United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
	)	**Docket No. 12-1236**
and	)	**Issued: November 15, 2012**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Hackensack, NJ, Employer	)	

Appearances:
James D. Muirhead, Esq., for the appellant
Office of 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 May 16, 2012 appellant, through her representative, filed a timely appeal from the January 4, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her emotional condition claim and the April 20, 2012 nonmerit decision of OWCP denying her reconsideration request. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether OWCP properly denied appellant's request for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On August 20, 2010 appellant, then a 41-year-old window clerk, filed a traumatic injury claim alleging that she had stress, chest pain, headaches and nausea from harassment. The employing establishment controverted the claim contending that she had not proven that harassment occurred. Appellant submitted medical forms dated August 20 to 25, 2010 with her claim and a statement in which a witness noted that she saw appellant crying and upset on August 20, 2010.

By letter dated August 25, 2010, OWCP advised appellant of the additional factual and medical evidence needed to support her claim.

In a September 7, 2010 statement, appellant related that on August 19, 2010 she had a problem with a money order and looked for help from her supervisor, Mina Patel. She could not find Ms. Patel and called the help desk to fix the problem. Ms. Patel then came to appellant's window and asked with whom she was talking. She then had a discussion with appellant and the shop steward on why appellant called the help desk. Appellant stated that she was responsible for the money order, but that her supervisor failed to fix the problem. She alleged that Ms. Patel told her and a coworker to stop switching workstations and claimed that this act constituted harassment. On August 20, 2010 Ms. Patel told appellant to go to a conference room and, when appellant arrived, she saw her postmaster, Tom Amendola, as well as Jim Spadaccini, a manager, and Linda Broyles, a coworker. Mr. Amendola told appellant that it was not a disciplinary meeting and that Ms. Broyles was only observing. Appellant told Mr. Amendola that she wanted her shop steward present and did not want Ms. Broyles at the meeting as she was not authorized to represent employees. She became fearful. Appellant alleged that in a loud and nasty voice, Mr. Amendola told her to get her out of there and clock out. She asked if he was telling her to leave, to which he replied that he would call the police and escort her out.

Appellant alleged that Mr. Spadaccini then told her that the shop steward would be coming and noted that she was able to speak to the chief steward. She was not feeling well, but went back to the meeting and Mr. Amendola stated that someone told him she was talking about him. Appellant alleged that Mr. Amendola told her that she was not a good worker. She explained to Mr. Amendola that she had to ask customers questions as a window clerk and asserted that he responded, "Who are you going to be afraid of, me or the customer?" Appellant contended that this comment was a threat. She alleged that Mr. Amendola harassed her for six months and claimed that the August 20, 2010 incident was the culmination of the harassment.

In an August 20, 2010 statement, Ms. Patel stated that on that day Mr. Amendola related that he overheard appellant in the customer lobby telling Abraham John and Rosa Malspin that he was threatening and harassing her, that her job revolved around the "Mystery Shopper" program and that she would not be harassed due to it. Appellant stated that she would not be pushed around, stating "I am a tough person and will show him." Mr. Amendola asked that appellant and another available clerk be brought in as a witness because appellant's conversation could be overheard by customers. Ms. Patel stated that Ms. Broyles and appellant came into the conference room and appellant, in a loud shouting voice, stated that she wanted her shop steward to be present. Mr. Amendola told appellant that it was not a disciplinary matter and appellant then abusively stated that he was harassing and threatening her and that she would not attend the

meeting without a shop steward. Ms. Patel stated that Mr. Spadaccini instructed appellant to take a seat and informed her that there was no need for a shop steward as no discipline was involved. Appellant kept screaming about being harassed and needing a shop steward. Mr. Amendola then asked her to leave but when she refused to leave, he asked Ms. Patel to call the police. Ms. Patel noted that appellant asserted that the employing establishment would pay her administrative leave and Mr. Amendola asked appellant to follow proper procedures. She asserted that Mr. Amendola acted in a professional manner throughout the conversation.

In a September 18, 2010 statement, Mr. Spadaccini described the August 20, 2010 meeting with Mr. Amendola, Ms. Patel, Ms. Broyles and appellant. Mr. Amendola advised appellant that he overheard her conversation when she told two other clerks negative comments about him. He told appellant that he was not going to discipline her but she yelled that she wanted a shop steward, was being harassed and did not want Ms. Broyles present (at which point Ms. Broyles left the room). Mr. Amendola kept telling her in a calm manner that the meeting had nothing to do with discipline, but she kept interrupting and screaming that he was harassing her. Mr. Spadaccini stated that Mr. Amendola then advised appellant that, if she could not conduct herself in a professional manner, she would be sent home. Appellant screamed that Mr. Amendola would have to pay her administrative leave if she left to go home. Mr. Spadaccini stated that Mr. Amendola told her to clock out and she again screamed that he had to pay her administrative leave. Ms. Patel followed appellant back to the window to close out and she stated loudly "who does he think he is." Mr. Spadaccini advised that she continued to make a scene and that Ms. Patel called the shop steward, Ophelia Dease. Ms. Patel told appellant that the shop steward was on the way, and to wait in the swing room; but appellant stated that Mr. Amendola told her to leave so she was going home. When Ms. Dease arrived, Mr. Amendola told her what happened and then appellant was called in, but she interrupted him several times. He left after he was done speaking to appellant and Ms. Patel gave appellant a P01 (pre-disciplinary interview) for her conduct. Mr. Spadaccini stated that appellant requested a traumatic injury form, which he gave to her.

In a September 17, 2010 statement, Mr. Amendola related the events of August 20, 2010. He noted that it took Ms. Dease 20 or 30 minutes to arrive and when she did, he informed appellant of the conversation he overheard. Mr. Amendola stated that, in front of Ms. Dease and Mr. Spadaccini, Ms. Patel administered a P01 to appellant for her failure to follow his instructions. He contended that appellant's claim for an emotional condition was based on her reaction to an administrative action. Mr. Amendola stated that his intent was to discuss appellant's one-sided conversation in a rational manner and to uncover why she felt harassed and/or threatened, but that her continuous shouting and disrespectful manner escalated the issue. He noted that appellant improperly asserted that he stated "Who are you going to be afraid of, me or the customer?" and stated that he had actually informed her that, if she was afraid of any customer because she had to perform her job according to the Mystery Shopper guidelines, to immediately call a supervisor or the local police. Mr. Amendola informed her that it was her responsibility to perform her job according to the Mystery Shopper guidelines, and that it was his responsibility to observe the operation.

Ms. Patel provided an additional statement dated November 30, 2010, regarding appellant's allegation that she would not fix her money order problem on August 19, 2010. She stated that the retail unit report showed that appellant had no money order transactions at the

time she claimed, at 10:45 a.m., but that she had one on May 26, 2010. On August 19, 2010 appellant left her window to call the help desk and advised that she could have asked permission to call the help desk. Ms. Patel stated that, while appellant noted that she was responsible for the money order, she had not been issued a letter of demand for the money order. She stated that all the window clerks had been instructed not to leave their work areas without notifying a supervisor. While appellant alleged that she tried to find her, there were seven supervisors she could have notified. Ms. Patel asked appellant to return to her window because of the customer wait times. She called appellant into her office with a shop steward to discuss calling the help desk and leaving her window without permission. Ms. Patel stated that appellant responded that she was forced to call the help desk, to which Ms. Patel again noted that appellant had ample time after May 26, 2010 to call the help desk with permission from a supervisor. She noted that appellant failed to follow instructions regarding switching windows and the Mystery Shopper program.

By letter dated September 22, 2010, the employing establishment challenged the claim for the reason that appellant was not harassed by anyone in management at any time as established by the statements from her supervisors.

By decision dated February 17, 2011, OWCP denied appellant's emotional condition claim on the grounds that she did not establish any compensable work factors. It found that she did not establish harassment or error or abuse in administrative matters.

Appellant disagreed with the decision and requested a telephone hearing before an OWCP hearing representative. Prior to the hearing, counsel submitted a card referring to the Weingarten rule regarding union representation, a copy of appellant's August 20, 2010 letter of warning and copies of appellant's Step 2 grievance appeal forms.

At the June 23, 2011 hearing, appellant testified that the Mystery Shopper program involved trying to sell different products to customers. She testified that many regular customers became annoyed with the program because they did not want to hear the same questions all the time. Appellant testified that Mr. Amendola wanted the office to score better under this program and to reach 100 percent compliance. She asserted that the only way he knew how to do that was to threaten his employees. Appellant alleged that Mr. Amendola brought her into his office regarding that matter about 10 times. On August 20, 2010 she was told to meet with Mr. Amendola and asserted that it was inappropriate for Ms. Broyles to be present and for her to be asked to such a meeting without union representation. Appellant felt that something serious was going to happen, and she believed that her Weingarten rights were being violated. She claimed that it was Mr. Amendola who was loud and abusive. Appellant testified that she grieved this matter and that it was currently at the Step 2 stage.

In an August 30, 2011 decision, an OWCP hearing representative affirmed the February 17, 2011 decision finding that appellant did not establish that she sustained a work-related emotional condition.

Appellant requested reconsideration and counsel submitted a statement which reiterated that management had harassed appellant and committed error because a union representative initially was not present on August 20, 2010. She also submitted an undated statement in which

Richard Dock, a union shop steward, stated, "I believe that [appellant was] entitled to have a shop steward present when she's called into a meeting with the Postmaster and two supervisor[s], clearly discipline was going to be involved. That's why Weingarten Rights are so important."

In a January 4, 2012 decision, OWCP affirmed the August 30, 2011 decision denying appellant's emotional condition claim.

Appellant requested reconsideration and submitted a January 24, 2012 statement in which Dennis Bowie, executive vice president of North Jersey Area Local of the American Postal Workers Union, stated, "[Appellant's] rights were violated by Postmaster Amendola when he refused and denied to grant [appellant] a shop steward during an interview that [appellant] was called into on August 20, 2010."

In an April 20, 2012 decision, OWCP denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

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 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.[2] On the other hand, the disability is not covered where 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.[3]

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.[4] 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.[5] 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.[6]

[2] *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Gregorio E. Conde*, 52 ECAB 410 (2001).

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

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

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

To the extent that disputes and incidents alleged as constituting harassment by coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[7] However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under FECA.[8]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.[9] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected a condition for which compensation is claimed and a rationalized medical opinion relating the claimed condition to compensable employment factors.[10]

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 causal relationship and which working conditions are not deemed factors of employment and may not be considered.[11] If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. 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] Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[13]

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained an emotional condition as a result of several employment incidents and conditions at work. OWCP denied her emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must initially review whether the alleged incidents and conditions of employment are covered employment factors under the terms of FECA. The Board notes that appellant's allegations do not pertain to her regular or specially assigned duties under *Cutler*.[14] Rather, she has alleged

[7] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[8] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[9] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[10] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[11] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[12] *Id.*

[13] *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

[14] *See Cutler* note 2.

error and abuse in administrative matters and harassment and discrimination on the part of her supervisors.

Appellant alleged that on August 20, 2010 she was improperly called into a meeting with Mr. Amendola, the postmaster at her workplace, in order to discuss a conversation he overhead. She alleged that Mr. Amendola violated her Weingarten rights to have a union shop steward present at the meeting. Appellant claimed that she was improperly disciplined as a result of this meeting.

Appellant did not substantiate her allegations of employing establishment error and abuse in the August 20, 2010 incident. Ms. Patel, Mr. Spadaccini, and Mr. Amendola refuted appellant's allegations and provided reasonable explanations for the actions taken. Appellant did not show that error or abuse occurred on August 20, 2010 when Mr. Amendola performed the administrative function of speaking to her. While counsel contended that appellant's Weingarten rights were violated, there is no independent, corroborative evidence to support his allegations. The brief conclusory statement of Mr. Dock, appellant's shop steward, would not constitute such probative evidence. Moreover, appellant was clearly told when she arrived at the August 20, 2011 meeting that it was not for discipline. It was not until after her behavior during the meeting that the employing establishment determined discipline was needed, at which point the discussion ended until her shop steward arrived. While appellant has a Step 2 grievance pending regarding the August 20, 2010 incident, there is no final decision showing any employing establishment error or abuse. Moreover, there is no indication that management committed error or abuse when it disciplined her on August 20, 2010 for her behavior at the meeting. Therefore, appellant has not established a work factor with respect to these administrative matters.

Appellant indicated that she disagreed with Mr. Amendola about trying to achieve 100 percent in the Mystery Shopper guidelines because she felt that the program annoyed the customers. However, her mere dislike of employing establishment policies or conditions of her job would not constitute a compensable work factor.[15]

Appellant alleged that Mr. Amendola harassed her on August 20, 2010 and other occasions, but unfounded perceptions of harassment do not constitute an employment factor. Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under FECA.[16] Appellant provided no evidence to support her allegations that Mr. Amendola screamed at her during the August 20, 2010 meeting. Mr. Amendola and the other supervisors present, Ms. Patel and Mr. Spadaccini, denied this allegation and asserted that appellant was the one who was loud and unruly. Appellant did not submit probative evidence, such as witness statements, to show that Mr. Amendola made statements or committed actions on August 20, 2010 or any other occasion which constituted harassment. She alleged that Ms. Patel harassed her on August 19, 2010 regarding her handling of a money order but she did not submit evidence supporting this allegation.

[15] *See supra* note 3.

[16] *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

On appeal, counsel continued to argue that management harassed appellant and committed wrongdoing because a union representative initially was not present on August 20, 2010. However, he did not adequately explain how the evidence of record supported these arguments.

For the foregoing reasons, appellant has not established any compensable employment factors under FECA and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[17]

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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[18] OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[19] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[20] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[21] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[22] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[23] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[24]

[17] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[18] Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[19] 20 C.F.R. § 10.606(b)(2).

[20] *Id.* at § 10.607(a).

[21] *Id.* at § 10.608(b).

[22] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[23] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[24] *John F. Critz*, 44 ECAB 788, 794 (1993).

ANALYSIS -- ISSUE 2

In her application for reconsideration, appellant, through counsel, continued to argue that her supervisors harassed her on August 20, 2010 and improperly failed to allow her to have a union representative present.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. Her argument that there should have been a union representative present on August 20, 2010 had been previously considered and rejected by OWCP. As noted above, the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case for merit review.

Appellant also submitted a January 24, 2012 statement in which Mr. Bowie, an executive vice president at her union, asserted that her rights were violated on August 20, 2010. However, this statement was similar to the previously submitted statement of Mr. Dock which indicated, without elaboration, that appellant's rights had been violated. Therefore, the submission of this document would not constitute a basis for reopening appellant's case for merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty. The Board further finds that OWCP properly denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the April 20 and January 4, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 15, 2012
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