

FACTUAL HISTORY

On April 20, 2013 appellant, then a 51-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained an emotional condition due to factors of her federal employment. She attributed her emotional condition to a pattern of harassment, retaliation, bullying, and being denied leave. Appellant stopped work in April 2013 and did not return.

The employing establishment controverted the claim, alleging that appellant filed her claim in response to an April 12, 2013 letter of warning for failure to maintain regular attendance. It noted that she held a different position from January 17 to May 4, 2012. Appellant then voluntarily returned to her prior job.

OWCP issued May 16 and August 9, 2013 letters advising appellant of the additional evidence needed to establish her claim, including a description and corroboration of the claimed exposures and work incidents, and a statement from her attending physician explaining how those work factors would cause the claimed emotional condition.

Appellant responded by July 8, 2013 letter. She explained that her emotional condition began in January 2012 when she began a new job. Appellant contended that on January 5, 2012 a supervisor tried to induce appellant's coworkers to apply for the new job because she did not want appellant under her supervision. She retreated to her former position after two weeks. Appellant asserted that the employing establishment erred by requesting that she recertify her Family and Medical Leave Act (FMLA) request on April 16, 2012. She alleged that, after she was diagnosed with a pulmonary mass and thyroid cancer in 2012, her supervisors denied her leave requests, although she had been granted FMLA leave in previous years.³ They held appellant absent without leave (AWOL), and falsified leave documents. Appellant alleged that on November 5, 2012 her supervisor told her that she had a zero leave balance. She experienced stress during a November 6, 2012 conversation with another supervisor about leave use. Appellant also attributed her condition to an April 12, 2013 letter of warning regarding irregular attendance due to excessive leave use.⁴ She alleged that on April 24, 2013 when she went to the employing establishment to pick up paperwork, her supervisors yelled at her, told her she was not allowed to be there, and ejected her from the premises. Appellant also attributed her condition to a supervisor allegedly leaving a note to another supervisor about appellant's leave use in a photocopier, where it was discovered by a coworker on an unspecified date. She also asserted that workplace exposures to mold, asbestos, flooding, rodent feces, excess humidity, lead paint, and unsanitary drinking water adversely affected her mental status. Appellant noted filing Equal Employment Opportunity (EEO) grievances regarding her allegations of harassment.⁵

³ Appellant submitted FMLA approval forms dated July 27, 2009, January 27, 2011, and March 21, 2012.

⁴ On April 12, 2013 the employing establishment issued appellant a letter of warning for failure to maintain regular attendance from October 4, 2012 through April 11, 2013.

⁵ Appellant submitted December 2011 EEO grievance documents that did not contain a final determination.

In support of her allegations of supervisory harassment, appellant provided a coworker's statement alleging that on January 5, 2012 a supervisor instructed the coworker to apply for a job appellant wanted. She also submitted statements from six coworkers asserting that on November 8, 2012 her two supervisors asked appellant to leave the building as she was yelling loudly and disrupting the work environment. Two coworkers confirmed that on April 24, 2013 both the supervisors asked appellant to leave the building. A coworker alleged that one supervisor told appellant that she was not allowed at work "in a very mean manner and chased her out."

Regarding her allegations of toxic exposures, appellant submitted August 2010, April 2012, May and July 2013 industrial hygiene surveys noting the abatement of asbestos flooring, lead paint, and mold on a wooden window sash. Studies showed the presence of magnesium sulfate, a nonhazardous substance not known to be an allergen, on a concrete deck.⁶

The employing establishment submitted a September 11, 2013 statement from a supervisor contesting appellant's allegations. The supervisor asserted that appellant filed her claim in response to disciplinary actions for attendance issues. She noted that management made several attempts to change appellant's schedule to accommodate her leave requests, but that appellant refused these offers. The supervisor provided her October 29, November 1, and November 5, 2012 e-mails to a co-supervisor noting that appellant telephoned in on each of those days, stating that she would be taking time off although she knew she had no leave available. Although advised that she would be AWOL, appellant did not report for duty.

A supervisor provided her November 8, 2012 e-mails regarding her discussion that day with appellant regarding an unauthorized November 7, 2012 absence. Appellant allegedly called her supervisor a "mean heartless bitch," causing the other supervisor to end the conversation. Appellant then left the building.

Appellant also submitted medical evidence. Dr. Monte L. Bible, an attending osteopath Board-certified in occupational medicine, provided reports from August 21, 2012 to July 24, 2013 relating appellant's account of workplace harassment and hazardous exposures. He diagnosed mild, stable depression, and anxiety symptoms. Dr. Leslie Yan Meier, a licensed clinical psychologist, noted treating appellant from April 17 to June 7, 2013. She related appellant's account of supervisory harassment, significant family stresses, and a history of depression and anxiety. Dr. Meier diagnosed depressive disorder and anxiety disorder not otherwise specified.⁷

By decision dated April 16, 2014, OWCP denied appellant's emotional condition claim finding that she had not established any compensable factors of employment. It found that the November 5, 2012 discussions about leave matters with supervisors, and the April 12, 2013 letter

⁶ On May 7, 2013 the Occupational Safety and Health Administration (OSHA) cited the employing establishment for obstacles in front of electrical panels, improperly marked exits, and not providing lead test results when requested.

⁷ Appellant also submitted medical reports regarding thyroid and respiratory conditions that did not address her emotional condition claim.

of warning were administrative matters not in the performance of duty, and that no error or abuse was shown. OWCP further found that there was no evidence establishing administrative error or abuse regarding her December 2011 job bid. It found that appellant did not submit sufficient evidence to establish as factual her allegations of harassment, bullying, and records falsification. A November 5, 2012 investigative interview, found someone left a document regarding her use of leave in a photocopier, that she was asked to recertify her FMLA leave on April 16, 2012, and that a supervisor told coworkers that appellant was AWOL.

Appellant requested a hearing, held telephonically on November 10, 2014. She alleged that, after she filed a grievance, the employing establishment rescinded the letter of warning. Appellant also alleged that her postmaster was dismissed for falsifying records. She contended that supervisors made her call in every day for three months because they would not accept her medical certifications. The hearing representative left the record open for 30 days. Appellant did not submit additional evidence.

By decision dated January 28, 2015, an OWCP hearing representative affirmed the April 16, 2014 decision, finding that appellant had not established a compensable factor of employment. She found that appellant did not establish her allegations of harassment, mistreatment, or bullying. Witness statements established only that appellant spoke to supervisors, not that they harassed her as alleged. The hearing representative found that there was no evidence that the employing establishment acted erroneously or abusively with regard to the administrative matters of leave use, discipline, attendance, job bids, and records processing, or that supervisors discussed appellant inappropriately. She further found that appellant did not establish her allegations of stress from working in a “sick building” as the evidence did not establish that her work environment was hazardous.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁸ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁹

Where disability results from an employee’s 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.¹⁰ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.¹¹ This

⁸ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁹ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁰ 5 U.S.C. §§ 8101-8193. *Lillian Cutler*, 28 ECAB 125 (1976).

¹¹ *Ruthie M. Evans*, 41 ECAB 416 (1990).

burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.¹²

In cases involving emotional conditions, the Board has held that when working conditions are alleged as factors in causing 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.¹³ If a claimant implicates 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.¹⁴

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relationship. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹⁵ The phrase “while in the performance of duty” has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers’ compensation law of arising out of and in the course of employment.

In *Lillian Cutler*,¹⁶ the Board noted that workers’ compensation law is not applicable to each and every injury or illness that is somehow related to an employee’s employment. There are situations when an injury or illness has some connection with the employment, but nonetheless does not come within the coverage of workers’ compensation as they are found not to have arisen out of the employment. When an employee experiences emotional stress in carrying out his or her employment duties, or has fear and anxiety regarding his or her ability to carry out his or her duties, and the medical evidence establishes that the disability resulted from his or her 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 resulted from her emotional reaction to her day-to-day duties. The same result is reached when the emotional disability resulted from the employee’s emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of the work.¹⁷

¹² *Effie O. Morris*, 44 ECAB 470 (1993).

¹³ *See Norma L. Blank*, 43 ECAB 384 (1992).

¹⁴ *Marlon Vera*, 54 ECAB 834 (2003).

¹⁵ *See* 5 U.S.C. § 8102(a).

¹⁶ *Supra* note 10.

¹⁷ *Id.* at 130.

In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is insufficient to constitute a personal injury sustained in the performance of duty within the meaning of FECA. Thus, disability is not covered when it results from an employee's fear of a reduction-in-force, unhappiness with doing inside work, desire for a different job, brooding over the failure to be given work she desires, or the employee's frustration in not being permitted to work in a particular environment or to hold a particular position.¹⁸ Board case precedent demonstrates that the only requirements of employment which will bring a claim within the scope of coverage under FECA are those that relate to the duties the employee is hired to perform.¹⁹

ANALYSIS

Appellant alleged that she sustained an emotional condition due to denial of leave, denial of FMLA leave, a November 5, 2012 investigative discussion of leave use, being classified as AWOL, and alleged interference with a job bid. OWCP found that the leave use matters and the job bid were administrative, noncompensable factors. Therefore, the Board must review whether the alleged incidents are covered employment factors under FECA.

Leave use is a noncompensable administrative matter unless error or abuse is shown.²⁰ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²¹ To support such a claim, a claimant must establish a factual basis by providing probative and reliable evidence.²²

In support of her allegations, appellant submitted forms showing that the employing establishment granted her FMLA leave request. Two supervisors provided statements noting that from October 29 to November 5, 2012 appellant knowingly failed to apply for leave or seek authorization for absences, instead informing her supervisors that she would take leave in any case. The supervisors also noted that appellant refused offers of schedule changes or other accommodations that would have allowed her to see her physician during off hours so she would not have to use leave. They also advised her that taking leave with no authority would result in her being charged as absent without leave. Appellant submitted a copy of the April 12, 2013 letter of warning, listing the October and November 2012 dates, AWOL status, as well as other work absences. Regarding her allegation at the hearing that the employing establishment rescinded the letter, the Board has held that a subsequent reduction or rescission of such action by itself does not establish error or abuse.²³ The Board finds that under these circumstances, appellant has not established that the employing establishment acted erroneously or abusively regarding leave use. Appellant's supervisors provided a detailed explanation of their actions,

¹⁸ *Id.* at 125.

¹⁹ *L.R.*, Docket No. 14-302 (issued June 6, 2014).

²⁰ *James P. Guinan*, 51 ECAB 604, 607 (2000).

²¹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

²² *See Barbara J. Nicholson*, 45 ECAB 843 (1994).

²³ *Paul L. Stewart*, 54 ECAB 824 (2003); *Mary L. Brooks*, 46 ECAB 266, 274 (1994).

including their attempts to counsel appellant and accommodate her medical appointments. Therefore, appellant has not established denial of leave and leave use as compensable work factors.²⁴

Appellant also attributed her condition to a supervisor interfering with a job bid in January 2012. A coworker noted that on January 5, 2012 a supervisor asked her to apply for the same position as appellant. However, there is no evidence that the supervisor erred by doing so, or was otherwise abusive. There is no evidence that the supervisor of the unit where appellant had bid for a job, was forbidden to discuss the matter or encourage others to apply. An employee's dissatisfaction with the way a supervisor performs duties or exercises discretion in assigning work is not compensable absent error or abuse.²⁵ As appellant did not submit corroborating evidence establishing error or abuse, she failed to establish a compensable employment factor in this regard.

Appellant also alleged a pattern of harassment, including November 5, 6, and 8, 2012, and April 24, 2013 bullying by two supervisors. For harassment to give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment or discrimination did in fact occur.²⁶ Mere perceptions of harassment, retaliation, or discrimination are not compensable under FECA.²⁷ Appellant did not submit probative evidence corroborating her allegations of harassment. She provided six witness statements asserting that appellant yelled at supervisors on November 8, 2012 and was therefore asked to leave. Although one coworker alleged that one supervisor was "mean" and "chased" appellant on April 24, 2013, these allegations are vague. Also, the other witness to the incident did not confirm this. The absence of clear documentation diminishes the validity of appellant's contentions in this case. As she has not substantiated her allegations with probative evidence, appellant has not established a compensable employment factor under FECA with respect to the claimed harassment.

OWCP also found that appellant had not established several of her allegations as factual. These include supervisors tampering with her leave documents, a supervisor leaving a note about her leave use in a photocopier, a November 5, 2012 investigative interview, and toxic or hazardous workplace exposures. The Board finds that appellant did not submit evidence corroborating that supervisors tampered with her leave documents, or that a supervisor left a note about leave use in a photocopier. Industrial hygiene surveys with laboratory analyses did not establish hazardous levels of any substances in appellant's work area, or that she was otherwise exposed to toxins at the employing establishment. Regarding a November 5, 2012 investigative interview, the Board notes that a supervisor noted speaking with appellant about leave use on November 5, 2012. However, there is no evidence that this conversation was an investigative interview. Therefore, OWCP correctly found that this allegation was not established as factual.

²⁴ *Janice I. Moore*, 53 ECAB 777 (2002).

²⁵ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005); *Linda J. Edward-Delgado*, 55 ECAB 401 (2004).

²⁶ *Supra* note 14.

²⁷ *Kim Nguyen*, 53 ECAB 127 (2001).

Therefore, the Board finds that appellant did not establish that she sustained an emotional condition as alleged, as she did not establish any compensable factors of employment.²⁸

On appeal, appellant's representative asserts that appellant provided sufficient evidence to establish that she worked in a "sick building" and in a hostile environment. He alleges that building repairs required by OSHA contributed to appellant's condition. As stated above, the industrial hygiene surveys of record do not establish that appellant was exposed to any hazardous substances or that she worked in an unsanitary or unsafe environment.

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 has not established an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 28, 2015 is affirmed.

Issued: June 22, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

²⁸ As appellant did not establish any compensable factors of employment, the medical evidence need not be considered. *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).