

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an emotional condition in the performance of duty, as alleged; and (2) whether OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 18, 2018 appellant, then a 49-year-old nursing assistant, filed an occupational disease claim (Form CA-2) alleging that she sustained post-traumatic stress disorder (PTSD) and depression causally related to factors of her federal employment. She attributed her condition to a charge nurse telephoning the employing establishment's police prior to an October 21, 2017 meeting. Appellant did not stop work.

In a development letter dated February 8, 2018, OWCP notified appellant that the evidence submitted was insufficient to establish her emotional condition claim. It requested that she submit a detailed description of the employment factors that she believed caused or contributed to her illness, factual evidence corroborating any workplace incidents, and a report from her attending psychiatrist or clinical psychologist addressing causation. OWCP afforded appellant 30 days to submit the necessary evidence.

Thereafter, OWCP received an October 21, 2017 investigative report from the employing establishment's police. The name of the individual who had telephoned the police was redacted in the investigative report. The investigating officer who completed the report indicated that the police had dispatched officers to standby during a meeting with a hostile employee. At the meeting, appellant discussed the working relationship between managers and staff. She became irritated when the parties brought up past situations and she then left the room. After appellant left, the person who had telephoned the police asked what would happen if appellant went to her vehicle and got a gun. The officers inquired whether she had ever threatened anyone with a gun and the individual responded in the negative. The officers advised the individual not to make unsubstantiated statements for effect and "to handle things that are administrative in the proper manner and not to exaggerate the circumstances that have not yet presented themselves."

Appellant also submitted a January 5, 2018 work status report by Dr. Stanley Kuo Yu, a Board-certified gastroenterologist, who provided a diagnosis of acute stress disorder and removed her from work for the period January 5 through 10, 2018.

In a report dated January 11, 2018, Cary Devin Glass, Ph.D., a clinical psychologist, noted that since October appellant had been reporting trouble at work including harassment by multiple people at work. He diagnosed major depressive disorder recurrent episode, anxiety, history of post-traumatic stress disorder due to occupational problems or work circumstances.

In a proposed 10-day suspension dated January 3, 2018, the employing establishment charged appellant with inappropriate conduct on October 21, 2017 when she switched assignments without the proper authority. It asserted that she had used profanity on October 21, 2017 toward P.S., the charge nurse, and raised her voice talking to two charge nurses after P.S. had telephoned the police about her conduct. Appellant also asked M.V. on October 21, 2017 to step outside the

facility and told her that she did not like how she gave her a break sheet. The employing establishment additionally charged appellant with carelessness in her work duties. It advised that on October 14, 2017 C.E., the charge nurse, asked her to look for a missing patient. Appellant neglected to tell C.E. that she had found the patient and responded angrily when he informed her that he had located the patient. On or around October 21, 2017, a nurse found one of her patients smelling of urine. He related that he had asked for help, but his nurse assistant failed to respond. Appellant used profanity when the charge nurse informed her of the patient's comments. The employing establishment also charged her with delay in patient care when around October 20, 2017 she had failed to set up a patient's lunch tray and had neglected to move a patient after he requested to return to bed.

In a response dated January 8, 2018, appellant asserted that there was no policy against switching assignments. She denied using profanity on October 21, 2017, raising her voice on October 21, 2017, or asking M.V. to leave the facility. Appellant advised that she had just sat down after locating the patient on October 14, 2017 when C.E. came by and told her that he had found the patient. She denied failing to provide proper patient care and related that at the meeting with the police officers, she had not raised her voice or become confrontational.

On February 8, 2018 the employing establishment suspended appellant for 10 days after it sustained the charges in the proposed suspension. It indicated that it had considered her written reply to the proposed suspension in reaching its determination.

In a statement dated February 12, 2018, appellant related that before she had arrived at work on October 21, 2017 she had asked a coworker to switch assignments because she was uncomfortable working with P.S. P.S. became confrontational after she told her she had changed assignments even though management had previously allowed staff to switch assignments if both parties agreed. Appellant asked P.S. and C.E., the charge nurses, to meet with her regarding "their unprofessional and hostile actions towards me." P.S. telephoned the police before the meeting. Appellant maintained that the police report demonstrated that P.S. and C.E. "made false accusations, slanderous remarks against my character that could have gotten me seriously hurt had the police officers not have witnessed the meeting themselves and observed me to be nonconfrontational...." She asserted that P.S. had sexually and verbally harassed her after she learned of her sexual orientation. Appellant indicated that she had advised management of the harassment.

In an undated statement received by OWCP on March 6, 2018, appellant related that P.S. had made sexual advances towards her that had become more aggressive over time. Coworkers had observed the harassment, but were afraid of retaliation.

The employing establishment, in a March 7, 2018 response, controverted appellant's claim contending that she filed her claim after it issued a proposed disciplinary action.

In a report dated March 13, 2018, appellant's treating psychiatrist, Dr. Elena Ortiz Portillo, Board-certified in psychiatry, noted that appellant would benefit from being transferred to a different unit or department with her employer. She placed appellant off work for the period March 15 through 21, 2018.

By decision dated July 23, 2018, OWCP denied appellant's emotional condition claim, finding that she had not established a compensable employment factor.

On August 27, 2018 appellant requested reconsideration. In an August 10, 2018 statement, she related that after she had informed management she had been sexually harassed she had difficulty performing her employment duties "due to the fear of retaliation, continuing harassment from upper management, and judgment of others." Appellant advised that management had not investigated her complaints of sexual harassment or contacted witnesses. She maintained that upper management had threatened her job, issued false accusations, suspended her, falsified her time, changed her work shifts, prevented her from attending classes for her nursing degree, and written her up for doing her work duties. Appellant cited provisions of the Whistleblower Protection Act.

By decision dated September 19, 2018, OWCP denied appellant's request for reconsideration, finding that she had not raised an argument or submitted evidence sufficient to warrant reopening her case for further merit review pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence including that he or she sustained an injury in the performance of duty, and that any specific condition or disability from work for which he or she claims compensation is causally related to that employment injury.⁴ 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.⁵

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*,⁶ 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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation.⁷ 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

³ *Id.*

⁴ *G.G.*, Docket No. 18-0432 (issued February 12, 2019).

⁵ *B.Y.*, Docket No. 17-1822 (issued January 18, 2019).

⁶ 28 ECAB 125 (1976).

⁷ *See G.R.*, Docket No. 18-0893 (issued November 21, 2018).

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.⁸

Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁹ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹⁰ Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹¹ 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.¹²

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.¹³ 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.¹⁴ 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.¹⁵

For harassment or discrimination to give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment or discrimination did in fact occur.¹⁶ Mere perceptions of harassment are not compensable under FECA.¹⁷

ANALYSIS -- ISSUE 1

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

Appellant alleged that she sustained an emotional condition as a result of several employment incidents and factors. OWCP denied her emotional condition claim because she had

⁸ *Supra* note 6.

⁹ *See B.O.*, Docket No. 17-1986 (issued January 18, 2019).

¹⁰ *Id.*

¹¹ *M.R.*, Docket No. 18-0305 (issued October 18, 2018).

¹² *A.C.*, Docket No. 18-0507 (issued November 26, 2018).

¹³ *See M.C.*, Docket No. 18-0585 (issued February 13, 2019).

¹⁴ *See S.K.*, Docket No. 18-1648 (issued March 14, 2019).

¹⁵ *Id.*

¹⁶ *S.B.*, Docket No. 18-1113 (issued February 21, 2019).

¹⁷ *Id.*

not established a compensable employment factor. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.¹⁸

The Board notes that appellant's allegations do not pertain to her regular or specially assigned duties under *Cutler*.¹⁹ Rather, she has alleged error and abuse in administrative matters by the employing establishment and harassment by her supervisor.

Appellant alleged that the employing establishment erred in issuing her a 10-day suspension for inappropriate conduct and carelessness in her work duties. As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of FECA.²⁰ The Board has long held that disputes regarding the assignment of work,²¹ handling of compensation claims,²² and disciplinary matters,²³ are administrative functions of the employing establishment and, absent error or abuse, are not compensable.²⁴ Absent evidence establishing error or abuse, a claimant's disagreement or dislike of such a managerial action is not a compensable factor of employment.²⁵

Appellant has not provided sufficient evidence to substantiate her allegations of error or abuse by the employing establishment in an administrative matter. The employing establishment suspended her for 10 days based on its finding that she had switched assignments without authorization, used profanity to a charge nurse, asked another nurse to step outside the facility, failed to notify a charge nurse that she had located a missing patient, and failed to provide timely patient care. While appellant denied the allegations, she has not submitted any evidence, such as an admission of error or finding of fault, establishing that the employing establishment acted unreasonable in administrative matters.²⁶

Appellant also alleged that P.S., a charge nurse, sexually harassed her after she learned of her sexual orientation. She maintained that the harassment increased over time. Appellant also contended that P.S. verbally harassed her and retaliated against her after she reported the harassment to management.

¹⁸ See *E.S.*, Docket No. 18-1493 (issued March 6, 2019).

¹⁹ *Supra* note 6.

²⁰ *F.C.*, Docket No. 18-0625 (issued November 15, 2018).

²¹ See *M.C.*, *supra* note 13.

²² *C.V.*, Docket No. 18-0580 (issued September 17, 2018).

²³ *Supra* note 5.

²⁴ See *G.G.*, *supra* note 4.

²⁵ *Supra* note 18.

²⁶ See *B.O.*, *supra* note 9.

Disputes and incidents alleged as constituting harassment and discrimination by managers and coworkers may constitute compensable employment factors if they are established as occurring and arising from appellant's performance of her regular duties.²⁷ The Board has held that unfounded perceptions of harassment do not constitute an employment factor.²⁸ For harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did in fact occur.²⁹ Appellant has not provided any evidence such as witness statements supporting her allegations or sexual or verbal harassment by P.S.³⁰ As there is no factual evidence to support her allegations of sexual or verbal harassment, she has not established a compensable work factor with respect to those allegations.³¹

Appellant also contended that P.S. harassed her by telephoning the police on October 21, 2017. An October 21, 2017 redacted investigative report from the employing establishment's police advised that it had dispatched two police officers to attend a meeting at the request of an individual who believed that she might become hostile. The officers indicated that appellant became annoyed when the parties discussed past incidents and left the room. The person who called the officers to the meeting questioned what would happen if she returned with a gun. The officers cautioned the individual not to make uncorroborated statements or exaggerate circumstances. While the investigative report does not establish that appellant had become hostile or threatening during the October 21, 2017 meeting, neither does it establish harassment by management in requesting that the police attend the meeting. Additionally, 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.³² 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.³³

The Board, therefore, finds that appellant has not established a compensable employment factor under FECA. Appellant has thus not met her burden of proof to establish that she sustained an emotional or stress-related condition in the performance of duty.³⁴

On appeal appellant contends that she could not concentrate after reporting that she had been sexually harassed, and that her PTSD negatively affected her work capacity. As explained

²⁷ *D.B.*, Docket No. 18-1025 (issued January 23, 2019).

²⁸ *A.C.*, Docket No. 18-0484 (issued September 7, 2018).

²⁹ *See F.C.*, *supra* note 20.

³⁰ *Id.*

³¹ *See M.C.*, *supra* note 13; *see also S.B.*, Docket No. 11-0766 (issued October 20, 2011).

³² *See G.G.*, *supra* note 4.

³³ *Id.*

³⁴ *See F.C.*, *supra* note 20.

above, however, she has not met her burden of proof to substantiate sexual harassment or a compensable work factor.³⁵ Consequently, as appellant has not established a compensable employment factor, the Board need not consider the medical evidence of record.³⁶

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 and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.³⁷

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.³⁸

A request for reconsideration must also be received by OWCP within one year of the date of OWCP decision for which review is sought.³⁹ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁴⁰ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁴¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

³⁵ See *S.B.*, *supra* note 16.

³⁶ See *G.G.*, *supra* note 4.

³⁷ 5 U.S.C. § 8128(a).

³⁸ 20 C.F.R. § 10.606(b)(3); *see also B.W.*, Docket No. 18-1259 (issued January 25, 2019).

³⁹ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁴⁰ *Id.* at § 10.608(a); *see also M.S.*, Docket No. 18-1041 (issued October 25, 2018).

⁴¹ *Id.* at § 10.608(b); *A.C.*, Docket No. 17-1616 (issued November 27, 2018).

The underlying issue on reconsideration is whether appellant has established an emotional condition in the performance of duty, as alleged. On reconsideration, she described her challenges fulfilling the duties of her employment due to her fear of harassment and retaliation. Appellant maintained that management threatened her job, made false accusations against her, changed her time and work shifts, and prevented her from attending classes. However, while she made generally allegations against management, she did not discuss a point of law or advance a relevant legal argument regarding a compensable work factor in this case.⁴² Appellant referenced the Whistleblower Protection Act, however, this statute is not relevant to the issue at hand, which is whether she has established an injury under FECA.⁴³ The Board, therefore, finds that she did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).⁴⁴

The Board further finds that appellant did not submit any evidence with her reconsideration request. As she did not submit relevant and pertinent new evidence, appellant has failed to satisfy the third requirement under section 10.606(b)(3).⁴⁵

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by it, or submit relevant and pertinent new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly declined to review the merits of appellant's claim.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an emotional condition in the performance of duty, as alleged. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁴² See *B.Y.*, *supra* note 5.

⁴³ See *B.W.*, Docket No. 18-1415 (issued March 8, 2019) (the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case).

⁴⁴ See *B.Y.*, *supra* note 5.

⁴⁵ See *F.C.*, *supra* note 20.

ORDER

IT IS HEREBY ORDERED THAT the September 19 and July 23, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 23, 2019
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