United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 14-945**
	)	**Issued: October 22, 2014**
DEPARTMENT OF VETERANS AFFAIRS, HUNTER/HOLMES/MCGUIRE VETERANS ADMINISRATION MEDICAL CENTER, Richmond, VA, Employer	)	

Appearances:
Toby Rubenstein, Esq., for the appellant
Office of the 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 March 20, 2014 appellant, through her representative, filed a timely appeal from a November 20, 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 case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition causally related to factors of her federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a November 22, 2010 decision, the Board affirmed OWCP's November 18, 2009 decision denying appellant's emotional condition claim. The Board found that she failed to establish a compensable employment factor as the evidence did not substantiate her claim of a sexual assault occurring on October 10, 2008; she did not substantiate her allegations of harassment and there was no evidence that the employing establishment failed to provide proper assistance or protective action following her complaint of a sexual assault.[2] Following this decision, appellant requested reconsideration, which OWCP denied on August 17, 2011 as untimely filed and without clear evidence of error. In a May 9, 2012 order remanding case, the Board found that her February 16, 2011 reconsideration request, which was received on May 19, 2011, was filed within one year of the Board's November 22, 2010 merit decision and was timely filed. The Board remanded the case to OWCP for application of the standard for reviewing a timely request for reconsideration under 20 C.F.R. § 10.606(b)(2).[3] The facts of the case as set forth in the Board's prior decisions are incorporated herein by reference.[4]

In her May 13, 2011 reconsideration request, appellant submitted new evidence, which included a February 9, 2011 letter from the Office of Personnel Management which found that she was disabled from her position as a nursing assistant due to post-traumatic stress disorder. In a January 25, 2011 report, David A. Israel, Ph.D., a licensed clinical psychologist, stated that he believed that appellant was involved in an unprovoked physical attack by a peer, who attempted to turn the event into a sexual experience. He stated that the incident caused a great deal of stress for her as well as other on-the-job stress and events of major significance. Dr. Israel stated that the actual event has not been disputed and that appellant continued to experience symptoms

[2] Docket No. 10-505 (issued November 22, 2010).

[3] Docket No. 11-2096 (issued May 9, 2012).

[4] On December 30, 2008 appellant, then a 52-year-old nursing assistant, filed an occupational disease claim (Form CA-2) for an emotional injury following an alleged sexual assault on October 10, 2008. She alleged that a coworker grinded himself against her while kissing her against her will. Appellant tried to get away, but he would not let her go. She reported the incident to the employing establishment police but contended that no action was taken to protect her from the individual who assaulted her. Appellant also alleged that the employing establishment failed to inform her of her right to file a workers' compensation claim for an exacerbation of her preexisting anxiety and depression. She stopped work on December 9, 2008 and sought medical treatment on December 10, 2008. The employing establishment noted that appellant was last exposed to the alleged work conditions on October 23, 2008 and reported the condition to her supervisor on December 30, 2008. In a February 25, 2009 statement, appellant stated that she was assigned to work the 3:30 p.m. to 12:00 midnight shift on October 10, 2008. She took her break at approximately around 11:15 p.m. and, at approximately 11:30 p.m., Don Gardner, a coworker, assaulted her by grinding into her and holding her against her will. Appellant stated that he kissed her all over and down her neck. She was shaken and embarrassed and did not know how to handle the situation. Appellant reported the incident to management on October 22, 2008 and filed a report with the employing establishment police on October 23, 2008, but no action was taken. She was told that it would be her word against his. Appellant tried to work but was in constant fear of Mr. Gardner as there were few people available, including police, on the second shift. She provided a copy of an Equal Employment Opportunity (EEO) complaint she filed on January 27, 2009 against the employing establishment and the police chief for sexual harassment and failure to provide a harassment-free work environment. The complaint noted that appellant had been harassed by the accused since 2004 and management failed to provide a harassment-free work environment.

including gastrointestinal dysfunction, loss of sleep, disturbed appetite, irritability, depressed mood, depression, anxiety, rumination and on-going fear and startle response. He opined that her depression and ruminations were of a significant nature which precluded her from working.

In a letter of June 20, 2012, OWCP requested additional evidence, including copies of the employing establishment's police report and investigation as well as reports and records from the local city magistrate and local city police department relating to her sexual harassment and assault charges.

In a July 10, 2012 letter, the employing establishment noted that they could only authorize a copy of the police report if OWCP had investigative authority.

Appellant submitted new statements to the record dated December 7, 2009, September 8, 2011 and June 25, 2012. She maintained that she was sexually harassed on October 7 or 8, 2008 by Mr. Gardner. Appellant alleged that Mr. Gardner whispered "Hi Foxy" in her ear on October 7, 2008 and wanted to buy lunch for her in celebration of each of their birthdays, which were on the same date. She had already eaten lunch and agreed to dine with him on October 9, 2008. Appellant concluded that she could trust Mr. Gardner, who gave her an index card, asking her to come to the 4 Exercise Room. When she arrived, he had changed his clothes and grabbed her. Mr. Gardner started kissing her neck and in her mouth. Appellant alleged that he grinded up on her, breathed hard and held her tight. She tried to push Mr. Gardner away but he would not let go. Mr. Gardner wanted appellant to tell him if her husband ever tried to hurt her. Appellant became embarrassed. She acknowledged that the employing establishment had conducted an investigation, but it was not enough for her protection. Mr. Gardner was removed from appellant's work area but continued to park in the same area as she did and worked the same hours. Appellant maintained that he should have been fired. She stated that the local police department did not investigate her claim as the employing establishment police were involved.[5]

Appellant stated that the incident took place on October 9, 2008. The employing establishment investigation concluded there was insufficient evidence to support her claim. Appellant stated that Mr. Gardner did not deny that he was in the exercise room and acknowledged kissing her; however, he maintained that it was a consensual act and that he only kissed her on the cheek. She stated that she never gave him permission to kiss her. Appellant maintained that she was physically attacked and fondled.

The employing establishment's May 12, 2009 Police Service Summary memorandum, which the Board previously reviewed, stated that appellant's case was reviewed by two independent law enforcement agencies and three separate legal entities. Each agency came to the conclusion that there was a lack of sufficient evidence to prosecute Mr. Gardner for the charge of assault.

The April 8, 2009 employing establishment investigative report now of record concluded that appellant trusted Mr. Gardner and had agreed to meet him in the exercise room as they were

[5] A copy of the December 10, 2008 incident/investigation report of the city police department noted now of record, the allegations as "a known individual forced himself upon victim" and that Mr. Gardner was a suspect.

comfortable with and trusted each other. Touching and kissing occurred between appellant and Mr. Gardner, but the parties differed on the nature of the touching and kissing and whether it was consensual. There were no witnesses and the 14-day gap between the alleged incident and when appellant reported that it undermined the potential for gathering evidence and no physical evidence had been collected. The investigative board concluded that touching and feeling did occur in the patient exercise room on October 9, 2008; however, there was insufficient evidence to determine whose version of the incident was accurate. Mr. Gardner stated that it was mutual and appellant stated that it was not mutual. Furthermore, appellant provided two statements with different portrayals of the touching and kissing, with her second statement more devastating in nature. She first portrayed Mr. Gardner as being an individual she trusted and then portrayed him as being someone who stalked her. This led the investigative board to question the accuracy of appellant's statements. The investigation noted that she was referred to the Employee Assistance Program (EAP) by her Nurse Manager when she called in sick on October 21, 2008 and was crying. At that time, the Nurse Manager was not aware of the incident with Mr. Gardner and was not made aware of appellant's allegations until October 23, 2008, 14 days after the incident. Once aware, management immediately separated him from her work area.

By decision dated August 30, 2012, OWCP denied modification of its November 18, 2009 decision. It found that the following occurred but were not factors of employment: appellant became upset with the way the employing establishment assisted her in filing the workers' compensation claim for the alleged workplace harassment; was upset with the results of the employing establishment's investigation and that Mr. Gardner was not fired. OWCP found that the following incidents did not occur: appellant was not sexually harassed or assaulted in the workplace by Mr. Gardner; the employing establishment did not fail to protect her from sexual harassment in the workplace or fail to advise appellant of her right to file a workers' compensation injury claim for the alleged workplace harassment.

On August 30, 2012 appellant requested reconsideration. She submitted a September 18, 2012 report from Dr. Israel, who opined that she had an array of symptoms, including depression, anxiety and fear as a result of being sexually assaulted by a peer and would be a liability if she were to return to work. A

By decision dated February 6, 2013, OWCP denied modification of its prior decisions. It found that the medical evidence was based on allegations which appellant had not proved to have occurred as alleged.

On August 6, 2013 appellant, through her representative, requested reconsideration. She argued that the case has not been reviewed under current case law and reasoning that workers' compensation law should be construed liberally in favor of the employee. Appellant argued that the employing establishment admitted that she had been subjected to something troublesome when it reassigned Mr. Gardner to another location and considered reassigning appellant to a third location. She submitted a June 19, 2013 statement from her husband, who opined that she was telling the truth with regard to being assaulted on the job. In a June 20, 2013 statement, appellant's brother attested to her character. Appellant submitted additional medical reports from Dr. Israel dated March 19, July 9 and October 17, 2013.

By decision dated November 20, 2013, OWCP denied modification of its prior decisions. It determined that appellant did not substantiate a compensable factor of employment.

LEGAL PRECEDENT

Workers' compensation 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 employing establishment 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.[6] 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.[7]

It is well established that administrative or personnel matters, although generally related to employment, are primarily administrative functions of the employing establishment and not duties of the employee.[8] Investigations are considered to be an administrative function of the employing establishment unrelated to the employee's day-to-day duties or specially-assigned job requirements.[9]

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that the incidents alleged or implicated by the employee did, in fact, occur.[10] Grievances or EEO complaints by themselves are not determinative of whether harassment or discrimination took place.[11] Where a claimant alleges harassment, the issue is whether he or she has submitted sufficient evidence to establish a factual basis for the claim by the submission of probative and reliable evidence to support such allegations.[12]

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

[6] *See supra* note 1; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[7] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[8] *See Pamela D. Casey*, 57 ECAB 260 (2005); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff' d on recon.*, 42 ECAB 566 (1991).

[9] *See Jeral R. Gray*, 57 ECAB 611 (2006).

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

[11] *C.S.*, 58 ECAB 137 (2006).

[12] *Id. See Robert Breeden*, 57 ECAB 622 (2006).

factors of employment and may not be considered.[13] 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.[14]

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that an emotional condition was caused or adversely affected by his or her employment.[15] Neither the fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[16]

ANALYSIS

On prior appeal, in a November 22, 2010 decision, the Board affirmed OWCP's November 18, 2009 denial of appellant's emotional condition claim as she failed to establish a compensable employment factor. There was insufficient evidence to substantiate appellant's claim of a sexual assault occurring on October 10, 2008, she did not substantiate her allegations of harassment and that the employing establishment did not fail to provide proper assistance or take protective action following her complaint of a sexual assault.[17] In a May 9, 2012 order, the Board subsequently remanded the case to OWCP to review her February 16, 2011 reconsideration request on the merits as she filed a timely request for reconsideration.[18] On remand, OWCP reviewed appellant's case on the merits and in decisions dated August 30, 2012, February 6 and November 20, 2013 denied modification of its November 18, 2009 decision finding that the evidence failed to provide a compensable factor to establish a work-related injury.

In statements dated December 7, 2009, September 8, 2011 and June 25, 2012, appellant reiterated her allegation of a sexual assault by a coworker on October 10, 2008. She alleged sexual harassment by the same individual since 2004 and alleged error on the part of her employer in investigating the matter and in failing to properly advise her about filing her claim. The Board notes that appellant did not attribute her emotional condition to her regular or specially-assigned job duties as a nursing assistant under *Cutler*.

Appellant alleged that on October 10, 2008 she was sexually assaulted by a coworker. Physical contact by a coworker or supervisor may give rise to a compensable work factor, if the

[13] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[14] *Id.*

[15] *See Charles D. Edwards*, 55 ECAB 258 (2004).

[16] *See Ronald K. Jablanski*, 56 ECAB 616 (2005); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[17] Docket No. 10-505 (issued November 22, 2010).

[18] Docket No. 11-2096 (issued May 9, 2012).

incident occurred as alleged.[19] Appellant did not report the claimed assault to her supervisor or police for almost two weeks. The April 8, 2009 employing establishment investigative report found that she trusted her coworker and had agreed to meet him in the exercise room. Touching and kissing occurred between appellant and the coworker, but each party differed on whether such contact was consensual. There were no witnesses to the alleged incident and no physical evidence was collected due to the 14-day delay between when the alleged incident and when she reported it to her supervisor. The investigative board concluded that, while touching and feeling occurred in the exercise room on October 9, 2008, there was insufficient to evidence to determine whose version was accurate. The coworker stated that it was mutual while appellant contended that it was not mutual. Furthermore, the investigative board questioned the accuracy of her allegation as she had provided two statements with different portrayals of the touching and kissing, with her second statement more devastating in nature. Appellant first portrayed the coworker as an individual she trusted and then portrayed him as being someone who had stalked her. The employing establishment's May 12, 2009 Police Service Summary memorandum stated that her case was reviewed by two independent law enforcement agencies and three separate legal entities. Each agency came to the conclusion that there was a lack of sufficient evidence to prosecute the coworker for the charge of assault. The Board finds that appellant has not submitted sufficient evidence to establish that she was sexually assaulted by a male coworker at the time, place or in the manner alleged. The evidence supports that on October 9, 2008 appellant met with her coworker in an exercise room. There are differing versions on the touching and kissing and whether or not it was consensual. The submission of statements by appellant's brother and husband with regard to her character do not establish that the incident occurred as alleged. The Board found that appellant presented insufficient evidence to substantiate her claim of a sexual assault occurring on October 9, 2008, she failed to establish a compensable employment factor.

For harassment to give rise to a compensable disability under FECA there must be evidence that such harassment did in fact occur. Mere perceptions of harassment are not compensable under FECA.[20] Appellant failed to submit sufficient evidence to establish that she was sexually harassed by her coworker. While she provided a statement to the employing establishment's investigative board that the male coworker had stalked her, she provided no evidence to substantiate that she was harassed by the male coworker, as alleged.[21] Appellant has not established a compensable employment factor.

Appellant alleged that the employing establishment provided no assistance or protection from the accused coworker following her complaint. The Board's prior decision found that the administrative actions by the employing establishment following her complaint were reasonable. The employing establishment removed the coworker from appellant's work area pending the outcome of the investigation and advised her of actions to take regarding the alleged October 9, 2008 incident, including contacting the employing establishment police, filing an EEO complaint for sexual harassment and filing a sexual assault charge with the local police and contacting an

[19] *Denise Y. McCollum*, 53 ECAB 647 (2002); *Helen Casillas*, 46 ECAB 1044 (1995).

[20] *Jack Hopkins, Jr.*, 42 ECAB 818 (1991).

[21] *See Michael A. Deas*, 53 ECAB 208 (2001).

EAP counselor. Appellant stated her frustration that her coworker should have been fired and not allowed to park in the same area; but she failed to establish that the employing establishment erred or failed or take adequate protective action following her complaint. Furthermore, she presented no corroborating evidence to support that the employing establishment erred or acted abusively in this matter.[22] The Board finds that the employing establishment acted reasonably in this administrative matter. Appellant has not established a compensable factor of employment with respect to her allegation that the employing establishment failed to take action or act reasonably following her complaint. For these reasons, she did not establish that her emotional condition arose in the performance of duty.[23]

On appeal, appellant's representative stated that from the outset appellant's case had been treated as a sexual harassment complaint as opposed to a sexual assault and that both the employing establishment and city police dismissed her case without a thorough investigation. The Board has reviewed the evidence of record performing to the allegation of assault occurring on October 9, 2008 and harassment by from her male coworker, prior to the alleged sexual assault. Based on the evidence of record, appellant did not establish that the October 9, 2008 incident occurred as alleged or that she was harassed by her coworker prior to the alleged sexual assault. It is noted that the employing establishment's investigation into the matter found that the 14-day delay between the alleged incident and when she reported it to her supervisor undermined the potential for evidence gathering. While appellant's representative noted that both appellant and the perpetrator remained on the same shift and parked in the same lot, the record is devoid of any evidence that the employing establishment erred or acted abusively in the investigation of this manner or in the manner in which her supervisors responded to appellant's complaints or offered assistance.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

[22] *See Richard J. Dube*, 42 ECAB 916 (1991).

[23] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 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