

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

S.K., Appellant)	
)	
and)	Docket No. 18-1648
)	Issued: March 14, 2019
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Kearney, NJ, Employer)	
)	

Appearances:
Luretha M. Stribling, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 29, 2018 appellant, through counsel, filed a timely appeal from a May 29, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

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.

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

ISSUE

The issue is whether appellant has met her burden of proof to establish an emotional condition in the performance of duty on July 6, 2017, as alleged.

FACTUAL HISTORY

On July 9, 2017 appellant, then a 45-year-old mail clerk, filed a traumatic injury claim (Form CA-1) alleging that on July 6, 2017 she developed anxiety and experienced throbbing pain in her head when she became upset as a result of a meeting where her supervisor gave her a new modified-duty assignment and told her that if she did not sign it she would be sent home and her workers' compensation benefits would be terminated. She indicated that she felt threatened and stressed during the meeting and she was hospitalized later that day for hypertension. Appellant stopped work on July 8, 2017.

On the reverse side of the claim form, the employing establishment checked a box marked "No" to indicate that appellant's injury did not occur in the performance of duty. It explained that she was meeting with management and union officials at the time of the alleged injury.

In a July 12, 2017 statement, an employing establishment supervisor controverted appellant's claim. He explained that she was informed that her assignment, the manual letters section on Tour 2, 10:00 a.m. to 6:30 p.m., was being eliminated and; therefore, she would need to change to another schedule when work that she was capable of performing was available. The supervisor further explained that appellant was not informed that OWCP would terminate her workers' compensation benefits if she refused the offer.⁴

In a subsequent statement dated July 27, 2017, the employing establishment indicated that the duties for the old and new assignments were identical, with the exception of the work schedule. Instead of beginning work at 10:00 a.m., appellant would begin at 9:00 p.m. The employing establishment further explained that the change was necessary because of a decrease in mail volume.

By development letter dated July 19, 2017, OWCP requested that appellant submit additional evidence in support of her claim. It advised her of the type of factual and medical

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence following OWCP's May 29, 2018 decision and on appeal. However, 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.*

⁴ The Board notes the employing establishment offered appellant a limited-duty assignment pursuant to a September 26, 2013 traumatic injury, which OWCP accepted in File No. xxxxxx476 for aggravation of osteoarthritis of the right knee.

evidence needed and provided a questionnaire for her completion. By separate letter of the same date, OWCP also requested additional information from the employing establishment. It afforded both appellant and the employing establishment 30 days to respond.

Appellant subsequently submitted results of a July 6, 2017 computerized tomography (CT) scan of the head and a portable chest x-ray read by Dr. Steven Festa, a Board-certified diagnostic radiologist. The CT scan was noted as unremarkable and the x-ray showed a midline trachea and normal heart size, with no infiltrate, effusion, or pneumothorax identified.

On August 4, 2017 OWCP received a July 10, 2016 letter to a union official in which appellant indicated that she was filing a grievance alleging that the employing establishment failed to give sufficient advance notice that her assignment was being abolished. It also received a statement of July 19, 2017 in which she indicated to the employing establishment's Equal Employment Opportunity (EEO) office that her supervisor had failed to accommodate her limitations arising from her September 26, 2016 employment injury under OWCP File No. xxxxx476 for which she was on limited-duty assignments.

In a July 26, 2017 statement, appellant indicated that she had no medical records for treatment for an emotional condition, nor had she ever been under the care of a psychiatrist or psychologist or sought counseling. She also noted that, during the meeting where her assignment change was discussed, she requested a transfer to the Edison, NJ call center, as she believed that assignment to the Edison call center would allow her to continue with a tour of duty that begins close to 10:00 a.m. However, appellant indicated that the union steward present at the meeting indicated that the employing establishment could not send her to Edison because it was required to exhaust every option within her current facility.

Appellant further noted that the union steward told her that she could not take the offer home to discuss with her family and that, if she did not accept the offer that day, management would send her home immediately and contact OWCP to terminate her benefits.

By decision dated August 25, 2017, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish an emotional condition in the performance of duty, as alleged.

On August 25, 2017 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held before a hearing representative on March 13, 2018. After the hearing, the representative held the case record open 30 days for additional evidence.

On April 13, 2018 appellant submitted copies of portions of the Postal Employee Labor Relations Manual and the collective bargaining agreement in support of her assertion that she was entitled to a greater period of notice of the change in her modified-duty assignment.

In an April 20, 2018 statement, appellant further responded to representations by the employing establishment.

By decision dated May 29, 2018, OWCP's hearing representative affirmed the prior decision, finding that the evidence of record was insufficient to establish that appellant sustained an emotional condition in the performance of duty.

LEGAL PRECEDENT

To establish an emotional condition causally related to factors of a claimant's federal employment, he or she must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his or 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.⁵

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.⁶

In the case of *Lillian Cutler*,⁷ 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 connection with the employment, but nevertheless does not come within coverage under FECA.⁸

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.⁹

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.¹⁰ 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.¹¹ In determining whether the employing establishment has erred or acted abusively, the Board will

⁵ *M.R.*, Docket No. 18-0304 (issued November 13, 2018); *A.C.*, Docket No. 18-0484 (issued September 7, 2018); see *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁶ *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁷ 28 ECAB 125 (1976).

⁸ See *G.R.*, Docket No. 18-0893 (issued November 21, 2018); *Robert W. Johns*, 51 ECAB 137 (1999).

⁹ *Supra* note 8.

¹⁰ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *reaff'd on recon.*, 42 ECAB 556 (1991); *Thomas D. McEuen*, 41 ECAB 387 (1990).

¹¹ See *William H. Fortner*, 49 ECAB 324 (1998).

examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹²

The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of FECA. This principle recognizes that a supervisor or manager must be allowed to perform their duties and that employees will, at times, disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.¹³

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.¹⁴

If a claimant implicates a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.¹⁵ 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.¹⁶

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty, as alleged.

The Board finds that appellant's allegation does not pertain to her regular or specially assigned duties under *Lillian Cutler*.¹⁷ Rather, appellant has alleged that the employing establishment offered a new light-duty position within limited restrictions for the accepted injury in OWCP File No. xxxxxx476.

In *Thomas D. McEuen*,¹⁸ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employing establishment and do not bear a direct relation to the work required of the employee. The Board

¹² *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹³ *S.M.*, Docket No. 09-2290 (issued July 12, 2010); *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

¹⁴ *D.L.*, 58 ECAB 217 (2006); *Jeral R. Gray*, *id.*

¹⁵ *K.W.*, 59 ECAB 271 (2007); *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

¹⁶ *Robert Breeden*, *supra* note 6.

¹⁷ *Supra* note 8.

¹⁸ *Supra* note 16.

noted, 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. 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.¹⁹

Appellant contends that on July 6, 2017 her supervisor advised her that her current position was being abolished and offered her a new tour of duty beginning at 9:00 p.m. rather than 10:00 a.m. as she had been working on the date of the alleged injury. The Board has held that the assignment of work is an administrative function²⁰ and is not a compensable employment factor absent a showing of error or abuse. The employing establishment explained that appellant's current position was no longer available due to changes in the volume of mail and that the new position was within her work restrictions assigned under her prior claim in OWCP File No. xxxxxx476. Therefore, the Board finds that the July 6, 2017 offer of a proposed position was reasonable and did not constitute error and abuse.

The Board thus finds that the administrative and personnel actions taken by management in this case show no evidence of error by the establishment and are, therefore, not considered compensable factors of employment.²¹

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 on July 6, 2017, as alleged.

¹⁹ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

²⁰ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

²¹ The Board notes that appellant indicated that she had filed a grievance and an EEO matter; however, there is no final decision showing that error and abuse actually occurred. See *M.R.*, Docket No. 18-0304 (issued November 13, 2018).

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2019
Washington, DC

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

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

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