United States Department of Labor
Employees' Compensation Appeals Board

R.F., Appellant	)	
and	)	**Docket No. 17-1143**
	)	**Issued: December 4, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 27, 2017[1] appellant filed a timely appeal from an October 31, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from October 31, 2016, the date of OWCP's last decision was April 29, 2017, a Saturday; consequently, the period for filing the appeal ran to the next business day, Monday, May 1, 2017. *See* 20 C.F.R. § 501.3(f)(2). Since using May 2, 2017, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 27, 2017, rendering the appeal timely filed. *See* 20 C.F.R. 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

On December 18, 2015 appellant, then a 39-year-old peer specialist, filed an occupational disease claim (Form CA-2) alleging that she suffered mental distress, physical pain, and sleep deprivation as a result of her federal employment. On the claim form she wrote that the main problem was harassment from her supervisor, with other incidents involving coworkers and a particular veteran that had caused her stress. On the reverse side of the claim form appellant's supervisor, A.S., indicated that appellant had not stopped work.

The record contains an employing establishment incident report dated December 9, 2015. A.S., wrote that appellant was asked why she was absent from a December 7, 2017 meeting, and she responded that she was being micromanaged. The report indicates that appellant later contacted A.S.'s supervisor and accused A.S. of harassing her.

By letter dated December 29, 2015, OWCP requested that appellant submit additional factual and medical evidence to support her claim for compensation. On March 1, 2016 appellant submitted a February 24, 2016 letter and medical evidence.

In the February 24, 2016 letter, appellant alleged that, on September 23, 2015, a veteran had made a comment that appellant was "knock-kneed" and the comment made her feel embarrassed. She alleged that there had been other times when that veteran had made comments about her weight. According to appellant, A.S. had minimized such incidents and told her that such incidents happen when you are attractive. Appellant then asserted that A.S. had harassed, bullied, and kept tabs on her for the past two years, creating a hostile work environment. In November 2013, she asserted that she had told A.S. she was not comfortable riding in the back of a car full of male patients, but nothing was done, yet other female employees were allowed to sit in front and drive. Appellant asserted that A.S. did not care about her concerns. She alleged that she had to share an office with a coworker from October 2013 to May 2014, and this individual would pick on her and interrupt conversations. In addition, appellant alleged that this coworker smoked electronic cigarettes in the office. She complained that this was a safety violation, but A.S. ignored her concerns.

Appellant further alleged that since December 2013 A.S. had constantly hounded her about not being in the recreational center and not interacting with veterans to build relationships. She further alleged that A.S. intentionally scheduled outings during times that she had scheduled meetings and she asserted that she was never asked to facilitate other staff member groups while they were on leave. When appellant reported this to A.S. on October 28, 2015, A.S. told her it was because she always rejected her offers to do so. Appellant then discussed volunteering to make a dish for the 2015 Thanksgiving lunch, but A.S. made sure she was at another clinic and could not prepare the dish. With respect to December 9, 2015, she asserted that A.S. questioned her aggressively about missing a December 7, 2015 meeting, but she had told A.S. that she was

attending a meeting at another location. Appellant asserted that she had filed a grievance regarding this matter.[3]

As to additional evidence submitted on March 1, 2016, the record contains December 2, 4, and 15, 2013 "report of contact" forms from A.S. The December 2, 2013 report refers to a discussion regarding appellant's lateness for work and a December 4, 2013 discussion regarding the need for her to engage more with the patients. The December 15, 2013 report indicated that a meeting was held to discuss her discomfort with veterans. The report indicated that appellant felt uncomfortable at a recent outing when she had to sit between two veterans and some of the veterans smelled and it bothered her allergies. A.S. wrote that appellant was advised that sometimes the front seat was occupied, but she was not expected to always sit between patients. There was a discussion involving November 12, 2013, when appellant asked for leave for personal business. A.S. indicated that appellant was advised to call her if she was not going to be back by 2:00 p.m., as that was the time put on her timesheet.

The record contains an agreement to mediate dated January 16, 2014, signed by appellant, A.S., a union representative, and another participant. Included is a page with comments regarding a coworker. The comments request that this coworker not intervene in private conversations, criticize everything, or take control of conversations.

In a brief note dated December 23, 2015, appellant wrote that she had filed an Equal Employment Opportunity (EEO) claim on December 17, 2015. She asserted that A.S. had demanded she sign some form regarding misconduct and disorderly behavior.

In a letter dated February 29, 2016, A.S. contended that she had not created a hostile work environment, never interrogated appellant, and had always been respectful. On March 29, 2016 she wrote that appellant's grievance had been "remedied-satisfied." A.S. indicated that appellant spent time in her office and did not interact with the patients, failed to complete notes in a timely manner,[4] and was often late to work.

On September 16, 2016 additional evidence was submitted. In a March 28, 2016 letter, A.S. asserted that the December 9, 2015 meeting was not conducted in an interrogating manner and it was appellant who raised her voice. As to the failure to attend a December 7, 2015 meeting, appellant stated that she did not know she was required to attend and felt that A.S. was micromanaging. A.S. wrote that, despite an agreement made in November/December 2014, appellant continued to spend time in her office away from her patient case duties.

In a September 9, 2016 statement, a coworker wrote that on September 23, 2015 appellant had complained that an older veteran had made a comment that she was "knock-kneed" and she was bothered by the remark. The coworker indicated that it was explained to appellant that patients may at times say something inappropriate, but they do not intend to cause harm. According to the coworker, the patient indicated that he did not intend to offend appellant, and

[3] A February 17, 2016 note from a union representative indicated appellant had alleged that A.S. created a hostile work environment.

[4] The record contains e-mails dated December 10, 2015 from A.S. regarding the need to complete patient notes.

he apologized to her. He indicated that he felt they were joking with one another, as they had in the past.

A.S. also submitted a September 9, 2016 letter addressing appellant's allegations. She wrote that she had always been supportive of appellant, that appellant was granted permission to attend every professional development event, and was allowed to stay in her office when appellant reported "having a bad day." A.S. indicated that appellant often had conflicts with patients or staff members, and felt that others were "looking at her funny." As to a September 23, 2015 incident, she wrote that the patient was 73 years old and the staff did not feel as if he had done anything inappropriate. A.S. asserted that she never made a statement regarding patients making comments because an employee was attractive, and she had to remind appellant to be careful how she joked with patients.

A.S. denied harassing appellant about being late, noting that supervisors were required to know the whereabouts of their staff. She denied ever harassing or bullying appellant. A.S. wrote that she did not have time to micromanage an employee, but she did expect employees to arrive at work on time and perform assigned job duties. With respect to outings, she reported that appellant was never asked to sit in the back of a vehicle, and all staff members drove vehicles when taking patients on outings. Appellant did share an office for a period of time, but there were problems from the start and it was agreed that they would minimize using the office at the same time. A.S. indicated that there was a policy against electronic cigarettes in the building, but she had no knowledge regarding appellant's allegations and never told appellant that any exposure was harmless. In addition, she denied ever intentionally scheduling outings during appellant's scheduled meetings.

By decision dated October 31, 2016, OWCP denied appellant's emotional condition, finding that appellant had not substantiated a compensable work factor.

LEGAL PRECEDENT

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 an illness has some connection with the employment, 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. 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.[5]

Appellant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by employment factors.[6] This burden includes the submission of a detailed

[5] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[6] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[7]

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 factors of employment and may not be considered.[8] 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.[9]

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.[10] Mere perceptions of harassment, retaliation or discrimination are not compensable under FECA.[11]

ANALYSIS

The Board finds that appellant has not alleged that, under *Cutler*,[12] her emotional condition was caused by performance of actual employment duties.[13] Rather, appellant objects to various actions by the employing establishment personnel.

Appellant alleged that she was harassed by her supervisor, A.S. She alleged, for example, that the supervisor micromanaged her, did not ask her to facilitate other staff members' groups, intentionally scheduled outings when appellant would be at a meeting, and failed to respond to concerns such as riding in the back seat with male patients. As noted above, there must be probative and reliable evidence to support a claim of harassment.[14]

Appellant has not submitted probative evidence of harassment in this case. There is no evidence of record corroborating appellant's allegations of micromanaging or other inappropriate supervision. It is well established that any allegation of error with regard to micromanaging

[7] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[8] *See Charles D. Edwards*, 55 ECAB 258 (2004); *Norma L. Blank*, 43 ECAB 384 (1993).

[9] *Lori A. Facey*, 55 ECAB 217 (2004); *Norma L. Blank, id.*

[10] *Marlon Vera*, 54 ECAB 834 (2003).

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

[12] *Supra* note 5.

[13] *See D.R.*, Docket No. 16-0605 (issued October 17, 2016).

[14] *Supra* note 10.

must be supported by probative evidence.[15] The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of FECA. This principle recognizes that a supervisor or manager must be allowed to perform his or her duties and that employees will, at times, disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.[16] Appellant's supervisor, A.S. explained that appellant was often late and it was a supervisor's responsibility to account for an employee's work hours. The record contains reports of contact indicating that the supervisor addressed appellant's concerns, such as riding in the back seat with male patients. There is no evidence to support that A.S., acting as a supervisor, intentionally kept her from outings or ignored appellant's concerns. As to an allegation that, A.S. interrogated appellant about missing a December 7, 2015 meeting, there was no evidence of error or abuse. While appellant has referred to filing a grievance and an EEO complaint, no evidence of such actions was presented and no findings of error have been submitted.[17]

Appellant also alleged that she had to share an office with a coworker who picked on her and at times smoked electronic cigarettes. However, she failed to provide information with respect to any specific instances of these assertions, and no witness statements or other supporting evidence were presented. While appellant submitted a copy of a mediation agreement involving this coworker, none of the listed allegations indicated that he used electronic cigarettes. Furthermore, appellant's supervisor indicated that she had no knowledge of any specific allegations against the coworker. As such, the evidence of record is insufficient to support appellant's allegations involving her coworker.[18]

In addition, appellant referred to a September 23, 2015 incident when a patient made a remark about her appearance that made her feel uncomfortable. While the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to a compensable work factor.[19] The evidence of record indicates that the patient did not intend to offend appellant and was simply joking with her as he had in the past. There is no evidence that the comment from the patient rose to the level of verbal abuse that established a compensable work factor.[20]

The Board accordingly finds that appellant has not substantiated a compensable work factor with respect to her claim for compensation. In the absence of a compensable work factor,

[15] *See S.B.*, Docket No. 16-1124 (issued November 10, 2016); *P.R.*, Docket No. 14-0346 (issued September 3, 2014).

[16] *See Linda J. Edwards-Delgado,* 55 ECAB 401 (2004).

[17] *A.M.*, Docket No. 17-0192 (issued June 5, 2017).

[18] *See Y.J.*, Docket No. 15-1137 (issued October 4, 2016).

[19] *Judy L. Kahn,* 53 ECAB 321, 326 (2002).

[20] *See K.T.*, Docket No. 11-0269 (issued September 20, 2011).

the Board will not address the medical evidence.[21] It is appellant's burden of proof to establish her claim, and appellant has not met her burden of proof in this case.

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 an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 31, 2016 is affirmed.

Issued: December 4, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[21] *See Margaret S. Krzycki*, 43 ECAB 496 (1992).