, 2010. Mr. Ramirez similarly noted that Mr. Torres would pass gas and forcefully kick containers while he was sorting mail with appellant and that he would pass gas in their presence. However, he also did not address the specific incidents that are the basis for this claim. Furthermore, the Board notes that, although Mr. Fonseca noted that appellant made numerous complaints about Mr. Torres in the past, she did not mention the incidents of August 24, 2010 to her supervisor at the time they occurred. Appellant indicates that she did not complain because prior complaints about Mr. Torres were not acted upon. However, it is reasonable to assume that if she was struck by a container, she would have reported the incident. Thus, appellant has not established a compensable factor under FECA with respect to the claimed harassment.

While OWCP found that, the medical evidence established an emotional condition, appellant has failed to submit probative evidence to establish a compensable factor of employment. Thus, appellant failed to establish that she sustained an emotional condition in the performance of duty.

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 has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 14, 2012 is affirmed.

Issued: February 1, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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