United States Department of Labor
Employees' Compensation Appeals Board

A.D., Appellant	)	
and	)	**Docket No. 10-2136**
	)	**Issued: July 19, 2011**
DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, GA, Employer	)	

Appearances:
Leo Glover, for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 20, 2010 appellant filed a timely appeal from a February 23, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her emotional condition claim and an April 23, 2010 nonmerit decision denying her request for an oral hearing as untimely. 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 the 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 a hearing.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 15, 2009 appellant, then a 45-year-old security specialist, filed an occupational disease claim for a job-related stress/illness commencing October 8, 2009. She claimed that she was repeatedly harassed by her supervisor and forced to leave her job to seek immediate medical attention. Appellant stopped work October 8, 2009 and returned to work November 10, 2009 as a management analyst.

In a December 21, 2009 letter, OWCP advised appellant that additional factual and medical information were necessary to support her claim.

In response, appellant submitted a workers' compensation package detailing her claim. On October 8, 2009 Margaret Rodeheaver, appellant's supervisor, held a meeting with her and a coworker to discuss a checklist. During the meeting, appellant stated that she was questioned on security material and whether she had attended the security manager's meetings. Her supervisor requested verification of her attendance as well as the minutes of the meetings. Appellant stated that, after her coworker was allowed to leave the meeting, her supervisor continued to question her about the remainder of the checklist items. She contended these were the responsibility of her coworker and for which she had no information. When appellant questioned her supervisor on why her coworker, who was the newest member of security, could attend the security trainings as he was not a security manager, she was told it was management's decision. Appellant's supervisor denied appellant's request for leave due to mission requirements and indicated that medical documentation was needed to support her sick leave request the next day, Friday, October 9, 2009 as it appeared appellant was abusing her leave prior to a three-day weekend. Appellant became upset and told her supervisor that the medical appointment was scheduled at her physician's request. She indicated that her requests for leave the following Tuesday and Wednesday were denied as her supervisor wanted the checklists completed. Appellant thereafter scheduled a meeting with the Equal Employment Opportunity (EEO) office and, as she left her office, began to experience shortness of breath. She related that a coworker took her to the hospital as she was having shortness of breath and crying.

In an October 27, 2009 EEO complaint form, appellant alleged that she was discriminated against on the basis of race and reprisal for past EEO activity when she was harassed by management. She alleged on September 10 and 18, 2009, she received oral counseling about her perfume; on October 2, 2009, she was accused of signing in at an earlier time; October 8, 2009, she was verbally denied sick leave but then she was informed by electronic mail that her sick leave was approved but she must bring in a physician's excuse; on October 8, 2009, she was denied restored leave; and on October 8, 2009, she was denied training after she was directed to research the location of and provide a cost analysis of such training.

Appellant submitted copies of medical documentation from her physician and specialists, including diagnostic testing and copies of leave requests. The October 8, 2009 discharge instructions from the Houston Medical Center Emergency Department provided a final diagnosis of anxiety-related symptoms.

In a December 16, 2009 letter, the employing establishment controverted appellant's claim. It submitted a copy of a November 24, 2009 FECA Fraud Investigative Unit report,

which concluded that her problems appeared to be self-generated and not the result of her work environment. The employing establishment also submitted October 9 and November 17, 2009 statements from Ms. Rodeheaver, branch chief, Force Development and Training.

In an October 9, 2009 letter, Ms. Rodeheaver related that a review of the self-inspection checklist and other program documents, which needed to be completed before the deadline of October 16, 2009 took place on the afternoon of October 8, 2009 with appellant, the primary security program manager and another security manager. A review of the checklist progress indicated that many checklist items needed attention and other program materials were not fully in order or inspection ready. Ms. Rodeheaver stated that, after the other program manager left, she continued the progress review with appellant. When the review was completed, she informed appellant that her request for 16 hours of restored annual leave for October 13 to 14, 2009 was denied. Ms. Rodeheaver indicated that Donna Mills, division chief, concurred on the denial based on the mission requirements of the agency. She also informed appellant that medical documentation was required for eight hours of sick leave requested for the next day, October 9, 2009. Ms. Rodeheaver stated that the reason medical documentation was requested was due to appellant's previous use of leave which seemed to correspond with office deadlines, holidays or other planned leave. Appellant told Ms. Rodeheaver that she would be visiting the EEO office.

On November 17, 2009 Ms. Rodeheaver stated that appellant was assigned as primary security manager and responsible for numerous programs for the communications directorate as well as self-inspection of those programs. Before the October 8, 2009 incident, appellant had taken leave related to high blood pressure testing. Ms. Rodeheaver stated that appellant sought medical attention for stress-related symptoms on October 8, 2009 after being denied annual leave for October 13 and 14, 2009, which had been requested earlier on the afternoon of October 8, 2009. She stated that appellant was on leave from October 9 to November 9, 2009, with no lost pay.

In a February 23, 2010 decision, OWCP denied appellant's claim for an emotional condition finding that she failed to establish a compensable employment factor.

In a March 30, 2010 appeal request form, postmarked April 1, 2010, appellant requested an oral hearing. In a letter also dated March 30, 2010, she provided authorization for her representative to represent her at the oral hearing.

By decision dated April 23, 2010, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds it was not timely filed. It found that she could have her claims further addressed by requesting reconsideration.

On appeal, appellant alleged that her April 1, 2010 request for an oral hearing was timely as OWCP's February 23, 2010 decision was postmarked March 5, 2010.

LEGAL PRECEDENT -- ISSUE 1

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.[2]

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 FECA. 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.[3] 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, 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.[4]

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.[5] 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.[6] 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.[7]

For harassment or discrimination to give rise to a compensable disability under FECA, 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.[8] Mere perceptions and feelings of harassment or discrimination will not support an

[2] *D.L.*, 58 ECAB 217 (2006).

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

[4] *Id*.

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

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

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

[8] *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).

award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[9] 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 OWCP and the Board.[10]

ANALYSIS -- ISSUE 1

Appellant alleged an emotional condition commencing October 8, 2009 causally related to factors of her federal employment. She attributed her emotional condition to administrative and personnel actions taken by management. As noted, administrative and personnel matters are not covered under FECA absent evidence which establish that appellant's employer either erred or acted abusively in the administrative or personnel action.[11]

On October 8, 2009 appellant together with another coworker, was questioned by her supervisor regarding a progress review of the self-inspection checklist and related program documents which needed to be completed by October 16, 2009. She was instructed to provide additional material and evidence with regard to certain checklist items. Appellant characterized her treatment by Ms. Rodeheaver as harassment and discrimination. She expressed her frustration over being questioned about the progress review of the self-inspection checklist. Appellant did not attribute her condition to any requirement involving her assigned duties under *Cutler*.[12] Appellant did not provide details about this allegation or supporting evidence to establish as factual that she was being treated differently than her coworker with regard to the material her supervisor requested. The Board finds that she has not established a compensable employment factor.[13]

On October 8, 2009 appellant stated that she was denied annual leave for October 13 and 14, 2009 due to mission requirements and that she was requested to submit medical documentation for her sick leave for October 9, 2009. The Board has held that matters regarding the use of leave are generally not considered compensable factors of employment as they are administrative functions of the employer and not duties of the employee.[14] This allegation is unrelated to appellant's regular or specially assigned work duties. In her October 9, 2009 letter, appellant's supervisor indicated that annual leave was denied due to mission requirements of the October 16, 2009 deadline for completing a self-inspection checklist for a unit compliance

[9] *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).

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

[11] *Kim Nguyen*, 53 ECAB 127 (2001).

[12] *Peter D. Butt, Jr.*, 56 ECAB 117 (2004); *Cutler*, *supra* note 3.

[13] *Sherry L. McFall*, 51 ECAB 436 (2000).

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

program. The supervisor further indicated that medical documentation was requested for appellant's use of sick leave as her previous leave use habits corresponded with office deadlines, holidays or other planned leave. Ms. Rodeheaver provided a reasonable explanation for her decisions regarding appellant's use of leave. Appellant did not establish a compensable work factor in this matter.

Appellant also expressed her dissatisfaction over why her coworker, who was the newest member of security, was allowed to attend security trainings as he was not a security manager. The Board has held that frustration with the policies and procedures of the employing establishment are administrative matters and are not compensable factors of employment.[15] In this case, appellant provided nothing to substantiate employing establishment error with respect to its decision to have her coworker attend the security trainings. She therefore failed to show error or abuse with the policies and procedures of the employing establishment. Thus, appellant failed to establish a compensable employment factor.

In her EEO complaint form, appellant asserted that she was harassed by and retaliated against by management, when she received oral counseling on September 10 and 18, 2009 about her perfume a coworker complained about; on October 2, 2009, when she was accused of signing in at an earlier time; and on October 8, 2009, when she was denied training. These matters are administrative as they relate to discipline, investigating and monitoring an employee's activities and training.[16] Appellant did not provide evidence, apart from her assertions, that the employer acted unreasonably in these administrative matters. She did not submit any final determinations from the EEO process tending to support that the employer acted unreasonably in its administrative capacity.[17] Thus, appellant has not established a compensable factor of employment in this regard.

As the record lacks probative evidence to support appellant's claim, the Board finds that she has not established a compensable factor of employment. Appellant therefore did not establish that she sustained a stress-related condition in the performance of duty as alleged.[18]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the

[15] *See William Karl Hansen*, 49 ECAB 140 (1997).

[16] *See V.W.*, 58 ECAB 428 (2007) (the handling of disciplinary actions and the monitoring of work activities are generally related to the employment but are administrative functions of the employer and not duties of the employee); *James E. Norris*, 52 ECAB 93 (2000) (training of employees is an administrative matter); *C.F.*, Docket No. 08-1102 (issued October 10, 2008) (investigations and reactions to disciplinary matters are administrative in nature and not compensable unless it is established that management erred or acted abusively).

[17] *James E. Norris*, *id.* (grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred).

[18] As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Katherine A. Berg*, 54 ECAB 262 (2002).

issuance of the decision, to a hearing on her claim before a representative of the Secretary.[19] Section 10.617 and 10.618 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[20] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[21]

ANALYSIS -- ISSUE 2

OWCP denied appellant's claim on February 23, 2010. Appellant's request for an oral hearing was dated March 30, 2010 and postmarked April 1, 2010. The date of filing of her hearing request is determined by the date of the postmark.[22] Appellant's April 1, 2010 hearing request was made more than 30 days after the date of OWCP's February 23, 2010 decision. She contends on appeal that her April 1, 2010 request was timely as the February 23, 2010 decision was postmarked March 5, 2010.[23] The evidence of record at the time of OWCP's April 23, 2010 decision reflects that the decision denying her claim was issued on February 23, 2010 therefore the Board finds that her hearing request was not timely. The 30-day time period for determining the timeliness of appellant's request for an oral hearing or review commences on the first day following the issuance of OWCP's decision.[24] As OWCP's decision was issued February 23, 2010, the 30-day period for requesting an oral hearing began to run on February 24, 2010 and the last or 30th day was March 25, 2010. Since appellant's request for an oral hearing was postmarked April 1, 2010, it is untimely. Accordingly, she was not entitled to a hearing as a matter of right.

OWCP has the discretionary authority to grant a hearing even though a claimant is not entitled as a matter of right. In its April 23, 2010 decision, it properly exercised its discretion. OWCP considered the issue involved and had denied appellant's request for a hearing on the basis that her claim on the issue of whether she established an injury in the performance of duty could be adequately addressed through the reconsideration process and the submission of additional evidence. The Board has held that the only limitation on OWCP's authority is reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable

[19] 5 U.S.C. § 8124(b)(1).

[20] 20 C.F.R. §§ 10.616, 10.617.

[21] *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[22] *See N.M.*, 59 ECAB 511 (2008) (a hearing request must be sent within 30 days of the date of the decision for which a hearing is sought as determined by postmark or other carrier's date marking).

[23] A copy of an envelope postmarked March 5, 2010 was submitted on appeal and is of record after OWCP's April 23, 2010 decision. However, the Board may not consider new evidence for the first time on appeal or evidence that was not before OWCP at the time of its decision. 20 C.F.R. § 501.2(c); *see Robert H. St. Onge*, 43 ECAB 1169 (1992).

[24] *See also John B Montoya*, 43 ECAB 1148, 1151-52 (1992); *see Donna A. Christley*, 41 ECAB 90, 91 (1989).

deduction from established facts.[25] In the present case, OWCP did not abuse its discretion in denying a discretionary hearing. For these reasons, it properly denied appellant's request for an oral hearing under section 8124 of FECA.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty. The Board also finds that OWCP properly denied her request for an oral hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the April 23 and February 23, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 19, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[25] *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).