

ISSUE

The issue is whether appellant has met her burden of proof to establish an emotional condition in the performance of duty.

FACTUAL HISTORY

On September 3, 2015 appellant, then a 61-year-old management and program analyst, filed an occupational disease claim (Form CA-2) alleging that she had insomnia, heightened anxiety, headaches, elevated blood pressure, and other conditions aggravated by a hostile work environment. She claimed that she first became aware of her conditions and their relationship to her federal employment on August 12, 2015.

In a September 22, 2015 letter, OWCP informed appellant of the deficiencies of her claim and requested that she provide additional evidence.

In a statement received October 21, 2015, appellant noted having worked at the employing establishment since 1988 and having had a subarachnoid hemorrhage in 2007 which caused a disability. She alleged that on February 20, 2015 she learned that a coworker, S.D., threatened her with physical harm. Appellant related that a different coworker informed her of the threat. She claimed that since receiving this threat she had been discriminated against due to her age and disability by her supervisor, D.K. Appellant met with D.K. on February 23, 2015 about the threat, but she declined to reveal the name of the informant as requested by D.K. On February 24, 2015 she requested reasonable accommodation due to the threat and her resulting anxiety and inability to work at her workstation. D.K. denied the request because she refused to identify the informant. Appellant claimed that D.K. inferred that her conduct led S.D. to threaten her or discuss threats directed towards other people. She related that D.K. told her that she had created a hostile work environment and counseled appellant regarding such conduct. D.K. noted that she overheard appellant discussing the threats with another employee. Appellant advised that she told coworker, K.L., her attorney, and the mayor's office about the threat. On February 23, 2015 a coworker informed her that D.K. referenced her mental capacity.

On February 24, 2015 appellant again requested reasonable accommodation from D.K. D.K., on February 25, 2015, removed her from a maxi-flex schedule and monitored her on a straight eight-hour time schedule due to the workload. Appellant asserted that the workload had nothing to do with flexibility related to an alternate work schedule (AWS), which she had been on for seven years. She noted that none of her team members, all younger than her, had received an eight-hour work restriction.

On February 24, 2015 appellant informed D.K. and Dr. T., D.K.'s supervisor, that she had an appointment for medical testing on February 25, 2015. She claimed that D.K. still scheduled a deliverable due at the time of her appointment. D.K. cited appellant for a performance issue for being late on the deliverable. Appellant claimed that this demonstrated discrimination and a hostile work environment created by D.K. She noted instances where younger coworkers were allowed to work at home due to medical conditions.

On March 4, 2015 appellant had a headache and requested telework which D.K. denied, stating that she could not telework while sick. On March 3, 2015 she met with D.K. and Dr. T. about a performance plan. D.K. showed appellant an August 2014 memorandum regarding her conduct. On March 10, 2015 she informed appellant that, even though she declined to sign the performance plan, it still went into effect on the day she presented the plan to her. D.K. stated that appellant had the same plan as the rest of the staff and it had not changed.

On March 9, 2015 D.K. had assigned appellant to draft a telework policy. Appellant asserted that a contractor instructed D.K. to give her this assignment and that D.K. had not received similar instructions for younger team members' assignments. She contended that her March 9, 2015 request to be reassigned was ignored. On March 3, 2015 appellant e-mailed D.K. about an agency agreement with the union regarding her removal from an AWS. She related that, on several occasions, she asked D.K. for the same opportunities afforded to other employees, such as telework and changing her work hours, to no avail. Appellant noted that there was a snowstorm on March 5, 2016 and that on March 6, 2015 D.K. denied her telework request despite an Office of Personnel Management (OPM) policy allowing a two-hour delayed arrival, telework, or unscheduled leave. She maintained that her work environment became very hostile after she told D.K. about the threat. Appellant asserted that D.K. took sides with the person who made the threat and the person who told her about the threat. She sought a remedy that included the return of all of her annual leave used during the snowstorm and a monetary buyout or reassignment.

In an October 20, 2015 report, Dr. Phyllis J. Mayo, a licensed psychologist, noted several work incidents reported by appellant. The incidents included the alleged threat of bodily harm by a coworker, hostile treatment and denial of her requests for reasonable accommodation by D.K. and T.B., appellant's new supervisor, and assignment of work. Dr. Mayo also noted that appellant was subjected to daily instances of scrutiny, criticism, and judgment. She provided examination findings and diagnosed persistent moderate depressive disorder with panic attacks. Dr. Mayo noted that appellant attributed her panic attack symptoms to her hostile work environment.

In a July 29, 2016 decision, OWCP denied appellant's claim for an emotional condition. It found that she had not established any compensable employment factors. OWCP also found that the evidence of record did not contain a medical diagnosis in connection with the claimed incidents.

On August 12, 2016 appellant, through counsel, requested a telephone hearing with an OWCP hearing representative. The hearing was held on December 28, 2016. Following the hearing, appellant submitted a January 7, 2016 letter from Dr. Mayo in which she restated her diagnosis of persistent moderate depressive disorder with panic attack. She advised that appellant could return to work on January 8, 2016.

Appellant also submitted an April 8, 2015 medical excuse letter in which Dr. Uzochukwu W. Unegbu, a family practitioner, indicated that appellant was under his care for a chronic condition that required cognitive behavioral therapy. He advised that she was unable to function well in a noisy environment and requested accommodation of her needs at work.

In a March 15, 2017 decision, an OWCP hearing representative affirmed the July 29, 2016 decision. She found that appellant had not established any compensable employment factors.

LEGAL PRECEDENT

A claimant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by factors of his or her federal employment.³ To establish an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; (2) medical evidence establishing that he or she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.⁴

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 regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁵ 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 frustration from not being permitted to work in a particular environment or to hold a particular position.⁶

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.⁷ 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.⁸ 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.⁹

³ *Pamela R. Rice*, 38 ECAB 838 (1987).

⁴ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁵ *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁷ *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

⁸ *See William H. Fortner*, 49 ECAB 324 (1998).

⁹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

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.¹⁰ 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.¹¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an emotional condition causally related to factors of her federal employment. The Board notes that she did not attribute her emotional condition to the performance of her regular or specially assigned duties, as an ammunition quality assurance specialist, under *Lillian Cutler*.¹² Rather, appellant has attributed her emotional condition to being harassed as she was verbally threatened with physical harm by a coworker and discriminated by her supervisor, D.K., based on her age and disability, after appellant informed D.K. about the alleged threat.

Harassment by supervisors and coworkers, including physical threats and verbal abuse, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.¹³ A claimant, however, must substantiate allegations of harassment with probative and reliable evidence.¹⁴ The Board finds that the factual evidence of record fails to support appellant's allegations of a physical threat. While appellant noted that a coworker informed her about the alleged physical threat, she did not submit a witness statement from the coworker to corroborate her allegation.¹⁵ Accordingly, appellant has not established her allegation that she was threatened with physical harm by a coworker.

The Board also finds that appellant's allegations of discrimination by D.K. have not been established. Appellant contended that her requests for reasonable accommodation due to her anxiety about the threat and inability to work at her workstation, and her failure to be reassigned were due to appellant's refusal to identify the employee who told her about the alleged threat. She claimed that in denying her request to telework due to a headache, D.K. stated that she could

¹⁰ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹¹ *Id.*

¹² *Supra* note 4.

¹³ *T.G.*, 58 ECAB 189 (2006); *Doretha M. Belnavis*, 57 ECAB 311 (2006); *Charles D. Edwards*, 55 ECAB 258 (2004).

¹⁴ *C.W.*, 58 ECAB 137 (2006); *Robert Breeden*, 57 ECAB 622 (2006).

¹⁵ *See Joel Parker, Sr.*, 43 ECAB 220 (1991) (the Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

not telework while sick. Appellant noted instances wherein her younger coworkers were allowed to telework due to their medical conditions. She indicated that D.K. denied her request to telework due to a snowstorm on the day prior to her request despite OPM regulations that allowed a two-hour delayed arrival, telework, or unscheduled leave under these circumstances. Appellant further claimed that D.K. blamed her conduct for the employee's threat against her and other employees and the creation of a hostile work environment because appellant had discussed the threat with a coworker. She related that D.K. sided with the employee who made the alleged threat. Appellant noted that during a meeting, D.K. showed her an August 2014 memorandum regarding her conduct and that a coworker informed her that D.K. had commented about appellant's mental capacity. Appellant asserted that D.K. removed her from an AWS and placed her on a straight eight-hour work schedule due to the workload despite an agreement between the employing establishment and union regarding removal from the work schedule and despite the fact that younger members on her team were not being placed on this same schedule. She alleged that D.K. assigned her a task on the same day that she had a medical appointment and subsequently cited her late performance on the assignment. Appellant questioned why a contractor instructed D.K. to give her an assignment to draft a telework policy since the contractor had never instructed D.K. to give assignments to younger team members. She noted that despite her refusal to sign a performance plan it went into effect. Appellant related, however, that D.K. told her that she received the same performance plan as the rest of the staff and it was no different from her previous one.

Appellant's allegations regarding the denial of her requests for reasonable accommodation¹⁶ and reassignment,¹⁷ leave usage,¹⁸ change in duty shift,¹⁹ assignment of work,²⁰ disciplinary matters,²¹ and issuance of a performance plan²² relate to administrative or personnel management actions. Administrative and personnel matters, although generally related to employment, are administrative functions of the employer rather than the regular or specially-assigned work duties of the employee. For an administrative or personnel matter to be considered a compensable factor of employment, the evidence must establish error or abuse on the part of the employer.²³ Appellant has not submitted any evidence to substantiate that these management actions were anything more than an ordinary tension between a manager and an employee and are insufficient to prove error and abuse.

¹⁶ *James P. Guinan*, 51 ECAB 604, 607 (2000); *John Polito*, 50 ECAB 347, 349 (1999).

¹⁷ *James W. Griffin*, 45 ECAB 774 (1994).

¹⁸ *See Lori A. Facey*, 55 ECAB 217 (2004); *Judy L. Kahn*, 53 ECAB 321 (2002).

¹⁹ *Peggy R. Lee*, 46 ECAB 527 (1995).

²⁰ *Robert W. Johns*, 51 ECAB 137 (1999).

²¹ *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

²² *Elizabeth W. Esnil*, 46 ECAB 606 (1995).

²³ *Thomas D. McEuen*, *supra* note 7.

The Board finds that appellant has not established a compensable employment factor. Thus, it is unnecessary to address the medical evidence of record.²⁴

On appeal counsel contends that OWCP's decision is contrary to fact and law. For the reasons stated above, the Board finds that counsel's arguments are not substantiated.

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 failed to meet her burden of proof to establish an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²⁴ *Garry M. Carlo*, 47 ECAB 299 (1996). See *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).