United States Department of Labor
Employees' Compensation Appeals Board

K.A., Appellant	)	
and	)	**Docket No. 14-17**
	)	**Issued: August 4, 2014**
U.S. POSTAL SERVICE, PROCTOR STATION, Tacoma, WA, Employer	)	

Appearances:
Coby Jones, for the appellant
No appearance, for the Director

Oral Argument June 12, 2014

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 11, 2013 appellant, through her representative, filed a timely appeal from an April 18, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her emotional condition claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether OWCP properly rescinded its August 3, 2012 statement of accepted facts.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 26, 2012 appellant, then a 47-year-old city letter carrier, filed an occupational disease claim alleging that she sustained depression and anxiety causally related to factors of her federal employment. She related that a coworker, Nick Bogajczyk, disliked her and that her belongings had been stolen. Appellant stopped work on March 22, 2012.

In statements dated March 26 and April 9, 2012, appellant related that in 2010 she became the union steward assistant and safety captain. She had to speak with Ken Sage, a manager, about helping carriers after dog incidents. Appellant found out that dog letters were not being properly sent but only got excuses from management when she complained. Mr. Bogajczyk made fun of her speech because she talked in a different manner due to her deafness. On December 16, 2010 appellant witnessed Mr. Bogajczyk cross an individual's name off of a union steward nomination list. She told him that he should not have crossed the name out. On December 22, 2010 Mr. Bogajczyk told Dan Salido, a manager, that appellant had taken a 45-minute lunch at her home. Both Mr. Bogajczyk and Mr. Salido drove to her home and conducted surveillance. On December 24, 2010 Area Manager Zack Carter and Union President Mike Touchet held a stand-up meeting. Mr. Touchet told employees not to remove names from nominations sheets. Mr. Bogajczyk became rude and pointed a finger at appellant, stating that she should "mind her damn business." The next day appellant found a key scratch on her car. She asked Mr. Sage in a written note for the telephone number for the Employees' Assistance Program (EAP) and two days later Mr. Bogajczyk knew that she was going to EAP counseling. In April 2011 Mr. Bogajczyk almost crashed a nutting cart into appellant. Appellant complained to Mr. Salido but nothing was done. Mr. Bogajczyk accused her of walking around when she was on safety patrol duty. On May 16, 2011 when appellant returned from vacation, Mr. Bogajczyk instructed her carrier not to give her vacation mail. On May 28, 2011 she went to her house, an authorized break location, to use the restroom. Appellant saw Mr. Bogajczyk and Eric Hetrick, a supervisor, driving away from her home. Mr. Hetrick informed her that a carrier had told him that she was at home. At an intervention meeting on July 7, 2011, Mr. Touchet told appellant that Mr. Bogajczyk believed that she was taking too many breaks. Mr. Bogajczyk also believed that she was spying on him with a mirror at her case. Appellant had difficulty understanding everything at the meeting due to her deafness but management refused to let her husband be present. She asked that Mr. Bogajczyk not deliver her mail. Appellant agreed to move the mirror to another spot. On July 20, 2011 she learned that Mr. Hetrick had put a letter of warning in her file without giving it to her. Mr. Salido removed the letter of warning and apologized. After a July 28, 2011 meeting, management rearranged the work floor so that appellant and Mr. Bogajczyk were not within one another's view. Appellant moved her mirror back to its usual spot. She asserted that Mr. Bogajczyk took breaks at Dairy Queen to spy on her.

On January 2012 appellant quit her safety captain job because she was denied interpreter services. She believed a coworker hid her mirror on March 2, 2012. On March 10, 2012 appellant's mirror was again missing. Mr. Sage laughed when she told him. On March 12, 2012 he told appellant she was "stirring the pot." Appellant questioned Katherine Parks, a coworker, about her mirror. On March 21, 2012 Ms. Parks gave appellant a mean look. She mouthed to another carrier that appellant was crazy. Appellant made many mistakes on her route.

In support of her claim, appellant submitted grievances settled between the union and the station manager.[2] On June 30, 2011 a Step A grievance resolution determined that Mr. Bogajczyk inappropriately denied her request for her vacation hold mail and that management was responsible for ensuring that Mr. Bogajczyk's behavior was appropriate. An August 5, 2011 Step A grievance resolution found that a letter of warning from appellant's file should be removed and that management should "cease and desist from keeping records of unissued discipline in files and records." A December 25, 2011 Step A grievance resolution found that the safety captain should be notified of meetings and receive information about the meetings.

Appellant also submitted settled class action grievances.[3] On July 24, 2010 union and management agreed that management should follow dog policies in place from a prior grievance. On February 4, 2011 union and management agreed that management had the responsibility to take action regarding violence in the workplace and intimidation. On April 28, 2011 union and management agreed to a group intervention about the events in prior grievances. On May 3, 2011 union and management agreed that management should have kept the name of a grievant confidential. On May 4, 2011 union and management concurred that management was failing to follow procedures for dog bite prevention. In a June 15, 2011 settlement, union and management agreed as follows:

> "Supervisor Hetrick[']s actions on May 28, 2011 displayed poor judgment and negatively affected the work environment of [appellant]. Carrier Bogajczyk's report that [appellant] was at her house should not have been taken as a report of misconduct. [Appellant's] house is an authorized lunch location. Carrier Bogajczyk has displayed numerous times a dislike for [her] and reports by him about [her] should be weighed against this bias.
>
> "Supervisor Hetrick's discussion on the workroom floor was not the appropriate place for the discussion. When [appellant] asked him on the workroom floor about the street observations, Supervisor Hetrick should have moved the conversation to the office with a steward."

The agreement cited as procedure that management should not spy on employees and concluded, "Management is responsible for [appellant's] work environment. In the future, [m]anagement shall take appropriate action to guard [her] from the harassing actions of employees in the work unit." In another June 15, 2011 grievance settlement, management and the union agreed that management had not corrected Mr. Bogajczyk's behavior and that this had affected appellant's work environment.

[2] On March 24, 2011 a Step A grievance resolution determined that management failed to weigh the needs of appellant against the needs of the employing establishment in denying her request for a temporary schedule change and that it would approve her request.

[3] Appellant submitted an April 30, 2012 report from Dr. Ryan Coon, a clinical psychologist, in support of her claim.

On August 3, 2012 OWCP prepared a statement of accepted facts accepting as a compensable work factor that on May 28, 2011 Mr. Bogajczyk told Mr. Hetrick that appellant was taking lunch at her house and that they went to her home and observed her from a vehicle.

On October 2, 2012 OWCP advised appellant of its proposed rescission of the August 3, 2012 statement of accepted facts. It determined that a supervisor observing her at lunch was an administrative matter outside the course of her employment.

On October 29, 2012 appellant submitted witness statements in support of her allegations. In a witness statement dated October 12, 2012, Christopher Lao, a coworker, confirmed that Mr. Bogajczyk told him that appellant could not pick up her vacation mail from him. On October 13, 2012 Sherry R. Stevens, a coworker, related that Mr. Bogajczyk believed that appellant was observing him from a mirror on her case.[4] In an October 16, 2012 statement, Joseph Barsalona, a coworker, indicated that he saw Mr. Bogajczyk bump the nutting truck in an intentional looking way. On October 18, 2012 Tom Botkey, a coworker, asserted that Mr. Bogajczyk was upset at a stand-up meeting. Mark Marsik, a coworker, submitted an October 19, 2012 statement relating that Mr. Bogajczyk removed a name from an election sign-up sheet without permission. At a stand-up meeting addressing his action, Mr. Bogajczyk shouted about the union. In a statement dated October 26, 2012, Jim Hubbard, shop steward, maintained that Mr. Bogajczyk was often rude and hostile and that there was friction between appellant and Mr. Bogajczyk. Management moved the equipment so that there would be little contact between them. Mr. Salido did not want to be alone in a room with Mr. Bogajczyk. When appellant asked for accommodation to work as safety captain due to her hearing loss, Mr. Sage remarked that she could be found unfit for work.

By decision dated November 13, 2012, OWCP denied appellant's emotional condition claim after finding that she had not established any compensable factors of employment. In another decision dated November 14, 2012, it rescinded its August 30, 2012 statement of accepted facts.

On November 20, 2012 appellant requested an oral hearing before an OWCP hearing representative.[5]

At the hearing, held on February 6, 2013, appellant's representative contended that the grievance settlements established that the alleged incidents occurred as alleged. He maintained that a settled grievance supported that the employing establishment erred in placing a letter of warning in her file without notice.

In a statement dated February 20, 2013, appellant described again the incidents with Mr. Bogajczyk to which she attributed her stress-related condition.

[4] A witness also related that Mr. Hetrick spoke with appellant about seeing her at her home on May 28, 2011. Another witness asserted that Mr. Bogajczyk had not received discipline yet for matters concerning appellant.

[5] In a statement dated May 4, 2010, appellant described an attacked by a dog and maintained that Mr. Salido did not follow the proper dog letter procedures.

In another statement dated February 20, 2013, appellant's representative summarized the witness statements and the grievance settlements. He noted that the employing establishment had not challenged her version of events. The representative alleged that the grievance settlements established error or abuse by the employing establishment.

By decision dated April 18, 2013, OWCP's hearing representative affirmed the November 13, 2012 decisions. She found that appellant had not established any compensable work factors.

On appeal appellant's representative asserts that Mr. Bogajczk's actions constituted harassment. He notes that the employing establishment did not refute her allegations. The representative describes the grievance settlements and witness statements and asserts that appellant has established error and abuse by the employing establishment.

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.[6] 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.[7]

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.[8] 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.[9] 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.[10]

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence introduced which establishes that the acts alleged or implicated by the

[6] *Supra* note 1; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[7] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[8] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[9] *See William H. Fortner*, 49 ECAB 324 (1998).

[10] *Ruth S. Johnson*, 46 ECAB 237 (1994).

employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[11] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[12] 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.[13] The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by OWCP and the Board.[14]

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.[15] 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.[16]

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, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

Appellant has not alleged that she developed an emotional condition as a result of the performance of her regular or specially assigned duties or out of a specific requirement imposed by her employment under *Cutler*. Instead, she primarily attributed her condition to error and abuse by management in administration matters and in failing to control actions taken by a coworker, Mr. Bogajczyk. Specifically, appellant alleged that Mr. Bogajczyk inappropriately refused to give her held vacation mail when she returned to work. She also maintained that management put a letter of warning in her file without notification. Appellant further asserted

[11] *See Michael Ewanichak*, 48 ECAB 364 (1997).

[12] *See Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

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

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

[15] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[16] *Id.*

that on May 28, 2011 Mr. Bogajczyk told Mr. Hetrick that she was at her house, which she described as an authorized lunch and break location. She saw both men driving away from her home when she left the premises.

In *Thomas D. McEuen*,[17] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the facts surrounding the administrative or personnel action established error or abuse by employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.[18]

Appellant submitted a grievance settlement dated June 30, 2011 in which management and the union agreed that Mr. Bogajczyk wrongly refused to give her vacation hold mail and that it was management's responsibility to ensure that he behaved appropriately. In an August 5, 2011 grievance settlement, management and the union agreed that management should remove the letter of warning from appellant's file and refrain from keeping future records of unissued discipline. In a class action grievance settlement dated June 15, 2011, it agreed that Mr. Hetrick's actions on May 28, 2011 showed "poor judgment and negatively affected" appellant's work environment when he acted upon Mr. Bogajczyk's report that she was at her house, an authorized lunch location. Management and the union further found that Mr. Hetrick should not have addressed appellant's concerns on the work floor and that it had the responsibility to ensure that she was not harassed by coworkers. The grievance settlements establish error or abuse by Mr. Bogajczyk and Mr. Hetrick in the above administrative matters. Appellant has established as compensable work factors that management erred when Mr. Bogajczyk refused to give her vacation mail and Mr. Hetrick erred in acting on information from Mr. Bogajczyk on May 28, 2011, that Mr. Hetrick should not have addressed her concerns about the incident at a meeting in front of a coworker and that management erred in keeping an unissued letter of warning in her file.

Appellant also alleged that management failed to send appropriate dog letters, disclosed to Mr. Bogajczyk that she was receiving EAP counseling and wrongly denied her an interpreter while performing her job as safety captain. Appellant, however, has not submitted evidence that the employing establishment erroneously denied her request for an interpreter or informed Mr. Bogajczyk about her EAP counseling. Regarding the dog letters, a class action grievance dated July 24, 2010 indicated that management should follow the dog policies already in place. On May 4, 2011 union and management agreed that management was not following proper procedures for preventing dog bites. The grievances, however, are general in nature rather than particular to appellant and thus insufficient to establish a compensable work factor.

Appellant further attributed her condition to harassment by Mr. Bogajczyk and other coworkers. She related that Mr. Bogajczyk made fun of her speech, pointed a finger at her in a

[17] *See Thomas D. McEuen*, *supra* note 8.

[18] *See Richard J. Dube*, 42 ECAB 916 (1991).

meeting, accused her of walking around when she was on safety patrol duty, almost hit her with a nutting cart and believed that she was spying on him with a mirror. Appellant believed that a coworker took her mirror. She also asserted that Mr. Sage told her she was "stirring the pot" when she asked about her missing mirror and that Ms. Parks gave her a mean look. Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.[19] A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.[20] Appellant has not established that Mr. Sage told her that she was stirring the pot about her mirror or that Ms. Parks looked at her in a hostile manner. While she has submitted witness statements supporting that Mr. Bogajczyk believed that she was watching him from a mirror case, had an outburst at a meeting and bumped a nutting cart, she has not established that these incidents rose to the level of harassment.[21] Appellant thus has not established a compensable work factor with regard to her allegation of harassment.

As discussed, appellant has established compensable employment factors. OWCP did not analyze or develop the medical evidence given its finding that there were no compensable employment factors. The case will be remanded to OWCP for this purpose.[22] After such further development as deemed necessary, it should issue a *de novo* decision on this matter.[23]

CONCLUSION

The Board finds that the case is not in posture for decision.

[19] *T.G.*, 58 ECAB 189 (2006); *Doretha M. Belnavis*, 57 ECAB 311 (2006).

[20] *C.W.*, 58 ECAB 137 (2006); *Robert Breeden*, 57 ECAB 622 (2006).

[21] *See M.H.*, Docket No. 13-1585 (issued January 24, 2014); *William P. George*, 43 ECAB 1159 (1992).

[22] *See Robert Bartlett*, 51 ECAB 664 (2000).

[23] In view of the Board's disposition of the first issue, the issue of whether OWCP properly rescinded the August 3, 2012 statement of accepted facts is moot.

ORDER

IT IS HEREBY ORDERED THAT the April 18, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 4, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge, concurring:

I join the majority opinion in finding that further development of the present claim is warranted to determine whether appellant sustained an emotional condition causally related to a compensable factor of her federal employment under *Thomas D. McEuen*.[1] I write this opinion as I find that the November 14, 2012 decision of OWCP's claims examiner purporting to rescind acceptance of the August 30, 2012 statement of accepted facts is not supported by the Board's case precedent.

[1] 41 ECAB 387 (1990), *reaff'd on recon*., 42 ECAB 556 (1991).

In *Leroy Thomas, III*,[2] the Board had the opportunity to address case law regarding rescission of acceptance of a claim under *Daniel E. Phillips*,[3] and its progeny. As stated in *Phillips*:

> "*Once the Office has accepted a claim*, it has the burden of justifying the termination or modification of compensation benefits. Under such circumstances, the Office must either establish that its original determination was erroneous or that the employment-related disability has ceased.
>
> "*The act of reopening and rescinding its prior acceptance of a claim, based on an erroneous acceptance*, should not become a surreptitious route for the Office to readjudicate a case.… In the opinion of the Board, in order for the Office to reopen and rescind its prior acceptance of a claim, it must establish that its prior acceptance was erroneous through new or different evidence and that it is not merely second guessing the initial set of adjudicating officials."[4] (Emphasis added.)

The facts in *Thomas* reflect that the employee filed a claim for an emotional condition alleging various compensable factors. In the original statement of accepted facts, OWCP accepted as a compensable factor the employee's allegation that his supervisor threatened to kill him during a conversation on January 28, 1993. However, after further development, the June 2, 1994 OWCP decision denying the claim, found that the incident did not constitute a compensable factor of employment as a death threat was not factually established.

The dissenting opinion in *Thomas* asserted that this factual pattern raised an issue of a rescission of acceptance. The majority found, however, that the Board case law applicable to rescission of acceptance of a claim is not applicable in a situation in which OWCP modifies a statement of accepted facts. As the employee's claim of an emotional condition had never been accepted by OWCP, he retained the burden of proof to establish his claim for compensation benefits under FECA. The majority emphasized that the rescission standard was applicable only following acceptance of a claim by OWCP. The Board stated:

> "Prior to acceptance of a claim, [OWCP] retains the discretionary authority to make factual findings based on the evidence submitted to the record, either in a statement of accepted facts or in a memorandum to the Director incorporated into a compensation order. In effect, the rescission position raised in the dissent would contort ordinary notions of burden of proof as it would bind [OWCP] to factual findings proposed or prepared prior to the formal acceptance of a claim and during a period in which [the employee] retains the burden of proof of establishing his or her claim for compensation. The Board finds that this approach would be administratively burdensome and add unnecessary complexity to the informal claims adjudication process employed by the Office under the Act.

[2] 46 ECAB 946 (1995).

[3] 40 ECAB 1111 (1989).

[4] *Id*. at 1117-18.

> For this reason, the Board finds that the *Phillips* standard is applicable only in cases following acceptance of a claim for compensation by [OWCP]."[5]

The November 12, 2014 decision of an OWCP claims examiner purporting to rescind the August 30, 2012 statement of accepted facts is not consistent with the Board's long established case precedent concerning modification of a statement of accepted facts. The majority finds that issue two is moot, based on the disposition of the decision to remand the case for further development. I find that the November 12, 2014 decision is *void ab initio* for the reasons stated.[6]

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

[5] 46 ECAB at 953-54.

[6] *See P.V.*, Docket No. 12-1822 (issued June 7, 2013); *D.C.*, Docket No. 12-51 (issued June 25, 2012).