

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

C.E., Appellant)

and)

DEPARTMENT OF LABOR, OCCUPATIONAL)
HEALTH & SAFETY ADMINISTRATION,)
Cleveland, OH, Employer)

Docket No. 13-1860
Issued: January 17, 2014

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 7, 2013 appellant, through her attorney, filed a timely appeal from a July 2, 2013 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.

On appeal, counsel asserted that OWCP's August 20, 2012 decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 27, 2012 appellant, then a 51-year-old safety and occupational health specialist, filed a notice of occupational disease (Form CA-2) claiming stress, depression, migraines and a consequential worsening of unspecified health conditions due to work factors on or before October 15, 2011. She submitted a September 17, 2012 Form CA-2 revising the date of injury to August 6, 2012. Appellant stopped work on September 13, 2012.

In a September 7, 2012 letter, the employing establishment controverted appellant's claim. Appellant had filed a prior emotional condition claim under File No. xxxxxx364 for stress related to a performance evaluation on October 14, 2011. OWCP denied the claim on February 9, 2012 finding no compensable factors of employment.²

In a September 21, 2012 letter, OWCP advised appellant of the evidence needed to establish her claim. It requested a detailed statement describing the employment incidents alleged to have caused the claimed emotional condition, and a physician's statement supporting a causal relationship between such incidents and the anxiety. Appellant was afforded 30 days to submit additional evidence.

Appellant submitted a September 27, 2012 statement in which she attributed her emotional condition to new supervisors engaging in a pattern of harassment and disparate treatment. She alleged discrimination due to race, age, sex and disability and retaliating against her for filing an Equal Employment Opportunity (EEO) grievance.³ Appellant's supervisors criticized her writing, attempted to assign her work outside her area of expertise, required her to submit leave slips for taking an extra 90 minutes for lunch,⁴ disliked her use of the Family and Medical Leave Act (FMLA), revoked her telework privileges and supervisory responsibilities, and reassigned her to complete a case on deadline in February 2012 instead of attending a previously scheduled training session. Appellant also attributed her condition to Aaron Priddy, a supervisor, questioning her in November 2011 as to why she did not record injured worker contacts on case diary sheets, while Ms. Weis, a supervisor, only gave her a time off award for completing two significant cases in April and May 2012. She addressed an April 2012 letter of

² In a September 27, 2012 statement, appellant attributed her condition in part to the October 14, 2011 performance rating. She acknowledged that OWCP's February 9, 2012 decision in File No. xxxxxx364 found that the October 14, 2011 performance rating was not a covered factor of employment as the employing establishment documented appellant's misconduct, tardiness and failure to follow instructions. By December 17, 2012 decision under the current claim, OWCP found that the October 14, 2011 performance appraisal had already been adjudicated under File No. xxxxxx364 and would not be addressed under the current claim.

³ Appellant submitted grievance documents in which she alleged discrimination and disparate treatment by the employing establishment due to physical disability, gender, age and race.

⁴ In a March 11, 2011 e-mail to appellant, Supervisor Julie Weis asked appellant to specify the type of leave she wished to use for work absences.

reprimand that was later rescinded⁵ and being placed on a performance improvement plan on June 4, 2012. Appellant also submitted medical evidence.⁶

In statements dated September 20 and 25, 2012, two of appellant's coworkers asserted that she was an exemplary investigator. They noted that, after a longtime supervisor retired, new management gave appellant undeserved low ratings.

Mr. Priddy provided a November 28, 2012 statement generally refuting appellant's allegations. He noted that she required substantial supervisory assistance on the two significant cases. Appellant took extended lunch breaks on September 16 and 28, 2011 without permission. Mr. Priddy explained that the June 2012 performance improvement plan was necessary to help appellant correct demonstrated deficiencies in work quality and time management. When he questioned her in November 2011 about her failure to enter worker contact information on case tracking sheets, she initially responded that workers did not return her calls. Appellant then admitted that she had not attempted to contact them.⁷

By decision dated December 17, 2012, OWCP denied appellant's claim on the grounds that fact of injury was not established. It accepted as factual that Mr. Priddy questioned appellant in November 2011, placed her on a performance improvement plan, and that supervisors reviewed her case writing. OWCP found that these work factors were not compensable as they concerned administrative functions and no error or abuse was shown. Mr. Priddy provided a detailed explanation of appellant's performance deficiencies and the need for the performance improvement plan. OWCP further found that appellant did not establish as factual that Ms. Weis harassed her; that the April 2011 letter of reprimand was rescinded due to error; that she was subjected to disparate treatment or retaliation for filing an EEO grievance, or that she was assigned work beyond her level of training. It found that appellant did not submit sufficient evidence to substantiate any of her allegations. The coworker statements were too vague to establish any of appellant's allegations as factual.

In a January 4, 2013 letter, counsel requested a telephonic hearing, held on April 15, 2013. He contended that there was no final decision regarding appellant's EEO grievance. Counsel asserted that appellant was overworked from February 2011 to August 2012 as she was the only compliance, health and safety officer on her team whereas other inspection teams had three. He contended that appellant's average case completion time was 95 days whereas the office average was 42.2 days because she had to perform the work of two safety

⁵ In an April 22, 2011 "official reprimand," the employer asserted that appellant was late for meetings on June 11, September 24 and October 20, 2010 and February 7, 2011, reported late for officer of the day duty on October 25 and 26, 2010, reported late for training on November 23, 2010, used leave without pay in late 2010, took five hours to have recall service performed on her government vehicle on November 2, 2010, and that there was a general decline in the quality of her work. Ms. Weis appended an April 20, 2011 supervisory diary documenting the incidents of tardiness. In an October 3, 2011 e-mail, Mr. Priddy acknowledged that the letter of reprimand was rescinded.

⁶ Dr. Latha R. Pillai, an attending Board-certified internist, submitted reports from August 1 to October 29, 2012 finding appellant totally disabled for work due to depression caused by supervisory harassment. She noted that appellant's stress aggravated lupus, chronic asthma and migraines. Paula M. English, an attending psychologist, noted work stress and diagnosed depression in August 24 and September 24, 2012 reports.

⁷ In an October 31, 2012 letter, the employer forwarded Mr. Priddy's statement that appellant received a minimally satisfactory performance rating on October 14, 2011 because of the "quality and timelines of her work."

specialists. From June 18 to 22, 2012, Mr. Priddy returned six of appellant's cases to her for substantial revision in addition to her regular work. Appellant was only able to complete two of the cases by June 22, 2012.⁸

Appellant submitted a January 26, 2012 EEO investigative report in which the supervisors refuted her allegations of harassment, disparate treatment, retaliation or discrimination. Regarding the April 25, 2011 reprimand, area director Howard Eberts asserted that appellant had a pattern of not communicating with her supervisor regarding when she would be late to work or hand in case files late. Ms. Weis provided an April 2011 diary tracking appellant's omissions or errors in case preparation, tardiness and unauthorized absences. Mr. Priddy noted that employees were allotted 30 minutes for lunch and that multiple administrative and union contract provisions required leave use for any additional absence. Regarding the allegation of overwork, appellant provided an October 17, 2011 e-mail from Mr. Priddy scheduling two of appellant's coworkers for officer-of-the-day assignments, noting that "we're short-handed this week (an understatement for sure)" and that coworkers would have to assist each other.⁹

In a May 10, 2013 letter, the employer asserted that appellant's account of events was inaccurate. Mr. Priddy refuted counsel's allegations regarding harassment, discrimination, error, abuse and overwork. He submitted case processing data and summary tables for appellant's division, showing that she took substantially longer to complete cases although she had a significantly lighter workload than other compliance officers in the same division. Mr. Priddy contended that appellant's allegation of being made to correct six new cases between June 18 to 22, 2012 was not accurate. He enumerated five cases that he had given appellant to correct before June 18, 2012 that required only minor revisions.

By decision dated and finalized July 2, 2013, an OWCP hearing representative affirmed the December 17, 2012 decision. The hearing representative found that appellant's allegations concerned the administrative functions of assignment of work, a desire to perform particular work duties, leave use, supervisory methods and disciplinary action. As appellant did not submit evidence to establish that her managers committed error or abuse in carrying out the administrative functions, the alleged incidents regarding job discussions, the performance improvement plan, case assignments and leave use were found noncompensable. Additionally, the hearing representative found that appellant did not submit evidence establishing her allegations of harassment, retaliation or discrimination as factual.

⁸ Appellant submitted additional medical evidence addressing depression, systemic lupus erythematosus, sinus problems and migraine headaches.

⁹ Appellant also submitted copies of her time and attendance records from June 2010 to February 2011, a Learning Link course history, March 15 and 17, 2011 e-mails from Ms. Weis explaining that appellant did not ask permission to telework on March 14, 2011, e-mails from Ms. Weis and Mr. Priddy from October 2010 to June 2011 regarding appellant's failure to comply with time and attendance procedures and a parking policy, December 29, 2010 and January 29, 2011 e-mails from Ms. Weis explaining errors and omissions in appellant's cases, February 3 to 23, 2011 e-mails from Ms. Weis reassigning appellant from a scheduled training session to complete a case before a statute of limitations expired, and Mr. Priddy's June 26, 2012 memorandum of a June 19, 2012 performance improvement plan meeting, detailing multiple deficiencies in appellant's case investigation and writing.

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.¹⁰ 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.¹¹

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.¹² To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.¹³ 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.¹⁴

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.¹⁵ 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.¹⁶

ANALYSIS

Appellant alleged an emotional condition due to a number of employment incidents which OWCP found to be noncompensable. She attributed her stress and depression, in part, to an April 2012 disciplinary letter that was later rescinded, and a June 2012 performance improvement plan. Disciplinary actions including oral reprimands, discussions or letters of warning for conduct pertain are noncompensable, administrative actions unless the employee shows management acted unreasonably.¹⁷ To support such a claim, a claimant must establish a

¹⁰ *Joe D. Cameron*, 41 ECAB 153 (1989).

¹¹ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

¹² *Lillian Cutler*, 28 ECAB 125 (1976).

¹³ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹⁴ *Effie O. Morris*, 44 ECAB 470 (1993).

¹⁵ *See Norma L. Blank*, 43 ECAB 384 (1992).

¹⁶ *Marlon Vera*, 54 ECAB 834 (2003).

¹⁷ *Ruth S. Johnson*, 46 ECAB 237 (1994).

factual basis by providing probative and reliable evidence.¹⁸ The Board has held that a subsequent reduction or rescission of a disciplinary action by itself does not establish error or abuse.¹⁹ Therefore, the rescission of the April 2012 letter of reprimand does not establish that the letter was issued in error. Mr. Priddy and Ms. Weis, appellant's supervisors, and Mr. Eberts, an area director, detailed a pattern of chronic time management issues and deficiencies in case writing. In particular, Mr. Priddy explained that the performance improvement plan was necessary to help appellant correct deficiencies in case quality and time management. Based on the evidence of record, the Board finds that the employing establishment acted reasonably in issuing both the April 2012 letter of reprimand and the June 2012 performance improvement plan. Appellant did not submit evidence establishing employing establishment error or abuse. Therefore, these disciplinary matters are not compensable work factors.²⁰

Appellant also attributed her emotional condition to being denied telework. The Board has held that self-generated frustration arising from not being allowed to work in a particular position or to hold a particular job is not compensable under FECA.²¹ Appellant did not submit evidence indicating that the employing establishment erred by denying telework. She did not establish a compensable employment factor in this regard.

Appellant also contended that she developed stress and depression because Ms. Weis and Mr. Priddy criticized her work and failed to reward her for completing significant cases; however, an employee's dissatisfaction with the way a supervisor performs duties or exercises discretion in assigning work is not compensable absent error or abuse.²² As appellant did not submit corroborating evidence establishing error or abuse, she failed to establish a compensable employment factor in this regard.

Appellant attributed her condition to leave use for extended lunch breaks and what she perceived as the employing establishment's negativity toward her use of FMLA leave. Leave use is a noncompensable administrative matter unless error or abuse is shown.²³ Appellant did not submit evidence demonstrating employing establishment error or abuse regarding leave issues. Also, in his April 3, 2013 statement, Mr. Priddy explained that appellant's extended lunch absences required submission of leave slips according to administrative regulations and union contract provisions. Based on the record, the Board finds that appellant has not established a compensable employment factor regarding the use of leave.

Appellant argued that she sustained stress and depression because supervisors criticized the way she wrote her cases, attempted to assign her work which she asserted was not within her area of expertise, reassigned her to complete a case instead of attending training and revoked her supervisory duties. These allegations concern the assignment of work or the monitoring of work

¹⁸ See *Barbara J. Nicholson*, 45 ECAB 843 (1994).

¹⁹ *Paul L. Stewart*, 54 ECAB 824 (2003); *Mary L. Brooks*, 46 ECAB 266, 274 (1994).

²⁰ *Janice I. Moore*, 53 ECAB 777 (2002).

²¹ *Lori A. Facey*, 55 ECAB 217 (2004); see *Katherine A. Berg*, 54 ECAB 262 (2002).

²² *Donney T. Drennon-Gala*, 56 ECAB 469 (2005); *Linda J. Edward-Delgado*, 55 ECAB 401 (2004).

²³ *James P. Guinan*, 51 ECAB 604, 607 (2000).

activities, are an administrative function of the employing establishment not compensable absent error or abuse.²⁴ The Board notes that in his November 28, 2012 statement, Mr. Priddy noted that appellant was provided extensive supervisory guidance in completing complex cases. Additionally, appellant did not submit evidence indicating that it was unreasonable for supervisors to request that she complete a case before a statute of limitations expired rather than attend training. Also, she did not demonstrate that she was actually assigned work or made to perform duties beyond her training or that her work was unreasonably monitored. Under the circumstances of the case, the Board finds that appellant has not established error or abuse regarding the assignment of work. Therefore, she has not established a compensable employment factor in this regard.

Appellant also attributed her emotional condition to a pattern of harassment, discrimination and reprisals based on age, race, gender, disability and filing an EEO grievance. 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.²⁵ Mere perceptions of harassment, retaliation or discrimination are not compensable under FECA.²⁶ 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, the supervisory statements of record refute 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 harassment, discrimination and reprisals.

In support of her April 15, 2013 hearing request, appellant newly attributed her emotional condition to overwork, in particular being assigned six case revisions in addition to her regular assignments from June 18 to 22, 2014. Mr. Priddy negated appellant's account of events in two May 2013 memoranda, providing detailed statistical information showing that appellant had less work assigned to her than other officers but completed it at a much slower rate. Also, he did not assign appellant six major revision cases on June 18, 2014. Rather, Mr. Priddy asked appellant to complete five minor case corrections prior to June 18, 2014, but appellant only completed two of them by June 22, 2014. The Board finds that in view of Mr. Priddy's statements and the lack of evidence corroborating her allegations, appellant has not established her allegations of overwork as factual.

On appeal, counsel contends that OWCP's July 2, 2013 decision is "contrary to fact and law." As set forth above, appellant did not submit evidence substantiating any compensable factor of employment. Therefore, she did not meet her burden of proof in establishing that she sustained an emotional condition in the performance of duty as alleged.

²⁴ *Donney T. Drennon-Gala, supra note 22; Linda J. Edward-Delgado, supra note 22; Peter D. Butt Jr., 56 ECAB 117 (2004).*

²⁵ *Marlon Vera, supra note 16.*

²⁶ *Kim Nguyen, 53 ECAB 127 (2001).*

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.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 2, 2013 is affirmed.

Issued: January 17, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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