

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

S.K., Appellant)	
)	
and)	Docket No. 23-0655
)	Issued: September 18, 2023
DEPARTMENT OF TRANSPORTATION,)	
OFFICE OF THE INSPECTOR GENERAL,)	
Washington, DC, Employer)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 5, 2023 appellant filed a timely appeal from a March 30, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On February 13, 2023 appellant, then a 38-year-old, information technology manager, filed an occupational disease claim (Form CA-2) alleging that she had sustained an onset or aggravation

¹ 5 U.S.C. § 8101 *et seq.*

of an emotional condition due to bullying, retaliation, and harassment over the previous five years by two different supervisors. She noted that she first became aware of her condition on June 19, 2019, and realized its relationship to her federal employment on January 2, 2023. Appellant stopped work on February 13, 2023.

In a letter dated October 28, 2022, Nathaniel Sawyer, a licensed clinical social worker, indicated that he was counseling appellant to help regulate her mood, cope with stress and anxiety, and cope with past trauma in her life. Appellant related that she filed an Equal Employment Opportunity (EEO) complaint. She indicated her supervisor and HR representative appeared to be retaliating against her in handling her case. Appellant further related that she previously had a positive working relationship and positive performance evaluations before she filed the complaint, and after filing the complaint her supervisor became very critical of her work, and she subsequently had negative interactions with allegedly unprofessional and hostile comments toward her. Mr. Sawyer indicated that appellant's mental health was deteriorating as a result of her work environment. He further indicated drastic improvement in her mental health after she took Family and Medical Leave Act (FMLA) protected leave per his advice. Based on this improvement, Mr. Sawyer believed that the work environment created by appellant's supervisor and others were "clearly" impacting her mental health, and that her work environment needed to change as soon as possible. He indicated that appellant would excel again in her position after being reassigned to a different supervisor/team.

In a development letter dated February 22, 2023, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In a February 22, 2023 response, appellant indicated that the date of injury was "complex" and stated that it was between June 2019 and February 2023. She also stated that she would like to edit her initial statement and date of injury. Appellant further related that she had been harassed, bullied, and retaliated against by two different male supervisors in a row. She alleged that the employing establishment had allowed harassment and retaliation against persons with disabilities. Appellant also indicated that she had post-traumatic stress disorder (PTSD) from military sexual abuse, and the ill-treatment she was facing aggravated her symptoms and increased her need for therapy and medications.

In a letter dated February 28, 2023, Mr. Sawyer reiterated appellant's history of her alleged change in work environment after filing her EEO complaint. He indicated that he first saw her on September 14, 2022, and that she had been diagnosed with generalized anxiety disorder and PTSD. Mr. Sawyer further indicated that appellant was seen by a psychiatrist and prescribed medications for her conditions. He noted an increase in her symptoms of depression and anxiety due to her alleged negative treatment at her workplace. Appellant related that she was paranoid about being pushed out of her position, and believed this to be confirmed when she was offered a settlement offer. Mr. Sawyer reiterated that he advised her to take FMLA leave at that time, and that her symptoms improved while she was on leave.

In a letter dated March 22, 2023, the employing establishment controverted appellant's claim, contending that appellant's alleged work factors are not sufficiently detailed, and the employing establishment's findings directly refute her allegations of harassment, bullying, and/or

retaliation. The employing establishment provided letters dated March 15, 2023 and March 16, 2023 from supervisors J.S and R.N. contending that they did not harass, bully, or retaliate against appellant, and affirming that they had no knowledge of any medical conditions or military service of appellant.

By decision dated March 30, 2023, OWCP denied appellant's emotional condition claim, finding that the evidence of record was insufficient to establish the implicated employment factors. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA² has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.³ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

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 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. 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. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁶ 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

² *Id.*

³ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁴ *B.H.*, Docket No. 20-0777 (issued October 21, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁵ *M.E.*, Docket No. 21-1340 (issued February 1, 2023); *see S.K.*, Docket No. 18-1648 (issued March 14, 2019); *M.C.*, Docket No. 14-1456 (issued December 24, 2014); *Debbie J. Hobbs*, 43 ECAB 135 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁶ *M.E., id.*; *Lillian Cutler*, 28 ECAB 125 (1976).

his or her frustration from not being permitted to work in a particular environment, or to hold a particular position.⁷

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.⁸ Mere perceptions of harassment or discrimination are not compensable under FECA.⁹ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹⁰ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹¹

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.¹² 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, it must base its decision on an analysis of the medical evidence.¹³

ANALYSIS

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 due to harassment/bullying and retaliation by two supervisors in her workplace. OWCP denied her emotional condition claim finding that she had not established compensable employment factors. The Board must, therefore, initially review whether these alleged incidents and conditions are covered employment factors under the terms of FECA.¹⁴ The Board notes that appellant's claim does not directly relate to her

⁷ *M.E., id.; A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁸ *M.V.*, Docket No. 22-0227 (issued March 28, 2023); *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁹ *M.V., id.; A.E., supra* note 7; *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ *M.V., id.; J.F.*, 59 ECAB 331 (2008); *Robert Breeden, supra* note 8.

¹¹ *M.V., id.; R.D.*, Docket No. 21-0050 (issued February 25, 2022); *T.Y.*, Docket No. 19-0654 (issued November 5, 2019); *G.S.*, Docket No. 09-0764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

¹² *M.E., supra* note 5; *see O.G., supra* note 8; *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹³ *Id.*

¹⁴ *M.V., supra* note 8; *R.K.*, Docket No. 20-0623 (issued February 9, 2022); *Y.W.*, Docket No. 19-1877 (issued April 30, 2020); *Dennis J. Balogh*, 52 ECAB 232 (2001).

regular or specially assigned duties under *Lillian Cutler*.¹⁵ Rather, appellant alleged a pattern of harassment by two different supervisors, asserting that she was subjected to harassment and retaliation after filing an EEO complaint. She alleged that this aggravated her PTSD and increased her need for therapy and medication.

To the extent that disputes and incidents alleged as constituting harassment are established as occurring and arising from an employee's performance of his or her regular duties, these could constitute employment factors.¹⁶ However, the Board has held that unfounded perceptions of harassment or discrimination do not constitute an employment factor.¹⁷ Mere perceptions are not compensable under FECA, and harassment or discrimination can constitute a factor of employment only if it is shown that the incidents constituting the claimed harassment or discrimination actually occurred.¹⁸

Appellant has not submitted corroborative evidence in support of her allegations of harassment and retaliation. The Board has previously explained that to establish harassment or retaliation under FECA, the claimant must submit sufficient evidence to establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.¹⁹ For harassment or retaliation to give rise to a compensable disability under FECA, there must be evidence that harassment or retaliation did, in fact, occur.²⁰

The Board notes that appellant has only made general assertions of harassment and retaliation. Appellant has not provided details regarding specific acts of harassment or retaliation or provided witness statements or other documentary evidence demonstrating that the alleged harassment or retaliation occurred as alleged.²¹ For example, she also has not submitted the final findings of any complaint or grievance she might have filed with respect to her alleged harassment and retaliation.²² Therefore, the Board finds that appellant has not established a compensable employment factor with respect to the claimed harassment and retaliation.

¹⁵ *A.E.*, *supra* note 7; *Gregorio E. Conde* *supra* note 7.

¹⁶ *M.E.*, *supra* note 5; *D.B.*, Docket No. 18-1025 (issued January 23, 2019); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

¹⁷ *M.E.*, *id.*; *see F.K.*, Docket No. 17-0179 (issued July 11, 2017).

¹⁸ *See id.*

¹⁹ *A.E.*, *supra* note 7; *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

²⁰ *Id.*; *see also D.G.*, Docket No. 22-0654 (issued May 11, 2023).

²¹ *M.E.*, *supra* note 5.; *see B.S.*, Docket No. 19-0378 (issued July 10, 2018).

²² *M.E.*, *id.*; *see generally C.T.*, Docket No. 08-2160 (issued May 7, 2009) (some statements may be considered abusive and constitute a compensable factor of employment, but that not every statement uttered in the workplace will be covered by FECA).

As the Board finds that appellant has not established a compensable employment factor, it is not necessary to consider the medical evidence of record.²³

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, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 18, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

²³ *M.E., id.*; *see B.O.*, Docket No. 17-1986 (issued January 18, 2019) (finding that it is not necessary to consider the medical evidence of record if a claimant has not established any compensable employment factors). *See also Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).