

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

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A.G., Appellant )

and )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**U.S. IMMIGRATION AND CUSTOMS** )  
**ENFORCEMENT, Laredo, TX, Employer** )

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**Docket No. 24-0113**  
**Issued: April 23, 2024**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On November 17, 2023 appellant filed a timely appeal from an October 24, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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/stress-related condition in the performance of duty, as alleged.

**FACTUAL HISTORY**

On April 20, 2023 appellant, then a 60-year-old investigative analyst, filed an occupational disease claim (Form CA-2) alleging that she developed depression, stress, anxiety, and mental

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

health disorders due to factors of her federal employment. She noted that she first became aware of her claimed condition and realized its relation to her federal employment on May 31, 2020. On the reverse side of the claim form, R.M., appellant's supervisor, indicated that appellant had retired on May 31, 2020, and first reported the conditions on April 20, 2023.

In an April 20, 2023 statement, appellant attributed her emotional/stress-related conditions to an alleged pattern of harassment, discrimination, retaliation, disparate treatment, and a hostile work environment commencing in 2013. She alleged that on December 17, 2018 she discovered that supervisors discriminated against her by providing false and misleading information in a performance evaluation, and singled her out from a staff of nine administrative employees. Appellant contended that on January 18, 2018 a coworker repeatedly belittled her pain symptoms following intra-articular injections although her physician instructed her to rest at home. She reported the comments to a supervisor, who indicated that he would speak to the coworker. Appellant also alleged that on February 23, 2018 the same coworker violated supervisory instructions by directing her to change how she labeled investigative case folders, and on February 24, 2018 instructed her to remove and replace the labels. On February 24, 2018 a supervisor denied appellant's request to attend a career-day event at an elementary school as she was the only investigative assistant in the office, and repeated a coworker's comments that she did not know how to prepare and label investigative file folders. On March 2, 2018 a supervisor informed appellant that he had spoken with the coworker regarding the January 18 and February 24, 2018 incidents and instructed him to stop the unwelcomed comments. Appellant alleged that, in July and August 2018, while on sick leave and Family and Medical Leave Act (FMLA) leave due to her husband's illness and hospitalization, supervisors called her every workday to demand that she return to work and revoke her FMLA request as they had granted her advanced sick leave although she still had annual leave. She also alleged that, although her supervisor explained during her September 28, 2018 annual performance review that all employees were given low ratings and no cash or time off awards in accordance with a senior management directive, on December 17, 2018 and during that week she overheard other administrative employees discussing their time off and cash awards. Appellant contended that a supervisor refused to authorize advanced sick leave on November 26 and 27, 2018 and that supervisors harassed her at a meeting about the leave request on November 28, 2018. She alleged that on December 6, 2018 a supervisor harassed her for scheduling laboratory tests that day and not on December 5, 2018 which was a nonwork day. Appellant also alleged that on December 18, 2018 an acting supervisor requested that she report to his cubicle to discuss furlough procedures and then screamed and yelled at her regarding a December 24, 2018 leave request. She requested that the discussion continue in a private location, so she and the supervisor went into a private office. The supervisor later called appellant to apologize for his conduct.

OWCP also received medical evidence.

In reports dated June 24, 2019 through April 27, 2020, Dr. John V. Puig, II, a Board-certified family medicine physician with a certificate of added qualifications in sports medicine, diagnosed traumatic conditions of the right foot and ankle. He held appellant off work commencing July 18, 2019.

In reports dated August 28 through September 10, 2019, Dr. Craig Glauser, a Board-certified orthopedic surgeon, held appellant off work through October 27, 2019, and returned her to work effective October 28, 2019, with restrictions.

OWCP also received December 13 and 17, 2019 e-mails regarding a December 16, 2019 appointment with Dr. Gary Whiting, a licensed psychologist, and a January 8, 2020 letter by Luis E. Flores, a licensed professional counselor.<sup>2</sup>

In an April 27, 2023 letter, the employing establishment controverted the claim, noting that appellant reported that she first became aware of her condition on May 31, 2020 the same date she retired.

In a development letter dated May 2, 2023, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. In a separate development letter of the same date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor, and an explanation of appellant's work activities. It afforded both parties 60 days to submit the necessary evidence.

In a May 18, 2023 response to OWCP's May 2, 2023 development letter, appellant requested that OWCP review her April 20, 2023 statement and the evidence of record.

OWCP received a portion of an undated employing establishment letter acknowledging appellant's January 31, 2019 filing of an Equal Employment Opportunity Commission (EEOC) complaint for a hostile work environment based on gender and family disability regarding the alleged January 18, February 24, July, November 28, and December 6, 17, and 18, 2018 employment incidents. It also received a portion of an undated settlement agreement in which she agreed to withdraw the EEOC complaint based on unspecified consideration.

In a May 18, 2023 letter, F.A., appellant's supervisor from November 2018 through January 2019, controverted the claim. He contended that he was not aware of the alleged incidents occurring from January 18 through September 28, 2018, as appellant was then supervised by J.L., who had since passed away, and by assistant Special Agent in Charge, J.F., who had since retired from federal employment. F.A. asserted that her recollection of the November 28, 2018 meeting with J.F. and himself was inaccurate. He explained that J.F. discussed how the employing establishment could assist appellant with her leave needs and asked if she needed advanced leave due to her situation. F.A. also contended that her recollection of the December 6, 2018 meeting was inaccurate. He asserted that on December 6, 2018 he spoke with appellant to "coach and advise" her about her leave deficiency to assist her in managing a diminished leave balance. F.A. recalled that, on December 18, 2018, although a group e-mail had been sent regarding furlough procedures, he did not instruct her to meet with him at his cubicle. He asserted that, while he was in another employee's cubicle discussing work matters, appellant approached him in "an agitated and uneasy state" and inquired about leave. F.A. began to answer her questions, then she requested

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<sup>2</sup> Appellant also submitted medical appointment logs and medication lists covering the period January 1, 2018 through January 1, 2022, a June 11, 2019 report diagnosing a right ankle sprain signed by Alex Cavazos, a nurse practitioner, and August 18, 2019 hospital emergency department instructions for cast or splint care.

to move to a private location. They went to a private office, where appellant closed the door. F.A. asserted that he attempted to resolve her concerns and did not raise his voice. He later called appellant to express support and empathy for her situation.

F.A. submitted his January 23, 2019 group email regarding procedures for employees to place themselves in furlough status, a January 25, 2019 e-mail to two employees noting that appellant and another employee were absent and February 25, 2019 e-mails in which appellant requested and J.F. approved 16 hours of advanced sick leave. He also provided a copy of her official position description.

By decision dated October 24, 2023, OWCP denied appellant's claim for an emotional condition sustained in the performance of duty, finding that she had not substantiated a compensable factor of employment. It found that the identified employment incidents did not occur as alleged. Therefore, OWCP concluded that the requirement had not been met to establish an injury as defined by FECA.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim,<sup>4</sup> including that he or she 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,<sup>5</sup> that an injury was sustained in the performance of duty as alleged, and that any specific condition or disability from work for which he or she claims compensation is causally related to that employment injury.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *L.G.*, Docket No. 21-0690 (issued December 9, 2021); *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).

<sup>5</sup> *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued December 13, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>6</sup> *L.G.*, *supra* note 4; *S.S.*, *supra* note 4; *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>7</sup> 20 C.F.R. § 10.115(e); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *T.O.*, Docket No. 18-1012 (issued October 29, 2018); *Michael E. Smith*, 50 ECAB 313 (1999); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>8</sup> *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).

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.<sup>9</sup> 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.<sup>10</sup> On the other hand, the disability is not covered when 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.<sup>11</sup>

Appellant's burden of proof includes the submission of a detailed description of the employment factors, which he or she believes caused or adversely affected a condition for which compensation is claimed.<sup>12</sup> As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim. The claim must be supported by probative evidence.<sup>13</sup> 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.<sup>14</sup> Mere perceptions of harassment, retaliation, or discrimination are not compensable under FECA.<sup>15</sup>

### ANALYSIS

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

Appellant has alleged that she sustained an emotional condition as a result of a number of incidents regarding her supervisor and conditions at her workplace. OWCP denied her emotional condition claim finding that she had not established a compensable employment factor. The Board must, therefore, initially review whether these alleged incidents and conditions are compensable employment factors under the terms of FECA.<sup>16</sup>

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<sup>9</sup> See *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

<sup>10</sup> See *S.K.*, *supra* note 8; *D.T.*, Docket No. 19-1270 (issued February 4, 2020); *Thomas D. McEuen*, 41 ECAB 387 (1990); *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>11</sup> See *S.K.*, *id.*; *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>12</sup> *P.T.*, Docket No. 14-0598 (issued August 5, 2014).

<sup>13</sup> *L.S.*, Docket No. 18-1471 (issued February 26, 2020).

<sup>14</sup> *R.D.*, Docket No. 19-0877 (issued September 8, 2020); *T.G.*, Docket No. 19-0071 (issued May 28, 2019); *Marlon Vera*, 54 ECAB 834 (2003).

<sup>15</sup> *Id.*; *B.K.*, Docket No. 23-0902 (issued November 29, 2023); see also *Kim Nguyen*, 53 ECAB 127 (2001).

<sup>16</sup> *C.Y.*, Docket No. 22-0699 (issued June 2, 2023); *Y.W.*, Docket No. 19-1877 (issued April 30, 2020); *Dennis J. Balogh*, 52 ECAB 232 (2001).

The Board notes that some of appellant's claims potentially implicate her regular or specially assigned duties under *Lillian Cutler*.<sup>17</sup> Appellant attributed her condition, in part, to February 23 and 24, 2018 employment incidents where a coworker/acting supervisor altered prior instructions on labeling investigative case folders, subsequently directed her to remove and replace the labels, and commented that she did not know how to properly label and prepare the folders. However, the Board finds that she has not established an employment factor in this regard as she only provided a generalized account of her labeling duties.<sup>18</sup> Additionally, the Board has held that mere dislike or disagreement with certain supervisory actions will not be compensable absent error or abuse on the part of the supervisor.<sup>19</sup> Appellant has not substantiated error or abuse committed by the employing establishment in the above-noted matters and, therefore, the Board finds that she has not established a compensable employment factor in this regard.

Appellant also attributed her condition to administrative matters. During development of the claim, she alleged that supervisors denied her February 24, 2018 request to attend a career-day event, called her daily while she was on leave in July and August 2018 to ask her to revoke her FMLA request, included false and defamatory information in a September 28, 2018 performance appraisal, questioned her sick leave requests for November 26 and 27, 2018, held a November 28, 2018 meeting regarding November 26 and 27, 2018 sick leave requests, confronted her on December 6, 2018 about her sick leave use on December 5, 2018 and required her to meet on December 18, 2018 about leave use and furlough procedures. The Board has held, however, that disputes regarding leave<sup>20</sup> and performance appraisals<sup>21</sup> are administrative matters not within the performance of duty under *Cutler*.<sup>22</sup> However, the Board has also 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.<sup>23</sup> 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.<sup>24</sup>

The Board finds that appellant has not submitted sufficient evidence to establish the above-noted claims about administrative/personnel matters. Although OWCP received portions of an EEOC complaint and settlement agreement, there is no indication in the case record that she obtained a final determination from an administrative body showing that the employing

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<sup>17</sup> *Supra* note 11.

<sup>18</sup> *See C.C.*, Docket No. 21-0519 (issued September 22, 2023); *W.M.*, Docket No. 15-1080 (issued May 11, 2017).

<sup>19</sup> *Id.*; *T.C.*, Docket No. 16-0755 (issued December 13, 2016).

<sup>20</sup> *R.M.*, Docket No. 22-0472 (issued October 16, 2023); *M.C.*, Docket No. 18-0585 (issued February 13, 2019); *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

<sup>21</sup> *C.C.*, *supra* note 18.

<sup>22</sup> *Supra* note 11.

<sup>23</sup> *C.Y.*, Docket No. 22-0699 (issued June 2, 2023); *M.S.*, Docket No. 19-1589 (issued October 7, 2020); *William H. Fortner*, 49 ECAB 324 (1998).

<sup>24</sup> *C.Y., id.*; *J.W.*, Docket No. 17-0999 (issued September 4, 2018); *Ruth S. Johnson*, 46 ECAB 237 (1994).

establishment committed the alleged error or abuse.<sup>25</sup> Appellant has not substantiated error or abuse committed by the employing establishment in the above-noted matters and, therefore, she has not established a compensable employment factor with respect to administrative or personnel matters.

Appellant also maintained that supervisors engaged in a pattern of harassment, discrimination, intimidation, retaliation, and disparate treatment, which created a hostile work environment during the period December 17, 2018 through May 31, 2020. She specifically alleged that on January 18, 2018 a coworker/acting supervisor repeatedly belittled her pain symptoms, that a supervisor harassed her during a December 6, 2018 meeting about leave use, and that a supervisor yelled at her during a December 18, 2018 meeting on furlough procedures and leave use.

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.<sup>26</sup> However, the Board has held that unfounded perceptions of harassment or discrimination do not constitute an employment factor.<sup>27</sup> 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.<sup>28</sup>

Appellant has not submitted corroborative evidence in support of her allegations of harassment, intimidation, discrimination, 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.<sup>29</sup> For harassment, discrimination, or retaliation to give rise to a compensable disability under FECA, there must be evidence that harassment, discrimination, or retaliation did, in fact, occur.<sup>30</sup>

The Board notes that, in his May 18, 2023 statement, supervisor F.A. contended that appellant's recollection of the November 28 and December 6 and 18, 2018 meetings were inaccurate. F.A. explained that supervisors had coached and advised her regarding her leave use and diminished leave balance, and denied raising his voice during the December 18, 2018 meeting. His statement contradicts appellant's account of events. Additionally, appellant has not provided witness statements or other documentary evidence demonstrating that the alleged harassment or

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<sup>25</sup> See *M.R.*, Docket No. 18-0304 (issued November 13, 2018).

<sup>26</sup> *M.E.*, Docket No. 21-1340 (issued February 1, 2023); *D.B.*, Docket No. 18-1025 (issued January 23, 2019); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

<sup>27</sup> *M.E.*, *id.*; *F.K.*, Docket No. 17-0179 (issued July 11, 2017).

<sup>28</sup> *S.K.*, Docket No. 23-0655 (issued September 18, 2023).

<sup>29</sup> *Id.*; *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>30</sup> *D.G.*, Docket No. 22-0654 (issued May 11, 2023).

retaliation occurred as alleged.<sup>31</sup> For example, she has not submitted the complete final findings of any complaint or grievance she might have filed with respect to her alleged harassment and retaliation.<sup>32</sup> Therefore, the Board finds that she has not established a compensable employment factor with respect to the claimed harassment, discrimination, and retaliation.

As the Board finds that appellant has not established a compensable employment factor, it is not necessary to consider the medical evidence of record.<sup>33</sup>

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/stress-related condition in the performance of duty, as alleged.

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<sup>31</sup> *M.E.*, *supra* note 27; *see B.S.*, Docket No. 19-0378 (issued July 10, 2018).

<sup>32</sup> *Supra* note 26.

<sup>33</sup> *M.E.*, *supra* note 27; *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).



**ORDER**

**IT IS HEREBY ORDERED THAT** the October 24, 2023 merit decision of the of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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