

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

_____)
L.B., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
Nashville, TN, Employer)

_____)

Docket No. 14-1607
Issued: December 11, 2014

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 15, 2014 appellant filed a timely appeal from an April 7, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated November 21, 2013, the Board set aside an October 31, 2012 merit decision denying appellant's emotional condition

¹ 5 U.S.C. § 8101 *et seq.*

claim.² The Board discussed her allegations of discrimination at the employing establishment and retaliation after she filed a discrimination claim but found that OWCP had failed to obtain a statement from the employing establishment addressing her allegations in accordance with its procedures. The Board remanded the case for OWCP to further develop the factual evidence. The facts and circumstances as set forth in the Board's prior decisions are hereby incorporated by reference. The relevant facts from the prior decision will be briefly summarized.

Appellant related that beginning September 2001 she was part of an experiment conducted by the employing establishment. She and her coworkers were unable to keep up with the workload, which included ordering, picking up, delivering, and scanning supplies. The workload increased in 2005 when another facility transferred surgical instruments to her location. Performing reconciliations took a lot of time and interfered with other duties. Beepers and telephones rang all the time. Due to her training, appellant believed that she should have received a promotion to oversee sterilization but the employing establishment hired a Caucasian nurse instead. She was subjected to racial slurs and the employing establishment removed her when she was on sick leave. At the July 16, 2012 telephonic hearing, appellant contended that her workload was heavier than her Caucasian coworkers and that it was impossible to complete her duties. A supervisor referred to her as "black" in front of her first name whenever he saw her. After the war began it was not possible to get all the work done because the state abolished its program and sent veterans to the employing establishment. Appellant worried that there were contaminated eye drops on the shelf. After she began working the clinics, the employing establishment locked the door to her office.

Following remand, by letter dated January 3, 2014, OWCP requested that the employing establishment provide comments from a supervisor on the accuracy of appellant's allegations.

In a decision dated March 31, 2011, received by OWCP on February 27, 2014, the Merit Systems Protection Board (MSPB) affirmed the employing establishment's action in removing appellant from employment on June 18, 2010 for failing to follow the instructions of her supervisor; being absent without leave, and failing to follow the proper procedures in requesting leave. It further found that she had not established that the employing establishment discriminated against her based on race or retaliated against her for being a whistleblower.

By letter dated February 26, 2014, Jacqueline C. Wisner, a workers' compensation manager, noted that appellant had not requested any accommodations due to stress. Appellant had received excellent performance ratings and that Ms. Wisner was not aware of any conflicts she had with coworkers. Ms. Wisner related that appellant's supervisors would have taken action if she had complained of racial discrimination. In October 2005 appellant filed an Equal Employment Opportunity (EEO) complaint alleging that workloads differed based on race and gender, but the complaint was dismissed as untimely. On October 2006 she filed a civil action which was subsequently administratively closed because she did not participate in a deposition. Ms. Wisner questioned the timeliness of appellant's claim as she became aware of her condition in

² Docket No. 13-552 (issued November 21, 2013). On December 29, 2011 appellant, then a 52-year-old supply distribution clerk, filed an occupational disease claim alleging that she sustained anxiety, depression, post-traumatic stress disorder, insomnia and flashbacks due to racial discrimination and retaliation by the employing establishment after she filed a complaint with the Equal Employment Opportunity Commission.

March 2006 but did not provide notice until October 2011.³ She noted that the employing establishment was not conducting an experiment but instead had reorganized.

In a telephone call dated March 14, 2014, OWCP informed the employing establishment that it had not addressed whether appellant was assigned additional duties. It noted that decontamination and sterilization of equipment were not included in her job description and thus appeared to be added duties.

On March 17, 2014 Ms. Wisner advised that appellant's duties as a medical supply technician included equipment sterilization and decontamination. She maintained that the reorganization and centralization of work that started in 2000 and 2001 and military action during this time did not result in an increased workload.

By decision dated April 7, 2014, OWCP denied appellant's emotional condition claim.⁴ It found that she had not established any compensable employment factors. OWCP determined that appellant had not established that she was assigned additional duties during a realignment of job classifications. It further determined that she performed sterilization and decontamination procedures prior to the agency realignment and these actions did not constitute additional duties. OWCP also found that appellant had not submitted any evidence to support her allegations of racial discrimination.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional 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 On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁶

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.⁷ However, the Board

³ Appellant's claim is timely as she continued to be exposed to the work factors alleged to have caused her condition until 2010, when she was removed from employment. *See* 5 U.S.C. § 8122(b) and *M.R.*, Docket No. 14-793 (issued October 7, 2014); *see generally*, *Linda J. Reeves*, 48 ECAB 373 (1997).

⁴ OWCP initially issued its decision on March 18, 2014 to an incorrect address. It thus reissued the decision on April 7, 2014.

⁵ 5 U.S.C. § 8101 *et seq.*; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁷ *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.⁸ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.⁹

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁰ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.¹¹ The issue is whether the claimant has submitted sufficient evidence under FECA to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹² The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by OWCP and the Board.¹³

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or 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 and which working conditions are not deemed factors of employment and may not be considered.¹⁴ If a claimant does implicate 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.¹⁵

⁸ See *William H. Former*, 49 ECAB 324 (1998).

⁹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁰ See *Michael Ewanichak*, 48 ECAB 364 (1997).

¹¹ See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

¹² See *James E. Norris*, 52 ECAB 93 (2000).

¹³ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁵ *Id.*

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of several employment incidents and conditions. OWCP denied her claim on the grounds that she did not establish any compensable employment factors. The Board must initially review whether the alleged incidents and conditions of employment are compensable employment factors under the terms of FECA.

Appellant attributed her emotional condition to racial discrimination, retaliation, and her removal from work. She also maintained that she was overworked, especially after 2005 when another facility transferred surgical instruments to her location. Appellant asserted that she was unable to keep up with the workload and that her coworkers used sick leave to keep up with the demands. The Board has held that overwork, when substantiated by sufficient factual information to corroborate the claimant's account of events, may be a compensable factor of employment.¹⁶ The employing establishment challenged appellant's allegation that she was unable to keep up with the workload. It maintained that she had consistently performed equipment sterilization and that the reorganization and military action in 2000 and 2001 did not result in an increased workload. The employing establishment further advised that appellant received excellent performance ratings. Appellant has not submitted sufficient evidence substantiating her claim of an increased workload.¹⁷ Thus, she has not established overwork as a compensable employment factor under *Cutler*.

Appellant attributed her condition, in part, to error and abuse in administrative matters by her supervisor and management. She alleged that she was erroneously removed while on sick leave and denied a promotion even though she had more experience than her coworkers. Appellant also contended that the employing establishment did not have adequate safety procedures in place, locked the door to her office and allowed contaminated eye drops on the shelves.

In *Thomas D. McEuen*,¹⁸ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA. Such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the facts surrounding the administrative or personnel action established error or abuse by employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁹ In a decision dated March 31, 2011, the MSPB affirmed the action taken by the employing establishment in removing appellant for failing to follow

¹⁶ See *R.D.*, Docket No. 13-2182 (issued June 4, 2014); *Bobbie D. Daly*, 53 ECAB 691 (2002).

¹⁷ See *R.D.*, *id.*

¹⁸ See *Thomas D. McEuen*, *supra* note 7.

¹⁹ See *M.D.*, 59 ECAB 211 (2007); *Richard J. Dube*, 42 ECAB 916 (1991).

instructions, being absent without leave, and failing to properly request leave. Appellant has not submitted any evidence to establish as factual her allegations of error or abuse by her employer in matters involving leave, failing to promote her or removing her from work.²⁰ She has not factually established that the shelves of the employing establishment contained contaminated eye drops or other safety violations. Consequently, appellant has not established error or abuse by the employing establishment.

Appellant additionally attributed her condition to racial discrimination and reprisal. She maintained that the employing establishment promoted a Caucasian coworker and not her based on race and that she had more work to do than her Caucasian coworkers. Appellant further maintained that she was subject to racial slurs, including being referred to by a supervisor as “black” in front of her first name. She noted that she had complained in 2005 about the lack of patient care and the need for oversight regarding the sterilization of instruments. Appellant alleged that she was removed as reprisal. Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.²¹ A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.²² The employing establishment noted that appellant’s supervisor would have dealt with complaints of racial discrimination. Appellant had filed an EEO complaint alleging that the workloads differed based on race but it was denied as untimely. A civil action filed in 2006 was closed because she did not attend a deposition. The MSPB, in its February 27, 2013 decision, found that appellant had not established discrimination based on race or reprisal for being a whistleblower. Appellant has not factually established her allegations and thus she has not established a compensable work factor.

As appellant failed to establish a compensable factor of employment, OWCP properly denied her claim.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish an emotional condition.

²⁰ See *V.W.*, 58 ECAB 428 (2007); *Judy L. Kahn*, 53 ECAB 321 (2002) (actions of the employing establishment in matters involving the use of leave are generally not considered compensable factors of employment as they are administrative functions of the employer and not duties of the employee); *Jeral R. Gray*, 57 ECAB 611 (2006); (disciplinary actions are an administrative function of the employer and not compensable unless the evidence discloses error or abuse by the employer); *Donald W. Bottles*, 40 ECAB 349 (1988) (denials of a promotion is not a compensable employment factor absent error or abuse as it constitutes a claimant’s desire to work in a different position).

²¹ *T.G.*, 58 ECAB 189 (2006); *Doretha M. Belnavis*, 57 ECAB 311 (2006).

²² *C.W.*, 58 ECAB 137 (2006); *Robert Breeden*, 57 ECAB 622 (2006).

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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