

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

H.S., Appellant)	
)	
and)	Docket No. 23-0188
)	Issued: July 29, 2024
DEPARTMENT OF VETERANS AFFAIRS,)	
BOSTON HOME & COMMUNITY-BASED)	
SERVICES, BROCKTON CAMPUS,)	
Brockton, MA, Employer)	

Appearances:
Marc J. Levy, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 28, 2022 appellant filed a timely appeal from August 19 and November 18, 2022 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

ISSUE

The issue is whether appellant has met her burden of proof to establish an emotional condition in the performance of duty on February 24, 2022, as alleged.

FACTUAL HISTORY

On April 1, 2022 appellant, then a 45-year-old pharmacy technician, filed a traumatic injury claim (Form CA-1) alleging that on February 24, 2022 she sustained an exacerbation of her preexisting mental health issues while in the performance of duty. She related that she was at work in the pharmacy at 8:00 a.m. when a coworker showed her a “sexually vulgar and inappropriate joke on his phone.” Appellant stopped work on March 29, 2022 and returned to work on April 4, 2022. The employing establishment acknowledged that appellant was in the performance of duty at the time of the incident, but noted that the injury did not result from a specific work task. It reported her duty hours as 8:00 a.m. to 4:30 p.m.

In an employing establishment report of contact form, appellant related that she was walking to the pharmacy window on February 24, 2022 when M.M. told her to read a joke on his telephone “as he laughed hysterically.” M.M. showed her the telephone, which had a sexually vulgar and inappropriate joke. Appellant related that M.M. had been acting inappropriately toward her since he began work, but that his behavior worsened. She advised that she had reported his actions to management, but nothing had been done. Appellant indicated that cameras in the pharmacy break room had recorded the incident.

In a fact-finding report dated March 24, 2022, M.O., who works for the employing establishment, advised that the Equal Employment Opportunity (EEO) office had inquired into appellant's allegation of sexual harassment by M.M. It noted that she had alleged that M.M. made sexually inappropriate jokes to her, and that management was on notice but failed to respond. M.O. advised that appellant had established that M.M. shared an inappropriate joke but that the “other allegations were not substantiated. Management has taken appropriate steps to address the issues with the respondent.”

In a development letter dated April 12, 2022, 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 letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the November 18, 2022 decision, OWCP received additional evidence. 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.*

on the accuracy of appellant's allegations and any additional relevant information and documents. It afforded both parties 30 days to submit the requested information.

In a May 3, 2022 response, appellant related that she had experienced a traumatic injury after her coworker sexually harassed her on February 24, 2022. She asserted that stress from that incident had worsened her depression, anxiety, obsessive compulsive disorder, and post-traumatic stress disorder. Appellant related that M.M. showed her a sexually vulgar and inappropriate joke on his telephone. She advised that this "traumatic event was a trigger for preexisting mental health issues." Appellant noted that she had struggled with paranoia and depression since the incident. She noted that the employing establishment had substantiated that the incident occurred.⁴

On May 13, 2022 the employing establishment confirmed that a coworker had shown appellant an inappropriate sexually vulgar and inappropriate joke. It related that the coworker was removed from work during an investigation, which found that the "complaint did not meet the threshold for harassment." The employing establishment indicated that appellant had conflicts with other employees. It noted that she had not asked to be moved or reassigned.

By decision dated May 16, 2022, OWCP denied appellant's traumatic injury claim. It found that she had not factually established the occurrence of the alleged work incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On May 27, 2022 appellant, through counsel, requested reconsideration. Counsel asserted that OWCP erred in finding that the alleged incident did not occur. He maintained that Board case law supported that OWCP must make independent findings regarding incidents of harassment. Counsel contended that the coworker had violated the employing establishment's zero-tolerance policy for gender harassment. He asserted that OWCP should have obtained a statement from the involved supervisors and a description of the action taken against the coworker.

In a June 23, 2022 statement, the employing establishment noted that appellant had preexisting emotional conditions. It advised that it had investigated the incident and found that the coworker's showing of the image was a bad decision that did not rise to the level of harassment. The employing establishment maintained that it could not disclose administrative actions taken against the employee who showed the inappropriate picture "due to privacy laws."

By decision dated August 19, 2022, OWCP modified its May 16, 2022 decision to find that appellant had established that the incident occurred as alleged; however, the claim remained denied as appellant had not established a compensable employment factor.

On August 26, 2022 appellant, through counsel, requested reconsideration. Counsel questioned why OWCP had found that a coworker showing a sexually-vulgar and inappropriate joke to appellant on his telephone was not in the performance of duty. He noted that the employing establishment confirmed that the incident had occurred, that work brought the coworkers together,

⁴ Appellant also submitted medical evidence.

and that the law recognized friction and strain and disputes between coworkers as compensable even if the subject was unrelated to work if work brought the participants together.

In an August 29, 2022 response, the employing establishment advised that appellant indicated that her emotional reaction occurred at 8:00 a.m., the time that her tour began, and thus the incident must have occurred before her shift began. It contended that she had not established an injury in the performance of duty.

On November 4, 2022 counsel again asserted that OWCP must make independent findings regarding whether sexual harassment occurred and that the issue was not whether she had established harassment under the standards of the Equal Employment Opportunity Commission. He noted that the incident had occurred right after appellant arrived at work and had begun walking to her assigned pharmacy window, and that it was reasonable for her to be at work a few minutes before her shift began.

By decision dated November 18, 2022, OWCP denied modification of its August 19, 2022 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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 filed within the applicable time limitation of FECA,⁶ that an injury was sustained while 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.⁷ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁸

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.⁹

⁵ *Supra* note 2.

⁶ *C.B.*, Docket No. 21-1291 (issued April 28, 2022); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *R.C.*, 59 ECAB 427 (2008).

⁸ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ *See C.C.*, Docket No. 21-0283 (issued July 11, 2022); *S.K.*, Docket No. 18-1648 (issued March 14, 2019); *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 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.¹⁰ 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.¹¹

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.¹² Mere perceptions of harassment are not compensable under FECA.¹³

ANALYSIS

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

OWCP denied appellant's emotional condition claim, finding that she had not established a compensable employment factor. The Board must, therefore, initially review whether the alleged incident is a covered employment factor under the terms of FECA.

Appellant attributed her condition to a coworker, M.M., showing her a sexually vulgar and inappropriate joke on his telephone on February 24, 2022 as she was walking from break room to her pharmacy window at 8:00 a.m., when her shift began. Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.¹⁴ A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.¹⁵

In this case, the record establishes that the employing establishment investigated the February 24, 2022 incident and advised that the evidence substantiated that M.M. shared an inappropriate joke with appellant. It indicated that M.M. had been removed from work during the investigation and that it had addressed the issue with him. The employing establishment found that the incident did not meet the threshold for sexual harassment. The Board has held, however,

¹⁰ *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).

¹¹ *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹² *See E.G.*, Docket No. 20-1029 (issued March 18, 2022); *S.L.*, Docket No. 19-0387 (issued October 1, 2019); *S.B.*, Docket No. 18-1113 (issued February 21, 2019).

¹³ *Id.*

¹⁴ *See E.G.*, Docket No. 20-1029 (issued March 18, 2022); *M.S.*, Docket No. 19-1589 (issued October 7, 2020).

¹⁵ *Id.*

that a pattern of events is not required to constitute harassment under FECA.¹⁶ The Board thus finds that appellant has established a compensable employment factor of harassment.

As OWCP found that there were no compensable employment factors, it did not analyze or develop the medical evidence. Thus, the Board will set aside OWCP's decision and remand the case for consideration of the medical evidence to determine whether appellant has established an emotional condition in the performance of duty causally related to the compensable employment factor.¹⁷ 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.

¹⁶ *See E.G.*, Docket No. 20-1029 (issued March 18, 2022)(vulgar images altered to resemble her were placed throughout appellant's work location on February 12, 2018 constituted a compensable employment factor); *T.D.*, Docket No. 20-0153 (issued October 8, 2021)(the discovery of two large knives in a parcel locker, which appellant believed was a threat due to her sexual orientation, constituted a compensable factor of employment).

¹⁷ *K.M.*, Docket No. 22-1000 (issued November 9, 2022); *E.A.*, Docket No. 19-0582 (issued April 22, 2021).

ORDER

IT IS HEREBY ORDERED THAT the August 19 and November 18, 2022 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 29, 2024
Washington, DC

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

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

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