United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 13-818**
	)	**Issued: August 1, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Pahrump, NV, Employer	)	

Appearances:
Debra Rose Barbato, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 8, 2013 appellant timely appealed the January 29, 2013 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 emotional condition in the performance of duty on or about October 1, 2010.

[1] 5 U.S.C. §§ 8101-8193 (2006).

[2] The record on appeal contains evidence received after OWCP issued its January 29, 2013 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2012).

FACTUAL HISTORY

On October 7, 2011 appellant, then a 55-year-old clerk, filed four occupational disease claims (Form CA-2). One claim was for depression which arose on or about October 1, 2010. Appellant alleged that management attacked and abused her while the Union refused representation. She claimed to have been wrongfully discharged and after being reinstated, she allegedly experienced more abuse, threats and games. Appellant also filed a separate claim for employment-related sleep disturbance and another one for heart murmur/chest pain, both of which allegedly arose on or about November 1, 2010.[3] Lastly, she filed a claim for chronic fatigue arising on or about December 1, 2010, which she attributed to constant changes in her work schedule and particularly, having been assigned late afternoon start times.

Appellant previously filed a claim for an employment-related anxiety disorder that allegedly arose on or about September 27, 2010 (xxxxxx061). OWCP denied the claim by decision dated December 21, 2010 and subsequently denied modification in a June 17, 2011 decision.[4]

On October 26, 2011 OWCP acknowledged receipt of appellant's October 7, 2011 claims and advised her that the four claims were combined under a single claim number (xxxxxx162). Additionally, it advised her of the factual and medical criteria for establishing a claim under FECA, and afforded her at least 30 days to submit the required information. OWCP later advised appellant that her current claim should be limited to subsequent employment incidents that were not addressed in her previous claim (xxxxxx061).

Appellant allegedly had a difficult relationship with her postmaster, Debra Blankenship, who was assigned to the Pahrump facility effective August 2, 2010. She served as a steward (clerks) for the American Postal Workers Union (APWU) until January 2011, when she was relieved of her duties. Katherine A. Poulos, then-current APWU Local (No. 7156) president, reportedly orchestrated appellant's removal as a steward. Appellant accused Ms. Poulos of conspiring with management in an effort to fire her.[5]

In a November 18, 2011 statement, appellant alleged that she had been subjected to harassment, abuse, disparate treatment, bullying and was under constant scrutiny. She also alleged that her employing establishment wrongfully denied an accommodation for her medical condition(s). Appellant also accused the postmaster and other management officials of repeatedly denying her requests for Union representation (*Weingarten* rights). Her statement was accompanied by a chronology of alleged incidents during the period August 1, 2010 through November 18, 2011.

[3] Appellant had a history of heart murmur dating back to when she was a teenager (15).

[4] OWCP also denied reconsideration by decision dated February 17, 2012, which the Board affirmed. Docket No. 12-1006 (issued October 5, 2012).

[5] Appellant also claimed that the Union refused to file any grievances on her behalf. She ultimately filed a civil action against National APWU and Local No. 7156.

Appellant took exception to the number of hours she was assigned as a part-time flexible (PTF) clerk. She claimed that other PTFs with less seniority received preferential treatment with respect to the number of hours assigned, shift start times and availability of overtime.[6] In September 2010, the employing establishment allegedly hired another PTF, which appellant claimed resulted in a reduction of her own work hours.

Appellant also identified several instances where the employing establishment allegedly denied requests for official time to work on her personal EEO complaint(s). She also alleged that her employing establishment occasionally removed her from the work schedule after having requested official/EEO time.

In November 2010, a climate survey was reportedly conducted in response to complaints by coworkers regarding appellant's workplace behavior. Appellant alleged that some "Favorite" coworkers targeted her because of her prior EEO activity alleging disparate treatment and favoritism.

On January 20, 2011 the employing establishment requested that appellant undergo a fitness-for-duty (FFD) examination. Appellant's supervisor, Elias Armendariz, signed the request, and Postmaster Blankenship approved it. The FFD request was based on concern for appellant's safety and welfare. Appellant seemed to go in and out of a state of awareness and seemed confused at times. Other employees reportedly expressed concern for her safety, as well as their own.

On January 26, 2011 Dr. Norton A. Roitman, a Board-certified psychiatrist, performed an FFD examination. His findings are not part of the record.

Appellant filed an EEO complaint regarding the request for an FFD examination.

In February 2011, appellant continued to complain about the disparity in the number of hours assigned various PTFs. She claimed that her hours were severely cut despite the availability of work within her restrictions. Appellant alleged that, while other PTFs worked five days a week, the employing establishment scheduled her to work only two days a week. She also took exception to her assigned start time. Appellant preferred to start work earlier in the day because of her reported sleep apnea, chronic fatigue and sleep disturbance. She alleged that her employing establishment intentionally assigned her a later start time.

On March 30, 2011 the employing establishment offered appellant a light-duty assignment involving box mail (one hour), second notices on certified mail (two hours), and collections (one hour). The limitations included: 1 hour of continuous standing, up to 4 hours of intermittent standing, and 30 minutes of continuous driving. Appellant alleged that the employing establishment knew the offered position exceeded her physical limitations. However, she accepted the position. Appellant also took exception to the part-time (four-hour) assignment, noting that, while she was limited to four hours of continuous standing, she was capable of working an eight-hour day.

[6] Appellant alleged that her employing establishment denied overtime to certain PTFs in retaliation for having previously filed Equal Employment Opportunity (EEO) complaints.

On April 26, 2011 appellant received a notice of 30-day suspension for unacceptable conduct. On April 20, 2011 she refused Mr. Armendariz's direct order to go into the conference for an investigatory interview. Ms. Poulos, APWU Local No. 7156 president, provided a written statement regarding the April 20, 2011 incident.

On May 11, 2011 appellant received a notice of removal for unacceptable conduct -- failure to follow instructions. The removal action stemmed from an April 21, 2011 incident when appellant failed to heed Mr. Armendariz's instructions to leave the workroom floor after having already clocked out for the day. The removal was effective June 11, 2011.

In September 2011, the employing establishment unilaterally reduced appellant's April 26, 2011 30-day suspension to a 7-day suspension. It also reduced the May 11, 2011 removal action to 14-day suspension.

Appellant returned to work in October 2011.[7] During her absence, the employing establishment assigned her to the nontraditional full-time (NTFT) work schedule with weekly hours totaling 34.5. Appellant was scheduled to work six days a week from 12:15 p.m. to 6:00 p.m.[8] She requested a 7:00 a.m. start time, which the employing establishment denied.[9]

Following appellant's reinstatement, 23 of her coworkers signed an undated petition expressing concern over the employing establishment having given "an unstable person her job back." The petitioners described the work environment as "unstable and frightening." Appellant was reportedly out of control and becoming less and less stable. Her coworkers were afraid for their own safety. Appellant reportedly did not do her own job because she was too busy watching all of the other employees do their jobs to see if she could file an EEO complaint or a harassment charge against them. The petition further indicated that appellant ran "roughshod over everyone including management and [the] postmaster." Individuals reportedly witnessed "[appellant's] constant insubordination ... [offenses] for which she was fired." It was also noted that the Union had not supported appellant because there was no defense for insubordination. Even under those circumstances, upper management gave appellant her job back. Since her return to work, appellant reportedly watched certain employees, which made them

[7] On October 6, 2011 the employing establishment offered appellant a modified assignment as a clerk. She was expected to work part-time (four hours) performing dispatch and collection duties. The physical requirements of the modified clerk assignment included two to three hours lifting, bending, walking, standing and stooping. Appellant was also expected to perform two to three hours driving, sitting and twisting. Dr. Michael A. Jonak, a family practitioner, reviewed the job offer on October 13, 2011, and found it "medically unsuitable" due to the required lifting and multiple entering/exiting of the vehicle. Appellant returned to work on October 17, 2011, but it is unclear what her specific duties were at that time.

[8] The NTFT assignment was effective August 27, 2011.

[9] In a letter dated December 14, 2011, Postmaster Blankenship advised appellant that she could not approve her request for a 7:00 a.m. start time because of "legitimate business reasons." She explained that the trucks delivering the mail to the facility arrived between 7:00 a.m. and 7:15 a.m., and this mail would not be available to appellant until after her preferred start time. The postmaster further explained that an earlier start time would undermine the facility's efforts to meet its 2:00 p.m. commitment for First Class box mail. Ms. Blankenship further indicated that if the requested schedule change was for medical reasons, appellant should submit appropriate documentation for referral to the district reasonable accommodation committee (DRAC).

uncomfortable. The petitioners asked for an explanation of how outside individuals could disregard the local postmaster and local management's decisions in favor of one person who was "scaring most of the other employees." In conclusion, the petitioners expressed concern over appellant's perceived instability and requested that immediate steps be taken to correct the situation before it was too late.

Appellant alleged that Postmaster Blankenship circulated the petition. She also claimed that not all of her coworkers who signed the petition actually read it or agreed with its content. Appellant believed the postmaster coerced employees into signing the petition.

On December 2, 2011 Paul Senecal, an employing establishment labor relations manager, visited the Pahrump facility and interviewed 11 employees, 10 of whom signed the petition regarding appellant's perceived instability.[10] Mr. Senecal verified the identity of those who signed the petition and inquired as to their respective reasons for signing. Prior to the interviews, Mr. Senecal conducted a stand-up talk with employees and the postmaster regarding workplace conduct and treating employees with dignity and respect. During the discussion, 17 employees, including the postmaster, openly expressed a preference for working elsewhere, if possible.

Appellant submitted a copy of a July 20, 2012 grievance settlement wherein she received a lump-sum payment of $1,900.00.

Appellant also submitted medical evidence, which included an October 20, 2010 report from Dr. Jonathan G. Still, a Board-certified psychiatrist, who diagnosed adjustment disorder with depression and anxiety.

In a May 11, 2011 report, Dr. Jonak, who had treated appellant since 2004, noted that her multiple medical conditions had progressed over time. Appellant had a history of heart murmur since age 15 and associated chest pain. Dr. Jonak also noted that appellant was treated for cancer, diffuse myalgia, chronic fatigue, osteoporosis, sleep apnea, heel spurs and generalized anxiety disorder. He provided work restrictions with respect to appellant's various diagnoses.

Stephanie Stowman, Ph.D., a psychologist, began treating appellant on July 7, 2011. In an August 22, 2011 report, she diagnosed major depressive disorder and anxiety disorder not otherwise specified. Dr. Stowman indicated that both conditions appeared to have been aggravated by appellant's previous employment. In an October 26, 2011 report, she stated that appellant had shown slight improvement prior to her return to work in early October 2011. Since then, appellant reported a dramatic increase in anxiety and depression symptoms. Dr. Stowman reiterated that appellant's anxiety and depression appear to be aggravated by her employment. She also provided a November 2, 2011 medical certification under the Family and Medical Leave Act (FMLA).[11]

[10] At least two of the ten petitioners interviewed were identified as Union stewards.

[11] Appellant's FMLA request was ultimately denied because she had not worked sufficient hours for eligibility under FMLA.

OWCP denied appellant's claim by decision dated August 13, 2012. Appellant subsequently requested an oral hearing before the Branch of Hearings and Review, which was held on December 3, 2012.[12] She submitted additional factual and medical information, which included a September 3, 2012 report from David S. Remmert, Psy.D., a licensed clinical psychologist, who diagnosed major depressive disorder and post-traumatic stress disorder. Following the hearing, OWCP issued a January 29, 2013 merit decision affirming the prior denial of the claim. The hearing representative found that appellant had not established a compensable employment factor as the cause of her claimed condition(s).

LEGAL PRECEDENT

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.[13]

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' 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.[14] 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.[15]

An employee's emotional reaction to administrative or personnel matters generally falls outside FECA's scope.[16] Although related to the employment, administrative and personnel matters are functions of the employing establishment rather than the regular or specially assigned duties of the employee.[17] However, to the extent the evidence demonstrates that the employing

[12] In advance of the hearing, appellant requested subpoenas for 34 witnesses. All the identified individuals reportedly had personal knowledge of the issues in the claim and according to appellant the information could not be obtained by other means. On October 29, 2012 the hearing representative denied appellant's request to subpoena multiple witnesses.

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

[14] *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[15] *Lillian Cutler*, *id.*

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

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

establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[18]

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.[19] 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.[20]

ANALYSIS

The essence of appellant's complaint was that her employing establishment, Union leadership and several "favorite" employees retaliated against her because of her efforts to disclose illegal and/or unfair working conditions at the Pahrump facility. Initially, the Board finds there are no *Cutler* allegations. Appellant did not specifically attribute her claimed emotional and/or physical condition(s) to her regular or specially assigned work duties or a requirement imposed by the employment. Thus, appellant has not established a compensable employment factor under *Cutler*.[21]

Many of the alleged incidents involved scheduling of work. Appellant took exception to the number of hours of work she received in a given week, the particular duties assigned, and the assigned start time. She also identified several instances where the employing establishment allegedly denied requests for official time to work on her personal EEO complaint(s).[22] Additionally, appellant alleged that her employing establishment occasionally removed her from the work schedule after having requested official/EEO time.

An employee's frustration from not being permitted to work in a particular environment or hold a particular position is not compensable.[23] Moreover, assigning work and monitoring performance are administrative functions of a supervisor.[24] The manner in which a supervisor exercises his or her 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

[18] *Id.*

[19] *Kathleen D. Walker*, *supra* note 13.

[20] *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).

[21] *Supra* note 14.

[22] Time and attendance issues are generally not compensable absent evidence of error or abuse on the part of the employing establishment in discharging its administrative responsibilities. *See C.S.*, 58 ECAB 137, 145 (2006); *T.G.*, 58 ECAB 189, 197 (2006); *Joe M. Hagewood*, 56 ECAB 479, 488 (2005).

[23] *Lillian Cutler*, *supra* note 14.

[24] *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).

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.[25]

Appellant has not demonstrated error or abuse on the part of her employing establishment in the type of work assigned and the number of hours scheduled. She also failed to substantiate her need for an early start time due to chronic fatigue and/or sleep disturbance. While Dr. Jonak identified various work restrictions in his May 11, 2011 report, an early start time was not among the list of recommended accommodations. Furthermore, in a December 14, 2011 letter, the employing establishment identified "legitimate business reasons" for denying appellant's request for a 7:00 a.m. start time. One of the stated reasons was that the mail appellant was expected to process was unavailable at her requested start time. Appellant's allegation that her employing establishment knowingly assigned work outside her medical restrictions is unsubstantiated.

Many of the remaining alleged employment incidents are administrative in nature. As such, appellant must demonstrate error or abuse on the part of her employing establishment in order for those administrative matters to be compensable under FECA.[26]

Appellant alleged that the employing establishment and some of her coworkers improperly initiated a workplace climate survey in November 2010. Investigations that do not involve an employee's regular or specially assigned duties are not compensable absent a showing of error or abuse on the part of the employing establishment.[27] Although the record includes several references to a climate survey having been conducted, the specific reason for the survey and the survey findings are not readily apparent from the record. Consequently, appellant has not substantiated her allegations regarding the propriety of the November 2010 workplace climate survey.

Appellant also failed to establish error or abuse on the part of her employing establishment in requesting that she undergo an FFD examination in January 2011.[28] She filed an EEO complaint; however, the record does not include a final determination regarding this complaint. The mere fact that an employee filed an EEO complaint does not establish error or abuse on the part of his or her employing establishment.[29]

Appellant also challenged the April and May 2011 disciplinary actions. Both actions were premised on incidents of unacceptable workplace conduct. Reprimands, counseling sessions and other disciplinary actions are administrative matters that are not covered under

[25] *Linda J. Edwards-Delgado*, 55 ECAB 401, 405 (2004).

[26] *David C. Lindsey, Jr.*, *supra* note 17.

[27] *Beverly A. Spencer*, 55 ECAB 501, 512 (2004).

[28] The need for the FFD psychiatric evaluation was unrelated to the duties appellant was hired to perform. The FFD request was based on concern for appellant's safety and welfare. Appellant reportedly seemed to go in and out of a state of awareness and seemed confused at times, and other employees expressed concern for appellant's safety, as well as their own. Accordingly, the FFD examination is not compensable absent evidence of error or abuse on the part of the employing establishment. *Charles D. Edwards*, *supra* note 24.

[29] The complaint, by itself, does not establish that workplace harassment or unfair treatment occurred. *Id.* at 266.

FECA unless there is evidence of error or abuse.[30] In September 2011, the employing establishment unilaterally reduced appellant's April 26, 2011 30-day suspension to a 7-day suspension, and the May 11, 2011 removal action was reduced to a 14-day suspension. Appellant was ultimately reinstated in October 2011. The employing establishment's decision to reduce the severity of the sanctions is not proof of error or abuse. Appellant also noted that she received a settlement of $1,900.00. Absent an admission of fault, a settlement agreement does not establish error or abuse on the part of the employing establishment.[31] The July 20, 2012 grievance settlement does not include an admission of fault. Also, it is not specific to the April 26 and/or May 11, 2011 disciplinary actions. Accordingly, appellant has not demonstrated error or abuse with respect to either of the above-noted disciplinary actions.

Appellant also accused the postmaster and other management officials of repeatedly denying her requests for Union representation (*Weingarten* rights). However, not every workplace interaction with a supervisor or manager gives rise to a right to representation. This right is commonly associated with investigatory interviews where there is a possibility of disciplinary action.[32] Although appellant noted several instances where she was allegedly denied Union representation, she did not establish a right to representation under the particular circumstances.

Appellant also took exception to the October/November 2011 petition signed by 23 of her coworkers. The petitioners expressed their concern over appellant having been allowed to return to work. They perceived her as unstable and were afraid for their own safety. Appellant alleged that Postmaster Blankenship circulated the petition and coerced employees into signing it. On December 2, 2011 the employing establishment interviewed at least 10 of the employees who signed the petition, and none indicated that they had been coerced into signing. Although unclear from her November 18, 2011 statement, appellant likely perceived the October/November 2011 petition as a form of workplace harassment. For harassment to give rise to a compensable disability there must be evidence that harassment occurred.[33] The mere perception of harassment is not compensable.[34] Allegations of harassment must be substantiated by reliable and probative evidence.[35] The Board finds that appellant has not substantiated her various allegations of harassment, abuse, disparate treatment and bullying.

Lastly, appellant challenged the hearing representative's denial of her request for multiple (34) subpoenas. A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative.[36] The Board's function on appeal is

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

[31] *Kim Nguyen*, 53 ECAB 127, 128 (2001).

[32] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[33] *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

[34] *Id.*

[35] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991).

[36] 20 C.F.R. § 10.619.

to determine whether the hearing representative abused her discretion in granting or denying the subpoena request.[37] In requesting a subpoena, the claimant must explain why the testimony or evidence is directly relevant to the issues at hand, and also explain why a subpoena is the best method or opportunity to obtain such evidence because there are no other means by which the documents or testimony could have been obtained.[38] In denying appellant's request, the hearing representative indicated that appellant had not described the particular information the prospective witnesses would provide. Appellant merely noted that they had "personal knowledge of the issues in this claim." While she stated that this information could not be obtained by any other means, there was no evidence that written witness statements were otherwise unavailable to appellant. Under the circumstances, the Board finds that the hearing representative properly exercised her discretion in denying appellant's request for multiple witness subpoenas.

Because appellant failed to establish a compensable factor of employment, OWCP properly denied the claim without addressing the medical evidence of record.[39]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision.[40]

CONCLUSION

Absent a compensable employment factor, appellant has not established that she sustained an emotional condition in the performance of duty.

[37] *Mary Poller*, 55 ECAB 483, 489-90 (2004).

[38] 20 C.F.R. § 10.619(a)(2).

[39] *Garry M. Carlo*, *supra* note 20.

[40] *See* 5 U.S.C. § 8128(a); 20 C.F.R. §§ 10.605-10.607.

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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