United States Department of Labor
Employees' Compensation Appeals Board

E.G., Appellant	)	
and	)	**Docket No. 20-1029**
	)	**Issued: March 18, 2022**
DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Barstow, CA, Employer	)	

Appearances:
Sally F. LaMacchia, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 14, 2020 appellant, through counsel, filed a timely appeal from a March 12, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 February 16, 2018 appellant, then a 49-year-old management assistant, filed a traumatic injury claim (Form CA-1) alleging that on February 12, 2018 she experienced stress, anxiety, nausea, and depression while in the performance of duty when her second-line supervisor informed her that she was referenced in "graphic sexual harassment material." She noted that she had also received a death threat in August 2017. Appellant stopped work on February 14, 2018.

In a development letter dated February 23, 2018, OWCP advised appellant of the factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. It also requested that she clarify whether she was claiming an occupational disease or a traumatic injury. OWCP afforded appellant 30 days to respond.

In a March 23, 2018 response, appellant related that, in her position as secretary treasurer of the local union, she had uncovered questionable financial actions taken by the union.[3] An outside audit had revealed improprieties and the union had been placed under Trusteeship. Appellant alleged that, when officials came to assume control over the union, the union president, R.R., yelled that it was because appellant was "f**king" those higher-ups in rank and "sleeping around with them." R.R.'s associates, C.L., B.S., and E.C., agreed with him and began to spread this rumor throughout the office. Employees who were angry about the audit posted falsified minutes of union meetings and a photograph of appellant from Facebook on bulletin boards at work. Appellant also alleged that they vandalized her vehicle at work. Coworkers that appellant did not know approached her and asked if she was sleeping with the man who took over the union.

Appellant further asserted that on August 17, 2017 someone had placed a death threat on her office desk threatening her and her family and accusing her of being a "snitch b***h." Her home was vandalized with shattered glass bottles. Appellant sold her house quickly at a reduced price because she was afraid. She further asserted that on February 12, 2018 her second-line supervisor, S.B., called her into his office and informed her that "some extremely vulgar/graphic images of pornography" altered to resemble her had been placed in various locations at work. Appellant's cellphone number was next to the face on the image with instructions to call the number for a "good time."

Appellant related that she had filed an Equal Employment Opportunity (EEO) complaint after receiving the death threat. The Criminal Investigation Division (CID) and military police (MP) had investigated the threat. They found that some parts of her claim did not deal with employing establishment issues.

In a March 29, 2018 statement, appellant advised that her claim was for an occupational disease rather than a traumatic injury. She attributed her condition to harassment, sexual

[3] Appellant also submitted medical evidence in support of her claim.

harassment, a hostile work environment, death threats, vandalism, slander, and defamation of character.

Thereafter, OWCP received a September 14, 2017 closed investigation report from the CID of the employing establishment. M.L., the investigator, advised that an individual had placed a letter on appellant's desk, noting that "snitches get stitches" and threatening her and her family. The investigator indicated that appellant "believed [that] the letter and other harassing incidents were due to [appellant's] reporting the misuse of [u]nion [f]unds," but did not know who had put the letter on her desk. Appellant gave M.L. a flyer showing a social media post accusing her of making false accusations about the union after partying with union members. M.L. noted that the former union president had been interviewed about the letter, but could not provide any information. The investigator advised that the investigation was closed as no "logical leads or suspects have been discovered…."

In a witness statement dated September 28, 2017, L.P. related that, during a union meeting on July 6, 2017, R.R. had used profanity and accused appellant of sleeping with another individual. In a February 6, 2018 e-mail, P.K. confirmed that on July 6, 2017 R.R. had used profanity and vulgarity regarding appellant.

In a January 11, 2018 interrogatory, appellant related that on July 5, 2017 the local union had been put under trusteeship after she had requested an external audit that found a misappropriation of funds. Affected individuals had spread lies about her and placed pictures on a bulletin board on August 10, 2017. Appellant reported the incident to her supervisor, S.S., who tried to ascertain whether cameras covered the area. The plant manager, C.S., advised her that it was a union matter and ignored her concerns. On August 14, 2017 an employee appellant did not know yelled at her and asked if she was "f**king" the new union leader. On August 17, 2017 at the start of her work shift, she found a death threat saying that snitches get stitches, that she and her family would pay, and that she should die because she was a "snitch b***h." Appellant did not know who had left the threatening letter on her desk. She immediately reported the incident to her supervisors.

On February 13, 2018 M.P., the employing establishment commanding officer, partially dismissed appellant's September 28, 2017 discrimination complaint. He found that the employing establishment was not the proper agency for the incidents that had occurred at union meetings on July 6 and 18, 2017 as well as an August 8, 2017 occurrence when a union vice president had yelled at her and used profanity outside the workplace as the matters arose out of union concerns. M.P. also dismissed appellant's claim that she had to sell her residence on January 10, 2018 due to vandalism as she had not shown damages by the employing establishment. He noted that an investigation was pending into the February 12, 2018 placement of a pornographic flyer at work with her name and cellphone number.

In an undated statement received on April 2, 2018, appellant related that, when she started work in 2010, G.S., a coworker, had spread rumors that she had worked as a stripper and was a kind of prostitute of the former manager. G.S. and C.H. had complained about what she wore to work and her supervisor sent her home to change clothes. In 2012, appellant had undergone treatment for cancer and G.S. had asserted that she was disgusting and leaving hair in the restroom. G.S. made a hurtful comment after the death of her brother. On May 3, 2017 appellant requested

her supervisor's help processing a document. When she returned to the office, G.S. and others thought that it was unfair that she was being trained to process documents accurately.

In an April 27, 2018 letter, OWCP advised appellant that it was adjudicating her claim as an occupational disease claim. It again requested that she provide the evidence necessary to establish her claim as set forth in its February 23, 2018 development letter.

In a June 12, 2018 development letter, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations and statements from the individuals referenced in the allegations, including G.S., R.R., C.L., B.S., and E.C. It further requested that it clarify whether she was on official time for the July 6, 2017 union meeting or any of the other dates that involved union matters.

In a June 27, 2018 response, the employing establishment maintained that appellant's issues had begun over union matters and, thus, it had no authority to take corrective measures. It noted that it was unaware of the findings of the CID, but that "no person was culpable in any wrong-doing based on her allegations." The employing establishment enclosed statements with its response.

In a June 25, 2018 statement, C.L. advised that she was not at the July 6, 2017 union meeting and had no knowledge of false union minutes posted on a bulletin board.

R.R. submitted a June 21, 2018 statement denying he was at the July 6, 2017 meeting and advising that he had no knowledge of anyone placing union information on a bulletin board at work. He indicated that he did not know whether appellant had used official time for the July 6, 2017 union meeting or other union activity.

In an undated statement, B.S. asserted that R.R. had not raised his voice or accused her of sexual impropriety. He denied that anyone had posting false minutes of union meetings on the bulletin board. B.S. also denied using vulgarity in reference to appellant.

In a June 28, 2018 statement, R.V. advised that on July 10, 2017 appellant had notified her that "somebody had posted something bad about [appellant] on the bulletin board" and that R.R. had stated inappropriate things about her at a union meeting. She did not want to file a complaint. R.V. advised her to contact C.S., the plant manager. C.S. had informed her that he could investigate who posted something on a bulletin board if she provided names, but that he had no control over things that took place in union meetings. Appellant did not want to give the individuals' names.

By decision dated July 12, 2018, OWCP denied appellant's emotional condition claim. It found that she had not established any compensable employment factors.

On July 21, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In an incident report dated September 18, 2018, appellant related that her coworker's car, which she had driven to work, had been vandalized in the parking lot. The officer noted that the

coworker believed that it had been vandalized because appellant had been driving it as she had previously received threats due to whistleblowing in connection with union activity.

On December 7, 2018 appellant submitted a time and attendance screenshot, which she asserted showed that she was in regular work status and not on leave or on official time on August 17, 2017 and February 12, 2018.

A telephonic hearing was held on December 14, 2018. Appellant's representative asserted that she had experienced retaliation after reporting misconduct. He noted that on February 10, 2018 her supervisor told her that material "offensive to any person" had been found and distributed to multiple locations throughout the base. Appellant also received death threats and had her car vandalized. He related that she was at work and was not conducting union matters or on official time when the harassment, death threat, and car vandalism had occurred. Appellant testified that, on August 17, 2017 S.S., her first-line supervisor, had called security about the death threat. The MPs arrived and turned the case over to the CID because it involved a death threat. Appellant had not experienced problems prior to reporting the misappropriation of funds, so she believed that the incidents were connected. The union vice-president made inappropriate comments to her on August 8, 2017 after work hours, but on the premises of the employing establishment. Coworkers heard rumors that appellant was sleeping around. A coworker's car was vandalized in August 2018 on base after she drove the vehicle. G.S., a coworker, spread rumors that appellant had been a former manager's private stripper. Appellant related that she saw R.R., the former union president, every day because he worked in a nearby cubicle. She asserted that, when she returned to work after being off due to stress, the pictures of her were still being passed around the office.

Following the hearing, appellant submitted a copy of the threatening letter and the pornographic photographs. She also submitted an August 17, 2017 e-mail from R.S.,[4] the plant manager, advising that on that date a note had been left on an employee's computer threatening the employee and family, and that information about the employee had also been placed on an official bulletin board in violation of rules and policy. R.S. advised that an investigation was currently being conducted to find the person or persons responsible.

On August 17, 2017 S.S. advised that on that date appellant had showed her a paper that contained "clearly a written threat of harassment stating harm to [appellant] and her family." She had called the MPs and also emergency personnel because appellant required medical attention. The MPs had contacted CID because the threat was "above what he is allowed to process." The CID agent had possession of a picture of appellant with a harassing caption from the union bulletin board.

In a February 13, 2018 e-mail to the employing establishment, R.S. advised that pornographic images of an employee had been placed at multiple locations throughout the workstation. He indicated that the conduct would not be tolerated and was being investigated.

[4] R.S. is also referred to in the record by his nickname, C.S.

By decision dated May 10, 2019, OWCP's hearing representative affirmed the July 12, 2018 decision, finding that the events that appellant had established as factually occurring pertained to union matters unrelated to the performance of her federal work duties.

On December 2, 2019 appellant, through counsel, requested reconsideration.

By decision dated March 12, 2020, OWCP denied modification of the May 10, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim,[6] including that he or she sustained an injury in the performance of duty, and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[7] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[8]

To establish an emotional condition in the performance of duty, a claimant must submit:

> "(1) factual evidence identifying an employment factor or incident alleged to have caused or contributed to his or her claimed emotional condition; (2) medical evidence establishing that he or she has a diagnosed emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the accepted compensable employment factors are causally related to the diagnosed emotional condition."[9]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to a claimant'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.[10] However, disability is not compensable when it results from factors such as an

[5] *Supra* note 2.

[6] *S.S.*, Docket No. 19-1021 (issued April 21, 2021); *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[7] *S.S.*, *id.*; *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] 20 C.F.R. § 10.115; *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Michael E. Smith*, 50 ECAB 313 (1999).

[9] *See S.K.*, Docket No. 18-1648 (issued March 14, 2019); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[10] *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

employee's fear of a reduction-in-force, or frustration from not being permitted to work in a particular environment, or to hold a particular position.[11]

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.[12] Mere perceptions of harassment are not compensable under FECA.[13]

The Board has adhered to the principle that union activities are personal in nature and are not considered to be within the course of employment.[14] Attendance at a union meeting, for example, is exclusively for the personal benefit of the employee and devoid of any mutual employer-employee benefit that would bring it within the course of employment.[15]

However, the Board has recognized an exception to this general rule when employees performing representational functions, which entitle them to official time, are injured when in the performance of duty.[16] The underlying rationale for this exception is that an activity undertaken by an employee in the capacity of a union official may simultaneously serve the interest of the employer.[17] OWCP's procedures indicate that representational functions include authorized activities undertaken by employees on behalf of other employees pursuant to such employees' right to representation under statute, regulation, executive order, or terms of a collective bargaining agreement.[18]

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.[19] 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

[11] *Lillian Cutler, id*.

[12] *S.L.*, Docket No. 19-0387 (issued October 1, 2019); *S.B.*, Docket No. 18-1113 (issued February 21, 2019).

[13] *Id*.

[14] *R.L.*, Docket No. 18-1375 (issued May 1, 2019); *Jimmy E. Norred*, 36 ECAB 726 (1985).

[15] *R.L., id*; *J.G.*, Docket No. 17-1948 (issued September 13, 2018).

[16] *J.G., id*.; *R.F.*, Docket No. 14-0770 (issued September 29, 2015) (those on official time performing activities related to the internal business of a labor organization such as soliciting new members or collecting dues are not considered to be in the performance of duty. The singular fact that one is on paid official time for union representation is not enough to establish that every interaction during such official time is within the performance of duty).

[17] *J.G., id*.; *Marie Boylan*, 45 ECAB 338 (1994).

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16(b) (July 1997).

[19] *See R.B.*, Docket No. 19-0434 (issued November 22, 2019); *O.G., supra* note 6.

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.[20]

ANALYSIS

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

Appellant has not attributed her condition to the performance of her regularly or specially assigned duties under *Cutler*.[21] Instead, she maintained that she experienced harassment at work after she had reported financial impropriety by the union in her role as union secretary and treasurer.

There is no dispute that on August 17, 2018 someone placed a threatening letter on appellant's work desk. Appellant's supervisor confirmed that appellant had received the threatening letter and called the MPs, who contacted the CID. The Board has held that verbal and written threats, when sufficiently detailed by the claimant and supported by evidence, may constitute compensable employment factors.[22] Appellant has established with corroborating evidence that she received written threats made against her and her family. The Board has recognized the compensability of threats when the factual aspects of such claimed threats are established.[23] The Board finds that the letter left on appellant's desk, which threatened her with death and also threatened her family, rises to the level of a credible bodily threat.[24] Consequently, the Board finds that she has established a compensable employment factor with regard to the death threat.[25]

Appellant also attributed her condition to the placement of pornographic pictures purporting to be of her, noting her cellphone number, in multiple locations around her worksite on February 12, 2018. Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.[26] A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.[27]

Appellant maintained that on February 12, 2018 her second-line supervisor, S.B., told her that vulgar and graphic images altered to resemble her had been placed throughout the work

[20] *Id*.

[21] *Supra* note 11.

[22] *J.W.*, Docket No. 17-0999 (issued September 4, 2018).

[23] *See K.W.*, Docket No. 20-1504 (issued July 30, 2021); *Z.S.*, Docket No. 16-1783 (issued August 16, 2018).

[24] *See M.R.*, Docket No. 17-1803 (issued February 8, 2019) (finding that a statement made directly to the claimant that he would be "among the nonliving" was a credible bodily threat directed at the claimant).

[25] *See J.Z.*, Docket No. 19-1156 (issued July 28, 2020).

[26] *See M.S.*, Docket No. 19-1589 (issued October 7, 2020).

[27] *See A.F.*, Docket No. 29-0525 (issued September 14, 2020); *Robert Breeden*, 57 ECAB 622 (2006).

location. In a February 13, 2018 e-mail to the employing establishment, R.S., the plant manager, advised that pornographic pictures had been placed throughout work and asserted that the conduct would not be tolerated. While appellant expressed her belief that the images were placed around work as retaliation for union whistleblowing activities, there is no evidence of record from the employing establishment identifying the perpetrator. The incident occurred while appellant was performing her employment duties rather than union activities and the images were placed throughout the work location. The evidence factually supports that a coworker placed graphic and vulgar images of a sexual nature purporting to be of appellant around her work location and, thus, she has established a compensable work factor.[28]

Appellant further attributed her condition to R.R. yelling at her and accusing her of sleeping with the new union head at a July 6, 2017 union meeting. She related that she had uncovered financial irregularities and had called for an outside audit of the union and, as a result, the union had been placed under Trusteeship. When officials arrived to take control of the union, R.R. yelled at her and used profanity. Appellant maintained that on August 10, 2017 union members angry about the audit had posted false union minutes and photographs of her on the bulletin board at work. She advised that R.R.'s friends spread rumors about her around the office. Appellant has not alleged that she was performing representational functions or was on official union time at the time of these incidents. As there is no connection between these incidents and her employment, the actions taken by the union members in reaction to the investigation and audit did not occur in the performance of duty and are not compensable under FECA.[29]

Appellant maintained that on July 18, 2017 her car was scratched and that on September 18, 2018 a coworker's car that she had driven was vandalized. She also asserted that her home was vandalized. Appellant, however, has not submitted any evidence establishing that these incidents occurred as part of her employment duties or evidence that the vandalism was the result of harassment by coworkers.[30] Thus, she has not established a compensable work factor.

Appellant also maintained that a coworker had approached her and asked her about rumors of a sexual nature circulating about her and that after work on August 8, 2017 B.S. called her a whore and liar. She further alleged that a coworker, G.S., had accused her of being a stripper, told others that the hair in the restroom was from her and that she was disgusting, attacked her for speaking with her supervisor for guidance, complained about her work clothes, and made an unkind comment when her brother passed away. Appellant, however, has not provided any evidence such as witness statements supporting her allegations of harassment by either of the unknown coworkers, B.S. or G.S.[31] Consequently, she has not established a compensable work factor with respect to these allegations.[32]

[28] *See I.D.*, Docket No. 16-0581 (issued December 12, 2016).

[29] *Id*.

[30] *See J.B.*, Docket No. 070664 (issued September 13, 2007).

[31] *Id*.

[32] *See L.S.*, Docket No. 18-1471 (issued February 26, 2020); *S.B.*, Docket No. 11-0766 (issued October 20, 2011).

The case will, therefore, be remanded for an evaluation of the medical evidence to determine whether appellant has established an emotional condition causally related to the compensable employment factors.[33] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 18, 2022
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

[33] *See D.B.*, Docket No. 19-1310 (issued July 21, 2020).