United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 07-2218**
	)	**Issued: March 18, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Houston, TX, Employer	)	

Appearances:
Appellant, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 29, 2007 appellant filed a timely appeal from a June 22, 2007 merit decision of a hearing representative of the Office of Workers' Compensation Programs denying her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On August 7, 2006 appellant, then a 56-year-old therapeutic radiologic technologist, filed an occupational disease claim (Form CA-2) alleging that her headaches, nervousness, neck pain overeating and insomnia were caused by factors of her employment. She alleged that unsubstantiated allegations by her supervisor resulted in counseling and written reprimands; her

coworkers lied about various incidents and were constantly reporting on her; and she was singled out. Appellant was first aware of her condition on June 24, 2005.

In letters dated August 16, 2006, the Office requested additional information from both appellant and the employing establishment. Appellant was requested to describe in detail the incidents which she believed contributed to her condition and provide a report from her physician which included the physician's opinion, with medical rationale, on the cause of her condition.

In an August 11, 2006 statement, appellant indicated that her tension headaches began on June 24, 2005 when her supervisor, Jennifer Webb-Goetz, gave her a report listing treatment errors she allegedly committed on June 3, 13 and 15, 2005 with regard to patient radiation treatment. She also noted a June 24, 2005 written counseling report regarding her behavior and use of profanity towards patients and coworkers.[1] Appellant submitted her response to the list of treatment errors, as requested, on June 27, 2005. She also responded to the written counseling report.

Appellant indicated that she was accused of patient neglect and abuse on July 5, 2005. She stated that her headaches became progressively worse after an August 8, 2005 fact-finding meeting was held regarding the July 5, 2005 incident. An August 11, 2005 fact-finding summary and conclusion found that appellant failed to timely respond to a patient's distress on July 5, 2005. As a result of the fact findings, she received a September 20, 2006 memorandum from Ms. Webb-Goetz proposing to admonish her for negligent work. Appellant disagreed with the proposed admonishment and requested hearing before employing establishment officials, which was held on October 24, 2005. During the hearing, her union representative requested that certain evidence be considered prior to a decision being rendered and advised that the evidence would be submitted by October 28, 2005. Appellant submitted an October 28, 2005 response from Christopher Allen, her union representative, together with statements from coworkers, Arthur Alvarado, Aimee Boyd, Lori Edwards, Jackie Elijate and Nancy Hacker. The admonishment decision, however, was finalized on October 27, 2005. Appellant contended that she was not accorded due process as her documentation was never reviewed.

The October 27, 2005 decision from Dr. Meena S. Vij, Diagnostic & Therapeutic Care Line Executive, found the neglect charge fully supported by the evidence and that "It is my decision that you be admonished." The decision advised appellant that, if she believed the admonishment was unjustified, she could appeal through a grievance procedure.

Appellant received the admonishment decision on October 28, 2005. She became overwhelmed and ill and made an appointment with Dr. Winston E. Watkins, Jr., a Board-certified internist, who referred her to mental health services. Appellant also filed a formal Equal Employment Opportunity (EEO) complaint for harassment for prior EEO activity on November 1, 2005.

[1] Ms. Webb-Goetz indicated that, during the week of June 6, 2005, she heard appellant complaining loudly several times about the workload and also heard her using profanity. She also noted that appellant had twice ignored a doctor's request on June 15, 2005 that she get the dosimetrist for an electron set up.

Appellant submitted medical reports from Dr. Watkins and Dr. Royce Watts, Ph.D., a clinical psychologist. Dr. Watkins saw appellant on November 4, 2005 and diagnosed severe anxiety and situational depression. He opined that she was totally disabled. Dr. Watkins later advised that appellant was able to return to work on March 16, 2005 for no more than 40 hours per week. On November 5, 2005 Dr. Watts first examined appellant and indicated that she should be able to transition back to normal work after three months.

In an undated memorandum, Ms. Webb-Goetz stated that the June 24, 2005 letter of counseling was warranted as the evidence showed that appellant ignored a patient's cries for help on July 5, 2005. The patient identified appellant as the therapist who treated him on July 5, 2005. Appellant was given an opportunity to be heard during the fact finding and had union representation. When she returned to work on March 16, 2006, she was told she had to request reasonable accommodation for no overtime work and was accommodated after medical evidence was received. Ms. Webb-Goetz noted that appellant's physician initially stated that appellant should not work overtime for three months. Thereafter, medical documentation was requested from appellant who was notified on August 4, 2006 that she had to submit medical documentation if she was requesting accommodation on a permanent basis.

In an August 31, 2006 report, Dr. Ateka Zaki, a Board-certified psychiatrist, diagnosed appellant with adjustment disorder with anxiety and depression.

In a letter dated September 11, 2006, appellant indicated that she received the results of the August 18, 2006 EEO investigation and was consulting an attorney.[2]

By decision dated November 30, 2006, the Office denied appellant's claim, finding that she had not established any compensable work factors or submitted any probative evidence that she was singled out or that her coworkers had lied about the work incidents.

Appellant requested an oral hearing which was held on April 26, 2007. She testified that her problems began on June 24, 2005 when Ms. Webb-Goetz gave her a memorandum of written counseling along with a list of errors. Appellant stated that Ms. Webb-Goetz refused to provide her with details concerning the memorandum of written counseling, which concerned allegations of her harsh treatment of patients and coworkers and the use of profanity. She met with Zahida Kahn, an administrative officer, on June 27, 2005, who stated that she did not have knowledge of the basis for the charges. Appellant testified about the July 5, 2005 patient incident and denied that she had been negligent in treating the patient. She contended that Ms. Boyd did not truthfully state what happened on July 5, 2005 and had told her on October 18, 2005 that she was forced to write the statement she provided. Appellant contended that the employing establishment did not consider the written response submitted by her union representative prior to issuing the October 27, 2005 decision. She had never been written up for patient abuse in her 14 years of working. Appellant stated that Warren Robicheaux, of human resources, called Dr. Watts and wanted to know why she had to be off work on the days that she had counseling. She contended that this was harassment. After appellant returned to work March 16, 2006, she

[2] The record also contains copies of awards and commendations appellant received on October 21, 1998, August 26, 1999 and April 18, 2002 along with statements from coworkers recommending her for various awards.

was monitored and followed. She noted that no decision had been reached in the EEO complaint she filed.

After the hearing, appellant submitted duplicative copies of evidence already of record. She noted that she filed an informal EEO complaint on July 6, 2005 and a formal complaint on November 1, 2005. Appellant advised that she did not pursue any further relief with respect to the October 27, 2005 admonishment decision as she could not function mentally or emotionally. She stated that, after returning to work March 16, 2006, her supervisor provided her with a fully successful evaluation rating for the period March 2005 to February 2006 despite the accusation of patient neglect and abuse.

In a May 10, 2007 memorandum, Dr. Vij responded to appellant's comments at the hearing. She generally stated that the disciplinary actions taken against appellant were warranted. Dr. Vij denied appellant's allegations that her prior EEO involvement was a factor in issuing the proposed admonishment or that an employee had been assigned to monitor her. In a June 12, 2007 letter, appellant responded to Dr. Vij's comments.

By decision dated June 22, 2007, an Office hearing representative affirmed the November 30, 2006 decision, finding that appellant had not established any compensable employment factors.

LEGAL PRECEDENT

To establish a claim that an emotional condition arose in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[3]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with employment but nevertheless does not come within the concept or coverage of workers compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to her regular or specially assigned employment duties or to a requirement imposed by the employing establishment, the disability comes within coverage of the Federal Employees' Compensation Act. The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of her work or her fear and anxiety regarding her ability to carry out her work duties.[4] By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers compensation law because they are not found to have arisen out of employment,

[3] *D.L.*, 58 ECAB ___ (Docket No. 06-2018, issued December 12, 2006).

[4] *Ronald J. Jablanski*, 56 ECAB 616 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

such as when disability results from an employee's fear of reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.[5]

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 the Act.[6] 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.[7] 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.[8]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim but rather must be corroborated by the evidence.[9] Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[10] The primary reason for requiring factual evidence from the claimant in support of her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.[11]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, 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 not be considered. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that

---

[5] *Id.*

[6] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[7] *See William H. Fortner*, 49 ECAB 324 (1998).

[8] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[9] *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Arthur F. Hougens*, 42 ECAB 455 (1991) and *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case, the Board looked beyond the claimant's allegations to determine whether or not the evidence established such allegations).

[10] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

[11] *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Member).

factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[12]

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of several employment incidents. The Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents of employment are covered employment factors under the terms of the Act.

Appellant attributed her emotional condition, in part, to administrative and personnel actions taken by management. These concern a June 24, 2005 written counseling report regarding her behavior and use of profanity towards patients and coworkers; a June 24, 2005 request to respond to reports of three errors in patients' radiation treatment on June 3, 13 and 15, 2005; the investigation into and decision concerning the July 5, 2005 incident in which she was accused of not timely responding to a patient's distress; the failure to consider the union's October 28, 2005 written response and evidence regarding the proposed admonishment due to the July 5, 2005 incident; and the August 4, 2006 request that appellant should submit a request for reasonable accommodation with current medical documentation if she intended to request permanent limited work of no more than 40 hours per week.

Appellant alleged that management unfairly singled her out or treated her in a discriminatory manner with respect to its disciplinary actions of June 24 and October 27, 2005. Her supervisor, Ms. Webb-Goetz, stated that evidence which gave rise to the June 24, 2005 letter of counseling, the reports of errors in patients' radiation treatment, and the July 5, 2005 incident whereby appellant ignored a patient's cries for help were well documented by the record. Disciplinary matters consisting of counseling sessions, discussions or letters of warning for conduct pertain to actions taken in an administrative capacity and are not compensable as factors of employment absent any error or abuse.[13] There is no evidence to support appellant's allegations that she was unfairly singled out for disciplinary action or that her coworkers lied about her alleged mistreatment and neglect of patients. The July 5, 2005 incident ultimately resulted in an October 27, 2005 decision admonishing appellant. The record reflects that appellant was given the opportunity to be heard during the fact-finding process and had union representation. While she contends that the employing establishment failed to consider all the evidence she submitted, including the union's response to the proposed admonishment, the Board notes that appellant never appealed the October 27, 2005 decision. As a result, the record does not establish that the disciplinary and administrative actions taken by management were in error. Therefore, appellant has not established compensable factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the

[12] *D.L., supra* note 2; *T.G.*, 58 ECAB ___ (Docket No. 06-1411, issued November 28, 2006); *C.S.*, 58 ECAB ___ (Docket No. 06-1583, issued November 6, 2006); *A.K.*, 58 ECAB ___ (Docket No. 06-626, issued October 17, 2006).

[13] *See Barbara J. Nicholson*, 45 ECAB 803 (1994).

Act, unless there is evidence to establish that the employing establishment acted unreasonably.[14] Appellant has not presented sufficient evidence that her managers acted unreasonably or committed error with regard to the personnel matters asserted.

The Board further finds that management did not commit administrative abuse or error by monitoring appellant's requests for accommodation. The Board has held that an employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion falls, as a rule, outside the scope of coverage provided by the Act.[15] This principle recognizes that a supervisor or manager must be allowed to perform their duties and that employees will at times dislike the actions taken; however, mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.[16] The record indicates that appellant's physician did not permanently restrict appellant from working overtime, but rather advised that she could return to normal work after three months. Thus, it appears reasonable that the employing establishment would request medical documentation from appellant after the first three months. Additionally, the employing establishment's August 4, 2006 notification to appellant that she must submit medical documentation if she was requesting an accommodation on a permanent basis, appears reasonable given the circumstances of this case.[17] Appellant has not submitted any evidence to show that these actions demonstrated error or abuse on the part of management. Thus, she has not established a compensable employment factor.

Regarding appellant's contention that the employing establishment had assigned someone to monitor her after she returned to work on March 16, 2006, appellant has not provided any specific examples of improper monitoring of her work or provided sufficient supporting evidence to substantiate this allegation. Thus, this allegation is not accepted as factual.

There is also no evidence to support that the disciplinary actions constituted harassment as a result of prior EEO activity.[18] Although appellant filed an EEO complaint claiming that the actions of the employing establishment constituted harassment for her prior EEO activity, grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[19] She has additionally alleged that she was harassed when a Mr. Robicheaux, from human resources, called Dr. Watts and inquired why she had to be off work on the days she had counseling. As previously noted, appellant must substantiate her allegations of harassment or discrimination with probative and reliable evidence.[20] She has

[14] *See Alfred Arts*, 45 ECAB 530, 543-44 (1994).

[15] *See Judy L. Kahn*, 53 ECAB 321 (2002).

[16] *Id.*

[17] Furthermore, the assignment of work by a supervisor, the granting or denial of a request for a transfer and the assignment to a different position are administrative functions that are not compensable absent error or abuse. *D.L.*, *supra* note 2.

[18] *See Joel Parker, Sr.*, *supra* note 10.

[19] *See Parley A. Clement*, 48 ECAB 302 (1997).

[20] *See Joel Parker, Sr.*, *supra* note 10.

submitted no evidence corroborating her allegation that her physician was called by the employing establishment. Thus, this allegation is not accepted as factual.

For the foregoing reasons, the Board finds that appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[21]

CONCLUSION

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

[21] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *Karen K. Levene*, 54 ECAB 671 (2003); s*ee also Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).