

**United States Department of Labor
Employees' Compensation Appeals Board**

<p>P.E., Appellant</p>)	
)	
and)	Docket No. 14-102
)	Issued: April 1, 2014
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Waco, TX, Employer)	

Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
 COLLEEN DUFFY KIKO, Judge
 MICHAEL E. GROOM, Alternate Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 21, 2013 appellant filed a timely appeal from an October 4, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying an emotional condition claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 established that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On December 30, 2011 appellant, then a 66-year-old nurse and associate chief for behavioral health, filed an occupational disease claim (Form CA-2) alleging that she sustained an

¹ 5 U.S.C. § 8101 *et seq.*

emotional condition with consequential cardiovascular issues on or before April 4, 2011 after she received an e-mail from Supervisor Karen Spada requesting research for a patient. She stopped work on April 4, 2011. Ms. Spada controverted the claim. Appellant returned to work on December 19, 2011.

In a January 13, 2012 letter, OWCP advised appellant of the additional evidence needed to establish her claim. It requested a complete description of the work factors alleged to have caused the claimed emotional condition. OWCP also requested a statement from appellant's attending physician explaining how and why the identified incidents caused the claimed emotional condition. Appellant was afforded 30 days to submit such evidence.

In a statement received on February 6, 2012, appellant noted that she began work at the employing establishment in December 2009. She was responsible for 515 patients and 240 staff. Appellant received fully successful performance appraisals on April 27 and November 8, 2010, with positive remarks about her leadership and flexibility. She asserted that commencing on February 7, 2011 there was a pattern of hostility and reprisals due to her age by her supervisors Ms. Spada and Linda Wolf, as follows: a February 7, 2011 e-mail by Ms. Spada stating that she was not sufficiently assertive or engaged; a February 18, 2011 informal job counseling session with Ms. Wolf; Ms. Spada's alleged failure to greet her at a March 15, 2011 town hall meeting; a March 16, 2011 e-mail from Ms. Spada criticizing her lack of support for subordinate managers; Ms. Spada knowingly giving her a short deadline to complete a crisis intervention team review in March 2011; March 21, 2011 written memorandum of counseling from Ms. Spada regarding her failure to return an urgent telephone call regarding suicide prevention and an irregularity with dispensing narcotics;² a January 3, 2012 e-mail from Ms. Spada that she did not understand information she had requested from appellant regarding overtime; Ms. Spada telling her on January 12, 2012 that Ms. Wolf wished to speak to her; Ms. Spada asking her to calculate the overtime for a patient on January 3, 2012; Ms. Spada asking her to explain the overtime chart on January 5, 2012; and a January 12, 2012 conversation with Ms. Spada and Ms. Wolf that appellant feared would turn into a counseling session. Appellant submitted copies of the e-mails and performance appraisals.

In a March 29, 2012 memorandum, Ms. Wolf denied appellant's allegations of hostility and reprisals. She asserted that the February 18, 2011 counseling session was not disciplinary and that appellant had thanked her for the feedback. Ms. Wolf submitted copies of her e-mails to appellant from July 2010 to March 2011 requesting reports, updates, research, leadership action plans and training plans. She explained that each of the requests pertained to appellant's assigned job duties and were necessary to assure the proper functioning of a complex patient care organization. Ms. Wolf emphasized that appellant was always given reasonable deadlines to complete assigned tasks and projects.

² In a March 21, 2011 e-mail to appellant, Ms. Spada stated that the e-mail constituted official written counseling for "failure to ensure patient safety" and following correct protocols regarding medication errors and suicide attempts. She was "extremely disappointed in [appellant's] lack of follow through and [her] lack in respecting [her] direct order to call [Ms. Spada] back ... tonight ... as in ASAP ... with [her] plan." Ms. Spada stated that appellant's failure to follow up was a "total lack of accountability for [her] patients and the staff who provide their care."

Appellant also alleged that during a May 7, 2012 team teleconference, Ms. Spada stated that it was inappropriate for appellant to have left the meeting to use the restroom, that Ms. Spada asked her to complete a staffing methodology on June 4, 2012, that a clerical staffer asked her to call Ms. Spada on June 5, 2012, and that on June 6, 2012 Ms. Spada requested a staffing plan for a new 1:1 observation directive and provided suggestions for formulating the plan.

Appellant also submitted reports dated from April 4 to December 6, 2011 from Dr. Michael Menache, an attending Board-certified internist, noting the onset of hypertension and palpitations in 2004. Dr. Menache held appellant off work from August 22 to December 19, 2011 due to “stress at work.”

By decision dated September 27, 2012, OWCP denied appellant’s claim on the grounds that fact of injury was not established. It found that she did not establish any compensable work factors. OWCP noted that appellant attributed her condition to the administrative functions of job discussions, performance feedback and appraisals and that no error or abuse was shown that would bring these actions into the performance of duty. It further found that she did not submit sufficient evidence to substantiate her allegations of reprisals or a hostile work environment.

In a July 4, 2013 letter, appellant requested reconsideration. She submitted an undated statement from a coworker and a September 14, 2012 statement from her brother relating her account of problems at work. Appellant also provided a September 19, 2012 report from Dr. John V. Elwood, an attending licensed clinical psychologist, who diagnosed severe stress related to appellant’s “difficult relationship with the Director of Patient Care Services.” She also submitted a duplicate of Dr. Menache’s December 6, 2011 report.

By decision dated October 4, 2013, OWCP denied modification on the grounds that the evidence submitted did not establish employing establishment error or abuse regarding the administrative incidents appellant identified as causative.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁴

Where disability results from an employee’s reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the

³ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

coverage of FECA.⁵ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁶ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁷

In cases involving emotional conditions, the Board has held that when working conditions are alleged as factors in causing 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.⁸ If a claimant implicates 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.⁹

The Board has held that a variety of work factors are compensable under FECA. Among them, overwork is a compensable factor of employment if appellant submits sufficient evidence to substantiate this allegation.¹⁰ Also, in certain circumstances, working overtime is sufficiently related to regular or specially assigned duties to constitute a compensable employment factor.¹¹ Additionally, conditions related to stress resulting from situations in which an employee is trying to meet his or her position requirements are compensable.¹²

ANALYSIS

Appellant alleged that she sustained an emotional condition with consequential cardiovascular issues due to a pattern of reprisals and criticism by her supervisors, creating a hostile work environment. OWCP found these to be noncompensable factors. Therefore, the Board must review whether the alleged incidents are covered employment factors under FECA.

Appellant attributed her emotional condition to performance appraisals, February 7, March 16, 2011, January 3 and 5, 2012 e-mails, January 5 and 12, 2012 conversations commenting on her work, and a February 18, 2011 nondisciplinary job counseling session. However, performance appraisals are administrative and are not compensable unless error or

⁵ 5 U.S.C. §§ 8101-8193. *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁷ *Effie O. Morris*, 44 ECAB 470 (1993).

⁸ *See Norma L. Blank*, 43 ECAB 384 (1992).

⁹ *Marlon Vera*, 54 ECAB 834 (2003).

¹⁰ *Bobbie D. Daly*, 53 ECAB 691 (2002).

¹¹ *Ezra D. Long*, 46 ECAB 791 (1995).

¹² *Trudy A. Scott*, 52 ECAB 309 (2001).

abuse is shown.¹³ The Board has characterized supervisory discussions or evaluations of job performance as administrative or personnel matters of the employing establishment, which are covered only when a showing of error or abuse is made.¹⁴ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁵ To support a claim, a claimant must establish a factual basis by providing probative and reliable evidence.¹⁶ Ms. Wolf's March 29, 2012 supervisory statement disputed appellant's allegations and clarified that her interactions with appellant were to assure patient safety in a complex work environment. Under these circumstances, the Board finds that appellant has not submitted sufficient evidence to support that her supervisors acted erroneously or abusively regarding the e-mails, conversations or job counseling. Therefore, appellant has not established the memorandum as a compensable work factor.¹⁷

Appellant also attributed her condition to a March 21, 2011 written memorandum of counseling for failure to abide by narcotics and patient safety rules. Disciplinary actions including oral reprimands, discussions or letters of warning for conduct are noncompensable administrative actions unless the employee shows that management acted unreasonably.¹⁸ To support such a claim, a claimant must establish a factual basis by providing probative and reliable evidence.¹⁹ In the present case, appellant did not contend that Ms. Wolf, her supervisor, was mistaken in finding that appellant violated employing establishment procedures. Ms. Wolf provided a March 29, 2012 statement explaining that her communications with appellant were to ensure patient safety in a complex work environment. Under these circumstances, the Board finds that appellant has not established error or abuse by Ms. Wolf in issuing the March 21, 2011 memorandum of counseling. Therefore, appellant has not established the memorandum as a compensable work factor.²⁰

Appellant also attributed her condition to Ms. Spada asking her to calculate overtime on January 3, 2012, complete a staffing methodology on June 4, 2012 and a staffing plan on June 6, 2012. She also alleged stress from Ms. Spada stating that she did not want appellant to leave the room during teleconferences on May 7, 2012 and asking appellant to call her on June 5, 2012. An employee's dissatisfaction with the way a supervisor performs duties or exercises discretion in assigning work is not compensable absent error or abuse.²¹ As appellant

¹³ *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹⁴ *Roger W. Robinson*, 54 ECAB 846 (2003).

¹⁵ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁶ *See Barbara J. Nicholson*, 45 ECAB 843 (1994).

¹⁷ *Janice I. Moore*, 53 ECAB 777 (2002).

¹⁸ *Ruth S. Johnson*, *supra* note 15.

¹⁹ *See Barbara J. Nicholson*, 45 ECAB 843 (1994).

²⁰ *Janice I. Moore*, *supra* note 17.

²¹ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005); *Linda J. Edward-Delgado*, 55 ECAB 401 (2004).

did not submit corroborating evidence establishing error or abuse, she failed to establish a compensable employment factor in this regard.

Appellant also alleged a pattern of harassment and reprisals based on age. For harassment or discrimination to give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment or discrimination did in fact occur.²² Mere perceptions of harassment, retaliation or discrimination are not compensable under FECA.²³ Appellant did not submit probative evidence, such as witness statements, corroborating her allegations of retaliation, discrimination and harassment based on grievance activities. The absence of such documentation diminishes the validity of appellant's contentions in this case, where there is no evidence to document that she was discriminated or retaliated against. Additionally, Ms. Wolf's March 29, 2012 statement refutes appellant's allegations. As she has not established these incidents as factual, she has not established a compensable employment factor under FECA with respect to the claimed reprisals.

Regarding appellant's allegations that Ms. Wolf assigned short deadlines and that Ms. Spada failed to greet her at a March 15, 2011 town hall meeting, the Board finds that she did not submit sufficient evidence to establish these allegations as factual. In particular, Ms. Wolf noted in her March 29, 2012 statement that appellant was given sufficient time to complete assigned tasks. As these incidents have not been established as factual, they are not compensable factors of employment.

Therefore, the Board finds that appellant did not establish that she sustained an emotional condition as alleged, as she did not establish any compensable factors of employment.²⁴

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.

CONCLUSION

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty as alleged.

²² *Marlon Vera*, *supra* note 9.

²³ *Kim Nguyen*, 53 ECAB 127 (2001).

²⁴ As appellant did not establish any compensable factors of employment, the medical evidence need not be considered. *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 4, 2013 is affirmed.

Issued: April 1, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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