

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

C.O., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,
RADIOLOGY DEPARTMENT, NORTHERN
CALIFORNIA HEALTH CARE SYSTEM,
Redding, CA, Employer)

Docket No. 12-1435
Issued: January 15, 2013

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 22, 2012 appellant filed a timely appeal from a June 7, 2012 decision of the Office of Workers' Compensation Programs (OWCP) that denied her claim. 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 asserted that documents were missing from her OWCP record.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On June 3, 2011 appellant, then a 36-year-old program support assistant, filed an occupational disease claim asserting stress. She alleged being retaliated against by fellow employees. Appellant stopped work that day and noted that she had filed an Equal Employment Opportunity (EEO) claim.

By letter dated June 14, 2011, OWCP informed appellant of the evidence needed to support her claim. In an undated response, appellant noted that she had filed an EEO complaint against Deb Coy Merritt, a radiology technician, who worked in the same department, and against Mrs. Merritt's husband, Dennis Merritt, also an employee but not in radiology. She stated that she had asked management to assist in resolving her complaints and requested mediation. On January 12, 2010 appellant first met Mrs. Merritt. She monitored the comings and goings of Mrs. Merritt and when her husband would walk by the radiology department. Appellant alleged that Mrs. Merritt made sarcastic remarks or ignored her and was not cooperative in appellant's efforts to keep track of who was in the department. She alleged that Mrs. Merritt did not treat patients in a professional manner. Appellant first requested union representation on January 27, 2010. She reported that her desk and car were vandalized and that her home was broken into. Appellant stated that Mrs. Merritt was fired in April 2010 but returned to work in radiology in November 2011. She filed a complaint with management, alleging that Mrs. Merritt created a hostile work environment. Appellant again requested union mediation in March 2011 but Mrs. Merritt would not participate. She became upset because the union president represented Mrs. Merritt and was not held accountable for her behavior. Appellant alleged that management offered to move her from the radiology department but she refused because Mrs. Merritt was the instigator of the problems. Mrs. Merritt filed a complaint against appellant. Appellant informed both of her supervisors, Stuart Kurtz and Stacy Kilpatric and the EEO representative about the behavior of Mrs. Merritt and her husband, alleged as harassment Mrs. Merritt's continued silent treatment and standing stationary near her workstation, sitting at her desk, mediation "games" and physically touching her. She felt that she was being stalked by Mr. Merritt because he walked past the radiology window frequently. Appellant alleged being harassed by Mrs. Merritt's friends and family who would come to the radiology window and ask for her. She registered with the Employee Assistance Program (EAP) on May 24, 2011 and on June 3, 2011 met with Anita Kemp, Ph.D., a clinical psychologist, who took her off work for three weeks.

In a June 3, 2011 letter, Dr. Kemp advised that appellant was evaluated that day for "excessive stress and depression related to current work situation." She advised that appellant should not work for three weeks. On June 24, 2011 Dr. Kemp advised that appellant was seen on June 3 and 24, 2011. She was initially diagnosed with depressive disorder but was re-diagnosed for anxiety disorder, not otherwise specified. Appellant reported a history of harassment at work by a coworker and her husband that began in November 2010. She returned to work at a different location on June 24, 2011. Dr. Kemp indicated that appellant's condition had improved due to her absence from work.

By letter dated October 21, 2011, OWCP asked the employing establishment for a statement from appellant's supervisor and Mrs. Merritt. In a November 17, 2011 letter, the employing establishment indicated that the EEO office would not share its opinion regarding the

claim. It forwarded a statement from Mr. Kurtz, who noted that he started working at the employing establishment in July 2010 and was not aware that Mrs. Merritt had been separated from the employing establishment in April 2010. Mr. Kurtz reported that appellant became very upset when Mrs. Merritt returned to work in November 2010 and that she submitted multiple Reports of Contact describing encounters with Mrs. Merritt and her husband. He stated that Mrs. Merritt was again separated from the employing establishment, largely due to information provided by appellant and the radiology service and was appealing the separation. Mr. Kurtz noted that appellant had two supervisors. He handled appellant's timekeeping, leave and workstation assignment, but she worked for the radiology service. Ms. Kilpatric, appellant's radiology supervisor, could provide a more comprehensive evaluation regarding appellant's relationship with Mrs. Merritt. The employing establishment EEO representative recommended that appellant change her workstation and she was offered counseling. At first, appellant refused the offer but accepted it the second time, shortly before a three-week break from work. Mr. Kurtz opined that she moved away from the situation, the possibility of problems would have been lowered and the three-week loss of work time prevented. He noted that appellant was resistant to a change in the workplace but when Mrs. Merritt was not removed, appellant was moved.

By decision dated June 7, 2012, OWCP found that appellant did not sustain an emotional condition in the performance of duty. Appellant did not establish a compensable factor of employment.

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.² If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.³ 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.⁴

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*,⁵ 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

² *Leslie C. Moore*, 52 ECAB 132 (2000).

³ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁴ *Id.*

⁵ 28 ECAB 125 (1976).

coverage under FECA.⁶ 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.⁷ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁸ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.⁹ Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁰

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.¹¹ 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.¹²

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.¹³ With regards 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 EEO 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.¹⁴

⁶ See *Robert W. Johns*, 51 ECAB 137 (1999).

⁷ *Supra* note 5.

⁸ *J.F.*, 59 ECAB 331 (2008).

⁹ *M.D.*, 59 ECAB 211 (2007).

¹⁰ *Roger Williams*, 52 ECAB 468 (2001).

¹¹ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹² *Kim Nguyen*, 53 ECAB 127 (2001).

¹³ *James E. Norris*, 52 ECAB 93 (2000).

¹⁴ *Beverly R. Jones*, 55 ECAB 411 (2004).

ANALYSIS

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

Appellant did not attribute her emotional condition to the performance of her regular work duties or to any special work requirement arising from her employment duties under *Cutler*.¹⁵ Rather, her claim pertains to allegations that she was harassed and stalked by a coworker in radiology, Mrs. Merritt, a radiology technician, and by her husband Mr. Merritt, also employed at the employing establishment but not in radiology. Appellant alleged that management did not properly handle the situation with the Merritts and noted that she filed complaints with management and an EEO claim.

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.¹⁶ Absent evidence establishing error or abuse, a claimant's disagreement or dislike of such a managerial action is not a compensable factor of employment.¹⁷

Appellant generally alleged that her complaints were improperly handled by the employing establishment. Mr. Kurtz, a supervisor, advised that he had offered appellant a transfer, and that she refused. The evidence of record does not establish that management actions were unreasonable in these administrative functions. There is no indication of error or abuse in the matters.¹⁸

Appellant contended that she was harassed by Mrs. Merritt and her husband. The Board has held that mere perceptions of harassment or discrimination are not compensable under FECA.¹⁹ 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.²⁰ Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred. The issue is whether the claimant has submitted sufficient evidence under FECA to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.

Establishing a claim for compensation is a matter of proof. With regards to the rights of an employee for remedies provided under other statutory authority, the Board has held that the

¹⁵ See *supra* note 13.

¹⁶ *J.C.*, 58 ECAB 594 (2007).

¹⁷ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

¹⁸ *Supra* note 16.

¹⁹ *Supra* note 13.

²⁰ *Id.*

findings made by the Merit Systems Protection Board (MSPB) or the EEO Commission are not determinative of the employee's rights under FECA. While the findings made by the MSPB or EEO Commission may constitute substantial evidence relative to the claim to be considered by OWCP and the Board in reviewing a claim for compensation and instructive to such proceedings, the standard before the Board is not the equivalent of whether harassment or reprisal as defined by EEO Commission took place. Rather, under the workers' compensation system, the question is whether there is evidence.

Appellant submitted insufficient evidence to support specific actions by Mrs. Merritt or her husband to establish a compensable factor.²¹ Mr. Kurtz noted that Mrs. Merritt had been removed from work partially based on appellant's allegations. He did not describe any specific instances of harassment or other actions directed at appellant by Mrs. Merritt. Mr. Kurtz alluded generally to a difficult relationship but did not provide specific details regarding Mrs. Merritt's dismissal. Appellant therefore did not establish a factual basis for her claim of harassment by probative and reliable evidence.²²

Regarding appellant's allegation on appeal that her record is incomplete, the Board's jurisdiction is limited to a review of the evidence that was before OWCP at the time it rendered its final decision.²³ The record before the Board does not contain any supportive witness statements, any evidence regarding the findings of an EEO investigation or a final EEO decision that would establish harassment by either Mr. Merritt or Mrs. Merritt. 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.²⁴

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.

²¹ *Supra* note 14.

²² *See Robert Breeden*, 57 ECAB 622 (2006).

²³ 20 C.F.R. § 501.2(c).

²⁴ *Supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 15, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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