United States Department of Labor
Employees' Compensation Appeals Board

C.V., Appellant	)	
and	)	**Docket No. 16-0699**
	)	**Issued: November 4, 2016**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Yuma, AZ, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 26, 2016 appellant filed a timely appeal from an October 6, 2015 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 this case.

ISSUE

The issue is whether appellant has established an emotional condition causally related to compensable work factors.

FACTUAL HISTORY

On January 29, 2014 appellant, then a 40-year-old border patrol agent, filed an occupational disease claim (Form CA-2) alleging an emotional condition causally related to her

[1] 5 U.S.C. § 8101 *et seq.*

federal employment. On the claim form she alleged that she was subjected to sexual harassment from July 6 to August 31, 2012 by a supervisor. Appellant indicated that she reported the alleged harassment to the employing establishment on September 9, 2012, and subsequently was subjected to retaliation and increased harassment. The reverse side of the claim form does not indicate that appellant stopped work.

In support of her claim appellant submitted evidence on February 13, 2014 that included an Equal Employment Opportunity (EEO) complaint of employment discrimination dated December 6, 2012. The complaint alleges that she became aware of discrimination on July 6, 2012 and the last discriminatory event was August 31, 2012. Appellant submitted an undated statement alleging that she was subject to sexual harassment by a supervisor, A.L. Specifically she alleged that the supervisor had talked about personal matters, including his family and his marital situation, told her he had cheated on his wife, and discussed sexual matters. Appellant alleged that on August 31, 2012 the supervisor stated that he wanted to bring her a beer, but that she told him that would be inappropriate. She indicated that she saw an Employee Assistance Program counselor on September 6, 2012, and requested a permanent transfer to San Diego, California in October 2012, but her request was denied. According to appellant she was told on October 15, 2012 that the supervisor had been issued a "cease and desist order."

Appellant submitted an undated statement on February 13, 2014 indicating that she had sustained physical injuries on January 7, 2013 and that she was on full disability. She asserted that she had requested detail extensions to continue treatment in San Diego, California but her requests had been arbitrarily denied. Appellant claimed she had been denied reasonable accommodation for her injury, and was subject to retaliation based on filing an EEO complaint, based on her gender and on her disability status. She also submitted medical evidence, including a January 23, 2014 report from Dr. Shasita Inamdar, a Board-certified psychiatrist, with diagnoses of major depressive disorder, generalized anxiety disorder, post-traumatic stress disorder, and panic disorder.

By decision dated July 25, 2014, OWCP denied appellant's claim for compensation. It found the evidence of record had failed to establish a compensable work factor.

Appellant requested a hearing before an OWCP hearing representative which was held on March 24, 2015. She submitted additional evidence with respect to her claim, including a settlement agreement dated October 28, 2014 regarding her EEO complaint. The employing establishment agreed to transfer appellant to San Diego, California and to reimburse her for leave without pay and attorney fees. The agreement provided that, "nothing herein will be construed in any way as an admission of liability on the part of any of the parties." Other documents submitted included letters from a union representative with respect to grievances filed: a May 22, 2013 letter regarding a medical accommodation request, a February 13, 2014 letter regarding the filing of a workers' compensation claim, June 24, 2013, and February 28 and September 22, 2014 letters requesting arbitration, August 11 and September 9, 2014 letters regarding a request to waive debt, a July 22, 2014 letter regarding discrimination, harassment, and retaliation, an August 13, 2014 letter as to work schedule and leave matters.

The record also contains a November 6, 2012 report of investigation from the employing establishment regarding the allegation of sexual harassment by A.L. The report noted

appellant's allegations that A.L. talked and texted about personal matters, sometimes of a sexual nature, that made her feel uncomfortable. In the report are samples of text messages between appellant and A.L. during the period July 6 to August 31, 2012. The messages include conversations regarding both work and personal or family matters. In one conversation on August 9, 2012, A.L. texted that he "would be thinking of u when I get my massage in the morning." On August 15, 2012 he texted that he has had "problems with his marriage" for years, and appellant texted that this is because he cheats on his wife and asks if he is "a sex addict." A.L. indicates that he is an addict and describes a "fence incident" involving a sexual act. On August 19, 2012 he texted "I bet you look hot in your charger jersey." The August 31, 2012 messages show that A.L. had considered bringing beer, but appellant responded that that would be inappropriate.

The report provides that A.L. acknowledged that some conversations were of a sexual nature, but he asserted these were generally about his reputation and his past, that appellant never told him to stop contacting her, and he believed they were friends. He denied having any sexual contact with appellant or any other border patrol agent, and that he stopped contacting appellant after August 31, 2012 because of the messages sent. The report also indicated that A.L. acknowledged obtaining appellant's cellular telephone number from the employing establishment database, but this was for official and unofficial purposes, in case appellant needed something. The report did not make any specific findings with respect to the allegations of sexual harassment.

By decision dated October 6, 2015, the hearing representative affirmed the July 25, 2014 decision. He found the evidence of record did not establish a compensable work factor and therefore appellant had not established her claim for compensation.

LEGAL PRECEDENT

Appellant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her federal employment.[2] This burden includes the submission of detailed description of the employment factors or conditions which she believes caused or adversely affected the condition or conditions for which compensation is claimed.[3]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's

[2] *Pamela R. Rice*, 38 ECAB 838 (1987).

[3] *Roger Williams*, 52 ECAB 468 (2001); *Anna C. Leanza*, 48 ECAB 115 (1996).

emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.[4]

A reaction to an administrative or personnel matter is generally not covered as it is not related to the performance of regular or specially assigned duties.[5] Nevertheless, if the evidence demonstrates that the employing establishment erred, acted abusively, or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.[6]

With respect to a claim based on harassment or discrimination, the Board has held that actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under FECA. A claimant must, however, establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[7] An employee's allegation that he or she was harassed or discriminated against is not determinative of whether or not harassment occurred.[8]

ANALYSIS

In the present case, appellant has alleged that she sustained an emotional condition causally related to her federal employment. The initial question presented is whether appellant has alleged, and the evidence substantiates, a compensable work factor. If a compensable work factor is established, then the medical evidence is reviewed to determine whether a diagnosed condition is causally related to the compensable work factors.

The Board finds that the evidence of record substantiates a compensable work factor with respect to sexual harassment. The text messages of record establish that comments were made by a supervisor to a subordinate that were of a sexual nature. The texts were erroneous and unwarranted comments by a supervisor.[9] The comments do not have to involve work matters to be considered compensable work factors.[10] The text messages were not limited to a single incident, but represented a repeated pattern of inappropriate sexual comments.[11]

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

[5] *See Brian H. Derrick*, 51 ECAB 417, 421 (2000).

[6] *Margreate Lublin*, 44 ECAB 945, 956 (1993).

[7] *Gregory N. Waite*, 46 ECAB 662 (1995); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

[8] *Helen P. Allen*, 47 ECAB 141 (1995).

[9] *See R.T.*, Docket No. 13-1665 (issued September 12, 2014) (even though the supervisors' comments were apparently an attempt to strike a light tone, the sexual nature of the comments were erroneous and unwarranted).

[10] *See L.B.*, Docket No. 06-1939 (issued January 30, 2007).

[11] *Cf. M.F.*, Docket No. 13-1356 (issued February 10, 2014) (a single text message expressing affection for the claimant did not show a pattern of harassment).

As noted above, a claimant must establish a factual basis for a harassment claim by supporting the allegations with probative and reliable evidence. The probative evidence of record substantiates that appellant was subjected to inappropriate text messages from a supervisor. The Board thus finds appellant has established a compensable work factor with respect to sexual harassment by the supervisor.

Appellant has also alleged retaliation from the employing establishment after filing an EEO claim. The record, however, does not establish a compensable work factor in this regard. Appellant has referred to denial of requests for transfer, and a failure to make reasonable accommodation for a medical condition, but no probative evidence of error or abuse by the employing establishment was presented. Letters from a union representative do not establish that the employing establishment retaliated against appellant or acted erroneously with respect to an administrative or personnel matter. For example, there is a May 22, 2013 grievance letter from the union representative indicating that appellant had requested a temporary reassignment to San Diego, California to continue with medical treatment for a work-related injury. The letter indicates the request was denied, as there were adequate medical resources locally, and alleges employing establishment procedures were not followed. There are no findings with respect to a grievance or any probative evidence that would establish that administrative actions were taken in retaliation for an EEO filing or constitute administrative error or abuse.[12] In the absence of such evidence, the record does not establish a compensable work factor in this regard.

OWCP did not address the medical evidence as it had found that no compensable work factors had been established. Since the Board finds that appellant has established a compensable work factor, the case will be remanded to OWCP to properly consider the medical evidence.[13] After such further development as is deemed necessary, OWCP should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

[12] *Supra* note 6.

[13] *See R.T., supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 6, 2015 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 4, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board