United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 14-160**
	)	**Issued: June 9, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

Appearances:
William Hackney, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 28, 2013 appellant, through her attorney, filed a timely appeal of a May 30, 2013 merit decision and July 18, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an emotional condition due to her federal employment; and (2) whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, counsel alleged that the employing establishment was aware of the harassment and just ignored the problem.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 27, 2012 appellant, then a 43-year-old mail handler, filed a traumatic injury alleging that on that date she sustained anxiety with panic attacks and depression due to a coworker's harassment and his attempt to enlist others to harass her, as he had been instructed to leave her alone. On the reverse of the form, appellant's supervisor, Daniel J. Wozniak, stated that appellant believed a coworker stared at her, but that he had not witnessed this behavior.

Appellant submitted a report dated October 1, 2012 from Dr. Gary K. Arthur, a Board-certified psychiatrist, who reported that she had a previous armed services related diagnosis of post-traumatic stress syndrome Dr. Arthur stated that this condition had not interfered with her work until April 2012. He noted appellant's allegations that a male coworker wanted her job and began stalking her in April 2012 and reported to the employing establishment what he felt were her violations of rules. Appellant spoke to the employing establishment who addressed the issue with her coworker, but he continued to stare excessively when he was not observed. She stated that four other coworkers stopped providing her with required assistance in her job tasks causing pressure on her preexisting back condition. Dr. Arthur stated that appellant's symptoms were aggravated due to these actions of her coworkers, but remained under control. On September 27, 2012 a coworker informed appellant that her alleged harasser and another coworker had made a pact to help each other, but not appellant, with work. Dr. Arthur stated that she became immediately depressed, anxious and agitated. He diagnosed PTSD, major depressive disorder, lumbar strain with radiculitis and migraine headaches. Dr. Arthur stated, "[Appellant] was functioning well at work despite low chronic PTSD symptoms. However, all of her symptoms have been directly aggravated by the hostile work environment and the knowledge that she has continued to be harassed and her back injury endangered by now more than one fellow employee." He found that appellant was totally disabled.

In a letter dated October 23, 2012, OWCP developed appellant's claim as an occupational disease and requested that she provide additional factual and medical evidence. It also requested additional information from the employing establishment. Dr. Arthur responded on October 31, 2012 with an addendum to his October 1, 2012 report.

Appellant provided a statement and noted that she began working at the employing establishment in 1996 and moved to forklift operator in 2006. She stated that Robert Schmitt had been transferred to her facility and wanted to drive a forklift. Mr. Schmitt attempted to "bump" appellant from her position but management instead awarded him a position driving a tow motor during a duty shift which began two hours later than her. Appellant stated that her coworkers on the earlier shift would not provide her with keys to the forklift and that she had to look around the building for a forklift, which occasionally took 30 minutes to 1 hour of her shift time. She stated that Mr. Schmitt began to stare at her continuously. Appellant reported this behavior to Mr. Wozniak, her supervisor, who allegedly told her that he could do nothing. She had injured her back and the employing establishment allowed Mr. Schmitt to drive a forklift in her absence. When appellant returned to work, he was instructed to drive a tow motor and he began to file grievances in an attempt to secure her position. She alleged that in March 2012, after Mr. Schmitt's grievances had been denied, he began to follow her on her breaks and lunch and report her activities to Operation Supervisor Nate Moffat. Appellant raised this issue with Mr. Moffat who agreed to speak with Mr. Schmitt. In May 2012, Mr. Schmitt filed a safety

violation form against several forklift operators including appellant, who felt that he was indirectly harassing her. Appellant stated that he later rescinded the safety complaint against all the male drivers. In June 2012, Dan Fisher, appellant's second-line supervisor, told her that he had heard of her difficulties with Mr. Schmitt and that he would have a stern talk with him. Appellant stated that this was helpful until August 2012 when he again began to stalk and stare at her. On August 19, 2012 Supervisor Curtis discussed with her allegations that Mr. Schmitt had made. Appellant became very upset and left work. She reported to work on August 20, 2012 and immediately became upset when Mr. Schmitt reported for work and she discovered that they were scheduled to work together again. Appellant requested to speak with Mr. Fisher, but after waiting three hours left work. She contacted her psychologist and psychiatrist and scheduled future medical treatment on August 23, 2012. Appellant returned to work on August 24, 2012 and informed Mr. Fisher that Mr. Schmitt continued to stalk her and requested to file a threat assessment against him. Mr. Fisher told her not to do so and that he would speak to Mr. Schmitt. He told appellant that he instructed Mr. Schmitt to stay away from her.

Appellant continued to work, but noticed that other drivers would not work with her. She mentioned two coworkers who refused to help her when she asked. Appellant stated that this continued for weeks and that she reported this to management, but that management did nothing. She reported for work on September 27, 2012 and a coworker, Barry Wallace, informed her that the other forklift operators had an agreement with Mr. Schmitt not to assist her. Appellant stated that Mr. Schmitt was trying to organize the other male employees to make a pact not to assist her on the dock. She filed a grievance.

Appellant alleged that Mr. Fisher and Mr. Wozniak refused to provide her with a CA-16 when she filed her traumatic injury claim and requested medical evidence first. She faxed in medical evidence and Mr. Wozniak provided a CA-17 rather than a CA-16.

Mr. Wozniak completed a statement on November 16, 2012. He stated that in September 2012 appellant informed him that she believed that Mr. Schmitt was stalking her. Appellant reported that Mr. Schmitt stared at her and that in the past he had tried to get her bumped off the forklift. Mr. Wozniak stated that he assured her that he would assign her a forklift and that Mr. Schmitt would not be allowed to take it from her. On September 27, 2012 appellant requested a meeting with Mr. Fisher and Mr. Wozniak and reported that Mr. Schmitt was staring at her while she worked, that he had turned the other workers against her and that he was a ring leader. In response to a question from Mr. Wozniak, she stated that she felt this way because Mr. Schmitt stared at her while she worked and did not think that she was a good worker. Mr. Wozniak noted that Mr. Fisher directed Mr. Schmitt not to talk to appellant.

By decision dated November 30, 2012, OWCP denied appellant's emotional condition claim finding that it should be properly developed as an occupational disease claim. It found that appellant had not established a compensable factor of employment as she had provided no evidence corroborating her allegations of harassment. OWCP further found that the September 27, 2012 meeting was not a compensable employment event in the context of her emotional condition claim as there was no evidence of error or abuse.

Appellant requested a hearing before an OWCP hearing representative on December 10, 2012. She testified at the hearing on March 14, 2013 and noted that Mr. Schmitt

had harassed her for two years, that Mr. Fisher spoke with Mr. Schmitt on her behalf in June 2012 and that at time she was hopeful that his harassment would stop. Appellant stated that Mr. Schmitt left her alone for about a month and then began following her inside the employing establishment building. On August 24, 2012 she had a second meeting with Mr. Fisher and stated that she wanted to file a threat assessment against Mr. Schmitt. Mr. Fisher told appellant that he had instructed Mr. Schmitt to stay away from her. Appellant stated that Mr. Schmitt stopped stalking her, but that some of the other forklift operators started to avoid her and stopped helping her. She stated that she had been working for two hours on September 27, 2012 when Mr. Wallace, a coworker, told her that Mr. Schmitt was attempting to organize other employees so that appellant did not receive the help that she needed to complete her work so she would look bad at her job. Appellant then sought assistance from the union and filed a claim and requested a CA-16. At the oral hearing, she agreed that her claim could most properly be developed as an occupational disease claim.

By decision dated May 30, 2013, the hearing representative denied appellant's claim finding that she had not submitted sufficient evidence to substantiate the alleged factors of employment.

Appellant requested reconsideration on July 16, 2013 and submitted a report dated June 28, 2013 from Dr. Arthur.

By decision dated July 18, 2013, OWCP declined to reopen appellant's claim for consideration of the merits on the grounds that the evidence submitted in support of her request for reconsideration was not relevant.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[2] has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of FECA and that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability or specific 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]

OWCP's regulations define an occupational disease as "a condition produced by the work environment over a period longer than a single workday or shift."[5] To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease

[2] *Id*.

[3] *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *Elaine Pendleton*, 41 ECAB 1143 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] 20 C.F.R. § 10.5(q).

or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.[6]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[7] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.[8] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.[9] 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.[10] In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of FECA. Thus disability is not covered when it results from an employee's fear of a reduction-in-force. Nor is disability covered when it results from such factors as an employee's frustration in not being permitted to work in a particular environment or to hold a particular position.[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

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[6] *Lourdes Harris*, 45 ECAB 545, 547 (1994).

[7] 28 ECAB 125 (1976).

[8] *See supra* note 1.

[9] *See Robert W. Johns*, 51 ECAB 136 (1999).

[10] *Cutler, supra* note 7.

[11] *Id.*

[12] *Charles D. Edwards*, 55 ECAB 258 (2004).

employment factor.[13] A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.[14]

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under FECA. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[15]

ANALYSIS -- ISSUE 1

Appellant attributed the aggravation of her underlying PTSD to actions of a coworker, Mr. Schmitt, who over the course of two years stared at her, stalked her and attempted to persuade other coworkers not to aid her in her work while seeking to discredit her and obtain her position as a forklift driver. She also attributed her condition to the employing establishment's failure to prevent Mr. Schmitt from continuing to harass her. The Board finds that appellant has not attributed her emotional condition to her regular or specially-assigned duties. Therefore, appellant has not alleged a compensable factor under *Cutler*.[16]

In *Thomas D. McEuen*,[17] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the facts surrounding the administrative or personnel action established error or abuse by employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[18]

Appellant has alleged that the employing establishment did not act reasonably as the employing establishment did not prevent Mr. Schmitt from harassing her through staring, by filing grievances in an attempt to secure her position and by persuading other employees to act against her interests by refusing to help her complete her duties. She has submitted no evidence

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[13] *Kim Nguyen*, 53 ECAB 127 (2001). *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[14] *Roger Williams*, 52 ECAB 468 (2001).

[15] *Alice M. Washington*, 46 ECAB 382 (1994).

[16] *Cutler*, *supra* note 7.

[17] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff d on recon*., 42 ECAB 566 (1991).

[18] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

in support of the allegation of error or abuse in administrative actions of the employing establishment. Mr. Wozniak submitted a statement dated November 16, 2012 noting that appellant informed him in September 2012 that she believed that Mr. Schmitt was stalking her. The evidence for this allegation was contained in her statement where she claimed that Mr. Schmitt stared at her and that he had tried to take her position driving the forklift. Mr. Wozniak stated that he reassured appellant that her position was secure. On September 27, 2012 appellant requested a meeting with Mr. Fisher and Mr. Wozniak and reported that Mr. Schmitt was staring at her while she worked, that he had turned the other workers against her and that he was a ring leader. She again only supported her allegations by stating that Mr. Schmitt stared at her while she worked and by alleging that he did not think that she was a good worker. Mr. Wozniak noted that Mr. Fisher directed Mr. Schmitt not to talk and to stay away from appellant. He stated that he did not observe Mr. Schmitt staring at her and she did not provide any evidence that the event she alleged occurred in discussions with the employing establishment. The Board finds that the there is no evidence in the record supporting appellant's allegation of error or abuse on the part of the employing establishment in addressing her concerns about Mr. Schmitt.

Appellant also alleged that Mr. Schmitt harassed her by staring at her, stalking her by trying to oust her from her position of forklift driver and by organizing the other employees to refuse to help her at her job. She did not submit any witness statements or any evidence corroborating that these events occurred as alleged. Mr. Wozniak denied observing any actions against appellant by Mr. Schmitt. The only evidence in support of the alleged harassment consists of her statements. As noted previously, unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, appellant must establish a factual basis for the claim by supporting her allegations with probative and reliable evidence. She has submitted no such evidence and has failed to meet her burden of proof in establishing harassment as a compensable factor of employment. Where a claimant has not established any compensable employment factors, the Board need not consider the medical evidence of record.[19]

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.

LEGAL PRECEDENT -- ISSUE 2

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.[20] Section 10.606(b)(3) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or constitutes relevant and pertinent new evidence not previously considered by

[19] *A.K.*, 58 ECAB 119 (2006).

[20] 5 U.S.C. §§ 8101-8193, 8128(a).

OWCP.[21] Section 10.608(b) of OWCP's regulations provide that, when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.[22]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[23]

ANALYSIS -- ISSUE 2

In support of her request for reconsideration, appellant submitted an additional report from Dr. Arthur dated June 28, 2013. As the underlying issue in her emotional condition case is whether she has substantiated a compensable factor of employment, this additional medical evidence is not pertinent new and relevant evidence requiring OWCP to reopen her claim for consideration of the merits. Dr. Arthur's history of injury in his medical reports is based on appellant's statements rather than any personal knowledge of the events at the employing establishment. The medical evidence does not constitute a witness statement or other corroborating evidence establishing that the employment factors as alleged by her such as harassment and error or abuse by the employing establishment occurred. As noted previously, when a claimant has not established any compensable employment factors, the Board and OWCP need not consider the medical evidence of record in evaluating her claim.[24] The Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits.

CONCLUSION

The Board finds that appellant has not submitted sufficient factual evidence to substantiate that the factors of employment alleged were compensable. The Board further finds that OWCP properly refused to reopen her claim for consideration of the merits.

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[21] 20 C.F.R. § 10.606.

[22] *Id*. at § 10.608.

[23] *M.E.*, 58 ECAB 694 (2007).

[24] *See supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the July 18 and May 30, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 9, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board