United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
	)	
and	)	**Docket No. 24-0421**
	)	**Issued: October 10, 2024**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, El Paso, TX, Employer	)	

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 March 12, 2024 appellant filed a timely appeal from a September 22, 2023 merit decision and a December 1, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). Appellant, in support of her request for oral argument, argued that she did sustain an emotional condition in the performance of duty. The Board, in exercising its discretion, denies appellant's request for oral argument as the denial of appellant's claim can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

[2] 5 U.S.C. § 8101 *et seq*.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an emotional/stress-related condition in the performance of duty; and (2) whether OWCP properly denied her request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 17, 2020 appellant, then a 50-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on that date, she sustained emotional and physical conditions as she was subjected to libel and defamation of character, bullying, belittling, harassment, hostility, persecution, and retaliation while in the performance of duty. On the reverse side of the claim form, the employing establishment controverted the claim noting that the text message appellant claimed caused her mental stress and trauma was received on November 16, 2020 at approximately 4:00 p.m. Mountain Standard Time (MST) and was read at approximately 8:00 p.m., while off-duty.

In support of her claim, appellant submitted the text she received on her telephone on November 16, 2020, which read:

> "Miss 'M', I am writing in regards to your email titled, 'A Cry For Help!' First off, you obviously do not understand what a Chain of Command is. The Chief and Assistant Chief of the [the employing establishment] should never be directly addressed by an agent. I'm wondering why you believe you are so entitled to ask agents to donate their leave to you. No one likes you. You have terrorized everyone at the station. Everyone is afraid you are either going to file on them[,] sue them, or you'll draw your weapon on them, as you have done, more than once, in the past. I'm certain you were only approved for the Voluntary Leave Program because of this. You have always been treated differently than every other agent. You don't even wear the proper uniform for an Admin agent, and you get away with it because of this. You are a horrible human being. I hope that no one ever has to deal with you, ever again. The station will probably have a party to celebrate after you're gone. All you have ever done is caused trouble. You are a compulsive liar, and you should have sought help for your craziness long, long ago. Instead, you terrorized everyone. You even stalked me. You know that no one violated your [Health Insurance Portability and Accountability Act [HIPPA] right. You have, however, violated everyone's rights. You harassed me the entirety of my career. Why don't you just use the money you got from suing the [employing establishment], repeatedly, to pay for your extensive mental health treatment? You need to be institutionalized for the rest of your life, you crazy 'b….'. I hope you send out another email to everyone about this message. You're such a despicable 'c…'. I love that you speak of accountability, transparency, respect, workplace bullying, discrimination, reprisal persecution, and retaliation. You are personally responsible for bullying, discrimination, persecution, and retaliation in and out of the workplace. It's inspired me to report you, again: Karma is coming for you."

Appellant also submitted a document which indicated that the telephone number from which the text was sent belonged to her supervisor, J.H.

In a November 17, 2020 e-mail, appellant wrote to management officials informing them of the text, and that she had discovered it was sent by J.H. She requested that he be fired immediately without any benefits, and that she be provided personal protection by the Federal Bureau of Investigation (FBI). Appellant noted that she would be reaching out to her attorney to see if she could add this "catastrophic event" to her EEO or whistleblower case.

In a development letter dated November 25, 2020, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim and provided a questionnaire for competition. OWCP afforded appellant 30 days to respond.

OWCP also received appellant's response to its questionnaire.[3] The response contained allegations of mismanagement at the employing establishment regarding J.H.

In a December 14, 2020 report, Dr. Michael P. Hand, a psychologist, related appellant's diagnoses of chronic post-traumatic stress disorder (PTSD); recent adjustment disorder with anxiety and depressed mood; generalized anxiety disorder; and psychophysiologic insomnia. He referenced a recent work-related e-mail threat of harm.

By decision dated January 13, 2021, OWCP denied appellant's claim, finding that she had not established an emotional/stress-related condition in the performance of duty. It explained that she provided only vague information and had not established any compensable employment factors under FECA. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On February 5, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review which was held on June 10, 2021. She alleged that Supervisor J.H. committed a cyberstalking hate crime under federal and Texas State law and was being protected by the employing establishment's upper management. Appellant argued that she had submitted evidence that the claimed injury occurred in the workplace and that she was required to be on duty 24/7. She also made other allegations of mismanagement at the employing establishment.

By decision dated June 25, 2021, an OWCP hearing representative set aside the January 13, 2021 decision and remanded the case, finding that the employing establishment should be requested to comment regarding appellant's allegation that she was exposed to an alleged improper or criminal act with regard to the November 16, 2020 text message.

On June 30, 2021 OWCP requested that the employing establishment provide comments from a knowledgeable supervisor on the accuracy of appellant's allegations regarding the November 16, 2020 text message.

[3] Appellant referred to her prior claim in OWCP File No. xxxxxx188.

On July 16, 2021 OWCP received a statement of the same date from Deputy Patrol Agent-in-Charge, C.T., who related that appellant did receive an improper and offensive message, but that it was not sent by an agency official. C.T. explained that a February 3, 2021 report of investigation determined that the message was sent by former agent H.H., who was married to supervisory agent, J.H. He related that the investigation revealed that J.H. forwarded to his wife a November 12, 2020 e-mail from appellant requesting leave donations, for his wife to print the e-mail for him. H.H. asked if she could respond to appellant, and J.H. agreed, without reading the November 16, 2020 text response. C.T. further related that an investigative report noted that J.H. indicated that he did not have knowledge of personal or professional issues between appellant and his wife H.H. until a court hearing on December 16, 2020, when H.H. was called to testify as a witness. Court documents showed that appellant filed a protective order against J.H. related to the November 16, 2020 text message, and a hearing was held on December 16, 2020 in the 65th Judicial District Court in El Paso County, Texas.

OWCP received documentation dated February 9, 2021, indicating that an investigation into misconduct by J.H. did not disclose any misconduct on his part regarding the text message at issue.

By decision dated June 22, 2022, OWCP issued a *de novo* decision and denied the claim. It found that the November 16, 2020 text message did not occur in the performance of duty because it was sent by the spouse of an employee. OWCP explained the friction and strain doctrine did not apply to privately-motivated quarrels or disputes imported from outside the employing establishment.

On July 19, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On September 8, 2022 OWCP's hearing representative noted that a preliminary review had been completed and it was determined that the case was not in posture for a hearing. The hearing representative set aside the June 22, 2022 decision and remanded the case for factual development regarding the history of the interaction between appellant and H.H. when they were both employed by the employing establishment in order to determine whether the friction and strain doctrine applied.

On October 18, 2022 OWCP requested evidence from the employing establishment concerning the history of the interactions between appellant and H.H. while they were both employed at the employing establishment.

On November 16, 2022 the employing establishment responded that it was unaware of any issues between appellant and H.H. prior to the November 16, 2020 text message, and that neither made allegations against one another prior to the departure of H.H. It noted that employees were not authorized to share work e-mails with their nonemployee spouses and deputize their spouse to respond on their behalf, and that appellant was not required to be available while off duty.

By decision dated November 30, 2022, OWCP denied appellant's claim, finding that there were no accepted events that were factors of employment and, therefore, she did not sustain an emotional condition in the performance of duty. It explained that the incident of receiving a text

message did occur; however, it was not a factor of employment, and the "friction and strain" doctrine did not apply.

On December 7, 2022 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In a letter dated December 7, 2022, appellant argued that she had presented evidence to substantiate her claim, that the employing establishment made false statements, and that as a federal agent, she was an employee 24/7.

OWCP received a March 11, 2022 e-mail from FBI agent Mario Correa, which indicated that the investigation of the allegations of misconduct by J.H. did not warrant FBI further investigation as this was a work-related issue and the text in question was sent by J.H.'s wife.

By decision dated September 22, 2023, OWCP's hearing representative affirmed the November 30, 2022 decision. The hearing representative found that while it was not disputed that the text message was sent, appellant was not performing assigned duties that were incidental to her job when the text message was received.

On November 29, 2023 appellant requested reconsideration. She argued that she had provided documents which demonstrated that the injury took place in the performance of duty.

By decision dated December 1, 2023, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] 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, 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.[5] 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.[6]

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

[4] *Supra* note 1.

[5] *S.Z.*, Docket No. 20-0106 (issued July 9, 2020); *A.J.*, Docket No. 18-1116 (issued January 23, 2019); *Gary J. Watling*, 52 ECAB 278 (2001).

[6] 20 C.F.R. § 10.115(e); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *see T.O.*, Docket No. 18-1012 (issued October 29, 2018); *Michael E. Smith*, 50 ECAB 313 (1999).

evidence establishing that the accepted compensable employment factors are causally related to the diagnosed 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] 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.[9] 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.[10]

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. However, the Board has 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.[11] 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.[12]

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.[13] Mere perceptions of harassment, retaliation, or discrimination are not compensable under FECA.[14]

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

[7] *L.R.,* Docket No. 23-0925 (issued June 20, 2024); *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).

[8] *T.G.,* Docket No. 19-0071 (issued May 28, 2019); *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

[9] *L.H.,* Docket No. 18-1217 (issued May 3, 2019); *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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

[11] *O.G.,* Docket No. 18-0359 (issued August 7, 2019); *D.R.,* Docket No. 16-0605 (issued October 17, 2016); *William H. Fortner*, 49 ECAB 324 (1998).

[12] *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *Ruth S. Johnson*, 46 ECAB 237 (1994).

[13] *T.G., supra* note 8; *Marlon Vera*, 54 ECAB 834 (2003).

[14] *Id.*; *see also Kim Nguyen*, 53 ECAB 127 (2001).

causal relationship and which working conditions are not deemed compensable factors of employment and may not be considered.[15] If an employee does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. 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.[16] If a compensable factor of employment is substantiated, OWCP must base its decision on an analysis of the medical evidence which has been submitted.[17]

ANALYSIS -- ISSUE 1

The Board finds that appellant has established a compensable factor of employment.

Appellant attributed her emotional condition to error or abuse by the employing establishment concerning the actions of supervisor, J.H. She alleged that the abusive text message she received on November 16, 2020 was sent from his telephone. The record supports this allegation in that Deputy Patrol Agent-in-Charge, C.T., confirmed that appellant did receive an improper and offensive message. C.T. explained that a February 3, 2021 report of investigation determined that the message was sent by former agent H.H., who was married to supervisory agent, J.H. He related that the investigation revealed that J.H. forwarded to his wife a November 12, 2020 e-mail from appellant regarding a leave request. H.H. asked if she could respond to appellant, and J.H. agreed, without reading the November 16, 2020 text response.

The employing establishment acknowledged that employees were not authorized to share work e-mails with their nonemployee spouses, nor were they authorized to have their spouses respond on their behalf.

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.[18]

The Board finds that the employing establishment erred or acted abusively when its supervisor unreasonably allowed his spouse to respond to appellant's official request for leave. Appellant has, therefore, established a compensable factor of employment.

As OWCP found that there were no compensable employment factors, it did not analyze or develop the medical evidence. Accordingly, the Board will set aside OWCP's September 22, 2023 decision, and remand the case for consideration of the medical evidence with regard to whether appellant has established an emotional condition in the performance of duty causally

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

[16] *Charles E. McAndrews*, 55 ECAB 711 (2004).

[17] *S.Z., supra* note 5; *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[18] *See supra* note 12.

related to the compensable employment factor. After this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.[19]

CONCLUSION

The Board finds that appellant has met her burden of proof to establish a compensable factor of employment. The Board further finds that the case is not in posture for decision as to whether she had established an emotional condition causally related to the accepted compensable employment factor.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2023 decision of the Office of Workers' Compensation Programs is reversed, and the case remanded for further proceedings consistent with this decision of the Board. The December 1, 2023 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: October 10, 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

[19] In light of the Board's finding regarding Issue 1, Issue 2 is rendered moot.