

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

A.C., Appellant)	
)	
and)	Docket No. 18-0507
)	Issued: November 26, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Chapel Hill, NC, Employer)	
)	

Appearances:
Dr. Peter J. Smith, for the appellant¹
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 January 12, 2018 appellant, through her representative, filed a timely appeal from a July 24, 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.³

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.*

³ The Board notes that appellant submitted additional evidence on appeal. However, section 501.2(c)(1) of the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

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 29, 2015 appellant, then a 54-year-old postal clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained an emotional condition in the performance of her federal employment.⁴ She noted that she first became aware of her claimed condition on August 20, 2014 and realized that it was caused or aggravated by her federal employment on September 10, 2014.⁵ On the reverse side of the claim form, appellant's supervisor, K.P., related that appellant's claim involved an incident which occurred on August 4, 2014. K.P. explained that she was not at work on August 4, 2014, but was instructed by her immediate supervisor, T.L., the officer-in-charge, to present appellant a letter of warning regarding an incident which occurred that day.

By development letter dated February 9, 2016, OWCP informed appellant that further factual and medical evidence was necessary to establish her claim. It provided her a questionnaire for her completion regarding the factual circumstances of her alleged injury. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant subsequently submitted a September 29, 2015 statement, she related that she received a letter of warning on August 20, 2014 for an August 4, 2014 incident when she failed to call for clerk backup at the window, which caused the employing establishment to have a wait in line time failure.⁶ She alleged that she was harshly criticized and threatened by management for her failure to act. Appellant noted that other employing establishment employees and a 204 B supervisor were present at the time, but none of them took action to remedy the situation. She alleged that the experience was psychologically and physically distressing to her. After appellant received the letter of warning, she learned that she was the only sales clerk working on Saturday, October 11, 2014. She followed the instructions previously given to her in the August 20, 2014 letter of warning and requested help at the window. Appellant alleged that S.C., the officer-in-charge, publically scolded her in front of customers for calling for help as she should have known that there were no other clerks available that morning. Sometime later that day, S.C. apologized to her for publically scolding her. Appellant contended that there were numerous times when the lobby line was long and other coworkers and supervisors were present, but no one called for help.

⁴ The record reflects that appellant has five other claims before OWCP. Under OWCP File No. xxxxxx692, OWCP denied an August 18, 2001 claim for an emotional condition with the finding that appellant had not established a compensable factor of employment. The other claims pertain to orthopedic conditions.

⁵ The dates provided were typed. A handwritten "5" was written over the year so that it read 2015. In a February 22, 2016 statement, appellant asserted that the correct date of injury was August 20, 2014, not 2015. She indicated that her supervisor, K.P. had changed the date of injury on her CA-2 form because of her August 20, 2015 statement. Appellant asserted that the letter of warning was dated August 19, 2014. In an undated handwritten statement, Supervisor K.P., stated that appellant's "accident actually occurred in 2014 not 2015." The record contains copies of the original Form CA-2 noting typed date of injury as August 20, 2014.

⁶ In a February 22, 2016 statement, appellant asserted that the letter of warning was dated August 19, 2014. The record contains an August 19, 2014 letter of warning.

She alleged that she was the only person singled out by management for failing to perform this duty.

In a February 28, 2016 statement, K.P., appellant's immediate supervisor, again related that she was on leave the day that the incident occurred, but her acting supervisor, T.L., told her to present appellant a letter of warning for not requesting assistance from the supervisor/postmaster. She related that she was told that there was a very long wait time for customers, and that there were two clerks on the window and an acting supervisor, who was directing customers in the lobby. K.P. also noted that appellant had a heavy accent and hearing problems, so management had to speak loudly to get her attention. She noted that appellant had since undergone medical treatment for her hearing loss and was seeking counseling through the Employee Assistance Program to help overcome her anxiety. K.P. stated that appellant was a sensitive individual who felt that everyone in management was against her, even after a situation had been resolved.

On March 15, 2016 appellant responded to OWCP's development questionnaire. She indicated that, as a result of a grievance, management had reduced the letter of warning to an official discussion. Appellant also noted that she had filed an Equal Employment Opportunity (EEO) complaint, but no final decision had been issued.

OWCP also received a copy of the August 19, 2014 letter of warning which charged appellant with unacceptable performance/failure to follow instructions. It noted that between 12:15 p.m. and 12:45 p.m. on August 4, 2014, appellant failed to call for clerk back-up at the window. OWCP advised that "this disregard for not calling for another clerk to come help you at the window caused [the employing establishment] to have a wait time in line failure. By grievance settlement dated September 9, 2014, the employing establishment agreed to rescind the letter of warning issued to appellant for unacceptable performance/failure to follow instruction and reduce it to an official discussion.

In September 29, 2015 reports, Dr. Smith diagnosed appellant with anxiety disorder and major depressive disorder, recurrent. He indicated that he started treating appellant on September 10, 2014 for the increasing and unrelenting psychological distress caused by the verbal and administrative harassment directed at appellant by the employing establishment over the past year. Dr. Smith provided a narrative description of the August 20, 2014 letter of warning and the events of October 11, 2014 and opined that these experiences fueled appellant's occupational disease. He also discussed other events occurring in August 2015 in which appellant felt sick or stressed, punished, or threatened from the employing establishment, or from customer's outbursts.

In an October 5, 2015 letter, Angela Purcell, a physician assistant, indicated that appellant had been a patient since 2007. She opined that the events which occurred at work were the etiology of appellant's emotional distress, hardship, and mental trauma.

In a March 10, 2016 letter, Dr. Smith opined that appellant's condition was directly caused by the events that occurred at work. He alleged that appellant was treated differently by local employing establishment administration than her peers. Dr. Smith also noted his and appellant's frustration with the claims process.

By decision dated August 5, 2016, OWCP denied appellant's claim. It found that she had not established a compensable factor of employment and, thus, had not established an emotional condition in the performance of duty.

On August 26, 2016 OWCP received appellant's August 25, 2016 request for an oral hearing before an OWCP hearing representative.

In a September 3, 2016 letter, appellant indicated that she was enclosing 21 attachments detailing allegations of abuse by the employing establishment. A summary identified the attachments as items A through U and offered an explanation of each attachment. Appellant alleged that on August 22, 2016, Supervisor S.S. chastised her about a clock malfunction that affected the entire office. She noted the letter of warning and alleged that the employing establishment was chronically understaffed. Appellant argued that the supervisors had lied to the EEO investigators, citing testimony from Supervisor K.P. She cited two other days where long lobby lines resulted in no discipline. Appellant argued that S.C. was aware of her letter of warning when she publically and harshly yelled at and humiliated her in front of customers when she called for help in October, which created a hostile environment. Two dates around the holidays in 2014/2015 were noted to have long lines due to understaffing. Other statements discussed alleged violations of employing establishment policy for which no one was disciplined.

A telephonic hearing was held on April 20, 2017. Appellant indicated that the correct date of injury was August 20, 2014, when she received the letter of warning. She alleged that the letter of warning was unjustly issued and acknowledged that it was subsequently reduced to a discussion following a grievance. Dr. Smith noted that numerous documents had been submitted which outlined various work factors he felt caused appellant's emotional condition. He also offered argument regarding harassment.

Testimony surrounding the circumstances of the August 4, 2014 incident, which led to the letter of warning, was received. Dr. Smith indicated that he had requested copies of reports which he felt were alluded to in the warning letter. He cited employment manuals and contract language which he felt the employing establishment had violated or ignored. Dr. Smith also argued that the employing establishment was not forthcoming with information which would establish their case. He indicated that the letter of warning was the triggering event for appellant's emotional injuries and that there was an "avalanche of events" which followed, which contributed to her condition. Dr. Smith noted that the letter of warning contained a "threat of termination." He alleged that the employing establishment made false statements to the EEO investigator.

Dr. Smith presented several arguments suggesting that the letter of warning was based on a mystery shopper experience. This was based on his interpretation of the warning letter and the performance goal time. Dr. Smith indicated that the labor manuals prohibited the use of such shopping experiences in the disciplinary processes. He also argued that appellant experienced disparate treatment as he had no evidence that any other employee had been disciplined regarding the wait time matter and that plenty of opportunities for such discipline existed. Dr. Smith also argued that the perceived delays by the employing establishment relative to the claims process and the EEO process contributed to appellant's conditions.

Subsequent to the hearing, OWCP received over 300 pages of argument and evidence in support of appellant's claim. This included copies of appellant's statements and numerous letters

from Dr. Smith to the Equal Employment Opportunity Commission (EEOC), the postmaster general, and OWCP's program director. A May 21, 2015 EEO decision reversed a December 11, 2014 EEO final decision which dismissed appellant's formal complaint of unlawful employment discrimination pertaining to the August 20, 2014 letter of warning. The decision found that even though the letter of warning had been reduced to a formal discussion, appellant had requested compensatory damages as a remedy. Accordingly, the formal complaint was remanded to the employing establishment for further processing of appellant's complaint. The submitted portions of the EEO complaint, including the employing establishment investigative findings, found no error or abuse. Copies of mystery shopper scores unrelated to appellant's incident were submitted along with handwritten and typed journal entries from appellant, which recorded her impressions of incidents at work between August 15 and November 9, 2014.

Dr. Smith also provided a statement wherein he argued that the issuance of the letter of warning was unreasonable. He also offered additional argument regarding the mystery shopper program and the wait time in line standard. Dr. Smith cited a recent incident in which appellant filed a new EEOC complaint. He argued that, while there was no direct admission of error or abuse by the employing establishment, culpability could be inferred from their comments and actions. Dr. Smith contended that S.C.'s apology was an admission of error or abuse. He also argued that asking an employee to submit documents to the officer-in-charge demonstrated a pattern of abuse by the direct supervisor. Dr. Smith also offered his analysis of the EEO investigative findings.

By decision dated July 24, 2017, an OWCP's hearing representative affirmed the August 5, 2016 decision, finding that no compensable employment factor had been established. He noted that, while appellant and Dr. Smith had a conflicting impression of the work environment, the facts were not established by a preponderance of the evidence.

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 her federal employment.⁷ To establish an emotional condition in the performance of duty, the claimant must submit the following: (1) medical evidence establishing an emotional condition; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.⁸

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*,⁹ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some

⁷ *Pamela R. Rice*, 38 ECAB 838 (1987).

⁸ *George H. Clark*, 56 ECAB 162 (2004).

⁹ 28 ECAB 125 (1976).

connection with the employment, but nevertheless does not come within coverage under FECA.¹⁰ 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.¹¹ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.¹² Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹³ Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁴ 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.¹⁵

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.¹⁶ 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.¹⁷ 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.¹⁸

For harassment or discrimination to give rise to a compensable disability under FECA, there must be probative and reliable evidence that the claimed harassment or discrimination did in fact occur.¹⁹ Mere perceptions of harassment, retaliation or discrimination are not compensable under FECA.²⁰

¹⁰ See *Robert W. Johns*, 51 ECAB 137 (1999).

¹¹ *Supra* note 9.

¹² *J.F.*, 59 ECAB 331 (2008).

¹³ *M.D.*, 59 ECAB 211 (2007).

¹⁴ *Roger Williams*, 52 ECAB 468 (2001).

¹⁵ See *supra* note 9.

¹⁶ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹⁷ See *William H. Fortner*, 49 ECAB 324 (1998).

¹⁸ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁹ *Marlon Vera*, 54 ECAB 834 (2003).

²⁰ *Kim Nguyen*, 53 ECAB 127 (2001).

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.²¹ 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.²²

ANALYSIS

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty.

The Board notes that appellant's allegations do not pertain to her regular or specially assigned duties under *Lillian Cutler*.²³ Rather, appellant has alleged error and abuse in administrative matters and harassment and discrimination on the part of her managers.

Appellant's contentions regarding the disciplinary actions relate to personnel matters which are not compensable absent a showing of error or abuse on the part of the employing establishment.²⁴ She alleged that she was unfairly issued a letter of warning on August 19, 2014 for an August 4, 2014 incident when she failed to call for clerk backup at the window, which caused the employing establishment to have a wait in line time failure. The letter of warning was reduced to an official discussion. The Board has found that an employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor, or the manner in which a supervisor exercises his or her supervisory discretion, fall, as a rule, outside the scope of coverage provided by FECA. This principle recognizes that a supervisor or manager in general must be allowed to perform his or her duties, and that employees will at times dislike the actions taken, but mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.²⁵ Despite appellant's allegations of error and criticism of the EEO investigation, she has presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to the letter of warning. There is also no evidence that the employing establishment had lied about the basis for the letter of warning. Although the employing establishment reduced the letter of warning to a discussion based on a grievance agreement, the Board has held that the mere fact that personnel actions are later modified or rescinded does not, in and of itself, establish error or abuse on the part of the employing

²¹ *Dennis J. Balogh*, 52 ECAB 232 (2001).

²² *Id.*

²³ *See supra* note 9.

²⁴ *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

²⁵ *See Marguerite J. Toland*, 52 ECAB 294 (2001).

establishment.²⁶ There is no admission of error, fault, or legal violation on the part of the employing establishment in the EEOC documents submitted and no final EEOC decision has been issued. The Board thus finds that appellant has not established a compensable employment factor with regard to the above-noted administrative and personnel matters.

Appellant also complained of frustration with regard to the employing establishment's handling of her EEO and FECA claims. However, this is an administrative matter and not compensable absent a showing of error or abuse on the part of the employing establishment.²⁷ She did not submit probative evidence establishing error or abuse regarding the above-noted administrative matters. Thus the Board finds that she has not established a compensable factor in this regard.

Appellant also alleged harassment by management. She contended that management's request that she submit documents to the officer in charge constituted harassment. The Board finds that the factual evidence of record is insufficient to establish that appellant was harassed or singled out by management. Absent corroborating evidence, this allegation alone does not demonstrate a pattern of abuse by management. As noted, mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.²⁸ While appellant also asserted other allegations of harassment, such as an August 22, 2016 time clock malfunction, she provided no factual evidence in support of her allegations. As there is no factual evidence to support her allegations of harassment, she has not established a compensable factor of employment with respect to these allegations.²⁹

Regarding appellant's allegation that she was publically scolded/verbally abused by S.C. on October 11, 2014 in front of employing establishment customers, the Board has generally held that being spoken to in a raised or harsh voice does not of itself constitute verbal abuse or harassment.³⁰ She did not submit any evidence such as witness statements to corroborate her allegation of verbal abuse. Furthermore, the record reflects that at the time appellant had problems with her hearing and management had to be loud to get her attention. In *Carolyn S. Philpott*³¹ the Board found that a loud discussion between a supervisor and the claimant on the workroom floor was not error or abuse. The Board noted that, despite the claimant's arguments that her supervisor should have spoken or reprimanded her in private, there was no evidence that the supervisor's remarks were unwarranted. Furthermore, the Board noted that the fact that the supervisor raised his voice during the course of conversation did not amount to verbal abuse as there was no evidence that he belittled the claimant. The Board finds that appellant has not established error or abuse merely because S.C. raised her voice on October 11, 2014 in the work area. To establish error or

²⁶ *Paul L. Stewart*, 54 ECAB 824 (2003).

²⁷ *Supra* note 17.

²⁸ *See supra* note 26.

²⁹ *Supra* note 19.

³⁰ *T.G.*, 58 ECAB 189 (2006).

³¹ 51 ECAB 175, 179 (1999); *Karen K. Levene*, 54 ECAB 671 (2003); *J.C.*, Docket No. 14-0299 (issued October 16, 2014).

abuse by her supervisor in reprimanding her, she must prove more than a raised voice.³² While appellant acknowledged that S.C. later apologized to her, the Board has held that an apology does not support an admission of fault or wrongful actions.³³ Thus, the Board finds that appellant has not established a compensable employment factor with respect to this allegation.

Because appellant has not substantiated a compensable factor of employment as the cause of her emotional condition, the Board will not address the medical evidence.³⁴

On appeal, appellant's representative provided his interpretations of the evidence and reiterated arguments previously made. However, as appellant has not established a compensable factor of employment, she has not met her burden of proof.

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

³² *M.H.*, Docket No. 12-0130 (issued December 4, 2012); *J.R.*, Docket No. 11-0334 (issued October 26, 2011); *J.S.*, Docket No. 09-0442 (issued September 15, 2009); *David C. Lindsey*, 56 ECAB 263 (2005).

³³ *M.R.*, Docket No. 11-0980 (issued August 15, 2012).

³⁴ *Karen K. Levene*, 54 ECAB 671 (2003).

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 26, 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