

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

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C.M., Appellant)	
)	
and)	
)	Docket No. 17-1076
DEPARTMENT OF HOMELAND SECURITY,)	Issued: November 14, 2018
TRANSPORTATION SECURITY)	
ADMINISTRATION, New Windsor, NY,)	
Employer)	
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Appearances:
*Paul Kalker, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 17, 2017 appellant, through counsel, filed a timely appeal from a March 23, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

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 March 23, 2015 appellant, then a 45-year-old lead transportation security officer, filed an occupational disease claim (Form CA-2) alleging that she developed an emotional condition that arose in the performance of duty on or about May 5, 2014. She described her condition as depression, anxiety, panic, and post-traumatic stress disorder (PTSD). Appellant did not specifically identify what caused her condition(s) other than noting "It was almost traumatic...." She stopped work on September 4, 2014.

OWCP received a copy of a March 20, 2014 e-mail that appellant sent to New York State's Department of Labor regarding her application for unemployment benefits. Appellant alleged that the employing establishment had retaliated against her for having filed an Equal Employment Opportunity (EEO) complaint against a supervisor, which was protected activity. She indicated that the denial of unemployment benefits was further retaliation, and that she had appealed her termination from employment.

In a January 15, 2015 report, Dr. Joseph R. Agyemang, an internist, indicated that appellant had been under his care since May 2014 for PTSD and anxiety. He noted that appellant followed up with him and/or her therapist on a bi-weekly basis, and it was his opinion that appellant's medical conditions were the result of her work duties and environment, as well as the distress of having been investigated and ultimately terminated by her employer.

By May 13, 2015 development letter, OWCP advised appellant of the type of factual and medical evidence needed to establish her claim. It explained that the evidence she had submitted was insufficient to establish that she was injured while in the performance of duty. OWCP provided appellant a questionnaire for her completion and asked her to describe the employment-related incidents she believed contributed to her illness. It also asked her to provide witness statements or evidence from anyone who could verify her allegations and explain how the incidents had contributed to or caused her condition. Additionally, OWCP asked appellant if she had ever received care for an emotional condition and to provide any and all medical records related to her prior treatment for an emotional condition. It noted that the evidence suggested that appellant's health was possibly affected by having her job eliminated or being afraid that her job would be eliminated. OWCP requested that appellant provide details as to whether her job was eliminated and why this occurred. It also requested appellant to provide copies of all relevant documents, as well as copies of any and all complaints or grievances filed and all relevant documents including conclusions of fact-finders and final decisions, if available. Finally, OWCP instructed her to provide a narrative medical report from her attending psychiatrist or clinical psychologist which provided dates of examination and treatment, a history of injury, a detailed description of findings and symptoms, results of psychological testing, diagnoses and clinical treatment recommendations, and the physician's opinion supported by a medical explanation regarding the cause of her emotional condition. It afforded appellant 30 days to respond.

By separate letter also dated May 13, 2015, OWCP requested that the employing establishment provide details related to appellant's claim and whether they concurred with her allegations.

In a June 14, 2015 statement, appellant indicated that she was removed from federal service in retaliation of her August 9, 2013 good faith bullying complaint. Beginning August 11, 2013, the employing establishment proceeded to question, surveil, and investigate appellant. Appellant further stated that on November 29, 2013 the employing establishment proposed removing her from service, thus triggering her emotional distress. The removal was effective January 30, 2014, which also triggered anxiety and stress. Appellant further indicated that she appealed her termination to the employing establishment's Office of Professional Responsibility (OPR), and she also applied for unemployment benefits. The employing establishment was initially able to get unemployment benefits denied, which caused appellant to fall into depression, anxiety, and stress. OPR's appellate board (OAB) ordered appellant's reinstatement. However, the employing establishment was able to prolong her reinstatement through exhaustive appeals to the OAB. The delay caused further stress, anguish, anxiety, and depression due to fear of financial ruin. Appellant claimed to have lost 70 pounds and reported difficulty sleeping. Upon reinstatement, refitting, and retraining, she experienced episodic bouts of anxiety which required time to compose herself in the ladies room. Reporting to work brought on dread, fear, and anxiety on a daily basis. Appellant also noted an incident when the employing establishment reportedly escorted a recently terminated supervisor past her static position at work. This incident triggered uncontrollable sobbing as the termination brought back all of her worst fears. Appellant stated that prior to her termination, she had not suffered anxiety attacks, depression and/or PTSD. She also indicated that she filed a grievance, submitted a written response to her proposed termination, subsequently appealed her termination to OAB, and challenged the initial denial of unemployment benefits. Appellant also reported having filed an EEO complaint.

On June 30, 2015 N.D., an employing establishment human resource specialist, provided a chronology of events beginning with appellant's proposed removal on November 29, 2013 through her return to duty on May 25, 2014.

OWCP also received a copy of the employing establishment's February 28, 2014 response to appellant's request for review of her termination by OPR. There was also a copy of the employing establishment's undated request for reconsideration of OPR's April 2, 2014 decision reinstating appellant. Appellant's union representative filed an April 17, 2014 response in opposition to the employing establishment's request for reconsideration.

Lastly, OWCP received a copy of an April 17, 2014 decision from the State of New York Unemployment Insurance Appeal Board, which overruled the initial determination and awarded appellant unemployment benefits. The decision noted that appellant was discharged on January 10, 2014 for making a false statement, failing to cooperate in an agency investigation, failing to follow instructions, and leaving her post without authorization. However, the Administrative Law Judge found that, based upon appellant's credible, undisputed testimony, she did not make a false statement, fail to cooperate in an agency investigation, fail to follow instructions, or leave her post without authorization. It concluded that appellant did not commit misconduct, and therefore, her employment did not end under disqualifying circumstances. As such, appellant was entitled to unemployment benefits.

By decision dated October 16, 2015, OWCP denied appellant's emotional condition claim, finding that she failed to establish a compensable employment factor as the cause of her claimed condition(s). It explained that the November 29, 2013 notice of proposed removal was an administrative/personnel matter, and appellant failed to demonstrate error or abuse on the part of the employing establishment. OWCP also found that she failed to substantiate her claim that she was removed from federal service in retaliation for having filed a complaint due to bullying.

On May 24, 2016 counsel timely requested reconsideration. He submitted psychotherapy treatment notes covering the period September 21, 2015 through March 8, 2016, and a March 23, 2016 report from appellant's psychologist, Dr. Martin Ogulnick, Ph.D. Dr. Ogulnick diagnosed major depression, single episode -- severe. In his March 23, 2016 report, he indicated that his initial treatment notes from September 21, 2015 clearly explained that appellant's psychiatric condition was totally caused by her workplace conditions, which included being wrongfully terminated after accusations of misconduct that were not true and never proven. Dr. Ogulnick further explained that appellant's supervisors unreasonably bullied her, made unfounded accusations, treated her prejudicially, and oftentimes with loud yelling behavior. This ongoing mistreatment led her finally to become severely depressed and anxious and unable to continue to work due to these symptoms. Dr. Ogulnick advised that prior to the series of events at her job appellant was happy, content with her life and her job, and functioning well in all areas of her life.

By decision dated March 23, 2017, OWCP denied modification of its October 16, 2015 decision. It found that appellant had not met her burden of proof to establish that she was wrongfully terminated or that the employing establishment bullied/harassed her.

LEGAL PRECEDENT

To establish that she sustained an emotional condition causally related to factors of her federal employment, the claimant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.³

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.⁴ However, disability is not compensable when it results from factors such as an employee's fear of

³ See *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁴ *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

a reduction-in-force, or frustration from not being permitted to work in a particular environment, or hold a particular position.⁵

An employee's emotional reaction to administrative or personnel matters generally falls outside FECA's scope.⁶ Although related to the employment, administrative and personnel matters are functions of the employer rather than the regular or specially assigned duties of the employee.⁷ However, to the extent 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.⁸

Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.⁹ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter, OWCP must base its decision on an analysis of the medical evidence.¹⁰

ANALYSIS

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

Initially, the Board finds that appellant did not specifically attribute her claimed emotional condition to her regular or specially assigned duties as a lead transportation security officer or any other requirement imposed by the employment. Since she has not raised an allegation under *Cutler* there are no *Cutler* allegations to address.¹¹

Rather, the essence of appellant's complaint is that the employing establishment retaliated against her for having filed an EEO complaint in August 2013, and the retaliation ultimately led to her wrongful removal from employment in January 2014. Appellant further alleged that following her removal, the employing establishment improperly sought to deny her unemployment compensation and delayed the process of her reinstatement.

In *Thomas D. McEuen*,¹² the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered

⁵ *Lillian Cutler, id.*

⁶ *Andrew J. Sheppard*, 53 ECAB 170, 171 (2001); *Matilda R. Wyatt*, 52 ECAB 421, 423 (2001).

⁷ *David C. Lindsey, Jr.*, 56 ECAB 263, 268 (2005).

⁸ *Id.*

⁹ *Supra* note 3.

¹⁰ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992). Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

¹¹ *See supra* note 4.

¹² *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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 further held, however, that coverage under FECA would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.¹³ Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁴

Appellant made specific allegations of error and abuse regarding administrative and personnel actions with regard to administrative discipline following her complaint of bullying in August 2013. Appellant alleged that the employing establishment acted unreasonably in walking an employee who had just been terminated past her work location causing her to relive her own removal from employment. The Board finds that this act was not unreasonable, and thus does not constitute a compensable factor of employment. Rather, this act pertains to procedures and requirements of the employer and did not bear a direct relation to the work required of the employee.

Appellant also alleged that the employing establishment proceeded to question, surveil, and investigate her, which ultimately led to her dismissal. According to the chronology provided by the employing establishment, it issued a proposed removal on November 29, 2013, followed by a January 10, 2014 notice of decision to remove appellant from her employment. On April 2, 2014 OAB issued a decision reinstating appellant. Following the order of reinstatement the employing establishment appealed. Within its request for reconsideration it asserted that OAB had erred in finding that the employing establishment had not established that appellant had made a false statement; erred in finding that the employing establishment incorrectly stated that appellant failed to follow instructions to provide documentation in support of her bullying claim; and had erred in finding that the employing establishment had failed to prove that appellant failed to follow instructions as it had not proven that she left her post without permission. On April 24, 2014 OAB denied the request for reconsideration upholding its prior findings adverse to the employing establishment. Appellant ultimately resumed work on May 25, 2014. She alleges that the administrative removal process triggered her emotional distress.

In addition, during the removal process appellant filed a claim for unemployment benefits with the State of New York. The employing establishment contested her unemployment claim. Following an initial denial of unemployment benefits the State of New York Unemployment Insurance Appeal Board overruled the denial and awarded appellant unemployment benefits, noting in its decision that based on appellant's credible and undisputed testimony she had not made a false statement as alleged, nor did she fail to cooperate in an agency investigation, fail to follow instruction, or leave her post without authorization. It concluded that she had not committed misconduct.

¹³ See *William H. Fortner*, 49 ECAB 324 (1998) and *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁴ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

The Board thus finds that appellant has established a compensable factor with regard to error by the employing establishment in the disciplinary process following her complaint of bullying. The evidence of record supports that they unreasonably removed appellant from her employment as an act of discipline and unreasonably sought to deny her claim for unemployment compensation. Both the findings of the OAB and the Administrative Law Judge in the unemployment insurance appeal support that the employing establishment committed error by removing appellant from her employment position and in denying her claim for unemployment benefits.

The Board has previously considered whether an administrative finding that the employing establishment acted improperly in a disciplinary matter established a compensable factor of employment. In *C.J.*,¹⁵ the employee claimed an emotional condition after being placed on emergency leave without pay following an incident in which a six-year-old girl on a bicycle collided with the postal vehicle in which she was delivering mail. Following placement on emergency leave without pay the employee appealed and the matter went to arbitration. In citing to numerous defects in the statements by witnesses for the employing establishment, the arbitrator noted that if properly investigated the notice of removal should never have been issued. In *T.G.*,¹⁶ the employee claimed an emotional condition as a result of issuance of a notice of removal and then the reduction of the punishment to a 105-day suspension without pay. The employee submitted an arbitrator's decision reducing the suspension to seven days, finding that the employing establishment's response to the employee's misconduct was excessive. The Board found that the employee established a compensable factor of employment. The record established that, although the employee's actions were worthy of discipline, the arbitrator found that the notice of removal was inappropriate as the employee had no prior disciplinary action in his record and the employing establishment did not establish two of the charges against the claimant.¹⁷ In *R.G.*,¹⁸ the employing establishment indefinitely suspended the employee for filing a false tax return and fraudulent bankruptcy petition. However, the arbitrator found that the suspension was premature as the tax investigation was still in process. The Board found that the decision by the arbitrator constituted sufficient evidence to establish the employing establishment erred in prematurely suspending the employee from work as there was no evidence of record that the employee had committed fraud at the time he was suspended. Accordingly, the Board found that the claimant established a compensable factor of employment pertaining to error in the administrative action of his suspension.¹⁹ In *Prentis Rucker, Jr.*,²⁰ the arbitrator found that the employing establishment improperly issued the claimant a letter of warning; and the Board determined that he established a compensable factor of employment.

¹⁵ *C.J.*, Docket No. 14-16 (issued October 21, 2014).

¹⁶ Docket No. 11-1176 (issued December 22, 2011).

¹⁷ *Id.*

¹⁸ *R.G.*, Docket No. 10-947 (issued April 25, 2011).

¹⁹ *Id.*

²⁰ Docket No. 05-1843 (issued January 20, 2006).

The Board finds that the administrative discipline and the subsequent actions by the employing establishment were unreasonable. Accordingly, the Board finds that appellant has established a compensable factor of employment.

As appellant has established a compensable factor of employment, OWCP must review the medical evidence. After such further development as deemed necessary, OWCP shall issue a *de novo* decision in this case.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board