

<sup>2</sup> The Board notes that, following the April 6, 2023 decision, appellant submitted additional evidence to OWCP and on appeal. However, the Board’s *Rules of Procedures* 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 August 20, 2020 appellant, then a 62-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she developed an emotional condition on July 24, 2020 due to factors of her federal employment. She explained that upon returning from the restroom, she walked behind supervisor R.J.'s rolling chair, which was turned around. To alert R.J. of appellant's presence so that he would not roll backward, she "gently and lightly touched an index finger and thumb" to his shoulders for "a half second." She alleged that R.J. then "yelled in a rage, 'don't touch me, get your hands off me'" four times. Appellant reported that as she tried to apologize, R.J. interrupted her, yelling in a hostile manner and "verbally assaulted" her by yelling at her twice more not to touch him. She began "shaking, crying, and had to leave the office." Appellant noted that she first became aware of her condition and realized its relation to her federal employment on July 24, 2020. She stopped work on August 15, 2020.

OWCP received appellant's statements dated from July 24, 2020 through August 25, 2021. She alleged that on June 30, 2020 R.J. told her in a loud, demeaning manner to go to a supply room and stay there rather than work on an assignment. On July 23, 2020 manager I.C. asked appellant to work near R.J.'s desk, which led to the incident in which she touched R.J. and he yelled at her repeatedly. Managers instructed appellant to write a July 24, 2020 statement about the incident, and to arrange her work schedule so she would not be in the building at the same time as R.J. Appellant contended that R.J. had filed a sexual harassment/unwanted touching claim against her and would linger at the entrance to the building to harass her and prevent her from clocking in on time. She asserted that on August 6, 7, 12, and 13, 2023 management instructed her to leave the office as R.J. had been called in at an unscheduled time. On August 15, 2023 appellant and R.J. both reported at 7:00 a.m. She went to her desk to begin work. I.C. admonished appellant that she was only permitted to come in to work with prior approval from himself or manager E.H. Appellant contended that she had followed all instructions for scheduling her shifts. E.H. then telephoned appellant to explain that R.J. had been given permission to come in at 9:00 a.m. although he had not been scheduled to report until 3:00 p.m. E.H. later telephoned appellant to inform her that she was being terminated due to the events of that morning. Appellant noted that after the incidents with R.J., she had to resume prescription medication for psychiatric conditions. She noted prior traumatic experiences, including a 1992 murder-suicide of a coworker, working as a flight attendant on the same Boston to San Francisco flight that later struck the World Trade Center on September 11, 2001, and domestic violence.

In an August 25, 2020 report, Melissa Thompson, an advanced registered nurse practitioner, prescribed medication and returned appellant to work.

In a September 23, 2020 statement, supervisor I.C. recounted a June 30, 2023 incident in which manager J.D., who "has a loud voice," verbally corrected appellant "in front of the bathroom." He discussed with manager B.B. "that the correction was not made in the proper place and that he verbally counsel J.D."<sup>3</sup> I.C. confirmed that on July 23, 2020 he assigned appellant to sit at a desk near R.J. On July 24, 2020 he obtained statements from appellant and supervisor M.J., about the July 23, 2020 incident. I.C. instructed appellant to coordinate her work schedule with E.H. so that she would not work the same shift as R.J. He alleged that during the following days,

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<sup>3</sup> In a statement received on January 3, 2022, appellant indicated that the individual who yelled at her on June 30, 2023, initiating intervention by I.C., was R.J. and not J.D.

appellant changed her schedule without permission. E.H. terminated appellant on August 15, 2023 as she had reported for work on an unscheduled day without permission.

In reports dated April 14 and May 13, 2020, Dr. Victor de Moya, a Board-certified psychiatrist and neurologist, recounted appellant's stressors of her daughter-in-law's terminal illness, her husband's hostility, and financial difficulties. He diagnosed major depressive disorder and anxiety disorder.

In reports dated August 10 through October 6, 2020, Dr. de Moya recounted the employment incident where a male coworker had "unauthorized touch" charges brought against her. Additionally, appellant's daughter-in-law passed away and her husband had been diagnosed with cancer. She also related stress from her termination from the employing establishment. Dr. de Moya diagnosed recurrent, severe major depressive disorder, and anxiety disorder.

In an October 17, 2020 report, Dr. de Moya recounted that while at work, appellant tried to pass behind a coworker seated in a narrow passageway and briefly touched his shoulders to alert him that she was behind him "to avoid him from backing out the chair pushing her into the wall." The coworker "reportedly had an explosive, bizarre, irrational outburst, jumping up and screaming in her face something similar to: 'Don't touch me! Don't touch me!' He was reportedly loud and aggressive, making a scene and intimidating her." The incident worsened appellant's major depression, with crying, hopelessness, insomnia, anxiety, anhedonia, impaired concentration, loss of appetite, and social withdrawal. Dr. de Moya reinitiated antidepressant and anti-anxiety medication. He also noted that appellant had been prohibited from working while the coworker was in the building, but that in August 15, 2022 he arrived before his scheduled shift, causing appellant to be at work at the same time as him. Appellant was then terminated, which increased her distress. Dr. de Moya opined that the employment incident had a direct causal relationship with the exacerbation of appellant's major depression, requiring medication and psychotherapy. "It is therefore with medical certainty that the exacerbation of her mood and anxiety [was] related to this work-related injury."

In reports dated October 23, 2020 and January 18, 2021, Dr. Pearl Bacdayan, a licensed clinical psychologist, recounted treating appellant since 2011 for anxiety and depression. She recounted that appellant began work at the employing establishment in April 2020. In August 2020, Dr. Bacdayan was distraught regarding a June 2020 conflict with a coworker "which resulted in them both being instructed to be in the office only when the other one was not present." On August 15, 2023 they both came into the office at the same time and appellant was fired. Dr. Bacdayan opined that appellant had "experienced a setback related to these recent incidents at her place of employment."

In a May 21, 2021 report, D.U., appellant's coworker, characterized R.J. as intimidating, and alleged a hostile work environment.

In a statement of accepted facts (SOAF) dated October 6, 2022, OWCP accepted that appellant had established as compensable the incident where she had walked behind a coworker/supervisor's chair and for an instant touched his shoulders with her fingertips to alert him to her presence so he would not roll backward onto her feet. The coworker "screamed 'keep your hands off me and don't touch me' three times," then twice more when appellant attempted to apologize. It also accepted as compensable that appellant was required to complete a statement memorializing the above incident. OWCP accepted as factual, but not compensable, that she

reported for work with permission on August 15, 2020, the coworker had reported at the same time, and she was verbally terminated from her employment. It found that appellant had not established as factual the June 30, 2020 incident where R.J. told her to go to a supply room and stay there, that R.J. filed a sexual harassment claim against her, and that R.J. deliberately lingered at the building entrance to harass her and prevent her from clocking in on time.

In an October 6, 2022 development letter, OWCP requested that Dr. de Moya review the SOAF and provide a medical opinion explaining how and why the accepted compensable employment factor would have caused or aggravated the diagnosed emotional conditions. It afforded him 30 days to respond. No response was received.

By *de novo* decision dated November 9, 2022,<sup>4</sup> OWCP denied appellant's emotional condition claim, finding that the medical evidence of record was insufficient to establish causal relationship between the accepted compensable employment factors and the diagnosed conditions.

On January 17, 2023 appellant requested reconsideration and submitted additional evidence.

In a December 10, 2022 report, Dr. de Moya responded to OWCP's October 6, 2022 development letter. He recounted appellant's history of recurrent, severe major depression since August 26, 2008, which had stabilized in approximately 2015 without the need for additional medication. In October 3, 2018, she was reestablished under care due to stressors including her daughter-in-law's cancer diagnosis and financial strain. Appellant did well until the July 24, 2020 employment incident in which she briefly touched a coworkers shoulders as she passed behind him to avoid him backing his chair out and pushing her into the wall. She was then instructed not to report to work when the coworker was present. Appellant was terminated on August 15, 2020 by telephone, which added to her distress. Dr. de Moya opined that the employment incidents had a direct causal relationship with the exacerbation of appellant's major depression and anxiety disorder, requiring resumption of antidepressants and anxiolytic medications as well as psychotherapy. Although appellant had other stressors, she had been able to manage without medication until the employment incidents. Dr. de Moya noted that appellant was being evaluated for possible misophonia, a disorder characterized by negative physical and emotional reaction to trigger sounds. He opined that misophonia would have amplified the traumatic nature of a coworker yelling at her in close proximity. Dr. de Moya found that appellant remained totally disabled from work.

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<sup>4</sup> OWCP initially denied the claim by decision issued January 25, 2021, finding that the medical evidence of record was insufficient to establish causal relationship between the diagnosed conditions and the accepted compensable employment factors. Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated May 4, 2021, OWCP's hearing representative set aside the January 25, 2021 decision and remanded the claim for clarification regarding which allegations constituted compensable employment factors. By decision dated August 2, 2021, OWCP again denied the claim, finding that appellant had not established any compensable factors of employment. Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated November 22, 2021, OWCP's hearing representative vacated the August 2, 2021 decision and remanded the claim for proper findings of fact. By decision dated March 23, 2022, OWCP again denied the claim, finding that appellant had not established any compensable employment factors. By decision dated September 26, 2022, OWCP's hearing representative vacated the March 23, 2022 decision. The hearing representative found that appellant had established as compensable that a coworker screamed at her up to five times, and that the employing establishment required her to complete a statement memorializing the incident.

By decision dated April 6, 2023, OWCP denied modification of the November 9, 2022 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> has the burden of proof to establish the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed, 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.<sup>6</sup> These are the essential elements of every compensation claim regardless of whether the claim is predicated on 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>

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.<sup>9</sup> However, disability is not compensable when it results from factors such as an 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.<sup>10</sup>

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

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<sup>5</sup> *Supra* note 1.

<sup>6</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

<sup>8</sup> *See A.M.*, Docket No. 21-0420 (issued August 26, 2021); *S.K.*, Docket No. 18-1648 (issued March 14, 2019); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>9</sup> *See A.M., id.*; *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).

<sup>10</sup> *Lillian Cutler, id.*

not be considered.<sup>11</sup> 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, OWCP must base its decision on an analysis of the medical evidence.<sup>12</sup>

### ANALYSIS

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

OWCP accepted as compensable that R.J. yelled at appellant multiple times. It also accepted as compensable that the employing establishment required her to complete a statement memorializing the incident. In support of her claim, appellant submitted medical reports wherein Dr. de Moya provided a detailed, accurate description of appellant's medical history and the employment incidents. Dr. de Moya opined that the employment incidents had a direct causal relationship with the exacerbation of appellant's major depression and anxiety disorder, requiring resumption of antidepressants and anxiolytic medications as well as psychotherapy. Although appellant had other stressors, she had been able to manage without medication until the employment incident. Dr. de Moya noted that appellant was being evaluated for possible misophonia, a disorder characterized by negative physical and emotional reaction to trigger sounds. He opined that misophonia would have amplified the traumatic nature of a coworker yelling at her in close proximity. Dr. de Moya found that appellant remained totally disabled from work.

The Board finds that, although Dr. de Moya's opinion is insufficiently rationalized to meet appellant's burden of proof to establish that she sustained aggravation of major depression and anxiety disorder due to the compensable employment factors, these reports are sufficient to require further development of the claim by OWCP.<sup>13</sup>

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While it is appellant's burden of proof to establish the claim, OWCP shares responsibility in the development of the evidence.<sup>14</sup> It has the obligation to see that justice is done.<sup>15</sup>

The Board will therefore remand the case to OWCP for further development of the medical evidence. On remand, OWCP shall obtain a rationalized medical opinion from a physician in the appropriate field of medicine as to whether appellant sustained an aggravation of major depressive disorder or anxiety disorder causally related to the accepted compensable employment factors.

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<sup>11</sup> *R.B.*, Docket No. 21-0962 (issued February 23, 2023); *C.G.*, Docket No. 20-0058 (issued September 30, 2021); *see R.B.*, Docket No. 19-0434 (issued November 22, 2019); *O.G.*, Docket No. 18-0359 (issued August 7, 2019).

<sup>12</sup> *Id.*

<sup>13</sup> *M.W.*, Docket No. 21-0661 (issued July 20, 2023); *see D.H.*, Docket No. 20-0041, 20-0261 (issued February 5, 2021); *M.C.*, Docket No. 19-0624 (issued December 8, 2020); *J.P.*, Docket No. 19-1206 (issued February 11, 2020); *L.E.*, Docket No. 18-0761 (issued December 30, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>14</sup> *M.W.*, *id.*; *M.C.*, *id.*; *J.W.*, Docket No. 19-0627 (issued June 1, 2020).

<sup>15</sup> *Id.*

After 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 April 6, 2023 decision of the Office of Workers' Compensation is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 15, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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