United States Department of Labor
Employees' Compensation Appeals Board

S.M. Appellant	)	
and	)	**Docket No. 08-1816**
	)	**Issued: March 23, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION REGIONAL OFFICE, Manchester, NH, Employer	)	

Appearances:
Appellant, pro se
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 June 16, 2008 appellant filed a timely appeal from the May 21, 2008 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the denial of appellant's emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUE

The issue on appeal is whether appellant has met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On December 1, 2005 appellant, then a 44-year-old letter service representative, filed a traumatic injury claim alleging that she was harassed by her managers, which caused her to develop anxiety, depression, stress and a bipolar disorder. She alleged that the injury occurred on November 29, 2005, the date that she stopped work. Patricia Alonman, a union

representative, indicated on the claim form that she represented appellant in a September 2005 meeting with her immediate supervisor, Marie Brochu. She alleged that Ms. Brochu wrote a letter of counseling and admonished appellant for "not being in on [tele]phones all day, something that all employees do at one time or another." Ms. Alonman indicated that appellant was "visibly shaken, started crying and said she had to go throw up." The employing establishment controverted the claim.

On December 14, 2005 Amy Ellard, a human resources specialist, asserted that appellant's emotional reaction was due to poor performance and a conduct issue. A meeting was held with appellant on November 29, 2005 at 2:00 pm. Appellant's union representative was also present. Ms. Brochu discussed the results of her performance improvement plan (PIP), which had concluded on November 22, 2005. Ms. Ellard noted that, after the meeting, appellant requested sick leave for the rest of the day. On December 1, 2005 appellant submitted her traumatic injury claim form and a note from her physician, who placed her off work due to work stress until January 16, 2006, which coincided with the 45-day maximum for continuation of pay. The physician noted that appellant had outside stresses as she was the mother of an adult special needs child, a caretaker for her ailing mother and a newlywed.

Ms. Ellard provided a timeline for appellant's history with the employing establishment, which began after her hardship transfer request was granted on November 15, 2004. Appellant was placed on a performance assistance plan (PAP) on June 23, 2005 and a PIP on August 22, 2005. On September 13, 2005 she attended court on behalf of her special needs child and requested court leave. Ms. Ellard explained that appellant did not initially provide the proper documentation and was advised to use annual leave pending receipt of the documentation. Subsequently, court leave was granted after appellant presented the summons and management verified the documents. On September 19, 2005 appellant alleged harassment after she received oral counseling due to her failure to follow procedures and cover assigned telephone responsibilities on several occasions. On September 20, 2005 upper level management assured appellant that she was not being harassed. Ms. Ellard noted that on October 3, 2005 a meeting was held with appellant, her union representative and the station director, Marybeth Cully, concerning her harassment allegations regarding court leave, oral counseling and replacement of her computer without advance notice. On October 6, 2005 Ms. Cully addressed these matters and explained the basis for the actions taken. Ms. Ellard stated that on October 17, 2005 a grievance was filed on behalf of appellant alleging harassment for the court leave matter and the issuance of oral counseling. She indicated that Ms. Brochu met with appellant and her union representative to discuss the grievance on November 3, 2005 and that the grievance was denied on November 14, 2005. On November 21, 2005 appellant filed a Step 2 grievance and on November 28, 2005 a meeting was held with her the union and a supervisor. On November 29, 2005 she met with Ms. Brochu and a union representative, regarding the results of the PIP. Appellant was advised that she failed to meet minimally acceptable levels. She was also advised that her within grade pay increase was denied.

By letter dated January 3, 2006, the Office advised appellant that additional factual and medical evidence was needed. It informed appellant that it would develop her claim as an occupational disease as she had alleged that her condition occurred from incidents over a period of time, as opposed to a single workday.

On a January 16, 2006 appellant contended that her claim was traumatic in nature, despite a number of events over a period of time, as she stopped work on November 29, 2005 when she had a traumatic ordeal. She reiterated that her manager had harassed her, but that she was "holding it together until that last meeting (11/29/2005) that's when I just snapped and could not take the stress of harassment anymore." Appellant alleged that her supervisor threatened to terminate her and that, despite doing her job for five years, "all of a sudden at her discretion I was not making my quality." She alleged that, two months previous, Ms. Brochu informed a union representative, Pat Connarn, that she was not going to make her numbers. Appellant noted that she never had a bad appraisal in 16 years of work until she started working at her present site. She alleged that she was "singled out to fail." Appellant worked until November 29, 2005, when her supervisor "threatened to down grade" or "terminate" her. She alleged that the meeting caused her to have an emotional breakdown. The following day, appellant dropped off a CA-16 form and Sandy Hill, a service center manager, called her at home and threatened to place her on absent without leave (AWOL) status and stated that she could terminate her, despite her physician's note placing her off work. She noted that the union president, Robert Cortez, heard the conversation on speaker phone. Appellant denied that her mother or her son caused stress. She stated that Ms. Cully, on December 21, 2005 offered her a position in another division under different management, upon her return.

The Office also received a performance appraisal dated October 7, 2002, which indicated that appellant had a successful rating and a copy of appellant's CA-16 dated November 29, 2005, placing her off work from December 1, 2005 to January 16, 2006. In a February 6, 2006 response, the employing establishment controverted her claim.

In a June 13, 2006 decision, the Office denied appellant's claim, finding that her emotional condition did not occur in the performance of duty. On July 10, 2006 appellant requested a hearing, which was scheduled for February 27, 2008.

In a February 28, 2008 letter, appellant reiterated the matters surrounding her request for administrative leave or court leave. She alleged that she was trying to build up her leave for her wedding and honeymoon and worked as much as possible, but "no matter" what she did, she was "never appreciated only reprimanded."

In a March 3, 2008 letter, appellant provided a November 22, 2005 performance appraisal, which showed a below standard rating for quality. In a March 2, 2008 statement, Frank Wardon, a coworker, alleged that he witnessed Ms. Brochu and Ms. Hill harass appellant. He noted that Ms. Hill harassed appellant on several occasions, making her uncomfortable and making it really hard to do her job. Mr. Wardon stated that he witnessed Ms. Brochu yelling, badgering and embarrassing appellant in front of coworkers instead of taking her into her office. He noted that he sometimes took appellant to lunch so "he could get her away from the office to let her vent." Mr. Wardon alleged that appellant cried on many occasions and left the office visibly shaken and very upset. He stated that some of the actions occurred on September 16, 20, 31, October 3 and December 1, 2005. Mr. Wardon referred to an incident on September 21, 2005, related to a subpoena, in which the manager accused appellant of lying about a subpoena that she was served, because it was not signed. He alleged that management was trying to get appellant to use up her annual leave, "so that she would not have enough leave to be approved for her [honeymoon] on the week of October 22, 2005."

In a December 21, 2005 settlement memorandum, appellant withdrew her step three grievance in return for reassignment to another department. Ms. Connarn indicated that, while the grievance relating administrative leave for court purposes was withdrawn, it was not an admission of disagreement with the grievance. In a December 21, 2005 memorandum, Ms. Cully noted that appellant was offered a new position as a loan specialist, at a lower grade, at her request and not as an adverse action. Appellant was informed that her unacceptable rating for her prior position would remain but would not carry over to her new position. The Office also received documents from appellant and the employing establishment pertaining to the denial of her within grade increase. The employing establishment indicated that it was denied because her work was not at an acceptable level.

Appellant provided a January 3, 2006 letter and a copy of a grievance pertaining to the employing establishment's actions related to her request for administrative or court leave. She alleged that the employing establishment retaliated against her because she requested to speak with her congressman about the refusal to grant administrative leave. Appellant also alleged that, because she was subpoenaed to appear in court on behalf of her handicapped son, this was a "case against the handicapped" as well as whistle blower retaliation. She alleged that she was harassed into using her annual leave instead of administrative leave. Appellant alleged that her supervisor abused her authority to make it look like appellant's performance was not acceptable. She provided handwritten notes from September 16 to November 16, 2005, in which she outlined events involving pressure and harassment by management: she was written up for oral counseling on September 16, 2005 for telephone duty; on September 20, 2005 she was informed that her subpoena was no good and it took several attempts to have administrative leave granted; and on October 3, 2005 her computer was taken and a new one appeared in its place. Appellant alleged that the court leave was granted only after many conflicting arguments between managers. She also alleged that she believed she was being singled out and harassed in relation to oral counseling for failure to follow local procedures.

On March 19, 2008 the Office received a statement from Ms. Connarn, who addressed the actions management took to verify whether appellant's subpoena regarding her child was proper. Ms. Connarn confirmed that Ms. Cully authorized appellant's manager to contact the court to verify the subpoena.

In a March 25, 2008 letter, Charles Woolford, the director of the employing establishment, asserted that appellant's allegations were related to administrative actions taken in accordance with established management practices. He denied that Ms. Brochu would "scream" or "belittle" her in front of other employees and stated that this type of behavior would not be tolerated. Mr. Woolford stated that Ms. Brochu held "employees accountable for assigned work and [would] occasionally advise them to return to the task assigned." Regarding the administrative leave matter, he noted that, while appellant alleged that it "took weeks to accomplish, in fact, the first notice of intent to request leave of any type was received on Monday, September 12, 2005 and was granted by the station Director on Friday, September 16, 2005." The delay arose as the first subpoena submitted was issued in her son's name and a second one was submitted which was issued in her name. Mr. Woolford noted that the employing establishment did not have prior experience with this situation and that management sought advice from its regional counsel and human resource center. At no time was appellant accused of lying or falsifying documents. Regarding the computer issue, Mr. Woolford

explained that the information technology (IT) staff exchanged her computer while she was on vacation after appellant contacted the IT staff on several occasions with complaints of her computer locking up. The IT staff found that the computer was seriously infected with mal-ware and computers were exchanged without the knowledge of management or the opportunity to provide notice to appellant. He noted that appellant's grievance was denied and did not progress further.

Regarding appellant's allegations that management unnecessarily found fault with her work, Mr. Woolford noted that, as early as June 23, 2005, appellant was notified that she failed to meet minimal quality expectations. She was also notified that a within grade increase could be delayed pending successful attainment of quality standards. Appellant did not improve and, as a result, she was placed on a PIP on August 22, 2005 and notified that failure to successfully complete the PIP could lead to a transfer, demotion or termination. Despite additional training, implementation of reminder checklists and mentoring, appellant received an unsuccessful performance evaluation. However, she was offered another opportunity to be successful and accepted a transfer to the loan guaranty division. Mr. Woolford denied that appellant's supervisor "had something up for her." He noted that, despite being in a new position and under a different management team, since January 2006, she was again under a PIP. Mr. Woolford reiterated that the management did not harass appellant.

By decision dated May 21, 2008, Office hearing representative affirmed the June 13, 2006 decision.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. There are situations where an injury or 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 her regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[1] 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

An employee 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.[3] This burden includes the submission of a detailed

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen,* 41 ECAB 387 (1990), *reaff'd on recon.,* 42 ECAB 566 (1991); *Lillian Cutler,* 28 ECAB 126 (1976).

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

description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions, for which compensation is claimed.[4]

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 the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.[5] If a claimant does implicate a factor of employment, the Office 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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[6]

ANALYSIS

Appellant attributed her emotional condition to several incidents involving her supervisors. The Board must review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.[7]

Appellant alleged that her managers denied her request for administrative leave, gave her a poor performance appraisal and oral counseling, threatened to place her on AWOL, denied her within grade increase, took away her computer and demoted her. The Board finds that these allegations relate to administrative or personnel matters unrelated to her regular or specially assigned work duties and do not fall within the coverage of the Act.[8] Although the handling of disciplinary actions, evaluations and leave matters[9] are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[10] The Board has found, however, that an administrative or personnel matter will be considered an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether appellant's supervisors erred or acted abusively, the Board has examined whether they acted reasonably.[11]

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

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

[6] *Id.*

[7] Although appellant stated that she first stopped work on November 29, 2005, the record clearly indicates that she attributes her injury to conditions and factors that occurred over more than and a single workday or shift. Consequently, the claim was properly adjudicated as an occupational disease claim. *See* 20 C.F.R. § 10.5(q), (ee).

[8] *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[9] *C.S.*, 58 ECAB ___ (Docket No. 06-1583, issued November 6, 2006).

[10] *See supra* note 8.

[11] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

With respect to her request for administrative or court leave related to a subpoena, appellant alleged that leave was granted after many conflicting arguments between managers. Ms. Connarn alleged that the employing establishment questioned the legality of the document and called appellant a "liar" despite being advised by appellant's attorney that the document was legitimate. However, the managers denied acting improperly and provided a reasonable explanation for their actions. Mr. Woolford noted that the request was authorized only four days after it was received. He explained that an initial delay arose because the first subpoena presented by appellant was issued in her son's name and a second was submitted which was issued with her name. Mr. Woolford also noted that they did not have experience dealing with subpoenas and sought advice from counsel. He denied that appellant was accused of "lying or falsifying documents." In another leave matter, appellant alleged that she was threatened with AWOL despite having a physician's note. The employing establishment explained that it indicated that appellant was advised of the documentation needed to support her absences. Appellant has not submitted evidence showing how the employing establishment acted improperly in this matter. Thus, she did not establish any compensable factors of employment with regard to these matters.

Appellant alleged that management gave her a poor performance appraisal and demoted her and that on November 29, 2005 her supervisor threatened to terminate her employment or downgrade her. She alleged that her poor performance appraisal was due to her supervisor's discretion and unwarranted in view of her years of service. Appellant noted that she had never received a bad appraisal or evaluation. Mr. Wardon stated that he witnessed both Ms. Brochu and Ms. Hill harass appellant on several occasions and alleged that they made her uncomfortable. While he referred to several dates, he did not specifically describe or explain what he witnessed to be unfair on each particular date. The employing establishment explained that appellant was placed on a PAP on June 23, 2005, which she failed. Appellant's within grade increase was subsequently denied because her work was not at an acceptable level of competence after she was placed on a PIP. Ms. Ellard indicated that a meeting was set for November 29, 2005, between appellant, her union representative and her supervisor, Ms. Brochu. Appellant was informed of results of the PIP, which included the denial of her within grade increase and of the chance to transfer to a different division. Mr. Woolford noted that appellant had documented performance problems since June 23, 2005 and that the employing establishment provided her several opportunities to improve her performance. Rather, than terminating appellant, the employing establishment allowed her to transfer to another division. The record indicates that she voluntarily accepted the transfer which was at a lower grade. The Board finds that the appellant has not established a compensable factor in this regard.

Regarding her allegations that the employing establishment improperly gave her oral counseling and denied her within grade increase, these are also administrative or personnel matters unrelated to her regular or specially assigned work duties. They do not generally fall within the coverage of the Act.[12] The employing establishment provided statements from appellant's supervisors explaining their actions as being in accordance with usual employing establishment administrative procedures. Appellant did not submit any evidence establishing that the employing establishment acted unreasonably in these matters. She example did not

[12] *See Charles D. Edwards*, 55 ECAB 258 (2004).

submit evidence to support that oral counseling was unreasonable in view of her failure to cover her assigned telephone responsibilities. Appellant had not established a compensable employment factor regarding these administrative matters.

Appellant also alleged that she was harassed by her supervisors. For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[13] In the present case, appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors or coworkers with regard to certain claimed incidents.[14] Appellant alleged that her supervisors engaged in actions which she believed constituted harassment and discrimination.

Appellant alleged that her supervisors harassed her with regard to request for administrative leave related to a subpoena, as they were trying to get her to use all of her leave so that she would not be able to go on her honeymoon. Ms. Connarn indicated that the employing establishment questioned the legality of the document despite being advised by appellant's attorney that they were legitimate. It was alleged that one of the managers was authorized to contact the court to verify the subpoena. Although Ms. Connarn's statement confirms that the employing establishment questioned the document, her statement does not establish that verifying the subpoena constituted harassment of appellant. The employing establishment explained that they were not experienced in matters related to subpoenas and sought legal advice. Appellant's leave request was granted after only a few days. The Board finds that the appellant has not established a compensable factor in this regard.

Appellant also alleged she had filed several grievances. However, she did not submit any evidence establishing that her grievances contained findings of harassment. The Board notes that grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[15] The Board notes that the evidence supports that the grievances were either settled with no finding of error by either party or denied as being without merit.

Appellant also alleged that the employing establishment took her computer as an effort to harass her. However, Mr. Woolford explained that management was not aware that appellant's computer was exchanged as she had previously contacted IT staff that her computer was not properly functioning. The IT staff exchanged her computer while she was on vacation, which occurred without the knowledge of management or the opportunity to provide prior notice to appellant. The Board finds that appellant has not established a compensable factor in this regard as the evidence does not show that the employing establishment acted unreasonably in this matter.

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

[14] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[15] *James E. Norris*, 52 ECAB 93 (2000).

For the foregoing reasons, 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.[16]

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated May 21, 2008 is affirmed.

Issued: March 23, 2009
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

[16] 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).