United States Department of Labor
Employees' Compensation Appeals Board

R.A., Appellant	)	
and	)	**Docket No. 14-814**
	)	**Issued: August 19, 2014**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Sacramento, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 27, 2014 appellant filed a timely appeal from a September 13, 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 this case.

ISSUE

The issue is whether appellant established an emotional condition in the performance of duty.

FACTUAL HISTORY

On March 1, 2013 appellant, then a 53-year-old revenue officer, filed an occupational disease claim (Form CA-2) alleging that she sustained an emotional condition on or before

[1] 5 U.S.C. § 8101 *et seq.*

February 22, 2013. She heard her manager advise her coworkers that, because she complained about their taking a two-and-a-half hour lunch, they would be required to use personal leave to cover the absence. Appellant experienced heart palpitations, a headache and began to shake. She stopped work that day. Appellant subsequently developed stress, depression, anxiety, difficulty concentrating, difficulty speaking, blurred vision, insomnia and stomach upset. Her supervisor disagreed with appellant's account of events, stating that her name was not mentioned during the discussion about the extended lunch and that employee were granted administrative leave and did not have to use their personal leave. Appellant's supervisor emphasized that there was no mention of leave being required due to appellant's complaint.

In a March 18, 2013 statement, appellant's supervisor noted that, on February 20, 2013, appellant's coworkers took an extended lunch to celebrate an employee's birthday. On their return, the supervisor sent the employees an e-mail reminding them of the scheduled lunch hour but granting them one hour of administrative time. Appellant was not sent this e-mail as she chose not to attend the luncheon. On Friday, February 22, 2013 she was scheduled to meet with the supervisor at 9:00 a.m. to discuss deficiencies in her work performance and implementation of a performance improvement plan. Before this meeting, appellant overheard a secretary discussing with an employee how to input the one hour of administrative time for the February 20, 2013 lunch. She reported to her supervisor that she was too upset to meet with her, expressing that she raised the leave issue and was concerned that the group would be mad at her. Appellant did not appear to understand that her coworkers did not have to take personal leave.

In an April 8, 2013 letter, OWCP advised appellant of the 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 would cause the claimed emotional condition. Appellant was afforded 30 days to submit such evidence.

Appellant submitted a May 7, 2013 statement alleging a series of events during 2011 and 2012. She asserted that, after being off work from April to September 2011 due to an accident, her manager initially agreed to assign her only five cases a week, but instead tried to return her to full inventory more quickly. Appellant felt like she was being punished for being out of work. She alleged that her manager slandered her numerous times. During a September 19, 2012 meeting with her manager and another official, appellant was accused of cheating on her time reporting. She explained her actions in the case at issue, then became "very upset, was crying and shaking." Appellant alleged hostility from a new group manager in October 2012 and that higher level managers would not listen to her allegations of mistreatment. From October to December 2012, she had mandatory weekly meetings with her manager as she had failed to meet her quota of closing five cases a week. Appellant feared that she would be terminated for unsatisfactory performance. On February 21, 2013 her coworkers left for lunch at 12:30 p.m. to celebrate another employees' birthday. As the coworkers did not return by 2:00 p.m., appellant asked her manager if there was an extended luncheon. The manager responded that it was "none of [appellant's] business what the other employees were doing and [appellant] needed to get back to work." Appellant alleged that this was disparate treatment because if she had been gone for two hours, the manager would have required her to sign out and take leave.

In an October 17, 2011 e-mail, appellant advised her manager that she was assigned nine new cases on October 15, 2011, but that the "new rule" limited assignments to five cases at a time. The manager responded on October 17, 2011 that he misspoke when he advised her that she would be assigned "only five cases a week, that is on a routine basis for when [her] inventory is within range." As appellant's inventory needed to be brought up, she would be assigned six to seven cases a week. In an October 24, 2011 e-mail, she advised her manager that, after reviewing her case assignments of 15 new cases plus 2 additional matters in the past two weeks, she experienced an episode of hypertension and would seek medical care. The manager responded that he assigned a summons to be served very close to her home, that two new assignments were related to her present inventory and that the remaining assignments were low dollar and included stand-alone work. Appellant contacted another manager on November 28, 2011 alleging that she should not have been assigned more than five cases a week.

In a February 27, 2012 e-mail, appellant asserted that, an attached work roster showed that during the week of December 10, 2011 she received seven new cases; from January 26 to 30, 2012, she received six new cases; and from February 11 to 18, 2012 she received eight new cases. She stated that this violated "new guide lines" limiting assignments to five cases a week. On March 26, 2012 appellant advised a manager that she had been assigned seven new cases on March 24, 2012. The group manager replied that he would look into the matter to see if she requested cases and if that was "where they crossed." Appellant received a performance award in August 2012.

Appellant also provided her April 26 to 29, 2013 e-mails with a manager regarding use of a time and leave system while she was off work. She alleged that being made to use the system was a form of harassment and disparate treatment. The manager recommended that appellant contact a hotline set up to resolve problems with the timekeeping system.

In a February 22, 2013 note, Dr. Katie Askew, an attending Board-certified family practitioner, held appellant off work from February 25 to April 25, 2013 due to an unspecified illness. In reports from April 15 to August 8, 2013, Drs. Scott Cannon, and George Hisatomi, attending Board-certified family practitioners, diagnosed an acute stress reaction with elevated blood pressure related to being a whistleblower at work resulting in hostile work environment. They held appellant off work.[2]

In an August 20, 2013 statement, an employing establishment group manager explained that agency procedures necessitated assigning appellant more than five cases a week as she did not have a full inventory. The manager noted that all of her assignments were within employing establishment manual guidelines and that she was not given more than six cases a week. During the September 2012 meeting, a detailed review of appellant's case inventory revealed that she was not using her time productively. On October 17, 2012 appellant met with two managers to discuss her performance. The managers agreed to lower her inventory to 73 cases for three months allow her to catch up on work. Appellant's position carried a standard inventory range of 70 to 95 cases. She never had more than 72 cases assigned to her inventory from October 2012 until her leave of absence. Regarding the weekly meetings from October to

[2] Appellant also submitted an August 29, 2011 report from a nurse practitioner and a May 2, 2013 report from a therapist.

December 2012, the manager noted that appellant was removed from flexiplace as she was failing critical job elements. He noted that she refused to sign a mid-year performance evaluation in September 2012, which indicated that she failed to meet 3 of 15 critical job elements. By February 2013, appellant failed to meet 5 of the 15 elements and again refused to sign the appraisal.

By decision dated September 13, 2013, OWCP denied appellant's claim on the grounds that fact of injury was not established. It found that she established as factual, but not compensable, that she was assigned more than five cases a week after returning to work in September 2011. Appellant met with managers to discuss her case management on September 19 and October 17, 2012 and was required to meet with her manager on a weekly basis from October to December 2012. She was given a copy of her performance rating in February 2013 and her coworkers attended an extended lunch on February 21, 2013. OWCP found that these incidents concerned administrative functions of the employing establishment in work assignments, supervision, timekeeping and performance evaluations and that no error or abuse was established that would bring these incidents within the performance of appellant's duties. It further found that appellant did not submit sufficient evidence to establish her allegations of slander, hostility or disparate treatment as factual.

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 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]

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

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

[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).

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]

ANALYSIS

Appellant alleged that she sustained an emotional condition with consequential hypertension due to performance appraisals, work assignments, meetings with managers to discuss her work performance and an alleged pattern of slander, reprisals and disparate treatment. OWCP found these to be noncompensable factors. The Board must review whether the alleged incidents are covered employment factors under FECA.

Appellant attributed her emotional condition to September 19 and October 17, 2012 meetings to discuss her work performance, weekly meetings with a manager from September to December 2012 to discuss workload management and September 2012 and February 2013 performance appraisals. The Board has held that performance appraisals are administrative matters and are not compensable unless error or abuse shown.[10] Also, 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.[11] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[12] To support such a claim, a claimant must establish a factual basis by providing probative and reliable evidence.[13] The March 18 and August 20, 2013 supervisory statements clarified that the weekly meetings and the September 19 and October 17, 2012 discussions were necessary to address appellant's time and workload management as she was failing critical job elements. Also, appellant refused to sign her performance appraisals in September 2012 and February 2013. Based on the evidence of record the Board finds that the employing establishment acted reasonably. Appellant has not established error or abuse by the employing establishment regarding the meetings or performance appraisals. Therefore, she has not established the meetings or appraisals as compensable work factors.[14]

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

[9] *Marlon Vera*, 54 ECAB 834 (2003).

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

[11] *Roger W. Robinson*, 54 ECAB 846 (2003).

[12] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[13] *See Barbara J. Nicholson*, 45 ECAB 843 (1994).

[14] *Janice I. Moore*, 53 ECAB 777 (2002).

Appellant also attributed her condition to a February 22, 2013 incident in which a secretary accused her of making her coworkers take leave for an extended lunch. Appellant's supervisor explained on the claim form and in a March 18, 2013 statement that appellant misinterpreted the conversation, as the secretary did not mention her by name and appellant appeared not to understand that there were no adverse consequences to her coworkers. This incident pertains to leave use, a noncompensable administrative matter unless error or abuse is shown.[15] As appellant has not provided evidence of error or abuse and the supervisory statements provide a reasonable explanation of the incident, she has not established a compensable factor in this regard.

Appellant also attributed her condition to being assigned more than five cases a week after returning to work in September 2011. An employee's dissatisfaction with the way a supervisor performs duties or exercises discretion in assigning work is not compensable absent error or abuse.[16] In an October 17, 2011 e-mail, appellant's group manager explained that the five-case rule applied only to an employee with adequate case inventory and that appellant's assignments were below that threshold. Also, in the August 20, 2013 statement, the employing establishment explained that all of her assignments were within the employing establishment guidelines and that her case inventory was at the low end for her job description. Additionally, appellant did not submit any evidence corroborating error or abuse in the assignment of her cases. Under these circumstances, she failed to establish a compensable employment factor in this regard.

Appellant also alleged a pattern of hostility, slander and disparate treatment, including being asked to use an employee hotline to resolve a timekeeping matter in April 2013. 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.[17] Mere perceptions of harassment, retaliation or discrimination are not compensable under FECA.[18] Appellant did not submit probative evidence, such as witness statements, corroborating her allegations of hostility and disparate treatment. The absence of such documentation diminishes the validity of her contentions in this case, where there is no evidence to document her allegations. Additionally, the March 18 and August 20, 2013 supervisory statements generally refuted appellant's assertions and explained that she was not treated differently from other employees. The Board also finds that it was reasonable for a manager to direct her to resolve a timekeeping problem by using a resource hotline designated to address such problems. As appellant has not established her allegations as factual, she has not established a compensable employment factor under FECA with respect to the claimed hostility, slander and disparate treatment.

[15] *James P. Guinan*, 51 ECAB 604, 607 (2000).

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

[17] *Marlon Vera*, *supra* note 9.

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

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.[19] Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 13, 2013 is affirmed.

Issued: August 19, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[19] 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).