United States Department of Labor
Employees' Compensation Appeals Board

M.R., Appellant	)	
and	)	**Docket No. 18-0305**
	)	**Issued: October 18, 2018**
U.S. POSTAL SERVICE, NATIONAL EQUAL EMPLOYMENT OPPORTUNITY INVESTIGATIVE SERVICE OFFICE, Tampa, FL, Employer	)	

Appearances:
Frederick M. Neiswender, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 27, 2017 appellant, through counsel, filed a timely appeal from a June 2, 2017 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 the claim.

[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 with consequential multiple sclerosis (MS) flare-up and immunological compromise in the performance of duty.

FACTUAL HISTORY

On September 5, 2012 appellant, then a 52-year-old Equal Employment Opportunity (EEO) service analyst, filed an occupational disease claim (Form CA-2) alleging that a stressful, hostile work environment caused a flare-up of a preexisting anxiety condition and major depression, which resulted in a flare-up of preexisting MS, immunologic deterioration, and infections.[3] She noted that she first became aware of her claimed conditions on March 6, 2008. She stopped work on July 12, 2012, and related her conditions to her federal employment on August 10, 2012.

In a supplemental statement to the Form CA-2, appellant indicated that her stress began on August 27, 2010 when she was promoted to her current position. She was concerned about her ability to complete time sensitive cases "the right way." Appellant alleged that she worked up to 19 hours a day, including nights and weekends, because she felt compelled to edit the work of other employees even though it had been approved by managers. She indicated that on her own initiative, she performed significant case research beyond what she characterized as an unethically minimal level directed by her supervisors. Appellant also asserted that supervisors demanded that she work overtime, including on August 18, 2011. Additionally, she alleged that, in September 2011, Acceptance and Dismissal Manager K.L. assigned her a new type of work at a higher volume than other analysts. Appellant noted stress related to a September 2011 assignment that she believed was a "conflict of interest" as it involved one of her former managers. She contended that her division was short staffed following an analyst's March 2012 retirement and that managers became "hostile" when she requested a reduction in workload. Appellant alleged that Investigative Division Manager V.B. came to appellant's office at the end of the work day to remind her of deadlines. She also alleged that while she was hospitalized intermittently from May to July 2012, managers deliberately let her case deadlines expire then blamed her for not completing her work on time. Appellant characterized a supervisor's tone of voice during a June 2012 meeting as harassment.

By development letter dated September 20, 2012, OWCP notified appellant of the type of additional evidence needed to establish her claim, including factual evidence of corroboration of the identified workplace incidents, and a report from her attending physician diagnosing a condition attributable to those incidents. It afforded her 30 days to submit the necessary evidence.

The employing establishment submitted two October 11, 2012 statements denying appellant's allegations. A human resources analyst noted that appellant had filed a prior emotional

[3] OWCP assigned the present claim OWCP File No. xxxxxx454.

condition claim on July 21, 2005 under File No. xxxxxx792[4] and an EEO claim for similar allegations of overwork and harassment. Manager V.B. contended that appellant worked excessive hours due to disorganization, procrastination, preoccupation with case details, and issues "not relevant to her core duties," unnecessary research, and failure to follow managerial directives. In September 2011, appellant refused to rely on approved templates for new work, and instead unnecessarily created her own materials. As she viewed all supervisory input as "harassment," managers had reassigned many of her cases to other analysts to assure their completion. V.B. noted that most of the analysts in appellant's division were able to meet case deadlines as the agency's work volume had decreased 20 percent in fiscal year 2012.

A June 11, 2012 EEO initial management inquiry summary noted that unnamed analysts agreed that the workload was heavy. Fifty percent of the analysts who responded claimed to work 40 to 42 hours a week, and 50 percent claimed to work more than 50 hours a week.

In response, appellant provided October 30, November 14, and December 12, 2012 letters contending that the employing establishment's statements were misleading and inaccurate. She provided a copy of her 2011 annual performance review. Appellant was rated as a 4 out of a possible 15. Appellant also provided medical evidence related to her MS diagnosis.[5]

In a letter dated December 31, 2012, the employing establishment controverted appellant's claim.

By decision dated March 18, 2013, OWCP denied appellant's claim for an emotional condition with consequential MS flare-up and immunological compromise as the evidence submitted failed to establish that the events occurred as alleged.

On November 1, 2013 appellant requested reconsideration. She provided her April 8, 2011 mid-year performance evaluation, in which her manager recommended speed reading training as appellant used a ruler while reading and would slide it down the page as she read. Appellant also provided an undated statement from Coworker C.N., who asserted that she and Coworker P.S. managed appellant's incoming mail and other items while appellant was hospitalized in July 2012. C.N. noted that analysts often worked more than 40 hours a week. She also submitted an August 22, 2012 EEO response and June 21, 2013 EEO final agency decision finding that appellant had not established her allegations of harassment, discrimination, disparate treatment, or a hostile work environment.

In a letter dated December 30, 2013, the employing establishment asserted that during 2012 when the division workload had declined, it was still necessary to reassign "major portions" of

[4] An additional claim had been filed under OWCP File No. xxxxxx805, in which OWCP accepted that appellant sustained an "other acute reaction to stress, unspecified" on October 1, 2001.

[5] Appellant was first diagnosed with MS in March 2008. She was treated by Dr. Robert Wilson, an attending osteopathic physician specializing in neurology, from January 6, 2011 to August 10, 2012. Dr. Gillian Karatinos, a Board-certified psychiatrist, treated appellant from July 12 to August 22, 2012 for recurrent major depressive disorder, generalized anxiety disorder, rule out bipolar II disorder, and cognitive problems. Appellant also provided laboratory reports and imaging studies dated from March 2009 to July 2011, and records from her hospitalization from July 12 to 16, 2012.

appellant's cases as she refused to comply with case processing procedures and supervisory instructions.

In response, appellant submitted several additional statements. She alleged that a supervisor humiliated her by giving her a copy of a book entitled, *The Complete Idiot's Guide to Speed Reading*. Appellant also contended that in July 2012, a supervisor telephoned her at home to discuss a leave use issue and the contents of her outgoing voicemail message during extended leave. She contended that supervisors refused to provide reasonable accommodations following her hospitalizations in 2012.

Appellant provided May 18 and June 6, 2012 e-mails to and from Manager W.C., in which she reiterated her allegations of harassment. W.C. assured appellant that he was not mad at her and had never been. He asked appellant to "calm down" and allow the EEO investigator to complete her assessment.

Appellant also submitted an excerpt of a September 22, 2012 EEO affidavit by Manager K.L. noting that, generally, analysts left work at 4:00 p.m., but took work home, and that appellant was notified when she was hired to "expect to work long hours, weekends and Holidays and to expect to take work home." Appellant's position was FLSA-exempt, with no preset limit to the number of hours worked in a given week.

By decision dated February 11, 2014, OWCP modified its prior decision to find that appellant had established as factual that she worked long hours, on weekends, and on holidays. It denied the claim, however, finding that appellant worked those hours to complete self-assigned tasks in contravention of supervisory directives. OWCP therefore found that the overwork did not occur in the performance of duty. It further found that appellant had established as factual that a supervisor had given her a copy of a speedreading book, but there was no intent to harass appellant. Additionally, OWCP found that appellant had established that she received a call at home to discuss her FMLA status and was instructed about the contents of her outgoing voicemail message. It found, however, that these were administrative matters not considered to be within the performance of duty, and that no error or abuse was established. OWCP further found that appellant had not established as factual that she was denied appropriate reference materials to perform her job successfully, that she was told to perform unethical acts, that she was denied accommodations following a hospitalization, and that a manager's tone of voice in a June 2012 meeting constituted harassment.

On February 9, 2015 appellant, through counsel, requested reconsideration. In additional statements, counsel contended that attached e-mails to appellant from K.L. and V.B. dated from October 2010 to May 2012, with questions or brief comments about appellant's cases, were examples of managerial harassment. Counsel also provided employing establishment case tracking screen captures dated from February to July 2012, EEO complaint documents regarding procedural issues, and a January 12, 2015 EEO decision affirming the denial of appellant's EEO claim.

Appellant submitted a February 9, 2015 statement from Coworker C.O. alleging that supervisors did not properly manage appellant's caseload during her hospitalizations and that

analysts often worked more than 40 hours a week. In a February 10, 2015 statement, her husband reiterated her allegations of overwork and harassment.

The employing establishment submitted statements dated March 20 and April 16, 2015, contending that appellant was assigned an equitable workload, but engaged in "time-wasting practices not central to her core duties," failed to follow standard operating procedures, and rejected guidance from managers and successful peers. These habits prevented appellant from completing a reduced workload in early 2012, prior to her hospitalizations.

By decision dated September 21, 2015, OWCP denied modification of its prior decision, finding that the additional evidence submitted failed to establish a compensable factor of employment. It found that appellant failed to establish her allegations of harassment, discrimination, or disparate treatment. OWCP noted that the supervisory statements of record provided a thorough and credible rebuttal of appellant's allegations.

On September 19, 2016 appellant requested reconsideration. She contended that the employing establishment's settlement of her 2005 EEO claim, and a court's denial of a motion to dismiss certain aspects of her current EEO claim, proved her allegations. Appellant submitted copies of EEO documents, including a January 4, 2016 settlement agreement related to a 2005 EEO claim.[6] In exchange for a payment of $40,000.00, appellant released and discharged the employing establishment from all claims related to those events. The employing establishment stipulated that the settlement was not an admission of liability or fault.

In a letter dated October 17, 2016, the employing establishment noted that voluminous EEO investigative documents failed to establish appellant's allegations of harassment, discrimination, disparate treatment, or overwork.

Appellant submitted a January 29, 2017 rebuttal, alleging that she had established overwork as a compensable employment factor. The employing establishment responded by letter dated March 6, 2017, asserting that appellant had been assigned an equitable workload, but refused to comply with her supervisor's instructions.

By decision dated June 2, 2017, OWCP denied modification of its prior decision, finding that the additional evidence failed to establish a compensable factor of employment. It found that while the evidence of record established that appellant worked long hours, her supervisors' statements confirmed that she did so due to disorganization and failure to follow directions. OWCP further found that appellant failed to establish her allegations of harassment, discrimination, retaliation, and disparate treatment.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric

[6] An August 13, 2012 tracking form indicates that the EEO settlement pertained to a complaint filed on December 16, 2005.

disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[7]

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*,[8] 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.[9] 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.[10] Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[11] Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[12] Personal perceptions alone are insufficient to establish an employment-related emotional condition.[13] 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.[14]

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.[15] Mere perceptions of harassment, retaliation or discrimination are not compensable under FECA.[16]

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[7] *George H. Clark*, 56 ECAB 162 (2004).

[8] 28 ECAB 125 (1976).

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

[10] *Supra* note 8.

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

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

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

[14] *Supra* note 8.

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

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

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an emotional condition with consequential MS flare-up and immunological compromise in the performance of duty.

Appellant has attributed her emotional condition to performing her regular or specially assigned duties of her position. She alleged that she began to experience anxiety and to feel overwhelmed when she was promoted on August 27, 2010. Appellant contended that managers assigned her an excessive workload with unreasonable deadlines, and that her division was short staffed following an analyst's retirement in March 2012. She noted performing unassigned research and editing tasks to complete cases "the right way." In a supplemental statement to her Form CA-2, appellant contended that her supervisors required an unethically minimal amount of research and used erroneous case templates. She felt compelled to perform additional research, alter the work of other employees, and create her own reference materials.

In support of her claim, appellant submitted a June 11, 2012 EEO management inquiry summary in which unspecified coworkers alleged that the unit workload was heavy and required more than 40 hours a week to complete. Coworkers C.N. and C.O. alleged that analysts worked more than 40 hours a week. In an excerpt from an undated statement, Manager K.L. noted that appellant was informed when she was hired to expect to work long hours.

These general statements attesting that analysts worked long hours are insufficient to establish that appellant was overworked. There were no specific dates or times provided where appellant was required to work more than 40 hours a week and the employing establishment has denied that appellant's regularly or specially assigned duties required overtime work.[17] Rather, the employing establishment contended that appellant engaged in irrelevant, unassigned tasks and then claimed this time as work hours.

In an October 11, 2012 statement, Manager V.B. contended that appellant refused to complete her work in accordance with management directives. Instead, appellant spent many hours on unnecessary or irrelevant research that extended her case processing time and resulted in missed deadlines, despite 20 percent decrease in agency case volume in fiscal year 2012. In statements dated March 20 and April 16, 2015, the employing establishment reiterated that appellant was disorganized and engaged in irrelevant, time-wasting practices.

OWCP accepted that appellant worked more than 40 hours a week, but found that any overwork was related to appellant's idiosyncratic case processing methods and irrelevant research. The managerial statements of record establish that appellant's self-imposed research, editing, and template creation tasks were performed outside the scope of her assigned duties and in contravention of management directives. The Board therefore finds that these extraneous activities

[17] *A.L.*, Docket No. 17-0368 (issued June 20, 2018); *see Y.J.*, Docket No. 15-1137 (issued October 4, 2016) (claimant did not provide the requisite detail regarding specific dates and the duties she performed, which allegedly overwhelmed her, to establish that her assigned work caused her stress).

were not sufficiently related to appellant's regular, day-to-day duties to constitute a compensable factor of employment under *Cutler*.[18]

Appellant also made several allegations related to administrative and personnel actions. In *Thomas D. McEuen*,[19] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employing establishment and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[20]

Appellant alleged that a supervisor telephoned her at home to discuss a leave issue and provide guidance regarding appellant's outgoing voicemail message during her extended leave. OWCP accepted this incident as factual, but found that these were administrative matters not within the performance of appellant's assigned duties. The Board notes that while the handling of leave requests is generally related to the employment, they are administrative functions of the employer and not duties of the employee.[21] The Board has also held that the actions supervisors must take during an employee's extended absence are administrative matters not considered to be within the performance of duty.[22] The Board finds that the employing establishment acted reasonably with regard to these administrative matters.[23] There is no evidence that the employing establishment denied appellant's leave request or acted unreasonably.[24] The Board recognizes that a supervisor or manager must be allowed to perform his or her duties and that, in performing such duties, employees will at times dislike actions taken.[25] Appellant has presented no corroborating evidence to support that the employing establishment acted unreasonably in this administrative matter.

[18] *R.A.*, Docket No. 14-1438 (issued September 16, 2015); *O. Paul Gregg*, 46 ECAB 624 (1995) (where the Board found that the tasks identified as elements of overwork must bear a sufficient relationship to the employee's regular assigned duties to constitute a compensable factor of employment under *Cutler*).

[19] 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[20] *David W. Shirey*, 42 ECAB 783, 795-96.

[21] *A.L.*, *supra* note 17; *see Judy Kahn*, 53 ECAB 321 (2002).

[22] *M.H.*, Docket No. 12-0130 (issued December 4, 2012) (where the Board held that a supervisor reading and deleting work-related e-mails on the claimant's computer during an extended work absence was a normal administrative function to assure an orderly work flow and that no error or abuse was shown).

[23] *A.L.*, *supra* note 17; *M.H.*, *id.*

[24] *Id.*

[25] *A.L.*, *supra* note 17, *see Michael A. Dass*, 53 ECAB 208 (2001).

Appellant also alleged that managers utilized erroneous, unethical case processing techniques, and allowed case deadlines to expire in July 2012 during her hospitalization. The Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under FECA.[26] As such, appellant has not established a compensable employment factor with respect to these administrative matters.[27]

Appellant further attributed her condition to harassment, discrimination, and a hostile work environment. To the extent that incidents alleged as constituting harassment or a hostile environment by a manager are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[28] However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under FECA.[29]

Appellant alleged that a supervisor's recommendation for speed reading training, giving her *The Complete Idiot's Guide to Speed Reading* in 2011, and e-mails dated from October 2010 to May 2012 with feedback on her cases, constituted harassment. OWCP accepted that a supervisor had given appellant the book and acknowledged the feedback e-mails, but found no evidence of harassment. The Board notes that appellant's April 8, 2011 performance review described her difficulties with reading text and of the need for additional training to improve her case processing speed. The evidence of record does not demonstrate that a supervisor or manager treated appellant in a disrespectful manner by providing performance feedback.[30] Error or abuse in discharging management duties has not been established. Therefore, these allegations are not compensable.[31]

Appellant also contended that the May 18 and June 6, 2012 e-mails to and from Manager W.C. about her EEO complaint, a supervisor's tone of voice during a June 2012 meeting, and an alleged failure to provide accommodations following a June 2012 hospitalization were all incidents of harassment and discrimination. The employing establishment submitted several statements denying appellant's allegations regarding these administrative matters. Appellant has not established these allegations of harassment with probative and reliable evidence.[32]

With regard to appellant's allegation that the supervisory e-mails about the EEO claim constituted harassment, the Board has long held that EEO complaints by themselves do not

[26] *Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

[27] *R.A., supra* note 18.

[28] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[29] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991). *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[30] *G.M.*, Docket No. 17-1469 (issued April 2, 2018).

[31] *Id.*

[32] *Supra* note 29.

establish that workplace harassment or unfair treatment occurred.[33] Additionally, Manager W.C. expressed that he was not angry with appellant and asked that she allow the investigation to proceed. The Board finds that the e-mails establish that the employing establishment acted reasonably in regard to these administrative matters.[34] The evidence does not establish her allegations of harassment.[35]

Concerning appellant's allegations that a supervisor spoke to her in an elevated tone of voice in a June 2012 meeting, and that managers failed to provide reasonable accommodations, she failed to submit any evidence to substantiate these assertions as factual. Also, the Board has held that not every verbal interaction in the workplace is compensable simply because a claimant takes issue with the tone of voice used by the speaker.[36]

Consequently, appellant has not established her claim for an emotional condition as she has not attributed her claimed condition to any compensable employment factors.[37] The Board therefore needs not to consider the medical evidence of record.[38]

On appeal appellant contends that she has established her emotional condition claim, and that the employing establishment failed to investigate or address her allegations. As explained above, she has not established her claim for an emotional condition as she has not established a compensable employment factor.[39]

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.

[33] *S.H.*, Docket No. 17-1942 (issued August 23, 2018). *See Parley A. Clement*, 48 ECAB 302 (1997). The Board noted that the EEO January 4, 2016 settlement agreement pertained to workplace events prior to August 28, 2010, and not to the events appellant alleged caused the claimed emotional condition in the current claim.

[34] *R.A.*, *supra* note 18.

[35] *See Joel Parker, Sr.*, *supra* note 29.

[36] *D.J.*, Docket No. 16-1540 (issued August 21, 2018); *T.G.*, 58 ECAB 189 (2006).

[37] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Margaret S. Krzycki*, 43 ECAB 496 (1992).

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

[39] *R.A.*, *supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 2, 2017 is affirmed.

Issued: October 18, 2018
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