United States Department of Labor
Employees' Compensation Appeals Board

M.D., Appellant	)	
	)	
and	)	**Docket No. 16-0479**
	)	**Issued: July 12, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 15, 2016 appellant filed a timely appeal from an October 16, 2015 merit decision and a December 1, 2015 nonmerit 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.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish a stress-related condition in the performance of duty causally related to factors of her federal employment; and (2) whether OWCP properly refused to reopen her claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant asserts that full consideration was not given to her claim by OWCP.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 2, 2015 appellant, then a 55-year-old customer service supervisor, filed an occupational disease claim (Form CA-2) alleging that bullying by the station manager caused severe anxiety and elevated blood pressure. She had stopped work on November 1, 2014. In support of appellant's claim she submitted brief reports from Dr. M. Catherine Yoder, a Board-certified family physician, dated November 3 to December 31, 2014, in which the physician advised that appellant was suffering from severe stress and anxiety and was unable to work. On December 31, 2014 she indicated that appellant would be incapacitated for one more month. Appellant did not return to work.

In letters dated January 29, 2015, OWCP requested additional information from appellant and the employing establishment.

In a January 2, 2015 statement, Brian Cox, manager of the Southport Station, advised that Southport was appellant's regular-duty station. He noted that she was detailed to the Clermont Station from April 1 to May 18, 2013, then returned to Southport and was detailed to the Wanamaker Station from December 14, 2013 to October 31, 2014. Mr. Cox reported that on October 27, 2014 appellant was notified *via* e-mail that she was to return to Southport on November 1, 2014 for a shift to begin at 10:00 a.m. He related that while he was en route to work, he was called by Supervisor Simpson[2] who told him that appellant arrived at work early. Mr. Cox instructed Mr. Simpson to have appellant wait to talk with him. Mr. Cox indicated that, when he arrived at work, she refused to enter his office. He informed appellant that if she had acknowledged multiple e-mails and telephone calls that he sent her regarding her work hours, she would have known her proper start time. Appellant related to him that she refused to work under those conditions and threw a leave slip at him that was already filled out, left the building, and did not return.

In a February 18, 2014 statement, Jennifer Johnson, customer services manager at the Wanamaker Station, reported that appellant seemed fine while working there and performed day-to-day supervisor duties. She indicated that appellant never mentioned that she was overstressed or upset about anything.

In an undated statement, appellant related that on October 27, 2014 she was informed that she would be returning to the Southport Station on November 1, 2014. She indicated that her Form SF 50 stated that her off days were Sundays and Mondays, and that she worked 7:00 a.m. to 4:00 p.m. Appellant continued that on October 28, 2014 Mr. Cox sent her a form that for no reason changed her days off to Sundays and Fridays and amended her work hours to 8:00 a.m. to 5:00 p.m. She reported that she previously had issues with Mr. Cox about changing her schedule prior to her detail to Wanamaker Station. Appellant noted that others had never been made to return to Southport, and implied that it was racially motivated. She indicated that she felt threatened by Mr. Cox, but reported to work at Southport on November 1, 2014 at 7:00 a.m. Appellant related that when he arrived she was already anxious, shaking, and afraid of him. She noted that Mr. Cox stated that he wanted all of his supervisors there each Monday, but she

[2] The full name of Supervisor Simpson is not contained in the record of evidence.

related that she told him he had sent her home on a Monday after working one hour. Appellant asserted that he was only doing this to her and it was a form of harassment. She stated that she could not work in such an environment and left, went to a clinic where she was diagnosed with anxiety and elevated blood pressure, and that the following Monday her treating physician took her off work.

Appellant also submitted an e-mail dated August 23, 2013 regarding staffing for vacations, and e-mails dated October 31, 2014 sent by her to District Manager Holly Burrell, in which appellant requested to stay at Wanamaker because she had serious issues with Mr. Cox. Ms. Burrell informed appellant that everyone was being returned to their regular stations, and she would address appellant's concerns in a meeting, but that appellant should report to Southport. In a response, appellant maintained that, although Southport was her assignment of record, she also had assigned hours and scheduled days off, and had serious issues with Mr. Cox and his management, such that the inspector general should have been called. She advised that she would follow instructions, but under protest. Ms. Burrell replied that appellant should see her that day, noting that her e-mail appeared very accusatory and defensive.

In a second statement appellant maintained that Mr. Cox screamed at her on several occasions, would stand behind her while she was working on the computer, expected her to complete route inspections in eight hours, which was impossible, and would change her reporting times and off days so that he did not have to pay her eight hours. She indicated that she became very upset when she was informed that she had to return to Southport. Appellant related that, when she returned, she had a flashback about what Mr. Cox had done in the past and was so upset that she had to leave and seek medical care.

By correspondence dated November 3, 2014, appellant was informed by the employing establishment that the medical documentation for her claimed absence did not say that she was incapacitated from performing her supervisory duties. She also provided an assignment order dated October 27, 2014 advising her to report to her home installation at 8:00 a.m. on November 1, 2014 and that her days off were Friday and Sunday. Copies of processed clock rings from pay period 18 to pay period 26 in 2013 had handwritten notations, apparently made by appellant, indicating that she was sent home when she was not needed on her off day, that she was charged with unscheduled annual leave when her parents were in an automobile accident, that her off day was changed to Wednesday after working her off day, that she worked some when she was supposed to be on vacation, that her off day was changed to Friday without her approval, and that Mr. Cox changed her off day on other occasions.

Correspondence dated February 6, 2015 indicated that appellant had filed an Equal Employment Opportunity (EEO) discrimination claim that was being processed.

In an undated statement Tom Oberting, a former union steward at Southport indicated that he had observed that Mr. Cox had issues with women who worked for him and intimidated supervisors until they requested transfers. He specifically stated that he saw Mr. Cox threaten appellant with discipline because she would not discipline her carriers for small infractions, and would stand behind her, watching her every move, would change her hours and days off, and would force her to work longer hours.

In a January 31, 2015 report, Diane M. Zaragoza, M.A., an intake clinician, advised that appellant was evaluated and would begin psychiatric outpatient treatment beginning February 2, 2015. In a February 12, 2015 report, Dr. Mohammad Kamal, a Board-certified psychiatrist, indicated that appellant reported a lot of bad issues at work including bullying and harassment by the station manager, and that this caused anxiety, depression, panic attacks, and anger. Dr. Kamal diagnosed adjustment disorder with mixed features of depression and anxiety, moderate-to-severe, panic disorder without agoraphobia, post-traumatic stress disorder, and hypertension, mainly work related. He prescribed medication and advised that appellant's prognosis was fair.

In a March 12, 2015 statement, Ms. Johnson reported that while appellant worked at the Wanamaker Station, she was not on automatic rings and worked hours when needed, which led to minor problems entering time.

In a March 16, 2015 statement, Mr. Cox challenged appellant's allegations, asserting that he never bullied or threatened her. He indicated that she saw any type of managing or performance discussion as an attack, and that he monitored the performance of all supervisors. Mr. Cox noted that, when he first became her manager, appellant had difficulty completing her duties, that she felt that rules and instructions did not apply to her, and only wanted to work when and where she pleased. He specifically replied to each of her allegations regarding leave and pay, indicating that he was unaware of some of the circumstances she reported. Mr. Cox concluded by stating that the employing establishment was ever-changing, and any changes to appellant's schedule were made for the needs of the employing establishment.

In an undated statement, Brian K. Blane, a former manager at the Wanamaker Station, advised that appellant was not detailed to Wanamaker due to any threatening, intimidating, or volatile situation at Southport, but due to operational reasons and her requests for a change in position. He further indicated that he talked with her about moving back to Southport Station, and she never indicated that she feared for her safety due to any actions of Mr. Cox. Shannon Blue, a city carrier at the Mapleton Station, indicated in an undated statement that on one occasion when appellant was a supervisor there, appellant became very upset about personal issues.

By decision dated April 22, 2015, OWCP denied the claim, finding that appellant did not establish an injury arising out of employment.

On June 24, 2015 appellant requested reconsideration. She again questioned being forced to return to Southport Station, and further alleged that Mr. Cox improperly charged her with 80 hours absent-without-leave (AWOL) when she had approved Family Leave, and that her EEO claim had been accepted. Appellant also alleged that he had shared her personal medical records with others including his manager. She noted including statements from other employees regarding Mr. Cox's harassing behavior.

In support of her reconsideration request, appellant submitted duplicate copies of evidence previously of record and an annual leave calendar. In a November 3, 2014 treatment note, Dr. Yoder noted seeing appellant for an anxiety attack. She described appellant's report of increased anxiety due to a hostile work environment, stating that appellant was forced to return

to an employing establishment where she had a significant conflict with the manager. Dr. Yoder diagnosed depression/anxiety and advised that appellant could not work. In a June 19, 2015 report, Dr. Kamal noted that appellant had been treated in an intensive outpatient program since February 2015. He related that she indicated that her anxiety began due to her hostile work environment when her immediate supervisor began bullying her. Dr. Kamal reiterated his diagnoses and advised that appellant was unable to work due to experiencing anxiety, panic attacks, sleep disturbance, ruminating thoughts, and other symptoms of post-traumatic stress. The only coworker statement submitted was a duplicate of former union steward Oberting's undated statement.

By merit decision dated October 16, 2015, OWCP denied modification of the April 22, 2015 decision.

Appellant again requested reconsideration on November 9, 2015. She alleged that OWCP had not thoroughly reviewed her file. Appellant attached a copy of the employing establishment's policy on workplace harassment dated June 10, 2014. Also included was an EEO affidavit dated April 30, 2015 from Donna M. Pepienbrock, identified by appellant as an employee she supervised. She stated that Mr. Cox told her that he was so mad at appellant that he wanted to fire her and that he hated her, that she witnessed him standing over her, that he would intervene in her work decisions, had changed her starting times, and days off. Ms. Pepienbrock also implied that Mr. Cox improperly sent appellant to the north side of town for a meeting.

By decision dated December 1, 2015, OWCP denied appellant's request for reconsideration without conducting a merit review. It noted that she did not submit any evidence with her request.

LEGAL PRECEDENT -- ISSUE 1

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that appellant has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to appellant's condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to appellant's stress-related condition.[3] If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.[4] 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.[5]

[3] *Leslie C. Moore*, 52 ECAB 132 (2000).

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

[5] *Id.*

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[6] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under FECA.[7] When an employee experiences emotional stress in carrying out his or her employment duties, and the medical evidence establishes that the disability resulted from an 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 results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[8] Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[9] Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[10] Personal perceptions alone are insufficient to establish an employment-related emotional condition.[11]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[12] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[13]

For harassment or discrimination to give rise to a compensable disability, 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. A claimant must establish a factual basis for his or her allegations that the harassment occurred with probative and reliable evidence.[14] With regard to emotional claims arising under FECA, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other employing establishments, such as the Equal Employment Opportunity Commission, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in

[6] 28 ECAB 125 (1976).

[7] *See Robert W. Johns*, 51 ECAB 137 (1999).

[8] *Supra* note 5.

[9] *J.F.*, 59 ECAB 331 (2008).

[10] *M.D.*, 59 ECAB 211 (2007).

[11] *Roger Williams*, 52 ECAB 468 (2001).

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

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

[14] *James E. Norris*, 52 ECAB 93 (2000).

evaluating claims for workers' compensation under FECA, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or workers. Mere perceptions and feelings of harassment will not support an award of compensation.[15]

ANALYSIS -- ISSUE 1

Appellant has not alleged that her emotional condition was due to any specific job duties. Rather, she has alleged that she was harassed and worked in a hostile work environment, and that Mr. Cox, the branch manager, bullied and threatened her and inappropriately changed her schedule and days off. Appellant also alleged that she was inappropriately returned to her home station from a detail, that errors were made in her time and pay, and that Mr. Cox improperly shared her medical records.

As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of FECA.[16] The Board has long held that disputes regarding leave,[17] the assignment of work,[18] assessment of work performance,[19] a change in a duty shift,[20] are administrative functions of the employing establishment and, absent error or abuse, are not compensable.[21] Absent evidence establishing error or abuse, a claimant's disagreement or dislike of such a managerial action is not a compensable factor of employment.[22]

In this case appellant submitted no evidence to substantiate her claims. Ms. Burrell and Mr. Cox explained that all supervisors were being returned to their station of record, and appellant submitted no evidence to show that her workstation or schedule were changed inappropriately. Although appellant submitted a leave schedule and evidence about clock rings, she did not submit any evidence such as earnings and leave statements that would demonstrate error or abuse in these matters. Likewise, she submitted no corroborating evidence to support her allegation that her medical records were improperly shared. Because appellant has not submitted any evidence corroborating these allegations, they cannot be deemed compensable factors of employment.

Appellant also alleged that employing establishment management, especially Mr. Cox, treated her unfairly. Generally, 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,

[15] *Beverly R. Jones*, 55 ECAB 411 (2004).

[16] *Carolyn S. Philpott*, 51 ECAB 175 (1999).

[17] *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

[18] *Robert W. Johns*, 51 ECAB 137 (1999).

[19] *Elizabeth W. Esnil*, 46 ECAB 606 (1995).

[20] *Peggy R. Lee*, 46 ECAB 527 (1995).

[21] *Supra* note 11.

[22] *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

outside the scope of coverage provided by FECA. This principle recognizes that a supervisor or manager in general must be allowed to perform his or her duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error, or abuse.[23] Here again, the record contains no corroborating evidence that Mr. Cox, or any other employing establishment supervisor or manager, treated appellant in a disrespectful or unfair manner. As there is no evidence of error or abuse in discharging management duties, this allegation is not compensable.[24]

Regarding appellant's contention that she was subjected to harassment at work by Mr. Cox, who bullied and threatened her and treated her in a discriminatory manner, mere perceptions of harassment or discrimination are not compensable under FECA[25] and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.[26] Although appellant indicated that she had filed an EEO claim, the record does not contain an EEO decision. Former union steward Mr. Oberting's statement is insufficient to meet her burden of proof. While he generally supported appellant's contentions regarding Mr. Cox, he did not provide specific dates or describe situations with sufficient specificity.

Appellant submitted insufficient evidence to show a persistent disturbance, torment, or persecution, *i.e.*, mistreatment by employing establishment management.[27] She therefore did not establish a factual basis for her claim of harassment by probative and reliable evidence.[28]

For the foregoing reasons, appellant has not established a compensable factor of employment under FECA and therefore has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty. As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record.[29]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of the October 16, 2015 decision on the merits of appellant's claim, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

[23] *Id*.

[24] *See David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

[25] *Supra* note 13.

[26] *Id.*

[27] *Supra* note 14.

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

[29] *Katherine A. Berg*, 54 ECAB 262 (2002).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[30] Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(3).[31] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[32] Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[33]

ANALYSIS -- ISSUE 2

With her November 9, 2015 reconsideration request, appellant did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b).[34]

With respect to the third above-noted requirement under section 10.606(b)(3), with her November 9, 2015 request for reconsideration, appellant submitted a copy of the employing establishment's policy on workplace harassment dated June 10, 2014 and an April 30, 2015 statement from Ms. Pepienbrock, who supported some of appellant's contentions regarding Mr. Cox.

OWCP, in its December 1, 2015 decision, incorrectly found that appellant had submitted no relevant and pertinent new evidence in support of her request for reconsideration. The Board finds that appellant's reconsideration request was accompanied by the workplace harassment policy (not previously of record) and a new statement which was supportive of the allegations of workplace harassment. The Board further finds that this new evidence is relevant and pertinent to her claim. As appellant submitted new evidence not considered by OWCP that is relevant and pertinent to the issue of whether she established her emotional condition claim, she is entitled to a review of the merits of her claim under section 10.606(b)(3) of OWCP's regulations.[35] The

[30] 5 U.S.C. § 8128(a).

[31] 20 C.F.R. § 10.608(a).

[32] *Id.* at § 10.608(b)(1)-(3).

[33] *Id.* at § 10.608(b).

[34] *Id.* at § 10.606(b)(2).

[35] *Id.* at § 10.606(b)(2); *see T.F.*, Docket No. 10-1701 (issued May 3, 2011).

case shall therefore be remanded to OWCP to consider whether the submissions with her November 9, 2015 reconsideration request are sufficient to establish an employment factor which may give rise to a compensable disability under FECA. The Board will therefore set aside OWCP's December 1, 2015 decision. After this and such further development deemed necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish an emotional condition in the performance of duty causally related to factors of her federal employment. The Board further finds that OWCP improperly denied her November 9, 2015 request for a merit review pursuant to section 8128(a) of FECA.

ORDER

IT IS HEREBY ORDERED THAT the October 16, 2015 decision of the Office of Workers' Compensation Programs is affirmed. The December 1, 2015 decision is set aside, and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: July 12, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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