

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

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W.D., Appellant)	
)	
and)	Docket No. 17-0700
)	Issued: July 7, 2017
DEPARTMENT OF HEALTH & HUMAN)	
SERVICES, CENTERS FOR DISEASE)	
CONTROL & PREVENTION, Atlanta, GA,)	
Employer)	
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Appearances:
*Patricia Champion, for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 6, 2017 appellant, through her representative, filed a timely appeal from an October 14, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met her burden of proof to establish an emotional condition in the performance of duty causally related to factors of her federal employment.

On appeal the representative asserts that, because it took appellant 18 months fighting the employing establishment before it admitted it committed an error regarding a job announcement, this constituted abuse on the part of the employing establishment and clearly established administrative error, a compensable factor of employment. She further asserts that appellant was not a GS-9 employee at the time of the job announcement.

FACTUAL HISTORY

This case has previously been before the Board. The facts as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts of the prior appeals are included below.

On February 25, 2002 appellant, then a 38-year-old GS-9 health communications specialist, who last worked on January 16, 2002, filed an occupational disease claim (Form CA-2) alleging that factors of her federal employment caused an emotional condition. This claim was adjudicated by OWCP under File No. xxxxxx622.

By decision dated September 26, 2002, OWCP found that appellant did not establish that she sustained an emotional condition in the performance of duty. On October 21, 2003 a hearing representative with OWCP's Branch of Hearings and Review found that she established one compensable employment factor that, from March 24 to 26, 1999, she and other workers were required to put together approximately 80 two-inch binders in a short turn-around time with inadequate instruction given. The hearing representative, however, found that the medical evidence of record did not support that her condition was caused by the accepted employment factor.

Appellant retired in 2003. On October 15, 2004 she requested reconsideration. In a nonmerit decision dated November 9, 2004, OWCP denied appellant's reconsideration request. Appellant filed an appeal with the Board on February 11, 2005. In a November 17, 2005 decision, the Board found that OWCP properly refused to reopen her case for further consideration of the merits of her claim pursuant section 8128(a) of FECA.³

The representative next requested reconsideration on March 2, 2007. On May 3, 2007 OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error. On July 25, 2007 appellant filed an appeal with the Board. In a January 14, 2008 decision, the Board found that, as her March 2, 2007 reconsideration request was untimely filed and because she failed to demonstrate clear evidence of error, OWCP properly denied a merit review of her claim in its May 3, 2007 decision.⁴

³ Docket No. 05-0754 (issued November 17, 2005).

⁴ Docket No. 07-2002 (issued January 14, 2008).

On April 10, 2008 appellant filed a second occupational disease claim, adjudicated by OWCP under File No. xxxxxx431. She alleged that her federal employment aggravated her depression and anxiety and caused post-traumatic stress disorder. In June 2008, OWCP doubled File No. xxxxxx622 and File No. xxxxxx431. In an April 2, 2009 decision, it denied the 2008 claim, File No. xxxxxx431, finding it untimely filed. Following a timely hearing request and, in a June 3, 2009 decision, an OWCP hearing representative found that OWCP did not appropriately develop the claim and remanded the case for further development. In a February 3, 2010 decision, OWCP found that appellant did not establish an emotional condition in the performance of duty. Appellant again requested a hearing, which was held on May 7, 2010. On July 28, 2010 an OWCP hearing representative affirmed the February 3, 2010 decision.

On December 21, 2010 and January 24 and June 23, 2011 appellant, through her representative, requested reconsideration. In nonmerit decisions dated January 6, June 2, and July 8, 2011 respectively, OWCP denied appellant's reconsideration requests. The representative again requested reconsideration on July 16, 2011 and submitted additional evidence. In a January 12, 2012 merit decision, OWCP found that, as none of the documents submitted substantiated that appellant established a compensable factor of employment, she did not establish an emotional condition in the performance of duty.

Appellant, through her representative, filed an appeal with the Board on March 7, 2012. In that appeal, her representative asserted that an Equal Employment Opportunity Commission (EEOC) decision supported her claim of workplace discrimination; that the employing establishment illegally placed a "red flag alert" on her personnel file; that OWCP and the employing establishment illegally colluded, thus violating appellant's due process; and that OWCP committed fraud and willful misconduct by misrepresenting facts by not fully addressing all alleged acts of discrimination, and by not explaining what a "flag alert" meant under FECA.

In a November 5, 2012 decision, the Board reviewed the merits of appellant's claim and found that she did not meet her burden of proof to establish an emotional condition in the performance of duty causally related to factors of her federal employment. The Board reviewed the claims of both File No. xxxxxx622 and File No. xxxxxx431.⁵

⁵ Docket No. 12-860 (issued November 5, 2012). Regarding the allegation that a flag alert was placed on appellant's personnel file, the Board determined that, while the record contained copies of a November 15, 2001 promotion certificate that included handwritten notations regarding appellant's race and EEOC activity, the employing establishment explained that it was not standard protocol for race and EEOC activity of an applicant to be annotated on a promotion certificate prior to it being given to hiring officials, and it was the type of information requested by EEOC investigators when an EEO complaint had been filed. The Board found that, as there was nothing in the record to indicate when and by whom the notations on the promotion certificate were made, appellant did not establish a compensable factor of employment in this regard. The Board further noted that the record did not contain a final EEOC decision on the merits of appellant's EEO complaints and only contained a nonfinal January 6, 2003 EEOC decision that merely found that appellant's claim should go forward. The Board also determined that the January 6, 2003 EEOC decision had been reviewed by OWCP in its October 21, 2003 decision rendered under File No. xxxxxx622. As to appellant's argument that OWCP denied her due process, the Board found that, as an administrative body, it did not have jurisdiction to review a constitutional claim such as that made by appellant and therefore lacked jurisdiction to review appellant's argument regarding due process. Regarding her assertion that OWCP committed fraud and willful misconduct, the Board found that matters relating to the handling of a workers' compensation claim were administrative in nature and did not arise in the performance of duty.

On February 25, 2013 appellant, through her representative, requested reconsideration, asserting that the employing establishment erred when appellant was not considered for promotion. She submitted a partial, unsigned investigative document dated August 26, 2002 that discussed an EEOC complaint filed by appellant and additional medical evidence. In a merit decision dated April 25, 2013, OWCP denied modification of its prior decision.

On June 13, 2013 appellant, through her representative, appealed to the Board. She asserted that the employing establishment committed error and abuse in failing to process appellant's applications for promotion appropriately. In a November 14, 2013 decision, the Board found that, as the provenance of the investigative report was unknown and unverified, it was of no probative value. The Board also found that the report contained nothing that would support appellant's assertion of error on the part of the employing establishment,⁶ and concluded that she did not establish that the employing establishment committed error or abuse regarding her applications for promotion and, thus, she did not establish an emotional condition in the performance of duty.⁷

On December 19, 2013 appellant, through her representative, requested reconsideration with OWCP, reasserting that the employing establishment erred when appellant was not considered for promotion. She submitted August 22, 2002 correspondence addressed to appellant by the employing establishment. The correspondence advised appellant that she had been authorized to receive priority consideration for the position of human resources assistant, GS-203-07, or the next substantially similar position in Atlanta, GA. She was informed that this had been authorized due to an administrative error that was made in association with announcement number MP2-01-164, which was a personnel assistant position, GS-203-6/7. In the August 22, 2002 correspondence, the employing establishment acknowledged that an error was made in evaluating appellant's basic qualifications, and that she was inappropriately rated as not qualified. In a nonmerit decision dated April 10, 2014, OWCP denied her reconsideration request. It found that the evidence submitted did not contain a relevant legal argument not previously considered.

Appellant filed an appeal with the Board on April 29, 2014. Her representative asserted that OWCP erred in denying merit review because she submitted evidence establishing that the employing establishment had committed error and abuse in failing to process promotion applications appropriately. By decision dated May 6, 2015, the Board found that the August 22, 2002 correspondence was pertinent to the merit issue in this case and OWCP thus improperly denied appellant's request for a merit review pursuant to section 8128(a) of FECA. The Board remanded the case to OWCP to a review of the merits of her claim.⁸

In a June 12, 2015 decision, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions. It specifically noted that she had been in a GS-9 position

⁶ The Board noted that the report contained a list of exhibits that were not forwarded with the reconsideration request.

⁷ Docket No. 13-1522 (issued November 14, 2013).

⁸ Docket No. 14-1196 (issued May 6, 2015).

since 1998 and therefore the GS-6/7 position found in announcement number MP2-01-164 would not be considered a “promotion.” OWCP concluded that there was no error or abuse demonstrated in omitting appellant from a list of qualified applicants because, as noted in the August 22, 2002 correspondence, the employing establishment corrected its error by giving her priority consideration in a similar position.

By decision dated March 17, 2016, the Board found that, while the August 22, 2002 correspondence from the employing establishment acknowledged error with regard to announcement number MP2-01-164, since this announcement was for a GS-6/7 position and appellant had been working in a GS-9 position since 1998, this position would not be considered a “promotion.” Moreover, by its August 22, 2002 correspondence, the employing establishment corrected its error by giving her priority consideration in a similar position. The Board concluded that appellant did not establish a compensable factor of employment. Therefore, the medical evidence was not addressed.⁹

On May 4, 2016 appellant, through her representative, requested reconsideration. She maintained that, since it took over 18 months for the employing establishment to admit error, having to deal with this delay caused appellant to develop depression and anxiety.

In an attached April 27, 2016 report, Dr. A. Benjamin Eubanks, an attending psychiatrist, advised that appellant’s depression and anxiety developed because the employing establishment denied any wrong-doing when it omitted her name from a posted position, MP2-01-164, GS-7, in November 2000. He maintained that, by the time it admitted its error in August 2002, appellant had already developed depression and anxiety as a result of having to fight with the employing establishment who refused to admit it had made an error. Dr. Eubanks opined that long periods of feeling hopeless brought on the depression and anxiety. He concluded that it was the combination of the error committed by the employing establishment, its refusal to acknowledge the error, and having to fight for almost 18 months to prove the employing establishment made the error that caused appellant’s depression and anxiety.

By decision dated October 14, 2016, OWCP reviewed the merits of appellant’s claim and denied modification of its prior decisions. It found that, as appellant had not established a compensable factor of employment, it was not necessary to address the medical evidence submitted.

LEGAL PRECEDENT

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her stress-related condition.¹⁰ If a claimant does implicate a factor of employment,

⁹ Docket No. 16-0148 (issued March 17, 2016).

¹⁰ *Leslie C. Moore*, 52 ECAB 132 (2000).

OWCP should then determine whether the evidence of record substantiates that factor.¹¹ 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.¹²

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*,¹³ the Board explained that there are distinctions as to the type of employment situations giving rise to a 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 under FECA.¹⁴ 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.¹⁵ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.¹⁶ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹⁷ Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁸

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.¹⁹ 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.²⁰

¹¹ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹² *Id.*

¹³ 28 ECAB 125 (1976).

¹⁴ *See Robert W. Johns*, 51 ECAB 137 (1999).

¹⁵ *Supra* note 13.

¹⁶ *J.F.*, 59 ECAB 331 (2008).

¹⁷ *M.D.*, 59 ECAB 211 (2007).

¹⁸ *Roger Williams*, 52 ECAB 468 (2001).

¹⁹ *Charles D. Edwards*, 55 ECAB 258 (2004); *reaff'd on recon.*, 42 ECAB 566 (1991); *Thomas D. McEuen*, 41 ECAB 387 (1990).

²⁰ *Kim Nguyen*, 53 ECAB 127 (2001).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an emotional condition in the performance of duty causally related to factors of her federal employment.

In *Thomas D. McEuen*,²¹ 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 employing establishment 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 factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.²² Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

The Board now finds that any delay of up to 18 months in addressing this matter as alleged by appellant, in and of itself, also does not rise to the level of administrative abuse.

Appellant alleges that the 18-month delay by the employing establishment in admitting error itself caused her emotional condition. In its March 17, 2016 decision, the Board found that, while the August 22, 2002 correspondence from the employing establishment acknowledged error with regard to announcement number MP2-01-164, since this announcement was for a GS-6/7 position and she had been working in a GS-9 position since 1998 this position would not be considered a promotion, and the employing establishment corrected its error by giving her priority consideration in a similar position. Mere perceptions of error or abuse are not sufficient to establish entitlement to compensation.²³ The mere fact that personnel actions are later modified or rescinded does not, in and of itself, establish error or abuse on the part of the employing establishment.²⁴ 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.²⁵ As there is no evidence that the employing establishment acted unreasonably in delaying to notify appellant of its administrative error, the Board finds that the 18-month delay does not constitute a compensable factor of employment.²⁶

²¹ *Thomas D. McEuen*, *supra* note 19.

²² *Supra* note 20.

²³ *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

²⁴ *Id.*

²⁵ *S.M.*, Docket No. 09-2290 (issued July 12, 2010).

²⁶ To the extent that appellant asserts that the employing establishment's handling of her claim caused an emotional condition, the Board has held that the development of an emotional condition related to OWCP's or the employing establishment's handling of a claim does not arise in the performance of duty as the processing of compensation claims bears no relation to her day-to-day or specially assigned duties. *Hasty P. Foreman*, 54 ECAB 427 (2003).

Appellant further alleges in the current appeal that she was not a GS-9 employee. However, the record supports that she had been working in a GS-9 position since April 1998. The Board also notes that the representative indicated that appellant was unsuccessful with regard to her EEOC case.

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 did not meet her burden of proof to establish an emotional condition in the performance of duty causally related to factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 7, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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