United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 12-1951**
	)	**Issued: March 5, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Montgomery, AL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On September 24, 2012 appellant filed a timely appeal of a September 5, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has met her burden of proof to establish that she developed an emotional condition due to factors of her federal employment.

FACTUAL HISTORY

This case has previously been before the Board on appeal. The relevant facts are as follows. On December 8, 2010 appellant, then a 52-year-old ultrasound medical technician, filed

[1] 5 U.S.C. § 8101 *et seq.*

an occupational disease claim alleging that she developed stress, depression, frustration, severe anxiety and work-related post-traumatic stress disorder. She attributed her condition to the requirement that she stay past her scheduled dismissal time. Appellant stated that she was unable to leave at the end of her shift due to an overflow of patients. She stated that the employing establishment was shorthanded and that her supervisor would not allow her to leave when her shift ended.

By decision dated June 9, 2011, OWCP denied appellant's claim for an emotional condition on the grounds that she had not submitted any medical evidence relating a diagnosed condition to her employment.

Appellant requested reconsideration on July 11, 2011. By decision dated September 2, 2011, OWCP declined to reopen her case for review of the merits on the grounds that she failed to submit any relevant new evidence in support of her request for reconsideration.

The Board considered OWCP's decisions on June 5, 2012.[2] The Board found that there was sufficient medical evidence to establish diagnosed medical conditions including generalized anxiety disorder, post-traumatic stress disorder -- chronic, panic disorder without agoraphobia, major depressive disorder. The Board remanded the claim for OWCP to consider the factors to which appellant attributed her condition.

Appellant submitted notes from the employing establishment medical clinic which verified that on December 1, 2010 she had presented a note from her physician limiting her work schedule to her normal work hours and no overtime. In a note dated November 2, 2010, Dr. Keith S. Hughes, a Board-certified family practitioner, stated that appellant should not work overtime due to her mental health. Dr. William C. Freeman, a Board-certified psychiatrist, completed a note on November 24, 2010 and stated that appellant should not work any overtime due to medical reasons for two months. On December 3, 2010 Dr. Hughes completed a certification of serious health condition in conjunction with appellant's request for leave under the Family and Medical Leave Act. He indicated that appellant could not perform overtime or on-call duty and diagnosed post-traumatic stress disorder.

Appellant submitted a series of e-mails she had sent to management addressing the scheduling of patients for ultrasounds. In an e-mail dated December 3, 2010, she requested that her supervisor, Connie L. Smith, abide by her physician's orders and not schedule appointments such that appellant was required to work overtime. On July 8, 2010 appellant protested that her on-call pay was removed from the entire night when she did not respond to calls to her home telephone and was not paged on her pager number.

By letter dated February 18, 2011, OWCP requested additional factual and medical evidence in support of appellant's claim. In a statement dated February 21, 2011, appellant stated that she was a veteran with post-traumatic stress disorder from spousal abuse and military sexual trauma, an attempted rape and sexual harassment by her supervisor during her military career. She stated that her health was precarious due to metabolic syndrome, extremely high cholesterol as well as diabetes.

[2] Docket No. 11-2144 (issued June 5, 2012).

Appellant alleged that she was overworked, that she had asked for help and had been promised help for five years, but still worked by herself. She stated that her physician recommended no overtime for two months, but that this recommendation was not honored by the employing establishment. Appellant noted that her regular hours were Monday through Friday from 8:00 am until 4:30 pm. She stated that she was frequently pressured to stay past her shift, with physicians adding patients at 4:29 pm. Appellant stated that there were not enough technicians to cover ultrasound calls resulting in delays. She stated that her supervisors, Ms. Smith and John L. Marshall pressured her to add more patients to the schedule causing her stress. Appellant stated that patients had been admitted and added to her schedule when she returned from her scheduled days off. She noted that weekend patients were directed to appear Monday morning at 8:00 am, but were not informed that they would have to be worked into the schedule. These patients then frequently became upset with appellant due to the wait, while patients with scheduled appointments also became irate due to delays.

Appellant stated that she was the only technician performing many lengthy examinations. She stated that her supervisor tried to coerce her into working overtime by adding patients at the end of the day. Appellant stated that her average day was more than 10 patients, plus add-ons from the emergency room, clinics and intensive care unit. She alleged that her supervisors did not help to regulate patient flow by informing doctors that the table was booked. Appellant noted on one occasion that she was an hour late leaving and was unable to pay her power bill on time resulting in no power for her for two weeks. She stated that, when her supervisor gave her a direct order to work overtime, she was afraid that she would be found insubordinate and fired if she left. Appellant alleged that she was unable to find assistance for venous studies which required a second person to squeeze the legs for augmentation and approximately an hour to scan both legs. She noted that she was instructed to have a chaperon for ultrasounds of scrotum, but was required to search for volunteers and if no one was available was frequently sexually harassed when performing these studies by herself. Appellant noted that the patient population frequently required help to access the table either through lifting or positional assistance and that she was also forced to search for volunteers. She alleged that she was required to perform x-ray call even though she had not performed x-rays for over 10 years. Appellant stated that she requested to be removed from this duty but this request was denied. She stated that she had no control over her schedule and was required to work in the x-ray department which resulted in rescheduling her patients.

Appellant stated that patients, nurses and doctors yelled at her due to waiting times. She stated that she was completely overwhelmed, going as fast as she could, but that her speed was never fast enough. Appellant stated that she was subjected to sarcasm, antagonism, intimidation, harassment, ridicule and retaliation on a daily basis. She stated that coworkers questioned her sick leave usage. Appellant alleged that "supervisor … John" asked why she did not wear make-up as he liked eye candy. She stated that she reported sexual harassment to her supervisor including a coworker, Ferman Miller, reaching inside her bra, feeling and squeezing her breasts as well as asking to see them. Appellant reported that a supervisor kept chocolate on his desk for all the "moody" women and stated that one woman was always on her period. She noted that he made her the butt of his jokes by telling coworkers that she was "too dumb to pass the registry certification test." Appellant alleged that her supervisor accused her of being "slutty" and looking at naked pictures of men at work. She also alleged that she was discriminated against through the denial of a bonus.

Appellant submitted e-mails in support of her claim. In an e-mail dated March 24, 2010, she stated that three examinations had been rescheduled and that she already had add-ons. Vichai Chaichamcheep responded and stated that this was an unresolved chronic issue and asked whether additional qualified ultrasound staff could be requested. Appellant corresponded with Stephen Pursley on October 6, 2010 and stated that she had 17 patients and stayed until 6:00 pm. Mr. Pursley suggested some ultrasound help. On December 3, 2010 appellant informed her supervisors that she was not to work overtime in accordance with her physician's orders. Mr. Marshall, a supervisor, refused to pay appellant the on-call subsidy on June 16, 2010 as she did not respond to pages. Appellant checked her pager and the system indicated that she was not paged. She requested that Mr. Marshall correct the error in her paycheck. Mr. Marshall refused and appellant alleged that she was treated differently from others. On September 16, 2009 appellant requested that clerks call the patients and inform them when no technician was available. On September 18, 2009 Mr. Marshall noted that appellant examined eight patients and performed 10 examinations three of which transferred from another facility.

Appellant submitted a series of text messages dated January 18, 2010, addressing whether the recipient would have sex with the sender. She alleged that these were to her from Mr. Miller. On August 3, 2010 and February 10, 2011 appellant sent an e-mail to management and listed her issues with scheduling. Mr. Marshall responded and suggested that Ms. Smith only perform emergency and ward patients when appellant is using annual leave.

In an e-mail dated February 16, 2011, Sandra Melton requested that appellant change her sick leave requests from January 26 through 28, 2011 to a request for annual leave as she had no sick leave available.

Following the Board's June 5, 2012 decision, OWCP requested additional factual information from the employing establishment which responded on July 19, 2012 noting that appellant had never requested to be removed from the radiology department due to sexual harassment. The employing establishment stated that sexual comments were common among the staff and that she participated. It stated that appellant frequently socialized with the coworker who sent the sexually charged messages. The employing establishment stated, "The agency feels [appellant] more than likely has not suffered the extreme harassment claimed, but probably is taking revenge on coworkers for a personal falling out." It noted that she took the sexual harassment claims out of her Equal Employment Opportunity (EEO) complaint.

The employing establishment further noted that appellant's overtime was not as extreme as presented. It concluded, "The agency sees [appellant] was very busy many days, but her inability to cope with the volume of work, lack of medical support and her voluntary decision to not ask for accommodation or removal from the environment, demonstrates to the agency the allegations are not of substance to the extreme she is alleging."

Mr. Marshall completed a statement on July 19, 2012 and denied suggesting that appellant wear makeup. He stated that, when she was busy, she had help from Ms. Smith and that appellant was busy when the policy to have baseline ultrasounds of the aorta was instituted. Mr. Marshall noted that appellant reported that Mr. Miller made sexual remarks and requested that Mr. Marshall discuss the issue without mentioning her specifically. He counseled Mr. Miller and instructed him to maintain a professional attitude. Mr. Marshall denied making

appellant the butt of jokes, but stated that she repeated all his suggestions to all the technologists including Mr. Miller. He denied discriminating against appellant by denying her a bonus.

In an undated statement, Collin C. Bailey alleged that appellant's statements were not substantiated. He noted that appellant had not made any request for accommodation, but was working under an FMLA request beginning in December 2010 which stated that appellant should not be scheduled for overtime, scanned minimal add-on patients and was not to work past 4:30 p.m. Mr. Bailey acknowledged that patient flow could not always be predicted and that scans could take longer than average. He alleged that appellant's last scheduling slot was 4:00 p.m. Mr. Bailey stated that she received help in time of increased workload and noted that other technologists performed scans. He asserted that appellant was not overworked as she averaged 7 patients a day when a comparison with other employing establishment sonographer's who averaged between 10 and 20 patients. Mr. Bailey stated that she exaggerated the amount of overtime that she worked and that she generally worked no more than 30 minutes of overtime on three occasions since the FMLA request in December 2010. He noted that prior to the FMLA appellant did work overtime including five hours on March 20, 2010. Mr. Bailey disagreed with her statements noting that while she scanned 16 patients on October 6, 2010 she did not work overtime on that date and most scans were only 20 minutes. He agreed that Ms. Melton requested that a leave status be changed as appellant did not have sufficient sick leave to cover her requested leave. Mr. Bailey explained the scheduling process and noted that some weekend patients misinterpreted the instructions and appeared with the expectation of a scan without scheduling an appointment, but that this was not the norm.

In a statement dated July 17, 2012, Mr. Miller denied any unwanted sexual conduct and acknowledged the conversation with Mr. Marshall.

The employing establishment provided documentation of an award for $250.00 which appellant received on June 22, 2011. It also provided documentation of a group award on February 24, 2012 in the amount of $600.00 which she received. In a series of e-mails dated July 19, 2012, appellant stated that she had removed sexual harassment from her list of EEO bases and claims. The employing establishment provided her overtime worked from January 1, 2010 through July 17, 2012.

The employing establishment provided a list of appellant's patients and procedures from May 24 through September 30, 2011. Also included was a technologist workload report dated October 1, 2011 through June 30, 2012 which indicated that she performed 88 percent of the ultrasound examinations or 1,178 compared to 183, 131 and 175 by her coworkers.

Appellant responded on August 12, 2012 and stated that her post-traumatic stress disorder was triggered by Mr. Miller. She alleged that the position description was changed to include x-ray duties. Appellant alleged that her FMLA was not accepted until she filed the EEO complaint. She submitted a written confirmation of request for accommodation dated April 1, 2011. Appellant submitted a statement dated August 18, 2011 entitled EEO retaliation complaint regarding her FMLA request. She submitted a statement from a coworker dated July 17, 2011 that Ms. Smith forced her to work overtime on October 27, 2010. On July 25, 2012 appellant received a mid-point performance counseling. In an e-mail dated August 21, 2012, she requested information regarding the policy to cover her sick leave usage. On July 25,

2012 appellant received written counseling from inappropriate e-mail. She submitted documentation of her EEO complaint and a statement from her son.

By decision dated September 5, 2012, OWCP denied appellant's claim for an emotional condition. It found that she had not established any compensable factors of employment.

LEGAL PRECEDENT -- ISSUE 1

To establish appellant's occupational disease claim that she has sustained an emotional condition in the performance of duty, she must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[3]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[4] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.[5] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.[6] When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[7] In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is not sufficient to constitute a person injury sustained in the performance of duty within the meaning of FECA. Thus disability is not covered when it results from an employee's fear of a reduction-in-force, nor is disability

[3] *Mark E. Richardson*, Docket No. 02-2182 (issued March 17, 2003).

[4] 28 ECAB 125 (1976).

[5] 5 U.S.C. §§ 8101-8193.

[6] *See Robert W. Johns*, 51 ECAB 136 (1999).

[7] *Cutler*, *supra* note 4.

covered when it results from such factors as an employee's frustration in not being permitted to work in a particular environment or to hold a particular position.[8]

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.[9] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[10] A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.[11]

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under FECA. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[12]

ANALYSIS

Appellant has attributed her emotional condition to overwork, requirements that she exceed her medical restrictions, denial of leave requests, bonuses and on-call pay as well as sexual harassment, patient conflict and harassment from her coworkers and superiors. The employing establishment has responded to appellant's allegations and OWCP denied her claim finding that she had not established a compensable factor of employment.

Appellant's allegation that she was overworked would be a compensable factor of employment if substantiated as it relates directly to her attempts to perform her duties under *Cutler*.[13] She has alleged that she was required to perform an unreasonable number of scans, to work overtime and to perform duties beyond her position description. Mr. Chaichamcheep completed an e-mail stating that appellant's overbooked schedule was an unresolved chronic issue and asked whether additional qualified ultrasound staff could be requested. This e-mail supports appellant's allegation that she was overworked. Mr. Bailey stated that she received help in time of increased workload and noted that other technologists performed scans. He asserted that appellant was not overworked as she averaged 7 patients a day when a comparison with

[8] *Id.*

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

[10] *Kim Nguyen*, 53 ECAB 127 (2001). *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[11] *Roger Williams*, 52 ECAB 468 (2001).

[12] *Alice M. Washington*, 46 ECAB 382 (1994).

[13] *Supra* note 4.

other employing establishment sonographer's who averaged between 10 and 20 patients. The Board finds that she has not established that the duties of her position were such that she was overworked. Appellant has not submitted substantiating evidence to counterbalance Mr. Bailey's statements.

Appellant also submitted a statement from a coworker that she was required to work overtime on October 27, 2010 performing three additional examinations after her regular duty ended. The employing establishment provided a list of overtime which indicated that she worked 45 minutes of overtime on this date. Appellant also alleged that she was required to work overtime on October 6, 2010. The employing establishment's list indicates that she did not work overtime on that date. Appellant also submitted evidence of her medical restriction of no overtime under the FMLA beginning December 2010, Mr. Bailey admitted that appellant was required to work overtime on three occasions since that date. The Board finds that appellant has substantiated that she was required to work beyond her medical restrictions and established a compensable factor of employment in this regard.

Appellant attributed her emotional condition to contact with her patients specifically those who were directed to undergo scans after weekend admissions to the emergency room and appeared without appointments on the following week day. Mr. Bailey conceded that patients did misunderstand instructions and did appear without appointments. Where a disability results from a claimant's emotional reaction to her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within coverage of FECA.[14] The Board has held that conditions related to stress from situations in which an employee is trying to meet his or her position requirements are compensable. In this case, the evidence is sufficient to establish that appellant experienced stress and anxiety in performing her regular duties of placating patients who misunderstood instructions. Thus, the Board finds that appellant has established a compensable employment factor. As appellant has substantiated that she was faced with patients who did not understand procedure as part of her employment duties, she has established this element of her claim.

Appellant alleged that she was improperly denied bonuses, that her sick leave requests were altered and that she was denied on-call pay. These actions are administrative functions of the employing establishment. 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.[15] The employing establishment has asserted that appellant was not denied bonuses, has explained why her sick leave request was altered to annual leave and otherwise denied error in these actions. Appellant has not submitted any evidence establishing error or abuse on the part of the employing establishment in these administrative actions and has therefore not established compensable factors of employment in regard to these events.

Appellant has also alleged that she was subjected to sexual harassment by Mr. Miller and Mr. Marshall. She submitted a series of text messages dated January 18, 2010, addressing whether she would have sex with the sender. Appellant alleged that these were from Mr. Miller.

[14] *Lawrence Scott*, Docket No. 05-315 (issued May 11, 2005).

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

Both Mr. Miller and Mr. Marshall have denied appellant's allegations of sexual harassment. Furthermore the record contains an e-mail from appellant removing that allegation of sexual harassment from her EEO complaint. The Board notes that there is no evidence substantiating her allegations of sexual harassment and that therefore she has not established this aspect of her claim as a compensable factor of employment.

Appellant attributed her emotional condition to the working conditions at the employing establishment including being subjected to sarcasm, antagonism, intimidation, harassment, ridicule and retaliation including raised voices, inappropriate remarks and actions by her supervisors and coworkers. As noted above, her perceptions of harassment are not sufficient to establish a compensable employment factor as harassment must be established to have occurred. Appellant has submitted no corroborative evidence of harassment and both Mr. Marshal and Mr. Bailey denied that she was subjected to harassment as alleged. The Board finds therefore that she has not substantiated this allegation.

The Board finds that appellant has established two factors of employment, that she was required to work overtime beyond her medical restrictions and that she was required to address patient confusion regarding procedures in the regular course of her employment. As appellant established compensable employment factors OWCP must base its decision on an analysis of the medical evidence. OWCP found there were not compensable employment factors and did not analyze or develop the medical evidence. The case will be remanded to OWCP for this purpose. After such further development as deemed necessary, OWCP should issue a *de novo* decision on this claim.[16]

CONCLUSION

The Board finds that appellant has established compensable factors of employment and remands the cas5e for further development by OWCP.

[16] *Tina E. Francis*, 56 ECAB 180 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 5, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: March 5, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board