United States Department of Labor
Employees' Compensation Appeals Board

B.L., Appellant	)	
and	)	**Docket No. 18-0965**
	)	**Issued: November 19, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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 10, 2018 appellant, through counsel, filed a timely appeal from a March 16, 2018 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] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish an emotional condition in the performance of duty on July 20, 2017, as alleged.

FACTUAL HISTORY

On July 25, 2017 appellant, then a 56-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on July 20, 2017 she sustained an emotional condition at work. On the Form CA-1, she indicated that reference should be made to an attached statement regarding the cause of the claimed emotional condition. Appellant stopped work on July 27, 2017.

In a July 25, 2017 statement, appellant indicated that on July 19, 2017 a coworker, T.R., arrived at the health unit with documentation dated July 17, 2017 which outlined his work restrictions. She informed T.R. that the documentation was insufficient according to employee labor relations manual and advised him he would need additional documentation from his physician that included a medical diagnosis and rationale for his work restrictions. T.R. returned with a Family and Medical Leave Act (FMLA) form and appellant told him that the form had to be submitted to another office for FMLA authorization. On July 20, 2017 P.R., a human resources management specialist and acting human resources management manager, who was T.R.'s wife, arrived at the health unit and inquired as to why T.R.'s restrictions were not in the health unit log. Appellant advised P.R. that she could not and would not discuss T.R.'s medical information with her. P.R. left the office and then returned with T.R. and stated that T.R. would give appellant permission to talk to her about the medical information. T.R. then provided such permission, but appellant refused to discuss T.R.'s medical information with P.R. and she asked her to leave so that she could discuss the information with T.R. alone. Appellant asserted that P.R. started yelling at her and inquiring why T.R.'s restriction was not in the health unit log. At that time, T.R. also began to raise his voice when speaking to appellant about his medical documentation.

Appellant further noted that, J.Y., a nurse in the health unit, then walked up to her cubicle during this exchange of conversation and witnessed what was taking place. She indicated that she informed P.R. and T.R. that it was an ethical issue for her to discuss T.R.'s medical information with her. Appellant also advised that there was a conflict of interest given that P.R. was the acting human resources management manager, and she asked P.R. to control her voice when addressing her. She advised P.R. and T.R. that there were three nurses in the health unit who could work on the health unit log and only one person could work on the log at a time. Appellant then asked P.R. and T.R. to leave her office. She asserted that the conversation was extremely loud, intimidating, and quite threatening. Appellant asserted that P.R. and T.R. were both standing in her cubicle, which was a very small area, and they stood over her and yelled at her. She indicated that the situation made her feel harassed, intimidated, threatened, and unsafe. Appellant noted that she had been physically and verbally harassed by another employing establishment manager in the past.

Appellant submitted various documents, including witness statements and e-mail communications, in which individuals discussed their knowledge, or lack of knowledge about the events of July 20, 2017.

In a July 24, 2017 e-mail, J.Y. indicated that she heard P.R. and T.R. speaking in "loud voices" with appellant on July 20, 2017 while she was working in her cubicle near them. She noted that P.R. asked appellant questions about T.R.'s medical documentation, but that appellant refused to talk with her about it due to ethical concerns. In a July 26, 2017 statement, R.S., a human resources specialist, indicated that appellant and J.Y. reported to her that P.R. and T.R. spoke in a tone "that they did not like" on July 20, 2017.

In a July 24, 2017 e-mail, N.L., a nurse in the health unit, indicated that on July 20, 2017 she heard appellant tell P.R. that she could not discuss T.R.'s medical documentation with her due to ethical issues. She noted that she did not hear P.R. raise her voice or become intimidating towards appellant. In a July 31, 2017 statement, L.N., indicated that she did not hear any communication between appellant and P.R. on July 20, 2017. In an August 1, 2017 statement, S.O. indicated that she did not hear anything even though she was at her desk most of the day on July 20, 2017.

In a July 20, 2017 e-mail, P.R. indicated that she approached appellant about T.R.'s medical records on that date, and appellant refused to discuss the subject, citing ethical issues. She discussed her summoning of her husband, T.R., to speak to appellant and give her permission to speak to her about the matter. P.R. then discussed the remainder of the conversation that she and T.R. had with appellant on July 20, 2017. In a July 27, 2017 e-mail, T.R. discussed the portion of the July 20, 2017 conversation in which he participated, noting that appellant indicated that she would not discuss his medical records with P.R. due to a conflict of interest.

Appellant submitted a July 17, 2107 disability note of Dr. Lauri Lowenbraun, an attending Board-certified psychiatrist.

In an August 14, 2017 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of her emotional condition claim. In another August 14, 2017 letter, it asked the employing establishment to respond to appellant's allegations.

In an August 14, 2017 statement, appellant provided a discussion of her July 20, 2017 conversation with T.R. and P.R. which was substantially similar to that contained in her July 25, 2017 statement. She also submitted handwritten responses to the August 14, 2017 development letter in which she asserted that P.R. and T.R. yelled at her and harassed her on July 20, 2017.

In a September 5, 2017 statement, T.P., manager of health and resource management, noted that on July 24, 2017 a coworker, J.A., advised about her attempts to obtain appellant's version of the July 20, 2017 incident. J.A. told T.P. that she approached appellant about the July 20, 2017 incident, but appellant stated that she was fine and declined to discuss the matter. T.P. spoke with P.R. on July 25, 2017 and P.R. acknowledged that she approached appellant regarding T.R.'s work restrictions. On July 26, 2017 appellant came to T.P.'s office, provided a description of the July 20, 2017 incident, and submitted the traumatic injury claim form.

Appellant also submitted reports from Dr. Lowenbraun and Marisa Rodriguez, a clinical psychologist.

By decision dated September 13, 2017, OWCP denied appellant's emotional condition claim because appellant failed to establish a compensable employment factor. It found that P.R.

and T.R. spoke to appellant loudly on July 20, 2017, but such occurrence did not rise to the level of verbal abuse.

On September 20, 2017 counsel requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review.

During the hearing held on January 31, 2018, appellant testified about her conversation with P.R. and T.R. on July 20, 2017, noting that J.Y was in an adjacent cubicle and N.L. also was present when P.R. and T.R. were in the health unit. She testified that P.R. and T.R. came close to her inside of her cubicle and yelled at her. Appellant indicated that she did not file an Equal Employment Opportunity (EEO) claim regarding the claimed incident, but she did file a complaint with T.P. Counsel argued that reports by treating physicians established that appellant's exposure to loud voices at work caused post-traumatic stress disorder.

Appellant submitted additional reports from Dr. Lowenbraun and Ms. Rodriguez.

By decision dated March 16, 2018, OWCP's hearing representative affirmed OWCP's September 13, 2017 decision.

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.[3] 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.[4]

A claimant 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.[5] This burden includes the submission of a detailed description of the employment factors or conditions which he or she believes caused or adversely affected a condition for which compensation is claimed, and a rationalized medical opinion relating the claimed condition to compensable employment factors.[6]

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

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

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

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

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

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.[7] 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.[8]

ANALYSIS

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 on July 20, 2017, as alleged.

Appellant alleged that she sustained an emotional condition due to an incident at work on July 20, 2017. The Board must initially review whether this incident is a covered employment factor under the terms of FECA. The Board notes that appellant's claim does not directly relate to her regular or specially assigned duties under *Lillian Cutler*.[9] Rather, appellant primarily claimed that she was subjected to harassment and discrimination on July 20, 2017.

Appellant claimed that harassment and discrimination occurred on July 20, 2017 when P.R., the acting human resources management manager, and T.R., a coworker and P.R.'s husband, yelled at her when discussing T.R.'s medical documentation relating to his work restrictions. She indicated that P.R. attempted to get her to discuss T.R.'s medical documentation with her, but that she refused because she felt that it would be unethical to do so. Appellant claimed that she felt threatened, intimidated, and unsafe due to P.R. and T.R. speaking loudly to her in a confined space on July 20, 2017.

The Board has held that unfounded perceptions of harassment do not constitute an employment factor.[10] Mere perceptions are not compensable under FECA and harassment can constitute a factor of employment if it is shown that the incidents constituting the claimed harassment actually occurred.[11]

The Board notes that appellant has submitted evidence showing that P.R. and T.R. spoke loudly to her on July 20, 2017. The record contains a statement from a coworker, Y.P., who was in close proximity for most of the time the conversation was held. She indicated that she heard P.R. and T.R. speaking loudly with appellant. However, the Board has held that speaking loudly is not by itself sufficient to establish a compensable work factor.[12] The Board further notes that

[7] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[8] *Id.*

[9] *See supra* note 3.

[10] *See F.K.*, Docket No. 17-0179 (issued July 11, 2017).

[11] *See id.*

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

appellant has not submitted sufficient evidence to show that the actions or statements of P.R. and T.R. on July 20, 2017 rose to the level of harassment or discrimination. She has not submitted evidence that they made any particular threatening or abusive comments.[13] The Board has held that, while some statements may be considered abusive and constitute a compensable factor of employment, not every statement uttered in the workplace will be covered by FECA.[14]

For these reasons, appellant has not established a compensable employment factor with respect to the claimed harassment and discrimination.

The Board further notes that, given P.R.'s role as a manager, the July 20, 2017 discussion about medical documentation relating to the development of work restrictions could be considered to be an administrative or personnel matter. Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[15] However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[16] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[17]

The Board notes, however, that appellant did not substantiate any error or abuse committed by P.R. on July 20, 2017 in her role as a manager. Appellant did not present a final holding of a grievance or other form of complaint showing that such error or abuse occurred. Therefore, she did not establish a compensable employment factor with respect to administrative or personnel matters.

For these reasons, the Board finds that appellant has not established a compensable employment factor. Given the Board's finding on the factual aspect of her case, it is unnecessary to consider the medical evidence of record.[18]

[13] Moreover, appellant did not present a final holding of a grievance or other form of complaint alleging harassment or discrimination which showed that such harassment or discrimination actually occurred. During the January 31, 2018 hearing, appellant indicated that she filed a complaint with T.P., the human resources management manager, but the record does not contain any documents concerning such a grievance.

[14] *See generally C.T.*, Docket No. 08-2160 (issued May 7, 2009).

[15] *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[16] *William H. Fortner*, 49 ECAB 324 (1998).

[17] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[18] *See Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992) (finding that it is not necessary to consider the medical evidence of record if a claimant has not established any compensable employment factors).

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 of proof to establish an emotional condition in the performance of duty on July 20, 2017, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 2018
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