United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 13-1939**
	)	**Issued: March 18, 2014**
DEPARTMENT OF THE ARMY, MADIGAN ARMY MEDICAL CENTER, Tacoma, WA, Employer	)	

Appearances:
Howard L. Graham, Esq., 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 26, 2013 appellant, through her representative, filed a timely appeal from the July 3, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her emotional condition claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision.

ISSUE

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

FACTUAL HISTORY

On July 23, 2012 appellant, a 48-year-old statistical assistant, filed an occupational disease claim alleging that her depression and anxiety were a result of her federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

She encountered numerous problems at work with supervisors and the violation of her privacy rights. Appellant had a hard time complying with training requirements for the Health Insurance Portability and Accountability Act (HIPAA) of 1996, and completing her tasks on time. She first became aware of her condition on or about April 1, 2010 and first realized that it was caused or aggravated by her employment on or about January 5, 2011.

In an addendum to her claim, appellant itemized the reasons she was discriminated against:

> (1) She had been off work for eight months due to emotional problems, and when she returned on November 30, 2010, John Mares, the HIPAA privacy officer, attempted to make her finish HIPAA training and complained to Lieutenant Colonel (LTC) Saville, Chief of the Patient Administration Division.
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> (2) Appellant was off work due to emotional problems beginning November 30, 2011, and when she returned on January 27, 2011, the employing establishment did not provide a functional work station. She was isolated in a single office.
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> (3) The employing establishment moved her from her prior work space because her coworkers allegedly "feared" her due to her emotional condition.
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> (4) On January 27, 2011 an Army psychiatric nurse interviewed her in a public hallway when the military police escorted her due to her alleged anger at the Army's failure to accommodate her.
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> (5) The supervisor stated that she could have terminated appellant due to her emotional outbreak on January 27, 2011.
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> (6) The supervisor told others that appellant would not return to work after November 30, 2011.
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> (7) When appellant did return, the supervisor, knowing that appellant had emotional issues, added to her workload and deliberately caused her stress by asking her to handle 30 percent of the coding for the unit.
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> (8) LTC Saville repeatedly called appellant at home following duty hours after appellant asked her to stop.
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> (9) The supervisor retaliated by generating false charges and telling appellant that the Army could terminate her if it could not accommodate, "thus intimidating the EEO [Equal Employment Opportunity] process rights of the complainant."
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> (10) The employing establishment retaliated by filing a Notice of Proposed Termination on March 4, 2011, three weeks after appellant filed an EEO complaint on February 12, 2011 against John Mares.

Appellant advised OWCP to see her EEO e-mails to Susan Nichols on February 12, 2011 and her doctor's letter for additional details.

Appellant's representative presented a similar listing of events that caused appellant stress: reasonable accommodation was not provided on January 27, 2011; appellant was immediately told she was delinquent in her HIPAA training; she was denied access to necessary files; she was retaliated against when her supervisor caused her to be forcibly removed from the work site on January 27, 2011 and taken to the psychiatric ward for medical screening, followed by misconduct and misdemeanor charges; her supervisor called 911 on March 12, 2011 and sent the sheriff's deputies to appellant's home at night, causing great emotional distress; she was taken to Madigan Army Hospital on March 27, 2011, where a psychiatric evaluation was conducted in the hallway with numerous persons present, violating her HIPAA and privacy rights; she was retaliated against on May 24, 2011 when the employing establishment misrepresented on a Notice of Personnel Action that appellant's resignation was based on receipt of notice of proposed termination for misconduct and offensive language when, in fact, her physicians had recommended she resign.

On August 24, 2012 Kathryn L. Pegum, appellant's supervisor, responded that the employing establishment did not concur with any of the allegations made in appellant's claim or addendum. "While we do not dispute that claimant may suffer from a mental condition of some form or another such that she is not fit for employment, we dispute the allegation that it was brought about in whole or in part by her work for the Army of Madigan Healthcare System." Ms. Pegum explained that appellant had been intermittently unable to control her temper in the workplace over the past 12 years. "She has had numerous outbursts which have, quite frankly, frightened her supervisors and coworkers." There were numerous conduct problems, many of which were bizarre. Appellant was formally disciplined on several occasions. Some of the disturbances resulted in calls to the police. Appellant had attempted suicide and made threats to kill herself such that supervisors had taken her to the emergency room, made calls to her house, and made calls to the police to have them check on her.

The supervisor noted that the employing establishment had made every attempt to accommodate appellant's condition, but appellant continued to disrupt the workplace with uncontrolled emotional outbursts, foul language and suicide threats. Ms. Pegum explained that they listened to every excuse and tried every suggestion, except allowing her to work from home. In the end the only accommodation that would have worked was to tolerate her frequent outbursts, "and that, for the sanity of her fellow employees and the overall safety of the workplace, we could not do." Appellant's removal was proposed twice. The first time she was allowed to return under another supervisor in a different office, but no sooner had she begun work when another incident occurred, the police were called, and her removal was again proposed. "If the Agency can be faulted for anything, it was that it should have acted sooner to terminate the employer/employee relationship."

Ms. Pegum directly addressed the incidents appellant cited in her claim and addendum. She stated that appellant was asked to complete her annual HIPAA training when she returned to work on November 20, 2010. Appellant became upset with the HIPAA officer. Ms. Pegum authorized an additional two weeks, but appellant was hospitalized for several days and went on leave to Phoenix without completing the training. This generated a routine e-mail from the HIPAA officer advising that appellant's computer access would be shut off unless she completed the training. When appellant returned to work on January 4, 2011, her computer was still

working. The following day, the supervisor asked appellant to complete the training as soon as possible. Appellant again left on sick leave and was again hospitalized.

Ms. Pegum stated that when appellant returned to work, she did discuss the possibility of adding some coding duties, but it was never presented as something that was going to happen. It was simply discussed as an option to allow her to develop new skills that she could fall back on when her only duty -- preparing a monthly report -- went away.

Appellant requested various accommodations before returning to work. The third-line supervisor approved each of them on January 21, 2011, except telework. Appellant was given a new office in a remote location and a new supervisor. She had difficulty getting her office key to work, started swearing and using foul language and threatened to commit suicide. Appellant slammed the door in the handicap accommodation officer's face. The police were again called to quell the disturbance, and the situation was defused only when appellant agreed to go to the emergency room. Appellant's removal was again proposed, but prior to a decision on that proposal, she resigned. Criminal charges filed for her conduct on January 27, 2011 were dismissed after she resigned.

Ms. Pegum rebutted appellant's allegation that her privacy rights were violated. She noted that an investigation found that appellant's allegation could not be substantiated, and an audit by the hospital HIPAA privacy officer found no violation.

Ms. Pegum denied that the employing establishment conducted any psychiatric examination of appellant in a hallway on January 27, 2011. Appellant voluntarily went in an ambulance to the emergency room in lieu of being arrested. "She may have been asked some basic question when she arrived at the ER to learn why she was there and ensure that she was given the right treatment." But Ms. Pegum was not aware that appellant ever filed a HIPAA complaint over it.

Ms. Pegum stated that appellant's allegations of discrimination and reprisal had no merit. The complaints were investigated, but appellant chose not to attend a fact-finding conference in June 2012, and the investigation was currently on hold because she claimed she was unable to answer questions regarding her complaint. "The EEO complaints cover the same matters discussed in this letter."

Concluding her statement, Ms. Pegum noted:

> "The bottom line here from my perspective is that the [employing establishment] did not cause or contribute to claimant's mental condition that renders her unfit to work. It existed or was set in motion before she became employed or by events that occurred outside the workplace. We simply tolerated the condition and tried to accommodate it. If anything we delayed the onset by our toleration."

OWCP received a number of statements regarding appellant's behavior, as well as disciplinary memoranda and correspondence advising appellant that her privacy allegations could not be substantiated. The record contains a June 2003 settlement agreement on appellant's grievance over her suspension for offensive language and inappropriate comments in the workplace.

In a decision dated December 17, 2012, OWCP denied appellant's claim for workers' compensation benefits. It found that she had failed to establish any compensable factors of employment. A handful of incidents were established but were not found as compensable.[2] The rest of appellant's allegations were not substantiated by the evidence.

Following a telephone hearing before an OWCP hearing representative, OWCP received a response from the employing establishment that appellant's testimony was misleading or contrary to the established facts.

Appellant's representative argued that appellant had established 10 compensable employment factors.[3] These included an erroneous personnel decision to terminate appellant on June 25, 2010; stress derived from the frustration of performing her everyday duties, as appellant had complained of the requirement to finish statistics and the increased workload of coding; failure to accommodate; violation of privacy rights; frequent call to her home after work by supervisors; sending the police to her home; the proposal to remove her on March 4, 2011; abuse of process for coercing her to the emergency room and filing criminal charges and misconduct charges; misrepresenting the reason for her retirement; and retaliation by delaying the processing of appellant's EEO complaints.

In a decision dated July 3, 2013, the hearing representative affirmed the denial of appellant's claim for workers' compensation benefits. The hearing representative found that she did not meet her burden to establish a compensable factor of employment.

Appellant's representative contends on appeal that the hearing representative's decision ignored a number of documents, misstated the facts, and was not supported by substantial evidence.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.[4]

When an employee experiences emotional stress in carrying out her employment duties or has fear and anxiety regarding her ability to carry out her duties, and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability resulted from her emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of her work.

[2] Appellant was taken to Madigan Army Hospital on January 27, 2011. The employing establishment filed misconduct charges due to the January 27, 2011 incident. The employing establishment informed appellant that she was delinquent in her HIPAA training, and LTC Saville was notified. Access to her computer was taken away for failure to comply with the training policy. Supervisors made calls to appellant's house and the police to check on her. The first-line supervisor discussed with appellant the idea of adding coding duties.

[3] Appellant argued eight factors during the telephone hearing.

[4] 5 U.S.C. § 8102(a).

By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation because they are not found to have arisen out of employment, such as when disability results from an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.[5]

Workers' compensation does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.[6] The Board has held that actions of an employer which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under FECA, but there must be some evidence that harassment or discrimination did in fact occur. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[7]

Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[8] The primary reason for requiring factual evidence from the claimant in support of her allegation 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.[9]

It is well settled that an employee's reaction to supervision is not a compensable factor of employment under *Lillian Cutler*.[10] Complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by FECA. This principle recognizes that a

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[5] *Lillian Cutler*, 28 ECAB 125 (1976).

[6] *Thomas D. McEuen*, 42 ECAB 566, 572-73 (1991).

[7] *See Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

[8] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

[9] *Paul Trotman-Hall*, 45 ECAB 229 (1993) (Michael E. Groom, Alternate Member, concurring).

[10] *Reco Roncaglione*, 52 ECAB 454 (2001) (disagreement with the associate warden held not compensable, whether viewed as a disagreement with supervisory instructions or as perceived poor management); *Robert Knoke*, 51 ECAB 319 (2000) (where the employee attributed his emotional injury to the manner in which his supervisor spoke to him about undelivered mail, the Board found that a reaction to the instruction itself was not compensable, as work assignments given by supervisors in the exercise of supervisory discretion are actions taken in an administrative capacity and as such, are outside the coverage of FECA); *Frank A. Catapano*, 46 ECAB 297 (1994) (supervisory instructions, with which the employee disagreed, held not compensable in the absence of evidence of managerial error or abuse); *Rudy Madril*, 45 ECAB 602 (1994) (where the employee questioned his supervisor's instructions to move from belt number five to belt number six and unload mail and became upset because he felt he was being pushed and picked on, the Board found that the incident was not a compensable factor of employment).

supervisor or manager must be allowed to perform his or her duties and that employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action is not compensable, absent evidence of error or abuse.[11]

ANALYSIS

When appellant filed her claim for compensation, she alleged that her depression and anxiety were a result of numerous problems at work with supervisors and the violations of her privacy rights. She added that she had a hard time complying with training requirements and completing her tasks on time, but this "hard time" is not found in her more detailed addendum, which confined itself to the problems she first mentioned with supervisors and privacy rights.

Appellant's representative's listing of events that caused stress also failed to implicate the nature of her assigned duties. As with appellant's addendum, the listing implicated administrative actions, harassment, privacy violations and retaliation.

After explaining that there was no way she could do her statistician job and spend 30 percent of her time coding, appellant testified during the telephone hearing that she did not find any other part of her job to be so frustrating that she could not accomplish her required goals, so long as she was left to do the statistician duties she could perform. "The only other frustrating part was I was not allowed to take leave from the 1st to the 10th in order to get the reports out that needed to be sent out."

Having reviewed the record, the Board finds that appellant has failed to implicate or establish a factor of employment under *Cutler*. Although she alleged that her supervisor added to her workload and deliberately caused her stress by asking her to handle 30 percent of the coding for the unit (or spend 30 percent of her time on coding), the supervisor denied that appellant was ever assigned such duty. By her account, the supervisor broached the idea of adding some coding duties merely as a possibility that would allow appellant to develop new skills. There is no evidence to substantiate that appellant's duties were ever modified to include coding. At best, the record suggests that appellant reacted emotionally simply to the thought of it.

In the absence of a *Cutler* factor of employment, appellant's claim rests on her reaction to administrative or personnel matters. Although such matters are connected to the workplace, they generally fall outside the scope of workers' compensation. As a rule, any emotional condition appellant might sustain as a result of her supervisors or actions taken by management is not considered a compensable injury under FECA absent evidence of error or abuse.

The Board has recognized an exception when there is proof of administrative error or abuse. The evidence in this case contains no such proof. It is fairly obvious to the Board that appellant feels that her supervisor and others committed wrongs against her. Her perception of these wrongs does not provide the basis for compensation. It is equally clear to the Board that the perception of the supervisor is entirely different. The statements of record support the supervisor's opinion that appellant's temper and conduct caused problems in the workplace,

[11] *T.G.*, 58 ECAB 189 (2006).

which in turn led to several actions that appellant has implicated, such as disciplinary measures and calls to police.

Appellant bears the burden of submitting evidence that the employing establishment committed a specific error or violation in handling an administrative or personnel matter relating to her. It is not enough simply to allege, for example, that the HIPAA privacy officer attempted to make her finish training and complained to LTC Saville, or that the employing establishment filed a Notice of Proposed Termination three weeks after appellant filed an EEO complaint. There must be proof of error or abuse in these administrative matters.

Appellant filed at least one grievance and several EEO complaints. There is no evidence, however, that she was ever able to prove her case in those forums. The record shows no final decision finding that the supervisor or anyone in management committed an administrative or personnel error or was guilty of harassment, retaliation or any other form of abuse.

The Board notes that the record shows two pieces of correspondence concerning an investigation and an audit. They advised that there was no evidence to substantiate appellant's allegations, and there was no breach of her privacy. There is also a settlement agreement that is not to the prejudice of either party.

The Board finds that appellant failed to substantiate her allegations of error and abuse with sufficient evidence. The Board finds that she has not met her burden to establish that she sustained an emotional condition in the performance of duty. The Board will therefore affirm OWCP's July 3, 2013 decision.

Appellant's representative contends that the hearing representative's decision is not supported by substantial evidence; the Board finds otherwise. The burden of proof lies with appellant. She has not supported her claim for benefits with sufficient evidence to establish a compensable factor of employment.

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 met her burden to establish that she sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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