

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

M.S., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Middle Village, NY, Employer

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**Docket No. 13-733
Issued: March 6, 2014**

Appearances:
Stephen Larkin, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2013 appellant, through her representative, filed a timely appeal from a September 5, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 established that she sustained an emotional condition in the performance of duty.

On appeal, appellant contends that she sustained an emotional condition as a result of many issues with her supervisor, Rudy J. Marinacci.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 24, 2011 appellant, then a 61-year-old distribution window clerk, filed a traumatic injury claim alleging that she suffered from high blood pressure and emotional stress as a result of performing her federal duties. In an accompanying statement, she indicated that on September 23, 2011 she opened the window by herself and was looking for packages for a customer when Mr. Marinacci yelled at her and incorrectly told her that she was looking for packages at the wrong place. Appellant noted that he yelled at her in a threatening tone when she went to retrieve certified mail and told her that she was backing up the line on purpose and that he was going to watch her all day. She noted that at this point she began to feel sick and left work.

The employing establishment controverted the claim. It alleged, *inter alia*, that appellant's reaction was to administrative matters and was self-generated and not compensable. In support thereof, the employing establishment submitted a statement dated October 6, 2011 by Mr. Marinacci who noted that on September 23, 2011 appellant was the only clerk and that he had gone to the front to assist customers. He noted that appellant had been looking for a package in the wrong area and that appellant also had gone to pick up certified mail but that he told her that he was doing customer pick-ups and that she should remain on the screen line and not attempt to use slow-down tactics to back up the line. Mr. Marinacci noted that, after he retrieved the certified letter, appellant stated that she was going home because she could not take working with him. He contended that he did not raise his voice, threaten or scream at her.

By decision dated November 14, 2011, OWCP denied appellant's claim for compensation as she had not submitted sufficient evidence to establish that a medical condition arose during the course of employment and within the scope of compensable work factors.

On November 17, 2011 appellant requested an oral hearing before an OWCP's hearing representative.

At the hearing held on March 19, 2012, appellant's counsel contended that, although the injury claim was filed based on circumstances that happened on a particular date, the claim was actually due to culmination of events that took place involving Mr. Marinacci and appellant. Appellant testified that she worked for the employing establishment for 25 years, and was stationed at the Middle Village Station for 14 years. She indicated that Mr. Marinacci came to the station in 2009 and that her problems with him started on October 19, 2009 when she returned to work after vacation and Mr. Marinacci told her that she was not to continue working as she was still on vacation. Appellant stated that she was returning one week of vacation, but had to take another week of vacation against her will. She noted that in December 2009 Mr. Marinacci screamed and yelled at her for parking her car in a parking lot which she had previously been allowed to do under Supervisor Perez but he told her he was going to give her a letter of warning and put her in for 14 days of suspension over the matter, which caused her stress. She noted that in January 2010 she requested two weeks' vacation but that Mr. Marinacci denied vacation and told her that nobody was going on vacation. Appellant noted that, in January 2011, New York was hit by a big storm and most of the employees could not go to work. She testified that everyone was paid except her, and that when she inquired about this situation, he told her not to worry that he would pay her, but that she had to wait about three months to get

paid. Appellant stated that in February 2011 he only approved four hours of sick leave and that she had to take leave without pay for six days. She also alleged that he erroneously claimed she did not punch her time card for one day and so she was not paid that date. Appellant alleged that he changed her lunch hours. She stated that he required her to get permission to go to the bathrooms. Appellant contended that Mr. Marinacci criticized her clothes and shoes. She stated that he turned down her request to take off on Good Friday and would not accept her note from her pastor that she was at Good Friday service. Appellant noted that as soon as Mr. Marinacci was transferred to the Forest Hills station, things got better, but that, when he returned, on September 23, 2011 she was not allowed to do registry job again, he made her work the window. She described the aforementioned incident with regard to picking up mail and certified letters. Appellant noted that he told her that she was doing a bad job and was going to watch her all day. She stated that she started shaking and left but returned to get something and he continued the verbal abuse. Appellant described the rest of the day, including her illness and treatment. She noted that she has not returned to work for the employing establishment. Appellant testified that she filed numerous complaints with the Equal Employment Opportunity Commission (EEOC).

Daniel Muentes, a witness, testified that he had been a letter carrier for 28 years and was shop steward at the Forest Hills station. Mr. Muentes described incidents with Mr. Marinacci at the Forest Hills station, and contended that, in the two months he worked there, Mr. Marinacci created an unhealthy work floor and a hostile environment. He noted issues where Mr. Marinacci refused to pay people who were on leave. Mr. Muentes noted that there was a petition filed to remove Mr. Marinacci from the Temple Hills office and he was then transferred back to Middle Village.

Statements were submitted by Bart Lerner, Andrew Fontanetta and Theresa DeMarrais. In a statement dated March 1, 2012, Mr. Lerner indicated that on September 23, 2011 he was in the back of the office sorting mail when he heard Mr. Marinacci yelling at appellant who was working on the window operation by herself, as the office was shorthanded that day. He stated that he heard Mr. Marinacci tell appellant that she was wasting time in retrieving a package for a customer and that he was going to watch her all day. Mr. Lerner noted that appellant was visibly shaken, and started crying and left. He indicated that he completed the customer's transaction for appellant. Mr. Lerner noted numerous complaints were filed against Mr. Marinacci.

In a statement dated March 13, 2011, Mr. Fontanetta stated that he worked for the Forest Hills office for almost 25 years and has been a shop steward for 14. He discussed various incidents in that office involving Mr. Marinacci. Ms. DeMarrais indicated that she had been a clerk in the Forest Hills branch for 20 years and that Mr. Marinacci was evil and treated her so horribly that she had to go for psychiatric help. She stated that there was a petition to have Mr. Marinacci removed from Temple Hills.

The record contains a copy of an undated letter from Middle Village employees requesting the immediate removal of Mr. Marinacci from the employing establishment because his alleged bullying tactics as manager have caused resentment and animosity. The letter continued that he was belligerent, condescending and very unprofessional in his demeanor to fellow employees.

In a March 29, 2012 settlement agreement before EEOC, the employing establishment agreed to rescind the letter of warning regarding failure to follow instructions for unauthorized parking of a vehicle from all of appellant's files, and that the employing establishment agreed to pay \$1,350.00 to appellant in compensatory damages. The settlement agreement indicated that the employing establishment did not admit to any wrongdoing.

By decision dated May 10, 2012, OWCP's hearing representative affirmed the denial of appellant's claim as the evidence did not establish any compensable factors of employment.

On June 6, 2012 appellant requested reconsideration. In support of her request, she submitted letters with regard to settlements for the grievances she filed against the employing establishment. All of these letters were on the letterhead of the employing establishment. In a January 5, 2010 letter, it was agreed that appellant would be paid administrative leave for the balance of her tour on November 16, 2009, and will be credited for any leave used. In a January 8, 2010 letter, it was agreed that appellant would be paid administrative leave for the week of November 21, 2009. In an April 1, 2011 letter, it was agreed that appellant would be paid for eight hours plus one hour of overtime for March 17, 2011. In a separate April 1, 2011 letter, the employing establishment agreed to pay appellant 16 hours of sick leave for an unspecified date. In a May 19, 2011 letter, a settlement was reached wherein appellant was to utilize annual leave for Good Friday. In a November 4, 2011 proposed settlement letter signed by a labor relations specialist, it was proposed that appellant be reimbursed for all the leave she used based on the September 23, 2011 incident and that the hostile environment and sexual harassment cease. It was proposed that Mr. Marinacci not make threatening remarks to appellant and treat her equal to other station employees including male employees in the station. However, this letter was not countersigned and a handwritten note on the letter states, "Requested remedy not given; not paid or approved for [compensation]."

By decision dated September 5, 2012, OWCP determined that the evidence was not sufficient to modify the previous decision.

LEGAL PRECEDENT

To establish a claim that she sustained an emotional condition in the performance of duty, an employee must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric 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 emotional condition.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.² 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.³ Where the disability results from an

² *L.D.*, 58 ECAB 344 (2007).

³ *A.K.*, 58 ECAB 119 (2006).

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.⁴ 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.⁵

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.⁶ 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.⁷ 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.⁸

The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of FECA. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.⁹ Although the handling of leave requests and attendance matters are generally related to employment, they are administrative matters and not a duty of the employee.¹⁰

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the facts alleged or implicated by the employee did, in fact, occur.¹¹ Mere perceptions of harassment or discrimination are not compensable under FECA.¹² A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹³ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁴

⁴ 5 U.S.C. §§ 8101-8193. *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *J.F.*, 59 ECAB 331(2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁶ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

⁷ See *William H. Fortner*, 49 ECAB 324 (1998).

⁸ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁹ See *William H. Fortner*, *supra* note 7; see also *H.C.*, Docket No 12-457 (issued October 19, 2012).

¹⁰ *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

¹¹ *K.W.*, 59 ECAB 271 (2007).

¹² *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *J.F.*, 59 ECAB 331 (2008).

¹⁴ *G.S.*, Docket No. 09-764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005).

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.¹⁶ 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.¹⁷

ANALYSIS

Appellant has not alleged that she experienced an emotional reaction to her regular or specially assigned duties, or to a requirement imposed by her employment. She alleged that she sustained an emotional condition as a result of a number of incidents involving her supervisor, Mr. Marinacci. OWCP denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. While she filed a traumatic injury claim, OWCP properly considered this claim as an occupational disease claim as appellant attributed her condition to events occurring over more than one shift.¹⁸ The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

Appellant alleges that numerous incidents occurred with regard to improperly denying her request for paid leave and in switching the time for her lunch hour. The Board finds that these allegations are related to administrative or personnel matters unrelated to employee's regular or special assigned work duties and do not fall within coverage of FECA absent evidence showing error or abuse on the part of the employing establishment.¹⁹ There is no evidence that gives rise to abuse in Mr. Marinacci's assignment of appellant's lunch hour. There is some evidence that an error was made in denying appellant certain hours of sick and annual leave. The Board notes, however, that these errors were corrected and appellant did receive payment for the hours she alleged were improperly denied. The mere fact that actions of the employing establishment were later modified does not, in and of itself, establish error or abuse by

¹⁵ *D.L.*, 58 ECAB 217 (2006).

¹⁶ *K.W.*, *supra* note 11; *Matilda R. Wyatt*, *supra* note 6.

¹⁷ *Robert Breeden*, 57 ECAB 622 (2006).

¹⁸ A traumatic injury is defined as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

¹⁹ *Judy L. Kahn*, 53 ECAB 321 (2002) (matters involving the use of leave are generally not considered compensable factors of employment as they are administrative functions of the employer and not duties of the employee).

management in its administrative duties.²⁰ The fact that Mr. Marinacci reprimanded appellant for improperly parking her car also does not rise to the level of error or abuse on the part of management. In this case, there is no evidence to establish error or abuse regarding these administrative matters.²¹

There is evidence in support of an incident that occurred on September 23, 2011, as statements by appellant, Mr. Fontanetta and Mr. Lerner support that there was a verbal altercation on that date between Mr. Marinacci and appellant. On that date Mr. Marinacci reprimanded appellant for allegedly looking for a package in the wrong area and for picking up a certified mail item when he told her to remain on the window. Mr. Marinacci denied yelling at appellant; however, Mr. Lerner stated that he heard him yell at appellant from the back of the office. Mr. Lerner also noted that, as he moved closer, he heard Mr. Marinacci tell appellant that she was wasting time and that he was going to watch her all day. There is a proposed settlement letter in the record addressing this incident, but it was not countersigned by the employing establishment and it does not appear from the record that appellant was given the relief requested in the settlement letter. Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under FECA.²² The Board has generally held that being spoken to in a raised voice does not of itself constitute verbal abuse or harassment.²³ Although Mr. Marinacci may have spoken to appellant in a raised voice and his behavior may not have been that of an ideal supervisor, appellant has not established that this incident rose to the level of establishing verbal abuse. Generally, complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by FECA.²⁴ The fact that Mr. Marinacci criticized appellant's work performance, possibly in a raised voice, does not indicate that this was sufficiently egregious to establish a compensable factor under FECA.

With regard to the remaining allegations, mere dislike of actions taken by a superior will not be compensable absent evidence establishing error or abuse.²⁵ Mr. Marinacci's alleged criticism of appellant's dress did not amount to error or abuse.

The Board notes that appellant submitted other testimony and statements in support of her claim. Mr. Muentes, Mr. Fontanetta and Ms. DeMarrais worked with Mr. Marinacci at a different location and were therefore not privy to the specific allegations in this case. The copy of the letter asking that Mr. Marinacci be removed is not relevant to the specific facts of this case; furthermore, the letter is unsigned and no names are listed with regard to who wrote the letter.

²⁰ *Peter D. Butt, Jr.*, 56 ECAB 227 (2004).

²¹ *V.D.*, Docket No. 07-1873 (issued July 10, 2008).

²² *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

²³ *T.G.*, 58 ECAB 189 (2006).

²⁴ *See Marguerite J. Toland*, 52 ECAB 294 (2001).

²⁵ *D.P.*, Docket No. 12-1859 (issued March 27, 2013).

For the reasons set forth above, appellant has not established any compensable employment factors under FECA and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.²⁶

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. §§ 10.604 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 decision of the Office of Workers' Compensation Programs dated September 5, 2012 is affirmed.

Issued: March 6, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

²⁶ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *R.C.*, Docket No. 13-1075 (issued December 23, 2013); *see also Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).