United States Department of Labor
Employees' Compensation Appeals Board

K.T., Appellant	)	
and	)	**Docket No. 11-269**
	)	**Issued: September 20, 2011**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Flint, MI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 10, 2010 appellant filed an appeal from a May 13, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP)). Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established an emotional condition causally related to compensable work factors.

FACTUAL HISTORY

On April 28, 2009 appellant, then a 51-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained acute stress disorder as a result of her federal employment. In a statement of April 30, 2009, appellant noted that she had witnessed an

[1] 5 U.S.C. § 8101 *et seq.*

incident between two employees at the end of June 2008, and since that time she had received intimidating stares from another employee. Appellant stated that management was unprofessional, citing a September 2, 2008 meeting where Joe Babcock, a supervisor, stated that he did not expect employees "to swap spit and make babies together, we just have to get the job done." According to her, Mr. Babcock also referred to an unidentified employee at another employing establishment work site as a "moron," and appellant's husband worked at that site. Appellant referred to a November 1, 2008 incident where the supervisor placed his hand on her back and she told him to stop touching her. On December 1, 2008 she had a disagreement with the supervisor regarding the use of leave, and the supervisor told her she worked at the pace of a "three[-]legged sloth." On January 13, 2009 the supervisor told appellant she had lost so much weight that she would have to "run around the shower twice just to get wet." Appellant alleged that the supervisor brushed up against her on February 18, 2009 and told her she did not have to finger each piece of mail.

The record contains additional statements from appellant regarding her claim. On May 15, 2009 appellant alleged that the supervisor had sexually harassed and intimidated her, and allowed a hostile work environment to develop. On September 2, 2008 she told the supervisor not to touch or wink at her. With respect to the December 1, 2008 incident, appellant stated the supervisor referred to her as a "little lady" in a demeaning tone. She stated that, while the supervisor had disciplined an employee for whistling a television theme song, he whistled a song from The Bridge on the River Kwai movie on two occasions. In May 2009, appellant requested time to complete Equal Employment Opportunity (EEO) paperwork, but was told she had to use the lunch room, which was retaliation. On June 23, 2009 she stated that since August 2008 the supervisor would sometimes wink at her when he passed by and initiate conversations when no one else was around.

Appellant submitted statements for coworkers in support of her claim. A Mr. Beardslee submitted a May 22, 2009 statement that he felt there was a hostile work environment. He did not discuss any specific incidents involving appellant. A Mr. Blumberg stated the work environment had steadily declined over the past several years in a June 14, 2009 statement. Ms. Hogard stated that management was promoting disharmony and discord. She discussed incidents at work and repeated appellant's allegations, although she did not state whether she had personally witnessed any incidents involving appellant.

The employing establishment responded with statements from a supervisor, Ms. Kurdziel, regarding an investigation into appellant's allegations. On February 27, 2009 Ms. Kurdziel interviewed Mr. Babcock. With respect to the alleged "moron" statement, Mr. Babcock asserted that he did not use the term at the service meeting, and it was appellant who later told him that her husband was not the "moron who left the mail." According to Mr. Babcock, he did not recall even touching appellant or winking at her, nor did she ever talk to him about such behavior. He acknowledged saying appellant was as slow as a three-legged sloth, and her performance improved after the comment. Mr. Babcock stated that he never commented on appellant's weight loss. As to February 18, 2009, the supervisor stated that he did not brush up against appellant, that staff was shorthanded that day and appellant was a slow worker who generated many complaints among her coworkers.

The record contains a March 5, 2009 statement from Ms. Kurdziel regarding the employee who allegedly looked at appellant in an intimidating manner. The coworker stated that she had never made an effort to glare at appellant or intimidate her and was surprised by the accusation.

By decision dated November 3, 2009, OWCP denied the claim for compensation. OWCP found that no compensable work factors had been established.

Appellant requested a hearing before an OWCP hearing representative, which was held on March 24, 2010. She submitted a transcript of testimony by a former coworker, Ms Moreton, pursuant to an EEO action. Ms. Moreton testified that there several coworkers who had complained about Mr. Babcock, stating they did not like working for him and he intimidated them.

By decision dated May 13, 2010, OWCP's hearing representative affirmed the November 3, 2009 decision. The hearing representative found no compensable work factors had been established.

LEGAL PRECEDENT

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 factors of her federal employment.[2] This burden includes the submission of detailed description of the employment factors or conditions which she believes caused or adversely affected the condition or conditions for which compensation is claimed.[3] A claimant must also submit rationalized medical opinion evidence establishing a causal relationship between the claimed condition and the established, compensable work factors.[4]

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 the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.[5]

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

[3] *Roger Williams*, 52 ECAB 468 (2001); *Anna C. Leanza*, 48 ECAB 115 (1996).

[4] *See Bonnie Goodman*, 50 ECAB 139, 141 (1998).

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

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors 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.[6] 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.[7]

A reaction to an administrative or personnel matter is generally not covered as it is not related to the performance of regular or specially assigned duties.[8] Nevertheless, if the evidence demonstrates that the employing establishment erred, acted abusively or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.[9]

ANALYSIS

In the present case, appellant has not alleged that the performance of her regular or specially assigned employment duties was a cause of her emotional condition. Rather, she alleged a stress-related condition as result of actions by her supervisor. The initial question is whether appellant established a compensable work factor with respect to her claim for compensation.

Appellant alleged that she was subject to sexual harassment and a hostile work environment. She pursued a claim before the EEO Commission, but the record does not contain any findings with respect to a claim for sexual harassment.[10] Appellant's allegations before OWCP regarding sexual harassment were that the supervisor placed his hand on her back, brushed up against her, winked at her at times and made a comment about her weight loss. The supervisor denied the allegations of touching, winking or commenting on weight loss. There are no statements by any witness that observed the alleged behavior, or any other evidence to support a finding that sexual harassment occurred.[11] The Board finds that the evidence of record is not sufficient to substantiate a compensable work factor based on sexual harassment.

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

[7] *Id.*

[8] *See Brian H. Derrick*, 51 ECAB 417, 421 (2000).

[9] *Margreate Lublin*, 44 ECAB 945, 956 (1993).

[10] It is not necessary to establish a claim of harassment before the EEO Commission, although findings made pursuant to such a claim may be relevant to the compensation issues presented. *Martha L. Cook*, 47 ECAB 226, 231 (1995)

[11] *Compare K.M.*, Docket No. 10-1139 (issued April 25, 2011) (where there were allegations of overtly sexual contact, evidence as to messages left by the alleged harasser, and lack of an adequate investigation by the employing establishment).

With respect to specific statements, the record does establish, and OWCP acknowledged, that the supervisor made a comment regarding appellant's work pace as a "three[-]legged sloth." In addition, the supervisor stated at a September 2, 2008 meeting that employees did not have to "swap spit and make babies together." It is well established that a compensable factor may be substantiated based on verbal abuse.[12] This does not mean, however, that every statement that is uttered in the workplace is sufficient to give rise to a compensable work factor.[13] While appellant may been offended by the remarks, the statements do not rise to the level of verbal abuse, even if they may be considered offensive or unprofessional.[14] There was also an allegation that the supervisor whistled a tune from a movie, but again this would not itself rise to the level of abusive behavior.

The Board finds the evidence of record does not substantiate a compensable work factor based on a claim of sexual harassment, harassment or verbal abuse. In addition, the Board finds no probative evidence regarding any other compensable work factors. Appellant noted a dispute regarding leave, but such matters are administrative actions of the employer and the evidence must show error or abuse.[15] There is no probative evidence or error or abuse with respect to an administrative matter in this case.

Since appellant has not established a compensable work factor, the Board will not address the medical evidence.[16] She 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.

CONCLUSION

The Board finds appellant has not established an emotional condition causally related to compensable work factors.

[12] *David W. Shirey*, 42 ECAB 783 (1991).

[13] *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

[14] *See K.C.*, Docket No. 10-709 (issued April 18, 2011).

[15] *Lori A. Facey*, 55 ECAB 217 (2004).

[16] *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 13, 2010 is affirmed.

Issued: September 20, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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