

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

W.K., Appellant

and

**U.S. POSTAL SERVICE, BELLEVUE POST
OFFICE, Seattle, WA, Employer**

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**Docket No. 14-1504
Issued: November 20, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 18, 2014 appellant, through her attorney, filed a timely appeal from a January 27, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) that denied her traumatic injury claim and a May 22, 2014 decision that denied merit review. 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.

ISSUES

The issues are: (1) 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 that occurred on March 5, 2013; and (2) whether OWCP properly refused to reopen her claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal appellant's attorney asserts that the decisions are contrary to law and fact.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 5, 2013 appellant, then a 47-year-old city letter carrier, filed a traumatic injury claim alleging that Zachary Carter, the postmaster, ordered her in a loud voice to clock in that day while she was waiting for a union steward. She alleged this violated her rights and showed disrespect. In an attached statement, appellant noted that she had been in an accident the previous day when the mirror on her postal vehicle was cracked. Mr. Carter harassed and intimidated her about this, which caused anxiety.

In a March 5, 2013 statement, Mr. Carter noted that a meeting was held about three weeks prior with appellant and her supervisor, Crystal Dalan, in which appellant's return to work from a previous injury was discussed. Appellant did not agree with the proposed job and voices were raised. On March 5, 2013 Mr. Carter questioned her about an accident she had and subsequently observed her standing by the time clock about 10:10 a.m. He asked Ms. Dalan when appellant began work and was informed 10:00 a.m. When Mr. Carter questioned why appellant had not clocked in, Ms. Dalan stated that they were waiting for the union to hold a meeting about the motor vehicle accident. He inquired if appellant could case mail while they were waiting, and Ms. Dalan stated yes. Mr. Carter then approached appellant, who told him she had clocked in. When he told her to case mail, she disagreed, stating she was on "steward" time. Ms. Dalan and a union representative, Kyna Lower, then talked with appellant.

In an April 4, 2013 correspondence, the employing establishment controverted the claim. It noted that appellant had been on the periodic rolls under file number xxxxxx153 from November 20, 2011 to February 9, 2013. Appellant was offered a modified assignment which she accepted and returned to work on February 12, 2013.

By letter dated April 5, 2013, OWCP informed appellant of the evidence needed to support her claim. Appellant submitted a May 1, 2013 psychological evaluation from James A. Keyes, Ph.D., a clinical psychologist. She was seen for anxiety. Appellant had been off work for an employment-related condition and had recently returned to work. Dr. Keyes noted a history of physical and emotional problems. Appellant reported a history that on March 5, 2013 she was waiting for union representation for a meeting about a motor vehicle accident the previous day when the postmaster directed her to return to work, which she believed constituted harassment. Dr. Keyes performed a mental status examination and diagnosed major depressive disorder, recurrent episode, moderate; panic disorder without agoraphobia and occupational problem. He advised that appellant had long-term problems with depression and anxiety that were likely related to personality factors and affected her relationships in and out of work, which predated her stress claim.

In a May 8, 2013 decision, OWCP denied the claim, finding that appellant had not established a compensable factor of employment.

Appellant timely requested a hearing, and submitted a statement in which she maintained that Mr. Carter violated her Weingarten rights on March 5, 2013. She had been instructed by Rod Artajo, the station manager, to clock in, find Ms. Lower, and report for an investigative interview regarding the motor vehicle accident that occurred the previous day. Appellant asked Mr. Artajo if she could meet with Ms. Lower prior to the investigative meeting and he agreed but

that Ms. Lower needed to get something from her car. As appellant waited, Mr. Carter saw her. She alleged he rudely questioned her and yelled at her and prevented her from meeting with Ms. Lower when he ordered her to work. Appellant had a panic attack while Mr. Carter allegedly yelled at her and Ms. Lower told her to go to work. She filed an Equal Employment Opportunity Commission (EEO) complaint against Mr. Carter and alleged that her anxiety was due to years of harassment and being treated without respect by management which began in January 2001 while working under restrictions due to a major automobile accident that was not employment related.

At the hearing, held on December 2, 2013, appellant testified that she had been harassed for years at the employing establishment and that she was not under active psychiatric care. On March 4, 2013 following the motor vehicle accident, she was told to come in the next day for an investigative interview, and Mr. Artajo had given her permission to talk with her union steward, Ms. Lower, prior to the investigative meeting. When Ms. Lower went to retrieve something from her car, Mr. Carter saw appellant waiting and she stated that he yelled at her to begin work. When Ms. Lower returned she did not help appellant. Counsel argued that appellant had established a compensable factor of employment.

In a December 5, 2013 report, Dr. Nhumey Tropp, an osteopath, advised that appellant reported being stressed at work that day due to interaction with a supervisor. He diagnosed anxiety state, unspecified. On December 6, 2013 Dr. Pamela Girres, a Board-certified internist, reported that appellant had an encounter with a supervisor the previous day. Appellant's examination was normal and she was advised to resume work on December 7, 2013.

By decision dated January 27, 2014, an OWCP hearing representative affirmed the May 8, 2013 decision. He found that appellant did not establish an employment-related emotional condition due to the events of March 5, 2013. The hearing representative determined that she did not substantiate her allegations of error or abuse by management that day.

On March 19, 2014 appellant, through her attorney, requested reconsideration. She submitted a March 4, 2013 statement in which she described the motor vehicle accident. On April 22, 2013 appellant again described the events of March 5, 2013. She also addressed subsequent events, including a March 9, 2013 incident and a 14-day suspension. Two unsigned copies of an investigative interview conducted on March 5, 2013, completed by different individuals, were submitted. They reflect that appellant was represented by Ms. Lower, who was present as a union steward. Documentation regarding an improper vehicle curbing incident that occurred on March 9, 2013 and resulted in a 14-day suspension for which appellant filed a grievance was also submitted. A dispute resolution team decision dated July 10, 2013 removed the 14-day suspension and expunged it from her records. In a March 8, 2013 report, Dr. Girres stated that appellant had been treated prior to the March 5, 2013 incident and that the details and diagnosis were confidential. She advised that appellant could return to work on March 9, 2013.²

² Dr. Girres also provided a February 15, 2013 report in which she indicated that appellant had a tender right first dorsal interspace.

In a nonmerit decision dated May 22, 2014, OWCP found that the evidence submitted on reconsideration was not relevant to the incident of March 5, 2013 and denied appellant's request for merit review.

LEGAL PRECEDENT -- ISSUE 1

To establish his or her claim that he or she sustained a stress-related condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her stress-related condition.³ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.⁴ 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.⁵

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*,⁶ the Board explained that there are distinctions as to the employment situations giving rise to a compensable emotional condition under FECA. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.⁷ 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.⁸ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁹ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹⁰ An employee's perceptions alone are insufficient to establish an employment-related emotional condition.¹¹

³ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁵ *Id.*

⁶ 28 ECAB 125 (1976).

⁷ *See Robert W. Johns*, 51 ECAB 137 (1999).

⁸ *Lillian Cutler*, *supra* note 6.

⁹ *J.F.*, 59 ECAB 331 (2008).

¹⁰ *M.D.*, 59 ECAB 211 (2007).

¹¹ *Roger Williams*, 52 ECAB 468 (2001).

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.¹² 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.¹³

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.¹⁴ With regard 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.¹⁵

ANALYSIS -- ISSUE 1

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 causally related to factors of her federal employment that occurred on March 5, 2013.

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*.¹⁶ Rather, her claim pertains to events that occurred on March 5, 2013. Appellant alleged that Mr. Carter, the postmaster, yelled at her and instructed her to begin working while she was waiting for a union steward prior to attending a scheduled investigative interview regarding a

¹² *Charles D. Edwards*, 55 ECAB 258 (2004).

¹³ *Kim Nguyen*, 53 ECAB 127 (2001).

¹⁴ *James E. Norris*, 52 ECAB 93 (2000).

¹⁵ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁶ *See supra* note 14.

motor vehicle accident that occurred the previous day. She alleged that he violated her *Weingarten* rights and was disrespectful.¹⁷

The Board has held that, while verbal abuse may constitute a compensable factor of employment, not every statement in the workplace will be covered by FECA.¹⁸ Appellant submitted insufficient evidence to substantiate her allegations of abuse by the postmaster. There is no statement from any witness that supports Mr. Carter yelled at her or treated her in a disrespectful manner on March 5, 2013. As such, appellant has not established that she was subjective to verbal abuse on March 5, 2013. She also contended that her *Weingarten* rights were violated. The *Weingarten* decision gave employees the right to representation during an investigative interview when the employee has the reasonable belief that the interview may lead to discipline.¹⁹ The evidence of record supports that Ms. Lower, appellant's union steward, was present for the investigative interview held on March 5, 2013. There is insufficient evidence of any administrative error in this regard.²⁰

With regard to Mr. Carter directing appellant to work while she waited for the investigative interview to begin, the assignment of work is an administrative function of the employer. The manner in which a supervisor exercises his or her discretion generally falls outside the ambit of FECA.²¹ Where the evidence demonstrates that a manager either erred or acted abusively in discharging his or her administrative or personnel responsibilities, such action will be considered a compensable employment factor.²² In this case, there is no evidence to establish error or abuse by Mr. Carter. The record does not contain independent, corroborative evidence to support appellant's allegations regarding the events of March 5, 2013.

Appellant alleged that Mr. Carter harassed her that day; but mere perceptions of harassment or discrimination are not compensable under FECA.²³ 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

¹⁷ Mr. Carter also noted a meeting that was held about three weeks before March 5, 2013, involving him, appellant, and Ms. Dalan in which appellant's return to work from a previous injury was discussed. Mr. Carter noted that appellant did not agree with the proposed job and voices were raised. Appellant did not allege that this caused her emotional condition on her March 5, 2013 traumatic injury claim. In any event, the Board has held that a raised voice in the course of a conversation does not, in and of itself, warrant a finding of verbal abuse. *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

¹⁸ *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

¹⁹ *N.L.R.B., v. J. Weingarten*, 410 U.S. 251 (1975).

²⁰ *See. R.G.*, Docket No. 12-1236 (issued November 15, 2012).

²¹ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

²² *Kim Nguyen*, 53 ECAB 127 (2001).

²³ *Supra* note 14.

reliable evidence.²⁴ As noted, appellant submitted no corroborative evidence in this case. Therefore, she did not establish a compensable factor of employment.²⁵

Appellant has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty on March 5, 2013.²⁶

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.²⁷ Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).²⁸ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.²⁹ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.³⁰

ANALYSIS -- ISSUE 2

With her March 19, 2014 reconsideration request, appellant did not allege or contend that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).³¹

With respect to the third requirement under section 10.606(b)(2), appellant submitted two unsigned copies of an investigative interview conducted on March 5, 2013, completed by different individuals. This material reflects that appellant was represented by Ms. Lower as a

²⁴ *Id.*

²⁵ *See Robert Breeden*, 57 ECAB 622 (2006).

²⁶ As appellant did not establish a compensable employment factor, the Board need not consider the medical evidence of record. *See Katherine A. Berg*, 54 ECAB 262 (2002).

²⁷ 5 U.S.C. § 8128(a).

²⁸ 20 C.F.R. § 10.608(a).

²⁹ *Id.* at § 10.606(b)(3).

³⁰ *Id.* at § 10.608(b).

³¹ *Id.* at § 10.606(b)(2).

union steward. The statements are not relevant to the issue of whether appellant established a compensable employment factor. Similarly, additional evidence submitted in regard to the events that occurred after March 5, 2013 is not relevant to the merit issue in this case.

The evidence submitted by appellant on reconsideration is not relevant to whether she established a compensable employment factor on March 5, 2013.

Appellant did not establish that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or constitute relevant and pertinent new evidence not previously considered by OWCP. OWCP properly denied her reconsideration request.

CONCLUSION

The Board finds that appellant did not establish that she sustained an emotional condition in the performance of duty on March 5, 2013. The Board further finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 22 and January 27, 2014 are affirmed.

Issued: November 20, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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