United States Department of Labor
Employees' Compensation Appeals Board

E.R., Appellant	)	
and	)	**Docket No. 11-821**
	)	**Issued: December 20, 2011**
U.S. POSTAL SERVICE, BUFFALO PERFORMANCE & DISTRIBUTION CENTER, Buffalo, NY, Employer	)	

Appearances:
Alan J. Shapiro, 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 February 15, 2011 appellant, through her attorney, filed a timely appeal from a January 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim. 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.

ISSUE

The issue is whether appellant met her burden of proof to establish that her medical conditions arising on or about July 7, 2007 were due to her federal employment.

FACTUAL HISTORY

On March 19, 2010 appellant, then a 45-year-old mail handler, filed a claim alleging that the stress from workplace harassment aggravated her skin conditions. She became aware of her

[1] 5 U.S.C. §§ 8101-8193.

skin conditions on July 2, 2007 and that it was due to her employment on September 28, 2009. In a March 4, 2010 report, Dr. Marcelle A. Grassi, a Board-certified dermatologist, opined that appellant's severe eczema since July 2007 was aggravated by work stress.

In statements dated September 27, 2007 through April 4, 2010, appellant alleged work incidents that aggravated her skin conditions. On October 16, 2006 while removing inserts from an all-purpose container (APC), her hands came into contact with a dripping clear yellow liquid. Supervisor Eckhard Koehler looked at the insert and stated it was "probably just oil." Appellant asserted that there was no determination about the exact nature of the substance and management failed to file a report. On January 10, 2007 Coworker William Goeske removed a small parcel from the top of a flat tub as she was placing the flats into the APC. Manager Catherine Piatkowski investigated and told her that Mr. Goeske took the item because he thought appellant was a casual employee.

Appellant described two incidents with a hearing impaired coworker, William Huber, who is unable to speak. The first incident concerned the correct placement of foreign express mail on the loading dock. Appellant stated that Ms. Piatkowski confirmed that she was correct regarding placement of the mail. The second incident occurred on February 1, 2007 and involved a tug of war over an APC. Appellant refused to let go and Mr. Huber grabbed her arm. Supervisor Sherrill Palmer addressed the incident and instructed Mr. Huber "Do n[o]t touch her." Appellant went to the medical unit as she was distraught over the incident.

On February 23, 2007 appellant alleged that Coworker Adina Costanza wrenched an insert out of her hand. She indicated that Coworker Debbie Syntek witnessed the incident and that she informed Ms. Palmer. On August 11, 2007 appellant saw Coworker Marty McDonough's fake rat, which he brought in to "terrorize" people at work. A week after Ms. Palmer asked him not to bring this to work, Mr. McDonough put up a poster that said "Mailhandlers RATTING on other Mailhandlers -- Don[o]t Do It!" which Manager Lisa Messler took down. Appellant advised that, statements taken for the termination of a coworker, Van Halen West, was done on her nonscheduled days and that she was still waiting to give her statement. On August 26, 2007 Ms. Piatkowski instructed appellant to move flats into the flat unit but Group Leader Mark Giambelluca objected to this. While appellant was allowed to do as instructed from Ms. Piatkowski, she never received an explanation of the matter. On September 16, 2007 Ms. Piatkowski received conflicting instructions from Mr. Giambelluca and Acting Supervisor Jason Quest, who was new. She indicated that Mr. Quest agreed with the group leader's assignment. On September 17, 2007 appellant stated that Coworker Debbie Page slapped her three times following a dispute about their respective duties. Management told her that Ms. Page was only trying to get her attention as she was wearing a headset. On September 27, 2007 she taped a sign to her chest that read "DO NOT TOUCH ME."

On December 20, 2007 appellant alleged it was unnecessary for Mr. Giambelluca to open a door on a jammed machine as this caused an alarm to sound. She reported the incident to management. On December 21, 2007 appellant alleged that Mr. Giambelluca grabbed the APC out of her hands and management informed her to walk away. On February 4, 2008 she was skipped over by Group Leader C. Lundin at shape-up. Appellant asserted that Mr. Lundin also called her a "pain-in-the ass." She alleged that he was vindictive due to the February 4, 2008 incident. Appellant also alleged that Mr. Lundin was ineffective as group leader. On

February 15 and 21, 2008 she alleged Coworker D. Gawron put her finger in her face and told her what to do. Appellant asserted that management was responsible for this and not the coworker. The offenses were reported to Supervisor Michael Pettit. On May 31, 2008 appellant alleged Coworker Jody Jaeger "flung" APC's six inches toward her. Management investigated but no one else saw the incident. On June 15, 2008 management informed her that it was investigating the allegations appellant made against Mr. Lundin. She was also informed that numerous complaints were made about her perfume being offensive. Appellant asserted that this was unethical. On June 27, 2008 she asserted that her rights were violated as she was forced to sweep all night long and not allowed to stay on her original machine. Appellant asserted that management gave preferential treatment to the coworkers who retaliated against her for filing Equal Employment Opportunity (EEO) complaints against Lottie Porter. On August 1, 2008 she alleged that the supervisors complained that she left a mess, when Mr. Lundin moved people around from their assignments. On April 3, 2009 appellant alleged that Mr. Jaeger, who was in an animated conversation with another coworker, kicked her in the heel. She alleged that Mr. McDonough, hit her on the arm on February 12, 2009 after being verbally warned by management to refrain from physically assaulting her the day before. Appellant filed a grievance against Mr. Lundin and management regarding assignments.

In a May 10, 2010 statement, Don Newton, senior manager distribution operations, reviewed appellant's statements and advised that management spoke to her about several of the matters as they arose. With regard to the incident with Mr. Jaeger moving the APC, Ms. Porter spoke to him who stated that he moved the APC's one or two inches, not six inches. Regarding appellant's perfume, Mr. Newton indicated that when employees complained about another employee's body odor or perfume, management tried to address the issue with the employee. He indicated that there did not appear to be any contract violations involving her complaints. Mr. Newton stated that an official investigation was conducted into appellant's allegations and the investigation team concluded that the complaints did not warrant action against any individual. He informed her of the investigation results on March 10, 2010.

In an undated statement, Ms. Piatkowski, manager of distribution operations, stated that she investigated the January 10, 2007 incident concerning appellant and Mr. Goeske. Appellant was fairly new and Mr. Goeske thought she was a new casual worker who placed the parcel in the wrong place. Mr. Goeske explained that he was sorry for his actions and he did not mean anything by it. Ms. Piatkowski informed appellant of his side of the story and indicated that she did not believe it would happen again. Regarding Mr. Huber, she indicated that he was in error concerning the dispatch of foreign priority mail and that she had explained on paper to him that he was incorrect and appellant was correct. Ms. Piatkowski acknowledged that the investigation into Van Halen West was conducted on appellant's nonscheduled days and, since she had enough information from other employees, no additional statements were needed. On September 19, 2007 appellant was upset that Ms. Page tried to correct her and was unable to get her attention verbally so she tapped her on the arm. Ms. Page tapped appellant on the arm because she had a head set on and did not hear her. She was instructed to tell the supervisor if she had a problem with appellant and not to touch her again. Ms. Page confirmed a discussion occurred with Mr. Giambelluca on August 26, 2007 regarding appellant's moving flats into the flat unit, but stated it was not necessary to explain such discussion with appellant. She discussed with appellant the events that transpired between her and Mr. Lundin and stated group leaders follow seniority order, but may make a mistake. Ms. Page indicated that she had never known

Mr. Lundin to bypass anyone intentionally. She stated that he was given an official discussion after the "pain-in-the-ass" statement was investigated.

In a September 15, 2010 decision, OWCP denied appellant's claim on the grounds there were no compensable work factors. It noted that her statements about her coworkers' behavior were not substantiated.

On October 1, 2010 appellant requested reconsideration. In an October 1, 2010 statement she disagreed with OWCP's finding about her coworkers and referenced her earlier statement of September 17, 2007. Appellant indicated that additional information and medical evidence were submitted to substantiate her previous statements and to detail incidents OWCP did not address. Submitted was a copy of an August 5, 2008 acknowledgment/amendment of formal EEO complaint and a February 1, 2007 health unit note, which indicated that she was upset about having her APC being pulled in a different direction and grabbed on right arm by a deaf coworker.

In an August 23, 2010 statement and a May 31, 2010 declaration, appellant alleged various incidents previously alleged as well as a new incident. The new incident involved an April 20, 2008 disagreement between her and Ms. Porter over job assignments and seniority. Appellant alleged that she was illegally forced into a less preferential job that violated the union agreement. She also stated on April 20, 2008 Ms. Porter stated that her break would be timed and, when she objected, Ms. Porter responded, "I can tell anybody whatever the f*ck I want."

Several EEO dispute resolution inquiry reports were received. Ms. Piatkowski indicated that management tried to address appellant's concerns when raised and took action when necessary. She noted an investigation into appellant's complaint of tampering with her power equipment failed to identify anyone responsible. Mr. Pettit stated that appellant complained about an employee's name being written twice on an assignment worksheet, but she did not make it clear that she was denied a job to which she was entitled. He explained that it was common for a name to be written in more than one place on the worksheet. Ms. Porter stated that appellant's frequent questioning and complaints made it difficult to run the unit. She indicated that she had raised her voice to appellant but did not use profanity and that she later apologized to appellant. Ms. Palmer investigated appellant's allegations against Mr. Lundin and found that appellant was not given her proper preferred assignments on two occasions. One was supervisor error. The other was the group leader's error, but Ms. Palmer did not believe that it was intentional. Mr. Lundin skipped appellant and gave another employee her seniority although he was in overtime and should have been junior to appellant for that day. Ms. Palmer indicated that management received a number of complaints about appellant's perfume and was asked twice to refrain from using it. Appellant complied with management's request the second time. Ms. Palmer indicated that she occasionally spoke to other employees in regards to a strong odor in the work environment. Supervisor Daniel Welch denied swearing or showing physical aggression at or near appellant. He stated that he spoke to a number of employees about clocking in early and had questioned appellant's coworker, who was seated next to appellant. He also stated that, based on her low seniority, she was assigned less desirable jobs.

By decision dated January 10, 2011, OWCP denied modification of its prior decision.

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.[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

[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).

evidence.[8] 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.[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

Appellant alleges that her skin condition was aggravated by the stress at work. OWCP denied her claim on the grounds that she did not establish any compensable work factors. The Board must review whether the alleged incidents are established as compensable factors under FECA.

The Board notes that appellant has not attributed her stress to performing her regular or specially assigned duties of her position. Therefore, appellant has not alleged a compensable factor under *Cutler*.[11] Rather, she made allegations concerning management's failure to take her complaints seriously with regard to perceived coworker harassment as well as management's abuse of assignments that denied her position preferences. While appellant filed grievances and an EEO complaint in several of these matters, no final decisions are of record on such matters.

Appellant disagreed with various job assignments given to her by the group leader and the manner in which job assignments were handled. Many of her contentions expressed general disagreement in the manner in which her supervisors and group leaders performed their duties. Appellant contended that she received conflicting instructions from management and the group leader, disagreed with decisions the group leader made and alleged the group leader had erroneously required her to sweep all night on June 27, 2008 instead of allowing her to retain her preferred assignment whenever possible. The record indicated that group leaders carried out supervisory decisions in work assignments and that, because of her low seniority, appellant was assigned less desirable jobs.

The assignment of work and monitoring performance are administrative functions of a supervisor.[12] The manner in which a supervisor exercises his or her discretion generally falls

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[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).

[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] *See supra* note 4.

[12] *Donney T. Drennon-Gala*, 56 ECAB 469, 475 (2005); *Beverly R. Jones*, 55 ECAB 411, 416 (2004); *Charles D. Edwards*, 55 ECAB 258, 270 (2004).

outside FECA's coverage. This principle recognizes that supervisors must be allowed to perform their duties and at times employees will disagree with their supervisor's actions. Mere dislike or disagreement with certain supervisory actions will not be compensable absent error or abuse on the part of the supervisor.[13] Appellant submitted no evidence to show that the group leader's assignment on June 27, 2008 or at any other time was erroneous or abusive. An investigation revealed group leader Mr. Lundin did not give her proper assignment on two occasions: one occasion was supervisor error and the other occasion was unintentional error by the group leader. While appellant believed he was ineffective, a claimant's own feeling or perception that a form of criticism by or disagreement with a supervisor is unjustified, inconvenient or embarrassing is self-generated and does not give rise to coverage under FECA absent evidence that the interaction was, in fact, erroneous or abusive. Thus, appellant has not established that this rises to the level of a compensable factor of employment.

While appellant may have been frustrated by receiving conflicting instructions from the group leader and management on August 26 and September 16, 2007, there is no evidence of record to show error on the part of the employing establishment in these situations. An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable.[14] Appellant therefore did not establish a compensable factor of employment.[15]

Appellant disagreed in the manner in which management responded to her complaints about coworker's actions and the work site. She detailed numerous incidents with coworkers regarding incidents she considered offensive, such as being touched, being told what to do and being corrected in her task or not properly performing the task. The Board has recognized the compensability of physical and verbal threats and verbal in certain circumstances.[16] In such cases, the Board has reviewed the evidence of record to determine whether the allegations of the claimant are substantiated by reliable and probative evidence. The record reflects that management addressed appellant's complaints regarding the work site and her coworkers as they arose. For those incidents in which an official investigation was conducted, the investigation team concluded that her complaints did not warrant action on any individual and Mr. Newton noted that she was informed of the results of such investigations on March 10, 2010. For those incidents that were informally investigated, the record reflects either the incidents did not occur in the manner in which appellant alleged or the coworker action taken was understandable given the circumstances. While appellant was upset over numerous incidents which occurred between her and her coworkers, she has submitted no evidence to establish that management's response to her complaints or the investigations into her complaints were inappropriate or in error. She therefore did not establish this as compensable.

[13] *Linda J. Edwards-Delgado*, 55 ECAB 401, 405 (2004).

[14] *Ronald K. Jablanski*, 56 ECAB 616 (2005).

[15] *See Beverly R. Jones*, 55 ECAB 411 (2004).

[16] *See Leroy Thomas, III*, 46 ECAB 946, 954 (1995) (the employee did not establish as factual that a supervisor threatened to kill him); *Alton L. White*, 42 ECAB 666, 669-70 (1991) (the employee established physical contact by his supervisor as a compensable factor).

Appellant also alleged that Ms. Page physically assaulted her by slapping her on the face on September 19, 2007. The Board has recognized the compensability of physical threats and assaults in certain circumstances. Physical contact arising in the course of employment may give rise to a compensable factor of employment.[17] However, Ms. Piatkowski determined that Ms. Page merely tapped appellant on the arm to get her attention as she was wearing headphones. Ms. Page was thereafter instructed not to touch appellant. Appellant provide no other evidence corroborating that Ms. Page slapped her. The Board finds that the weight of the evidence does not support appellant's allegation of a physical assault. Likewise, the evidence does not show that other incidents in which appellant may have been touched by a coworker, such as Mr. Huber, who was unable to speak, rise to the level of a compensable work factor.

Regarding allegations of verbal abuse, appellant alleged that, on April 20, 2008, Ms. Porter used profanity after she objected to having her break timed. Ms. Porter stated that appellant's frequent questioning and complaints made it difficult to run the unit. She admitted to raising her voice to appellant and later apologizing, but denied using profanity. A raised voice in the course of a conversation, however, does not, in and of itself, warrant a finding of verbal abuse.[18] Additionally, even if it were established that Ms. Porter used an isolated vulgar comment on April 20, 2008, the mere utterance of an epithet, in these circumstances, which may engender offensive feelings in an employee does not sufficiently affect the conditions of employment to constitute a compensable factor.[19] Although Mr. Landin referred to appellant as a "pain-in-the-ass" on February 4, 2008, this appears to have been an isolated comment in a contentious conversation between both parties. Furthermore, he was given an official discussion after the matter statement was investigated. In these circumstances, this comment does constitute a compensable employment factor. Other employing establishment officials, such as Mr. Welch denied acting improperly around appellant.

Appellant has raised charges of retaliation and harassment treatment as motive by various supervisory personnel and group leaders involved in the investigations into her coworker's actions as well as the grievance she filed against Mr. Lundin and management regarding assignments.[20] As noted, 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. Appellant, however, has offered no evidence to substantiate her allegations. While management had requested that she stop wearing her perfume, it explained that a number of complaints were received about her perfume and that other employees were

[17] *See Helen Casillas*, 46 ECAB 1044 (1995). *See also J.L.*, Docket No. 08-2395 (issued July 22, 2009) (where the claimant alleged that a coworker grabbed his coat and pushed him aside but the evidence only established that the there was an incidental bump, the Board found the record insufficient to establish appellant's allegation of physical harassment).

[18] *Karen K. Levene*, 54 ECAB 671 (2003).

[19] *Denis M. Dupor*, 51 ECAB 482 (2000).

[20] The term harassment as applied by the Board is not the equivalent as the term is defined or implemented by other agencies, such as the EEO or MSPB, which are charged with statutory authority to investigate such matters and personnel actions within the workplace. In evaluating claims for workers compensation, the Board evaluates the evidence to determine if allegations of mistreatment by coemployees are substantiated by the evidence of record. *See Ronald K. Jablanski*, 56 ECAB 616 (2005).

treated similarly. The employing establishment further offered reasonable explanations for its responses to appellant's complaints. The mere fact that appellant filed an EEO complaint does not constitute evidence of harassment or unfair treatment by the employing establishment.[21] Thus, she did not establish a compensable factor of employment.

As appellant failed to establish any compensable factors of employment, OWCP properly denied her claim.[22]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that her medical conditions on or about July 7, 2007 arose as a result of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2011
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] *See David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

[22] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See Hasty P. Foreman*, 54 ECAB 427 (2003).