

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

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**S.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Portland, OR, Employer**

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**Docket No. 13-172  
Issued: November 20, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 23, 2012 appellant filed a timely appeal from the April 27, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</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 met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193. Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of OWCP's decision. *See* 20 C.F.R. § 501.3(f)(2). An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. One hundred and eighty days from April 27, 2012, the date of OWCP's decision, was October 24, 2012. Since using October 31, 2012, 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 October 23, 2012, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

## **FACTUAL HISTORY**

On September 6, 2002 appellant, then a 42-year-old clerk, filed an occupational disease claim for a work-related emotional condition. OWCP accepted that two compensable work factors caused her to sustain panic disorder with agoraphobia, generalized anxiety disorder and major depression, single episode, in partial remission.<sup>2</sup> On December 13, 2010 appellant filed a notice of recurrence of disability claiming that her work stoppage beginning December 1, 2010 was due to her prior accepted injury.<sup>3</sup> She stated that her main problem was depression and noted, "Depression has come back. Every time I get stressed out over this matter (harassment at work) it comes back to me in worsened form."

In conjunction with her December 13, 2010 claim, appellant submitted a December 12, 2010 statement in which she discussed various incidents and conditions at work which she believed caused or contributed to her emotional condition. She claimed that, on December 1, 2010, a coworker harassed her by telling her that she was working too slowly on parcels. Another coworker told appellant that she was working slowly when she was throwing parcels, gave her a "disturbing look" on one occasion and shook her head every time the two passed each other.<sup>4</sup> Appellant claimed that management did not allow her to work on her bid assignment duties and wrongly gave some of her bid assignment duties to coworkers. She alleged that she was improperly issued a letter of warning in September 2010 for missing scans on express mail and that her coworkers were not disciplined for missing scans on express mail. Appellant asserted that management did not properly pay her when she went on emergency leave in October 2009 and that coworkers were paid when they were on emergency leave. She claimed that Eden Ching, a supervisor, did not allow her to make any mistakes when throwing parcels and that she improperly asked her to place small parcels into hampers instead of tubs. Appellant stated that she was unfairly disciplined for taking a 20-minute break and alleged that she was the only person at her workplace to take 10-minute breaks, whereas her coworkers all took breaks of 15 minutes or more. She claimed that she wrongly received an investigation interview because her work speed was not consistent and that two coworkers harassed her by giving several false statements to Ms. Ching about the length of her breaks and conversations with other employees. Appellant felt that management improperly scrutinized her restroom trips and alleged that in November 2009 she was unfairly accused of taking a coupon book from the mail for her personal use.<sup>5</sup>

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<sup>2</sup> OWCP found that appellant had established work factors with respect to being improperly required to work 12½ hours on August 17, 2002 after only a 5-hour break from work and with respect to working a split shift with various hours off between shifts for four years. In December 2007, appellant filed a claim for a work-related emotional condition that was denied in May 2008 for failure to establish any compensable work factors.

<sup>3</sup> Appellant listed the date of injury as August 21, 2002 and stopped work on December 1, 2010.

<sup>4</sup> Appellant also claimed that another coworker threw a large parcel at her.

<sup>5</sup> A document was submitted in which Nancy Tanner, appellant's union representative, discussed alleged incidents between appellant and Ms. Ching from early 2009 to early 2010. The document indicates that appellant filed a number of grievances against management with respect to some of these incidents.

In a December 28, 2010 statement, Ms. Ching indicated that she took disciplinary action against appellant on various occasions, but she asserted that these actions were appropriate given appellant's conduct. She noted that she did not treat appellant differently from any other employee and claimed that the disciplinary actions were in accordance with employing establishment policy. Despite appellant's assertions, numerous coworkers were also disciplined with respect to such matters as mishandling mail and abusing work breaks. Ms. Ching denied that she prevented appellant from working on bid assignments or gave her improper work assignments. She noted that appellant never worked on accountable mail because accountable mail was only to be handled after regular mail distribution was completed and appellant was never able to finish her regular mail distribution. Ms. Ching asserted that appellant was held responsible for her mistakes to the same extent as her coworkers and stated that she was paid for leave taken in 2009 while an investigation was being carried out into her possible improper use of coupon books delivered through the mail.

OWCP found that appellant had actually filed a claim for a new work-related emotional condition on December 13, 2010 because she alleged that new work factors caused her disability rather than a spontaneous worsening of her prior accepted conditions. Therefore, a new occupational disease claim file was created and developed. In a January 27, 2011 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim.

In statements dated February 11, 2011, appellant took issue with the substance of Ms. Ching's December 28, 2010 statement. She maintained that she was given improper assignments, her work was unfairly scrutinized and she was improperly disciplined. Appellant asserted that she was the only person required to notify management when she went to the restroom and asserted that management disciplined her for the type of actions that were ignored when committed by coworkers. She claimed that it was improper for Ms. Ching and a coworker to visit her house in July 2009 for the ostensible reason of checking on her safety.

Appellant submitted medical evidence discussing her emotional condition between 2009 and 2011, including reports from Dr. Sarah R. Osland, an attending clinical psychologist, and Dr. Anthony H. Lee, an attending Board-certified family practitioner. She also submitted witness statements in which coworkers discussed various matters, including their impressions of her work habits, the accepted practice for taking work breaks and the supervisory actions of Ms. Ching. In an undated statement, two coworkers at appellant's workplace stated that most clerks were taking breaks lasting 15 minutes or more. In a July 29, 2009 statement, eight coworkers indicated that they had been instructed to take 10-minute breaks.<sup>6</sup>

In a July 27, 2009 statement, Tami Beckwith, a supervisor, stated that she and Ms. Ching visited appellant's home on that date to carry out a wellness check with the cooperation of local law enforcement officers. She indicated that management was concerned about appellant's well-being because it had not been able to make contact with her and it appeared that her telephones had been disconnected. When Ms. Beckwith and Ms. Ching arrived at appellant's home, one of the two front doors was wide open and there was no response to several knocks on the door. She

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<sup>6</sup> In undated statements, a coworker indicated that Ms. Ching told appellant that she had to notify management when she went to the restroom or any other time she left the working area and another coworker stated that she heard Ms. Ching tell appellant that she was stealing because she went over her allotted break time.

stated that local law enforcement officers arrived at the scene and that appellant eventually responded after several knocks on the door and indicated that she was “just sick.” The record contains a document, produced by a local law enforcement official, detailing the “welfare check” made at appellant’s home on July 29, 2009. It was noted that the employing establishment reported that appellant had not showed up for work for four days and that the employing establishment had not been able to contact her.

Appellant submitted documents regarding numerous grievances she filed against management in reaction to various disciplinary actions she received. These documents indicate, *inter alia*, that a September 2010 disciplinary action for missing a mail scan was expunged; an emergency placement issued in October 2009 was rescinded and appellant received back pay for October 2 to November 20, 2009; a payment of \$1,000.00 was made for an unspecified reason; a payment of \$50.00 was made relating to a “medical information” matter; a 14-day suspension issued on an unspecified date was reduced to a discussion; a March 2009 seven-day suspension was reduced to a letter of warning, and a 14-day suspension regarding work breaks, of an unspecified date, was reduced to a discussion. It was also indicated that a December 2009 14-day suspension for unauthorized opening of mail would be removed from appellant’s file in one year if no further discipline was initiated within the year. Appellant also submitted documents related to claims she filed with the Equal Employment Opportunity (EEO) Commission, including an April 11, 2011 investigative report which summarized evidence presented by appellant and management. Her EEO claims relate to some of her claimed work factors in the present case, but the documents do not contain any final findings regarding these matters.<sup>7</sup>

In an April 20, 2011 statement, Ms. Tanner discussed various grievances filed on appellant’s behalf for disciplinary actions she received from the employing establishment. She indicated that some of the disciplinary actions had been modified or withdrawn.

In a December 16, 2011 decision, OWCP denied appellant’s claim on the grounds that she did not establish any compensable work factors. It found that she had not established her claims of harassment and discrimination or shown error or abuse in administrative matters.

In a February 21, 2012 letter, Ms. Ching noted that several of the individuals who provided witness statements in support of appellant had also been disciplined for their actions and inappropriate behavior. She asserted that she repeatedly informed appellant that her work breaks could only last 10 minutes but that appellant often did not observe this rule. Ms. Ching acknowledged that she went to appellant’s home with a coworker in July 2009, but asserted that she only did so because she was concerned for her safety after she had been absent from the workplace. She indicated that, when they arrived at appellant’s home, it was observed that the front door was wide open and personal items were strewn everywhere. Ms. Ching stated that she was instructed by the employing establishment’s inspection service to call local law enforcement authorities and that she followed these instructions.

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<sup>7</sup> In a January 31, 2011 statement made in conjunction with an EEO claim, a coworker stated that he saw Ms. Ching “repeatedly harassing” appellant and “aggressively talking down to her” while monitoring her work. The documents also contains statements in which Ms. Tanner detailed conversations with appellant regarding Ms. Ching’s actions.

Appellant requested a review of the written record by an OWCP hearing representative. She submitted additional documents concerning her EEO claims. Most of these documents had been previously submitted.

In an April 27, 2012 decision, OWCP's hearing representative affirmed OWCP's December 16, 2011 decision denying appellant's emotional condition claim. She found that appellant had not established any compensable work factors, including those related to her claims of harassment, discrimination and wrongdoing in administrative matters. The hearing representative noted some of the disciplinary actions appellant received had been modified or rescinded *via* settlement agreements, but stated that the agreements did not provide any indication that there was a finding of management wrongdoing.

### **LEGAL PRECEDENT**

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 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>8</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>9</sup>

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.<sup>10</sup> However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.<sup>11</sup> In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>12</sup> The Board has repeatedly held that the mere fact that a personnel action is later modified or rescinded does not, in and of itself, establish error or abuse.<sup>13</sup>

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<sup>8</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>9</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>10</sup> *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

<sup>11</sup> *William H. Fortner*, 49 ECAB 324 (1998).

<sup>12</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>13</sup> *L.Y.*, Docket No. 13-242 (issued August 20, 2013); *C.Y.*, Docket No. 12-1333 (issued December 28, 2012); *Paul L. Stewart*, 54 ECAB 824 (2003); *Michael Thomas Plante*, 44 ECAB 510 (1993).

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.<sup>14</sup> However, for harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under FECA.<sup>15</sup>

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.<sup>16</sup> This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected a condition for which compensation is claimed and a rationalized medical opinion relating the claimed condition to compensable employment factors.<sup>17</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>18</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>19</sup>

### ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. OWCP denied her emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA. The Board notes that appellant's allegations do not pertain to her regular or specially assigned duties under *Cutler*.<sup>20</sup> Rather, appellant has alleged error and abuse in administrative matters and harassment and discrimination on the part of her supervisors and coworkers.

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

<sup>15</sup> *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>16</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

<sup>17</sup> *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

<sup>18</sup> *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

<sup>19</sup> *Id.*

<sup>20</sup> *See Cutler* note 8.

Appellant alleged that management committed wrongdoing with respect to a number of administrative matters. She claimed that Ms. Ching, a supervisor, did not allow her to work on her bid assignment duties and wrongly gave some of her duties to coworkers. Appellant alleged that she was improperly issued a letter of warning for missing scans on express mail, that she was not allowed to make any mistakes when throwing parcels and that she was improperly asked to place small parcels into hampers instead of tubs. She claimed that she improperly failed to receive pay when she went on emergency leave in October 2009, that she was unfairly disciplined for taking a 20-minute break and that she wrongly received an investigation interview because her work speed was not consistent. Appellant also felt that management improperly scrutinized her trips to the restroom and that she was unfairly accused of taking a coupon book from the mail for her personal use. She asserted that it was improper for Ms. Ching and a coworker to visit her house in July 2009 for the ostensible reason of checking on her safety.

Such 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. However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.<sup>21</sup>

The Board finds that appellant did not submit sufficient evidence to show that management committed error or abuse as alleged. Appellant submitted documents regarding numerous grievances she filed against management in reaction to various disciplinary actions and some of these documents show that the initial disciplinary actions were later modified or rescinded. For example, a September 2010 disciplinary action for missing a mail scan was expunged, an emergency placement issued in October 2009 was rescinded and appellant received back pay for October 2 to November 20, 2009, a March 2009 7-day suspension was reduced to a letter of warning, and a 14-day suspension regarding work breaks, of an unspecified date, was reduced to a discussion. However, the Board has repeatedly held that the mere fact that a personnel action is later modified or rescinded does not, in and of itself, establish error or abuse.<sup>22</sup> None of the grievance documents submitted by appellant contain any finding that the changes to various disciplinary actions occurred due to any error or abuse by the employing establishment. Appellant has not otherwise submitted evidence showing error or abuse by management with respect to these matters.

With particular regard to appellant's claim that Ms. Ching did not allow her to work on her bid assignment duties, Ms. Ching explained that appellant never worked on accountable mail because this was only to be handled after regular mail distribution was completed and appellant was never able to finish her regular mail distribution. Ms. Ching cited instances in which coworkers were disciplined for the same actions that appellant committed and stated that appellant actually was paid for leave taken in October and November 2009 while she was investigated for possible improper use of coupon books. With respect to the visit of Ms. Ching and Ms. Beckwith to appellant's home in July 2009, the documents of record, including witness statements and a law enforcement report, do not reveal that this visit constituted error or abuse

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<sup>21</sup> See *supra* note 11.

<sup>22</sup> *L.Y., supra* note 13; *C.Y., supra* note 13; *Paul L. Stewart, supra* note 13.

by management. Rather, it appears that the visit was effectuated due to a legitimate concern for appellant's safety. For these reasons, appellant has not established error or abuse with respect to administrative matters as alleged.

Appellant claimed that her supervisors and coworker subjected her to harassment and discrimination. She claimed a number of the disciplinary actions that were leveled against her constituted harassment and discrimination in that coworkers who committed the same actions were not punished in the same manner. However, as noted above, appellant has not shown any error or abuse in these disciplinary matters, let alone that the circumstances of these administrative matters constituted harassment or discrimination by management.

Appellant also claimed that, on December 1, 2010, a coworker harassed her by telling her that she was working too slowly on parcels. Another coworker told her that she was working slowly when she was throwing parcels, gave her a "disturbing look" on one occasion and shook her head every time the two passed each other. Appellant also claimed that another coworker threw a large parcel of mail at her. She alleged that two coworkers harassed her by giving several false statements to Ms. Ching about the length of her breaks and conversations with other employees.

The employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by her coworkers and supervisors.<sup>23</sup> Appellant alleged that coworkers and supervisors made statements and engaged in actions which she believed constituted harassment and discrimination, but she provided insufficient corroborating evidence to establish that the statements actually were made or that the actions actually occurred.<sup>24</sup> In a January 31, 2011 statement, made in conjunction with an EEO claim, a coworker stated that he saw Ms. Ching "repeatedly harassing" appellant and "aggressively talking down to her" while monitoring her work. However, this statement would not establish that harassment occurred because it is vague in nature and does not describe the actual comments that were made to appellant. In undated statements, a coworker indicated that Ms. Ching told appellant that she had to notify management when she went to the restroom or any other time she left the working area and another coworker stated that she heard Ms. Ching tell appellant that she was stealing because she went over her allotted break time. These statements do not contain sufficient detail to establish that Ms. Ching committed harassment or discrimination while carrying out her supervisory duties of monitoring appellant's work. Thus, appellant has not established a compensable employment factor under FECA with respect to the claimed harassment and discrimination.

On appeal, appellant claimed that management wrongly disciplined her and visited her home, but she did not submit evidence establishing these claims. For the foregoing reasons, she has not established any compensable employment factors under FECA and, therefore, has not

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<sup>23</sup> 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).

<sup>24</sup> See *William P. George*, 43 ECAB 1159, 1167 (1992).



met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.<sup>25</sup>

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 meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 27, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 20, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>25</sup> As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).