United States Department of Labor
Employees' Compensation Appeals Board

S.A., Appellant	)	
and	)	**Docket No. 11-171**
	)	**Issued: January 9, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Sacramento, CA, 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 October 18, 2010 appellant filed a timely appeal from a June 4, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for an emotional condition. The appeal is also timely filed from a September 24, 2010 decision denying her request for an oral hearing. Pursuant to the Federal Employees' Compensation Act[1] (FECA) the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that she sustained an emotional condition as a result of factors of her federal employment; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] On appeal, appellant contends that not all medical evidence was noted to OWCP, and submitted a new report by Tamara L. Elkins, Ph.D. However, the Board cannot consider evidence that was not before OWCP at the time of the final decision. *See* 20 C.F.R. § 501(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007).

FACTUAL HISTORY

On November 30, 2009 appellant, then a 50-year-old rural carrier associate, filed an occupational disease claim alleging anxiety and migraine headaches as a result of stress in her federal employment during the period April through November 2009.

By letter dated December 18, 2009, OWCP informed appellant that she had not submitted sufficient evidence in support of her claim. It provided 30 days to submit additional information.

In support of her claim, appellant submitted letters that she wrote to management at the employing establishment detailing various issues. She also filed several grievances and submitted a time line concerning alleged incidents. Appellant stated that she was called to work to cover for another employee who had jury duty, but that management did not use the proper matrix system to call employees, and that she should not have been called before other employees. She contended that she did not have proper training to work certain routes and that the matrix needed to be amended to reflect this. Appellant did not feel comfortable working a different route after she worked three years on designated routes.

Appellant alleged that gossip in the workplace created conflict. She asked management to have three female coworkers leave her alone and complained about hostility. Appellant detailed discussions that she deemed inappropriate. She alleged that Marie Boyer started talking about the passing of appellant's dog in a hurtful way and that her coworkers did not leave the premises when they finished their work.

Appellant alleged that the employing establishment improperly handled her request for leave under the Family and Medical Leave Act (FMLA). She requested FMLA in March but management did not respond. Appellant asked to take leave without pay when her dog died and that she should have been under FMLA when her son was in the hospital or off work due to a migraine. She noted that she was written up for excessive absences when FMLA should have been allowed. Appellant contended that others were granted FMLA in similar situations.

Appellant's grievances alleged retaliation at the employing establishment on January 28, 2009 after she filed a Form 8191. She alleged that she was threatened with a written warning but she was within her rights to discuss facts with an authority figure. Appellant also contended that an employee who had his license suspended until August 2009 bid on a route that required driving.

Appellant alleged disparity in treatment by management of its employees. She alleged improper assignment of personnel in bailouts; that three female coworkers waste time talking to each other at their cases and that she asked a supervisor to tell them to stay at their own cases; and questioned why another employee was allowed to take extended leave. Appellant alleged that she was required to be available up to 12 hours a day while most rural carriers were finished by 2:00 pm.

On October 31, 2009 appellant had a conversation with Rebecca Estrada, a supervisor, and requested that a union representative be present but was denied. Ms. Estrada discussed a physician's note stating that appellant could not work more than a nine-hour day due to chronic

medical problems. She told appellant to get additional medical documentation together by the time she returned from leave. Ms. Estrada informed appellant that there was no limited duty available and that appellant needed to be able to work up to 12 hours a day. If appellant was not cleared to work 12 hours a day then she would be let go. Appellant noted that Ms. Estrada told her that she needed to be available to work every day.

On May 11, 2009 appellant filed a grievance alleging a change in policy as she was to use her private motor vehicle rather than a furnished vehicle in the middle of a pay period. On May 12, 2009 the employing establishment responded that a vehicle was not authorized for an auxiliary route, and that, when this situation was brought forward, corrective measures would be immediately taken.

In a July 6, 2009 letter, the employing establishment notified appellant that she had been placed on restricted sick leave due to excessive absences. Until future notice, appellant would be required to support all applications for sick leave by submitting medical documentation or other acceptable evidence.

On December 23, 2009 Ms. Estrada, supervisor of customer service, stated that she worked with appellant for several years. When she returned from a detail in August 2009, she noted that appellant was not talking to anyone and was very quiet. Another employee told Ms. Estrada that appellant yelled at her and that Ms. Estrada instructed appellant to not yell at other employees, tell them what to do, and to bring all matters to her attention. At an October 31, 2009 meeting, appellant was informed that as a rural carrier she was required to be available up to 12 hours as were all other rural carriers and, if not available as required, she would let them go. Appellant never mentioned any other issues. Ms. Estrada noted that appellant became very upset when she was moved off her route due to a decline in mail volume. Appellant had expected to get Route 6 but another coworker was assigned to the route. Ms. Estrada stated that appellant used to be friends with three female coworkers but not any longer and this caused her to become upset.

In an undated statement, Ms. Estrada addressed appellant's grievances. As to the denial of FMLA, she noted that appellant was not in regular attendance or request FMLA on her leave form. In good faith management had removed the restricted leave from appellant's file. The grievance for the period April through October 31, 2009 was settled. Even though it was untimely, management met in good faith and agreed to utilize "respect in the workplace," and appellant was to bring her issues to management's attention and not other employees. Since her return to the branch in September 2009, appellant never brought to Ms. Estrada's attention hostility on the work room floor. Ms. Estrada stated that the grievance with regard to employees being treated equally was also settled. This pertained to a fellow rural carrier who had been off and was no longer covered by FMLA and resigned effective January 29, 2010. Ms. Estrada noted that management adhered to contractual obligations with regard to route assignment. On January 14, 2010 she advised that she had placed appellant on notice for gossiping on the workroom floor. On September 12, 2009 Ms. Cosgrove, a coworker, became upset when appellant yelled at her on the work floor. Ms. Estrada informed appellant not to take matters into her own hands. On October 31, 2009 she tried to explain to appellant the policy about no light duty and how rural carriers were required to be available for up to 12 hours a day. Ms. Estrada did not threaten appellant, who became very defensive. As to corrective action taken with regard

to appellant's excessive absences, she removed a letter appellant's previous supervisor had placed in the file as 14 days of her absences would not be covered under FMLA. In a memorandum dated March 2, 2010, Ms. Estrada addressed appellant's allegations of disparate treatment. She noted that a coworker who received an off-duty driving under the influence charge was allowed under a last chance agreement to have a family member drive him in a private vehicle to deliver mail. This arrangement was in place until the coworkers' license was returned. When the route became open, he no longer had a suspended license and bid on it. With regard to another employee, Ms. Estrada noted that her five-year-old son had a heart transplant and her absence was covered by the FMLA.

In an undated statement, Ms. Boyer discussed the assignment of rural route three. She noted that appellant had complained of back pain and migraines in 2008. Ms. Boyer indicated that appellant became excited about the possibility of becoming a regular carrier but became stressed over his assignments of work and dissolution of his route.

In a February 4, 2010 letter, Ms. Vierness stated that the rural route contract did not allow light-duty accommodation for nonwork-related conditions. Appellant filed for FMLA that was covered from December 23, 2008 through February 26, 2009 but after her attendance became irregular she was no longer entitled to FMLA and was placed on restricted sick leave. Ms. Vierness noted that appellant again qualified for FMLA from October 22 to December 15, 2009, but that the employee had to request such leave.

In a February 8, 2010 statement, David Zucker, a supervisor, advised of a meeting with all rural route carriers and telling them that there would be no gossiping. The carriers were to stay at their cases except for restroom breaks, break or other work duties. From that point on, no carrier came out of their cases and everything seemed fine.

In a statement, a Ms. Cosgove, stated that on September 12, 2009 she went to speak to another carrier about having lunch after work and that appellant told her, "You need to get out here." She told appellant to mind her own business. Ms. Cosgrove spoke with management about the incident.

In a decision dated June 4, 2010, OWCP denied appellant's claim for an emotional condition finding that she had not established a compensable factor of employment.

By form dated August 26, 2010, postmarked August 27, 2010, appellant requested an oral hearing before an OWCP hearing representative.

By decision dated September 24, 2010, OWCP denied appellant's request for a hearing for the reason that it was untimely filed. It further reviewed her request under its discretionary authority and denied the request as the issue could be equally well addressed by requesting reconsideration at the district OWCP.

LEGAL PRECEDENT -- ISSUE 1

To establish that appellant sustained an emotional condition causally related to factors of her federal employment, she must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition;

(2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors.[3]

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. However, when disability results from an employee's emotional reaction to her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.[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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[8] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[9] The issue is whether the claimant has submitted sufficient evidence under FECA to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[10] The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in

[3] *Kathleen D. Walker*, 42 ECAB 603 (1999).

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

[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] *See Michael Ewanichak*, 48 ECAB 364 (1997).

[9] *See Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

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

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.[11]

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.[12] If a claimant does implicate a factor of employment, it 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.[13]

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained an emotional condition as a result of several employment incidents. OWCP denied her emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must review whether the alleged incidents or conditions of employment are compensable factors under FECA.

Appellant alleged error by the employing establishment's management of her requests for leave. She alleged that her requests for FMLA were improperly denied and that she was improperly placed on restricted sick leave. Appellant stated that her leave requests were treated differently than other employees. The record indicates that she was placed on restricted sick leave due to excessive absences, but that Ms. Estrada later removed appellant from restricted sick leave. Ms. Estrada stated that appellant was not eligible for FMLA in certain instances, and Ms. Vierness noted that appellant did not request leave under the FMLA in other cases. With regard to appellant's allegations that other employees were given more favorable treatment with regard to their leave requests, Ms. Estrada denied this allegation. Appellant has not proven that her supervisors acted improperly in handling her leave requests. Although the handling of leave requests is generally related to employment, they are administrative functions of the employer and not duties of the employee. An administrative or personnel matter will be considered to be an employment factor only where the evidence discloses error or abuse on the part of the employing establishment.[14] Appellant failed to submit sufficient evidence substantiating her allegation of error or abuse on the part of the employing establishment. She has failed to establish a compensable factor in this regard.

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

[12] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[13] *Id.*

[14] *C.S.*, 58 ECAB 137 (2006).

The Board finds that appellant's allegations with regard to not being able to work on a particular route, being switched in the middle of a pay period to require use of her own car for work, being called in when she was not the next employee on matrix, the employing establishment's handling of job assignments for bailouts and lack of training for working a different route also concern administrative and personnel matters. Although the assignment of training, the assignment of work duties, and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer rather than regular or specially assigned work duties of the employee.[15] The employing establishment denied that it acted improperly in these matters. To the extent that appellant alleged that she was dissatisfied with the actions of her supervisors, the Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under FECA.[16] Appellant has not submitted any evidence establishing that the employing established acted abusively or erroneously with regard to these administrative factors, and accordingly appellant has not established that they amounted to a compensable factor of employment.

Appellant alleged that she had a meeting with Ms. Estrada who threatened to let her go. Ms. Estrada stated that she simply informed appellant of the policy that rural carriers must be available 12 hours a day and that there was no limited duty. If she was not available, she would be let go due to unavailability. Ms. Estrada denied ever threatening appellant. Reprimands, counseling sessions and other disciplinary actions are administrative matters that are not covered under FECA unless there is evidence of error or abuse.[17] Appellant has not established abuse by Ms. Estrada with regard to this meeting.

Appellant alleged that she was injured by gossip at the workplace. An employee's perception of gossip and rumors is a personal frustration, which was not related to her job duties or requirements and therefore was not compensable.[18] The Board further notes that the employing establishment took proper measures when it called a meeting to discuss employee gossip, and that Mr. Zucker indicated that he told staff that there would be no gossiping and that no one was to come out of their cases except for restroom breaks, break or other work duties. Mr. Zucker stated that, since the conversation, everything seemed fine. Accordingly, appellant has not established a compensable factor with regard to gossip.

Appellant made various allegations about how other employees conducted themselves. She was upset at special arrangements made for one employee to deliver the mail and was upset that other employees were going out of their cases. These matters did not concern appellant's job performance and are therefore not compensable.

[15] *See Phillip L. Barnes*, 55 ECAB 426 (2004).

[16] *See Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

[17] *Andrew Woilfgang-Masters*, 56 ECAB 411, 414 n.7 (2005).

[18] *James B. Hickok*, Docket No. 06-70 (issued July 12, 2006).

Because appellant failed to establish a compensable factor of employment, OWCP properly denied her claim. The Board need not review the medical evidence.[19]

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

A claimant dissatisfied with a decision of OWCP shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date for the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[20] The Board has held that OWCP, in its broad discretionary authority in the administration of FECA has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.[21] OWCP procedures, which require OWCP to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.[22]

ANALYSIS -- ISSUE 2

In its September 24, 2010 decision, OWCP denied appellant's request for a hearing on the grounds that it was untimely filed. It found that she was not, as a matter of right, entitled to a hearing at her request, postmarked August 27, 2010, had not been made within 30 days of its June 4, 2010 decision. As appellant's request was postmarked August 27, 2010, more than 30 days after the date of the June 4, 2010 decision, the Board finds that OWCP properly determined that she was not entitled to a hearing as a matter of right as her request was untimely filed.[23]

OWCP has the discretionary power to grant a request for a hearing when a claimant is not entitled to such as a matter of right. In its September 24, 2010 decision, it properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest

[19] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992) (unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record).

[20] *Claudio Vazquez,* 52 ECAB 496 (2001).

[21] *Marilyn F. Wilson*, 52 ECBA 347 (2001).

[22] *Claudio Vazquez, supra* note 20.

[23] *Id.*

error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[24] In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a hearing that could be found to be an abuse of discretion. OWCP therefore properly denied her request.

CONCLUSION

The Board finds that appellant has not established that she sustained an emotional condition as a result of factors of her federal employment. The Board further finds that OWCP properly denied appellant's request for an oral hearing as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 24 and June 4, 2010 are affirmed.

Issued: January 9, 2012
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

[24] *See Mary Poller*, 55 ECAB 483 (2004).