United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
and	)	
FEDERAL ENERGY REGULATORY COMMISSION, OFFICE OF ADMINISTRATIVE LITIGATION, Washington, DC, Employer	)	**Docket No. 12-1786** **Issued: September 12, 2013**

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 August 22, 2012 appellant timely appealed the March 15, 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 over the merits of the claim.[2]

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on August 25, 2011.

[1] 5 U.S.C. §§ 8101-8193.

[2] Appellant requested oral argument which the Board denied by order dated July 10, 2013. *See* 20 C.F.R. § 501.5(a).

FACTUAL HISTORY

On August 31, 2011 appellant, then a 63-year-old trial attorney, filed a traumatic injury claim (Form CA-1) alleging that on August 25, 2011 she was subjected to "yelling and verbal abuse by a FERC manager." The manager in question was supervisory trial attorney, Derek L. Anderson. Appellant described the nature of her injury as "upset, elevated blood pressure, headache, and exacerbation of disabilities." The claimed incident occurred at approximately 6:15 p.m., on August 25, 2011. Appellant reported for duty on Friday, August 26, 2011, but stopped work from August 29 to 30, 2011. She resumed her duties on August 31, 2011.

Dr. James D. Katz, a Board-certified internist and rheumatologist, examined appellant on August 26, 2011. He noted that her blood pressure was elevated (171/77) that day and was the highest it had been in two years. Dr. Katz explained that appellant's blood pressure was elevated "in the setting of an incident at work causing upset and distress within less than the past 24 hours." He further indicated that appellant's health was detrimentally affected by negative stress.

The August 25, 2011 incident stemmed from a work-related meeting attended by appellant, Mr. Anderson and Bonnie Pride, an energy industry analyst. The three Office of Administrative Litigation (OAL) staff members had been listening in on a prehearing conference regarding a Trans-Alaska Pipeline System (TAPS) proceeding. The prehearing conference was held in Alaska while the OAL staff listened *via* telephone from their Washington, DC offices.

In an August 25, 2011 incident statement, appellant indicated that she and Mr. Anderson participated in a TAPS prehearing teleconference which began at 2:00 p.m. and continued for several hours through early evening. The OAL staff in Washington, DC was able to listen in on the Alaska proceedings, but could not participate/speak to those individuals at the prehearing conference. While in the OAL conference room, the staff reportedly discussed the case and speculated about strategies. Appellant indicated that she had commented about the adequacy of recent testimony prepared by the technical staff. She also noted a prior instance where she expressed concerns about technical staff testimony that Mr. Anderson had reviewed and approved. Appellant brought the matter to the attention of her immediate supervisor, Richard "Rick" Kelly, as well as to the case team "legal lead," Ken Ende. She noted that the technical staff testimony was ultimately revised.

During the August 25, 2011 teleconference, Mr. Anderson allegedly repeatedly called the presiding judge's clerk "stupid." Appellant quoted Mr. Anderson as saying the judge's clerk had previously "interned in Enforcement and they did not want him back." Mr. Anderson also reportedly called Mr. Ende "crap" and "stupid." Another coworker, Mary Hain, was also said to be "stupid," and Mr. Anderson reportedly referenced either her ethics or integrity. However, appellant could not recall which attribute he questioned. Mr. Anderson also reportedly disparaged two of the attorneys who spoke at the prehearing conference.[3] Appellant indicated that Mr. Anderson also discussed his prior experience as a Marine sniper and reportedly claimed to be the best lawyer in the office. She also stated that Mr. Anderson had been playing Yahtzee

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[3] Appellant, however, did not provide any specific details of the alleged disparaging remarks.

on a handheld device during the prehearing teleconference. Mr. Anderson reportedly had to keep his hands busy.

During an evening break (6:15 p.m.) in the prehearing conference, Mr. Anderson allegedly began to shout and yell at appellant in the empty OAL conference room. She claimed that he told her she was "unprofessional" and that he would not "tolerate [her] calling technical staff crap." Mr. Anderson reportedly accused appellant of calling "their testimony crap" which he claimed she did "all the time." Appellant stated that she asked Mr. Anderson to please not yell and scream. She also denied calling technical staff "crap." He reportedly replied as follows: "You think this is screaming. You have n[o]t heard how I scream. I will not tolerate you calling them crap to their face. I have to scream. You deserve to be screamed at. I will shout over you." Mr. Anderson also allegedly stated to appellant "You do crap work. I know you do crap work. You wrote a crap memo. I wrote a shadow memo. You did crap analysis. My memo was better."

Mr. Anderson also allegedly stated "I am the best lawyer in the office. I have more litigation than anyone here. I am a better lawyer than you. I have more litigation experience than you." Appellant asked Mr. Anderson "How do you know that?" He replied, "You wrote a crap memo. I wrote a shadow memo. I have to have more experience. You are a crap lawyer who did crap analysis. I will not tolerate you coming to my office and saying this is not litigation." Appellant then questioned Mr. Anderson about his prior work experience. He named two law firms where he had previously worked, but appellant could not recall the names. Afterwards, she left the OAL conference room for the evening. Before her departure, Mr. Anderson reportedly expressed his intention to remain until the end of the TAPS prehearing conference.

On August 31, 2011 Mr. Anderson submitted a statement regarding the August 25, 2011 incident.[4] He explained that there was a prehearing conference regarding TAPS Docket No. IS09-348. Mr. Anderson stated that members of the trial staff listened in on the August 25, 2011 conference *via* telephone setup in the OAL small conference room. The team members listening in that afternoon included appellant, Ms. Pride and Mr. Anderson. He stated that several times during the prehearing teleconference appellant criticized the trial staff's performance on the TAPS case, including what she termed "embarrassing" testimony and substandard legal work by attorneys on the team. Mr. Anderson further stated that in answering appellant's complaint that we filed testimony at all, Ms. Pride stated at one point "that was our job." Appellant reportedly continued to disrupt attempts to listen to the conference with her outbursts and unprofessional behavior.

By way of background, Mr. Anderson explained that in the past appellant continually made such charges both in team meetings and privately. He acknowledged having previously shared his concerns about the case with appellant; however, he stated that he had always done so privately. Mr. Anderson stated that he told appellant many times before that, while he may have agreed with some of her concerns, it was not helpful to disrupt team meetings and attack team members with her criticism. He indicated that appellant had always ignored his advice.

[4] The unsigned memorandum/statement was directed to OAL Director, Ted P. Gerarden.

Returning to the events of August 25, 2011, Mr. Anderson stated that after 6:00 p.m. the conference was on a break and appellant asked him whether he was upset with her. In response, he told her that his only concern was that her repeated criticism of fellow team members was inappropriate. Mr. Anderson also reportedly told appellant that even if her complaints were valid, her continued expression of these concerns and other unprofessional comments were a distraction and counterproductive. He stated that appellant became very upset, and with an extremely raised voice, she continued her criticism of the case, the team and her involvement. Mr. Anderson indicated that she repeatedly stated that she wanted to be removed from the case and that management was "out to get her." He noted that she refused to listen to any of his comments concerning her behavior, despite having asked him why he was upset.

Mr. Anderson further indicated that as appellant continued her verbal attack, he reminded her that a legal memorandum she submitted on the case was substandard. He then told appellant she should not be so critical of fellow team members when her own performance was open to criticism. Mr. Anderson stated that his remarks were intended to calm appellant down, and hopefully, she would have realized her own comments were not only unprofessional, but hypocritical as well. Unfortunately, appellant became even louder and more upset. Mr. Anderson stated that she began yelling that the assignment was a "set-up" by management and not a legitimate assignment. He indicated that she went on to verbally attack everyone involved in giving her the memorandum assignment, including himself. Mr. Anderson stated that appellant had never taken any responsibility for her performance completing that particular task, yet her criticism of other team members was relentless. He acknowledged having raised his voice, but explained that it was only in an effort to be heard over appellant's own yelling. Mr. Anderson stated that at no time did his voice exceed the level it had risen to in other meetings attended by various team members where he attempted to curb appellant's unprofessional attitude and comments. He further stated that at no time did his voice get to the level of yelling, unlike appellant who was constantly screaming throughout their discussion.

Appellant reportedly left the conference room for several minutes and when she returned she asked Mr. Anderson a general question about his litigation experience. Mr. Anderson stated that in an effort to calm appellant down, he explained his experience. When he finished, appellant allegedly stated in a sarcastic manner that Mr. Anderson had very little experience and was not qualified to judge her. As the break was about to end, Mr. Anderson refocused on the prehearing teleconference. He indicated that he held the door open for appellant as she left, and afterward the teleconference continued for approximately one hour.

In a September 6, 2011 statement, Ms. Pride provided a synopsis of the legal issues addressed during the August 25, 2011 prehearing teleconference.[5] There was discussion about whether certain issues would be severed and tried separately and what impact separate hearings might have on the OAL staff's case. Ms. Pride described the discussion as cordial. She stated that she left the teleconference at 6:00 p.m. When pressed about whether she had observed any less than cordial discussions among OAL staff members, Ms. Pride responded that the discussion

[5] Ms. Pride's September 6, 2011 witness statement was in the form of a series of e-mails between herself and the agency director, Mr. Gerarden who inquired about the August 25, 2011 incident. Neither Ms. Pride's nor Mr. Gerarden's e-mails identified any of the other OAL staff participants by name.

was at times "animated," but she did not think there was anything heated. She reiterated that it appeared "cordial" to her.

Appellant submitted a copy of an Equal Employment Opportunity (EEO) complaint filed on October 4, 2011. Her complaint identified 12 employment incidents that reportedly occurred between July and September 2011 which she considered discriminatory. Appellant included the August 25, 2011 incident with Mr. Anderson, as well as alleged discrimination on the part of the employing establishment in investigating the incident and processing her FECA claim. Eight of the alleged discriminatory acts were unrelated to appellant's claimed August 25, 2011 employment injury. She acknowledged that no final decision had been rendered on her EEO complaint.

Appellant also submitted an October 26, 2011 statement from Ms. Hain, a fellow OAL attorney, who described an October 19, 2011 incident between her and Mr. Anderson. That morning Ms. Hain submitted revisions to a brief Mr. Anderson had earlier circulated to OAL staff for comment. The brief was due to be filed later that same day. In a series of e-mails, Mr. Anderson questioned Ms. Hain's suggested revisions and ultimately summoned her to his office. The remainder of the statement described what Ms. Hain characterized as a "nightmare" encounter with Mr. Anderson. During their closed-door discussion in his office, Ms. Hain reportedly felt threatened and feared for her safety. She characterized Mr. Anderson as an "abusive person." Ms. Hain stated she had never worked with a supervisor who was physically intimidating until Mr. Anderson took out his filing-day stress on her. She believed that he retaliated against her for making comments about his draft, which comments had been circulated to other OAL staff and managers.

By decision dated November 28, 2011, OWCP denied appellant's traumatic injury claim. She subsequently requested a review of the written record.

In a March 15, 2012 decision, the Branch of Hearings & Review affirmed the November 28, 2011 denial of the claim. The hearing representative found that appellant had not established a compensable employment factor as the cause of her claimed condition. Absent a compensable employment factor, there was no need to address the medical evidence of record.

LEGAL PRECEDENT

To establish that she sustained an emotional condition causally related to factors of her federal employment, appellant 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.[6]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers'

[6] *See Kathleen D. Walker*, 42 ECAB 603 (1991).

compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.[7] Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.[8]

An employee's emotional reaction to administrative or personnel matters generally falls outside the scope of FECA.[9] Although related to the employment, administrative and personnel matters are functions of the employer rather than the regular or specially assigned duties of the employee.[10] However, to the extent 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.[11]

Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.[12] When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter, OWCP must base its decision on an analysis of the medical evidence.[13]

ANALYSIS

The hearing representative found that the August 25, 2011 incident between appellant and Mr. Anderson was a noncompensable administrative/personnel matter.[14] She explained that appellant's reaction to the criticism of her work product was not compensable. It is apparent that Mr. Anderson took exception to one or more of appellant's remarks during the August 25, 2011 prehearing teleconference, and he subsequently voiced his dissatisfaction during an evening break. Despite Mr. Anderson's status as a manager/supervisor, the current record does not

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[7] *Pamela D. Casey*, 57 ECAB 260, 263 (2005).

[8] *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[9] *Andrew J. Sheppard*, 53 ECAB 170, 171 (2001); *Matilda R. Wyatt*, 52 ECAB 421, 423 (2001).

[10] *David C. Lindsey, Jr.*, 56 ECAB 263, 268 (2005).

[11] *Id.*

[12] *Supra* note 6.

[13] *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. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

[14] Assigning work and monitoring performance are administrative functions of a supervisor. *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). The manner in which a supervisor exercises his discretion falls 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. *Linda J. Edwards-Delgado*, 55 ECAB 401, 405 (2004).

demonstrate the existence of a supervisor/subordinate relationship between him and appellant.[15] Moreover, his perceived comportment issue is not supported by the record, as discussed *infra*. Under the circumstances, Mr. Anderson's August 25, 2011 rebuke of appellant does not warrant characterization as an administrative/personnel matter. But even if he was authorized to monitor appellant's performance/participation during the August 25, 2011 TAPS prehearing teleconference, Mr. Anderson's criticism of her is not insulated from coverage under FECA merely by characterizing the incident as an administrative/personnel matter. In this instance, appellant took exception to the manner in which Mr. Anderson addressed her. She raised a question of proper office decorum rather than specifically challenging what, if any, authority Mr. Anderson exercised over her.

Verbal altercations and difficult relationships with supervisors/managers, when sufficiently detailed and supported by the record, may constitute compensable factors of employment.[16] However, this does not imply that every ostensibly abusive or threatening statement uttered in the workplace will give rise to coverage under FECA.[17] For appellant to prevail on her claim, she must support her allegations with probative and reliable evidence.[18]

The altercation that occurred during the prehearing conference break reportedly stemmed from remarks that appellant made earlier that evening while she, Mr. Anderson and Ms. Pride listened in on the TAPS proceeding conducted in Alaska. Appellant indicated that the three of them were able to hear the Alaska participants, but they could not speak to the individuals in attendance. Thus, it appears that the discussion in the Washington, DC OAL conference room was heard only by appellant, Ms. Pride and Mr. Anderson. As noted, Mr. Anderson reportedly took exception to one or more of appellant's remarks. Several times during the prehearing teleconference, appellant reportedly criticized the trial staff's performance on the TAPS case, including what she termed "embarrassing" testimony and substandard legal work by attorneys on the team. However, Mr. Anderson's August 31, 2011 statement provided no context for what he characterized as "outbursts and unprofessional behavior."

Mr. Anderson variously described appellant's actions as inappropriate, disruptive, distracting, unprofessional and counterproductive, but neglected to provide any specific details as to what appellant actually stated or did during the prehearing teleconference. Also, he did not assert or even imply that appellant's specific criticisms regarding technical staff testimony and substandard legal work were inaccurate. Moreover, Mr. Anderson's characterization of events is not supported by Ms. Pride's September 6, 2011 statement. Ms. Pride described the August 25,

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[15] Although he was a supervisory trial attorney, Mr. Anderson was not appellant's first-line supervisor. Appellant identified Mr. Kelly as her immediate supervisor. Also, there is no indication that Mr. Anderson was directly within appellant's supervisory chain of command or that he was vested with any specific managerial/supervisory responsibilities with respect to his involvement in the particular TAPS case that was the subject of the August 25, 2011 prehearing conference. Appellant indicated that Linda Lee was her second-line supervisor. Also, Mr. Ende was identified as the case team "legal lead" on that particular TAPS proceeding.

[16] *Marguerite J. Toland*, 52 ECAB 294, 298 (2001).

[17] *Fred Faber*, 52 ECAB 107, 109 (2000).

[18] *See supra* note 6.

2011 discussion among OAL staff as "animated" but "cordial," and she did not think there was anything heated. This is in stark contrast to what Mr. Anderson characterized as repeated "outbursts and unprofessional behavior."

Ms. Pride indicated that she left around 6:00 p.m. on August 25, 2011, and thus, she did not witness the incident between appellant and Mr. Anderson that occurred at approximately 6:15 p.m. According to Mr. Anderson, appellant asked him during the break if he was upset with her. He allegedly replied that his only concern was that her repeated criticism of fellow team members was inappropriate, and even if appellant's complaints were valid, her continued expression of those concerns and other unprofessional comments were a distraction and counterproductive. Mr. Anderson stated that appellant became very upset, and with an extremely raised voice, she continued her criticism of the case, the team and her involvement in the case.

In an effort to "calm her down," Mr. Anderson proceeded to criticize appellant's own work on the case. He reminded her that a legal memorandum she submitted was "substandard." Mr. Anderson stated that he told appellant she should not be so critical of fellow team members when her own performance was open to criticism. By exposing appellant's own shortcomings, he hoped she would realize her comments were both "unprofessional" and "hypocritical." However, Mr. Anderson's attempt to diffuse the situation was unsuccessful. He stated that appellant became even louder and more upset. Mr. Anderson acknowledged having raised his voice to appellant, but only in an effort to be heard over her own yelling.

Appellant also reportedly asked Mr. Anderson a general question about his litigation experience. Again, in an "effort to calm her down," Mr. Anderson described his experience. When he finished, appellant allegedly commented in a "sarcastic manner" that Mr. Anderson had very little experience and was not qualified to judge her. Afterwards, appellant left the OAL conference room and Mr. Anderson turned his attention back to the prehearing conference which continued for approximately one hour.

Appellant's description of the April 25, 2011 incident is consistent with Mr. Anderson's statement to the extent they both acknowledged: (1) Mr. Anderson took exception to appellant's criticism of fellow team members' performance; (2) Mr. Anderson criticized a legal memorandum appellant prepared for the case; (3) appellant inquired about Mr. Anderson's prior litigation experience; and (4) Mr. Anderson raised his voice during the incident.

Appellant did not claim to have initiated the break-time incident. She stated that Mr. Anderson began to shout and yell. Appellant also did not admit to any yelling or screaming on her part. She claimed to have asked Mr. Anderson to please not yell and scream. He allegedly told her she was "unprofessional" and that he would not "tolerate [her] calling technical staff crap." Appellant stated that she denied calling technical staff "crap." In response to her request that he not yell and scream, Mr. Anderson allegedly replied "You think this is screaming. You have n[o]t heard how I scream. I will not tolerate you calling them crap to their face. I have to scream. You deserve to be screamed at. I will shout over you." Regarding appellant's own contributions to the case, Mr. Anderson allegedly stated "You do crap work. I know you do crap work. You wrote a crap memo. I wrote a shadow memo. You did crap analysis. My memo was better." According to appellant, he also proclaimed himself "the best

lawyer in the office," and stated that he had more litigation experience than anyone there, including appellant.

As noted, not every ostensibly abusive or threatening statement uttered in the workplace will give rise to coverage under FECA.[19] Mr. Anderson's August 25, 2011 rebuke of appellant did not rise to the level of compensable verbal abuse. He admittedly raised his voice to appellant; however, she appears to have done the same. Moreover, the harshest language attributed to Mr. Anderson was his alleged use of the word "crap," repeatedly. At worse, appellant described an unpleasant, loud and perhaps heated exchange between two coworkers who at one point or another had voiced criticism of the other's work, but this did not amount to verbal abuse. Also, Ms. Hain's statement regarding her October 19, 2011 encounter with Mr. Anderson, even if fully credited, does not establish that he was verbally abusive on August 25, 2011.

The record does not support a finding of verbal abuse, and the mere fact that appellant filed an EEO compliant does not establish error or abuse on the part of her employer.[20] Accordingly, appellant has not demonstrated that Mr. Anderson was verbally abusive on August 25, 2011. Because she failed to establish a compensable factor of employment, OWCP properly denied appellant's claim without addressing the medical evidence of record.[21]

CONCLUSION

Appellant failed to establish that she sustained an injury in the performance of duty on August 25, 2011.

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[19] *Supra* note 17.

[20] *See Charles D. Edwards*, 55 ECAB 258, 266 (2004).

[21] *Garry M. Carlo*, *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 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