

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

D.C., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
GULF COAST VETERANS' HEALTHCARE
SYSTEM, BILOXI VA MEDICAL CENTER,
Biloxi, MS, Employer**

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**Docket No. 23-1068
Issued: March 15, 2024**

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

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 7, 2023 appellant filed a timely appeal from an April 4, 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.²

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence 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.*

FACTUAL HISTORY

On February 11, 2022 appellant, then a 57-year-old licensed practical nurse, filed an occupational disease claim (Form CA-2) alleging that she developed an emotional condition due to factors of her federal employment. She indicated that a nurse manager yelled and used profanity, admonishing her in front of patients and co-workers. Appellant noted that she first became aware of her condition and realized its relation to her federal employment on January 27, 2022. She stopped work on January 31, 2022.

In support of her claim, appellant submitted a January 30, 2022 letter by Dr. Stephen Agans, a Board-certified emergency medicine specialist, who noted that she was seen in the emergency department on January 29, 2022. Dr. Agans recommended that she remain off work through February 6, 2022.

In a letter dated February 10, 2022, Alexa Morales, a licensed clinical social worker and psychotherapist, recommended that appellant remain off work from February 7 through 21, 2022.

In a development letter dated March 4, 2022, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of medical and factual evidence needed and provided a questionnaire for her completion. In a separate letter of even date, OWCP requested that the employing establishment provide information regarding appellant's claim, including comments from a knowledgeable supervisor. It afforded both parties 30 days to respond.

In an undated response to OWCP's questionnaire, appellant described several incidents which involved S.P., an employing establishment nurse manager. She indicated that in May 2021, S.P. instructed her to work in a different unit, even though it was not her turn to do so, while also assigning her regular position to another nurse. Appellant asked if she could return to her regular position after two hours, and S.P. agreed but also yelled that she needed someone to work. She further related that, in July 2021, she underwent a dental procedure and provided an out of work slip to S.P. and called out of work due to the effects of her pain medication. Thereafter, in November 2021, S.P. gave appellant a written counseling for taking excessive sick leave. In December 2021, she noted that she was not paid for time she worked during the holidays and S.P. did not assist her to resolve the issue. Appellant related that she was paid correctly after she inquired with a different supervisor. In January 2022, appellant indicated that S.P. accused her of not following the safety rules concerning medication administration. She related that the medication cart had been changed several times, that some medications did not scan properly, and that she was not granted a meeting with the bar code medication administration (BCMA) coordinator to discuss the issue. Appellant further related that since S.P. became her nurse manager, she watched S.P. openly yell at employees regarding nursing duties, which caused her to feel increased anxiety. She also noted a prior history of being assaulted by a patient in 2019, for which she sought counselling with Ms. Morales.

In a January 27, 2022 employing establishment report of contact (ROC) form, appellant indicated that S.P. approached her at the main counter on that date while she was talking with co-workers and yelled at her stating that "this is bull***t" why can't you just answer the email? You did not answer one thing!" She related that S.P. began to move the medication cart rapidly and pull the drawers out, while she continued to berate her, yelling "I cannot believe you, s***. Can't you see I am trying to help you out! And you are stabbing me in my back! But since you want to do this, I am going to take it all the way to the top! And I'm not going to stop until I do." Appellant

related that she felt unable to respond, humiliated, threatened, and discriminated against and left the unit.

In a February 15, 2022 medical report, Dr. Magdy Mikhail, a Board-certified internist, noted that appellant related complaints of mistreatment at work, including verbal abuse by a nursing supervisor. He performed a physical examination and diagnosed major depressive disorder, single episode unspecified, and recommended medication, a referral to psychiatry, and asked her to obtain paperwork for time off from work.

In an unsigned response to OWCP's questionnaire dated March 8, 2022, S.P. indicated that on January 27, 2022 appellant approached her and stated that she felt singled out and was being punished by having to assist with a BCMA action plan. S.P. explained to her that she was not being singled out and that she had been asked to participate in the action plan because she had 53 percent missed scans, which was the most missed scans on the medication cart. When the meeting was over, S.P. indicated that appellant was smiling and she "thought they were good." Later in the day, appellant emailed her and a union representative and accused S.P. of harassing her by continuously asking her to pull up her facemask and assist with the BCMA wristband scanning action plan. She then spoke to appellant and said that she could not believe that she wrote that email, knowing it was not true and that it was "such B.S." and that she tried "to help people and they turn it against her, you people are unbelievable." S.P. indicated that some staff, but no residents, were present at the nurse's desk when the conversation took place. She noted that there had been several other incidents where appellant raised her voice at her in the hallway and at the nurse's desk in front of staff and residents, incidents with other interdisciplinary staff, counseling about excessive sick leave, and one-on-one discussions about her rudeness towards staff and residents that she reported to the chief nurse. S.P. related that prior to appellant filing her claim for mental stress, S.P. sent her an email on February 10, 2022 to meet regarding a written counseling. She further noted that appellant was instructed not to contact S.P. *via* telephone, email, or face to face, because appellant made a threat against S.P. that "she could kill her."

In a March 9, 2022 narrative letter, Ms. Morales noted that she treated and discharged appellant in 2019. She resumed treatment in February 2022, at which time she noticed a decline since her previous gains and related a history of a work-related incident of chronic belittling, degradation, and verbal aggression from her direct supervisor.

In a March 28, 2022 narrative report, Dr. Kristi Mong, a licensed psychologist, performed an evaluation and noted appellant's symptoms of depression and anxiety, which she attributed to employment incidents in 2019 when she was hit in the face by a patient and 2022, which she described as aggression, belittling, and degradation from her current supervisor/manager. She administered a Millon Clinical Multi-Axial Inventory 4 (MCMI – 4) and diagnosed major depressive disorder, recurrent episode, severe, with anxious distress and nightmare disorder.

In a May 17, 2022 out of work slip, Dr. Laviesta Ferrell, a Board-certified psychiatrist, indicated that appellant was disabled from work, effective May 17, 2022.

OWCP also received additional employing establishment ROC forms, which were only partially legible.

By decision dated August 25, 2022, OWCP denied appellant's claim, finding that she had not established any compensable factors of employment. Therefore, she did not sustain an injury in the performance of duty as defined by FECA.

On September 12, 2022 appellant requested reconsideration of OWCP's August 25, 2022 decision. In support of her request, she submitted additional evidence, which included a January 27, 2022 medical report by Dr. Jasper R. Jones, a Board-certified internist, who noted that appellant was very upset and related that she felt she was in a hostile environment with her nursing supervisor.

In February 16 and March 6, 2022 letters, Ms. Morales held appellant off work from February 16 through March 30, 2022.

Following a preliminary review, by decision dated December 5, 2022, OWCP's hearing representative vacated the August 25, 2022 decision and remanded the case for OWCP to further develop the claim. The hearing representative instructed OWCP to request that the employing establishment provide fully legible copies of the ROCs and all documents concerning any investigation it conducted.

By correspondence dated January 20, 2023, OWCP requested the additional information from the employing establishment.

OWCP thereafter received an amended version of the employing establishment's March 8, 2022 response to OWCP's questionnaire, which had been updated with S.P.'s signature and was now dated February 28, 2022.

It also received fully legible copies of the previously-submitted employing establishment ROC forms. In a September 9, 2021 form, A.D., an employing establishment supervisor, noted that she was informed by J.H., a clinical nurse leader, that on August 26, 2021 appellant had retrieved a COVID-19 vaccine from the clinic for a patient, despite having been previously counseled that only J.H. was to retrieve the vaccines.

An employing establishment ROC form dated October 7, 2021 from S.P. noted that police had responded to the unit after a resident became upset that appellant sat around and did nothing all day and refused to assist him.

An employing establishment ROC form dated December 10, 2021 from B.E., an employing establishment manager, indicated that she assisted appellant regarding an incorrect timecard.

An employing establishment ROC form dated December 15, 2021 from S.P. indicated that appellant "went off" on her, called her a liar, and accused her of not correcting appellant's timecard. S.P. tried to calm her down and redirect her, without success.

An employing establishment ROC form dated January 27, 2022 from S.P. indicated that the unit had not met the compliance benchmark for the past three months for BCMA wristband scanning. She asked appellant to help create an action plan to resolve the issue because appellant had a 50 percent noncompliance rate, and she felt appellant could assist her in determining how the scanning issues had occurred. S.P. related that the next day appellant asked to speak with her and stated she felt singled out and was being punished by having to assist in the action plan. She

explained to her that she was not being singled out or punished and reiterated that she thought appellant could help identify problems and how to overcome them because she had the most missed scans. S.P. indicated that when the meeting was over appellant smiled, and she thought “they were good.” Later that day, appellant emailed her and a union representative accusing S.P. of harassing appellant and asking her to continuously pull up her face mask and assist with the BCMA wristband scanning plan. After reading the email, S.P. responded and asked some questions, to which appellant “wrote back with some off the wall comments.” At that point, S.P. went to the unit to get answers to her questions and appellant indicated she emailed her. S.P. replied “no you did not answer my questions” and “I can’t believe you wrote that email to the union, knowing it’s not true, it’s such B.S. I try to help you people and you turn it against me, you people are unbelievable. It’s alright, it will get taken care of.”

By *de novo* decision dated April 4, 2023, OWCP denied appellant’s claim, finding that she had not established any compensable factors of employment and, thus, had not established an injury in the performance of duty as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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,⁴ 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.⁵ 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.⁶

To establish a claim for an emotional condition in the performance of duty, an employee must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; (2) medical evidence establishing that he or she has an emotional or psychiatric disorder; and (3) medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.⁷

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment.⁸ In the case of *Lillian Cutler*,⁹ the Board explained that there are distinctions as to the type of employment situations giving rise to a

³ *Supra* note 1.

⁴ *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).

⁵ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *R.B.*, Docket No. 19-0343 (issued February 14, 2020).

⁸ *L.Y.*, Docket No. 18-1619 (issued April 12, 2019); *L.D.*, 58 ECAB 344 (2007).

⁹ 28 ECAB 125 (1976).

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 of FECA.¹⁰ 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.¹¹

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.¹² Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.¹³

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.¹⁴ Mere perceptions of harassment or discrimination are not compensable under FECA.¹⁵ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹⁶ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁷

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.

Appellant has alleged that she sustained an emotional condition as a result of a number of incidents regarding her supervisor. OWCP denied her emotional condition claim finding that she had not established a compensable employment factor. The Board must, therefore, initially review

¹⁰ *M.R.*, Docket No. 18-0305 (issued October 18, 2018); *Robert W. Johns*, 51 ECAB 136 (1999).

¹¹ *D.I.*, Docket No. 19-0534 (issued November 7, 2019); *T.G.*, Docket No. 19-0071 (issued May 28, 2019).

¹² See *D.T.*, Docket No. 19-1270 (issued February 4, 2020); *Andrew J. Sheppard*, 53 ECAB 170, 171 (2001); *Matilda R. Wyatt*, 52 ECAB 421 (2001).

¹³ *C.V.*, Docket No. 18-0580 (issued September 17, 2018); *Kim Nguyen*, 53 ECAB 127 (2001); *William H. Fortner*, 49 ECAB 324 (1998). See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon*, 42 ECAB 566 (1991).

¹⁴ *Supra* note 8.

¹⁵ *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *M.D.*, 59 ECAB 211 (2007); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁶ See *J.R.*, Docket No. 20-1382 (issued December 30, 2022); *L.J.*, Docket No. 20-0998 (issued December 14, 2022); *S.G.*, Docket No. 22-0495 (issued November 4, 2022); *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, 57 ECAB 622 (2006).

¹⁷ *T.Y.*, Docket No. 19-0654 (issued November 5, 2019); *G.S.*, Docket No. 09-0764 (issued December 18, 2009).

whether these alleged incidents and conditions are compensable employment factors under the terms of FECA.¹⁸

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

Appellant alleged that, in January 2022, S.P. accused her of not following the safety rules concerning medication administration. In an employing establishment ROC dated January 27, 2022 and a February 28, 2022 response to OWCP's questionnaire, S.P. explained that the unit had not met the compliance benchmark for the past three months for BCMA wristband scanning. She thought appellant could help identify problems and how to overcome them because she had the most missed scans, so she asked appellant to help create an action plan to resolve the issue. Appellant's allegations regarding her dissatisfaction with this supervisory action²⁰ and assignment of work²¹ relates to administrative or personnel management actions. Administrative and personnel matters, although generally related to employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee. As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of FECA.²² For an administrative or personnel matter to be considered a compensable factor of employment, the evidence must establish error or abuse on the part of the employer.²³ The Board finds that appellant has not provided sufficient evidence to substantiate her allegations of error or abuse by the employing establishment in this administrative matter. Although appellant expressed dissatisfaction with S.P.'s supervisory action, 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.²⁴

Appellant further alleged that S.P. swore at and admonished her in front of other staff and patients on January 27, 2022 and that since S.P. became her nurse manager, she watched S.P. openly yell at employees regarding nursing duties, which caused her to feel increased anxiety. In her January 27, 2022 ROC and February 28, 2022 response to OWCP's questionnaire, S.P. refuted appellant's allegations and explained that on January 27, 2022 she confronted appellant about knowingly writing false statements about her in an email after she sought her assistance to resolve the BCMA issue, that it was "B.S." and "unbelievable" that she wrote the email knowing it was not true, and that she had been trying to help appellant. Verbal altercations and difficult relationships with supervisors/managers, when sufficiently detailed and supported by the record,

¹⁸ Y.W., Docket No. 19-1877 (issued April 30, 2020); *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁹ See *R.D.*, Docket No. 19-0877 (issued September 8, 2020); *L.H.*, Docket No. 18-1217 (issued May 3, 2019); *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, *supra* note 9.

²⁰ *N.S.*, Docket No. 21-0355 (issued July 28, 2021); *T.C.*, Docket No. 16-0755 (issued December 13, 2016).

²¹ *L.S.*, Docket No. 18-1471 (issued February 26, 2020); *V.M.*, Docket No. 15-1080 (issued May 11, 2017); *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

²² *E.M.*, Docket 19-0156 (issued May 23, 2019); *F.C.*, Docket No. 18-0625 (issued November 15, 2018).

²³ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

²⁴ *F.W.*, Docket No. 19-0107 (issued June 10, 2020).

may constitute compensable factors of employment.²⁵ However, this does not imply that every abusive or threatening statement uttered in the workplace will give rise to coverage under FECA. For appellant to prevail on her claim, she must support her allegations with probative and reliable evidence.²⁶ The Board has held that being spoken to in a loud or harsh tone does not in itself constitute verbal abuse or harassment.²⁷ Furthermore, appellant has not submitted any witness statements or other evidence corroborating that she was spoken to in an offensive and disrespectful manner, that patients were present, that S.P. threatened her employment, or that S.P. openly yelled at employees regarding nursing duties. Mere allegations, in the absence of factual corroboration, are insufficient to meet a claimant's burden of proof.²⁸

Appellant also alleged that in May 2021, S.P. instructed her to work in a different unit; in November 2021 S.P. counseled her for taking excessive sick leave following dental work in July 2021; and that in December 2021, S.P. did not assist her to resolve an issue with her timecard. An employing establishment ROC dated December 10, 2021 indicated that another manager assisted appellant regarding an incorrect timecard. Thereafter, on December 15, 2021, S.P. reported that appellant "went off" on her and called her a liar, and that she was unable to redirect her. As noted above, for an administrative or personnel matter to be considered a compensable factor of employment, the evidence must establish error or abuse on the part of the employer.²⁹ The Board finds that appellant has not provided sufficient evidence to substantiate her allegations of error or abuse by the employing establishment in these administrative matters.³⁰

Appellant further alleged that, in July 2021, she was off work due to a dental procedure and the effects of her pain medication, but was later issued written counseling for taking excessive sick leave. Also, in December 2021, S.P. did not assist her to resolve an issue with regard to pay for time worked during the holidays. However, the Board has held that assignment of work, being monitored, investigations, disciplinary matters, and disputes regarding leave are administrative or personnel matters and can only be considered compensable work factors if there is probative evidence of error or abuse.³¹ There is no indication that the employing establishment committed error or acted abusively in these instances.

As the Board finds that appellant has not established a compensable employment factor, it is not necessary to consider the medical evidence of record.³²

²⁵ *J.M.*, Docket No. 16-0717 (issued January 12, 2017); *L.M.*, Docket No. 13-0267 (issued November 15, 2013).

²⁶ *Y.J.*, Docket No. 15-1137 (issued October 4, 2016).

²⁷ *R.T.*, Docket No. 13-1665 (issued September 12, 2014).

²⁸ See *K.G.*, Docket No. 16-1066 (issued September 21, 2017); *Pamela D. Casey*, 57 ECAB 260 (2005); *Bonnie Goodman*, 50 ECAB 139 (1998).

²⁹ *Supra* note 23.

³⁰ *Supra* note 24.

³¹ See *M.C.*, Docket No. 18-0585 (issued February 13, 2019).

³² See *R.B.*, Docket No. 19-0434 (issued November 22, 2019); *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).

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 April 4, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 15, 2024
Washington, DC

Alec J. Koromilas, 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