United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 18-1270**
	)	**Issued: September 4, 2020**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Victorville, CA, Employer	)	

Appearances:
Joe Mansour, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 11, 2018 appellant, through her representative, filed a timely appeal from a December 20, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[2]

[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] Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated July 15, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 18-1270 (issued July 15, 2020).

Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[4]

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.[5] The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On May 31, 2013 appellant, then a 49-year-old disciplinary hearing officer (DHO), filed a traumatic injury claim (Form CA-1) alleging an emotional condition caused by staff intimidation after reporting misconduct while in the performance of duty.

In a July 2, 2013 statement, appellant asserted that R.A., a fellow DHO, subjected her to harassment, intimidation, and profane, vulgar language after she had reported his misconduct. She recalled that in August 2009 and June 2010, R.A. became angry when she used office space he had wanted for himself. Appellant further alleged that in August 2010, management denied her request to change offices as "someone had to watch the wolf in the hen house." She alleged that on February 7, 2013, R.A. made derogatory, profane jokes about murdered law enforcement officers and engaged in other disruptive behavior. Appellant also alleged that on February 8, 2013, R.A. received a personal call on his cell phone and used the phrase "a pain in the ass" loudly enough for appellant to hear. She asserted that on May 23, 2013 R.A. gave her "a very dirty stare" as she walked through a door he held open for her. Management took no disciplinary action against R.A. and denied appellant's request to be transferred to a different facility. Appellant contended that R.A.'s overbearing, harassing manner with female secretaries, frequent profanity, and management's encouragement of his aggressive, unprofessional demeanor had created a hostile work environment.

By decision dated July 25, 2013, OWCP denied appellant's claim finding that she failed to establish the factual basis of her claim as the evidence submitted was insufficient to substantiate that the injury or events occurred as alleged. It concluded that the requirements had not been met to establish an injury as defined by FECA.

On August 2, 2013 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, later modified to a request for a review of the written record. She provided statements dated June 7 and August 2, 2013, and March 6, 2014 alleging discrimination

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that, following the December 20, 2017 decision, OWCP received additional evidence. Appellant's representative also submitted new evidence on appeal. The Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

[5] *Order Remanding Case*, Docket No. 14-1663 (issued September 29, 2015).

on the basis of race (Native American), as she was asked by management to reschedule November 2011 Native American Heritage Month events on short notice and management also denied her several job promotions. Appellant alleged that on April 1, 2013 R.A. discussed his GS-13 pay grade loudly to intimidate her, as she was a GS-12 who performed the same duties. She noted that after Coworker B., a GS-13 DHO and her former trainee[6] who was also a personal friend of R.A., had been placed in the same office due to an adverse action, R.A.'s demeanor became more aggressive. Appellant also alleged that from May 2010 to June 2012, R.A. focused inappropriately on one of the female office secretaries, which caused a senior manager to move the secretary to another office on days that R.A. was scheduled to work. She noted a January 2013 incident involving a computer in which she was issued a proposed 14-day suspension and R.B., her husband, who worked in a different sector of the facility, received a proposed letter of reprimand. Appellant asserted that on eight occasions from April 25 to May 31, 2013, R.A. engaged in loud, profane conversations, excluded her from office small talk, refused to acknowledge her even if no other coworkers were present, and on May 14, 2013 refused to eat mango bread she had brought to the office to share. On June 4, 2013 a day when R.A. was not scheduled to work at the employing establishment, he reported for work and glared at appellant.

In support of her claim, appellant submitted affidavits from her Equal Employment Opportunity (EEO) complaints for harassment and discrimination. In a November 8, 2013 affidavit, Manager A.M. indicated that he was aware of previous similar behavior by R.A. He noted that R.A. was permitted to work a portion of the week at the employing establishment as part of a settlement agreement. In a November 13, 2013 affidavit, R.B. recalled hearing R.A. use offensive language at work in late 2012 and noted that he observed R.A. glaring at appellant on unspecified dates. In a November 18, 2013 affidavit, manager L.M. noted that there were no cases assigned to R.A. from February 7 to June 18, 2013 that required his presence at the employing establishment, and that she had instructed a senior manager to speak to R.A. and appellant about appellant's allegations. In a December 18, 2013 affidavit, A.O., a secretary in the DHO office from April to July 2010, recalled that R.A. made unspecified "snide remarks," used offensive language, and behaved in an offensive manner with a sexual undertone.

By decision dated April 9, 2014, an OWCP hearing representative affirmed the July 25, 2013 decision. She modified the previous decision to the extent that she found appellant's allegations were factual as the employing establishment had not contested their occurrence. The hearing representative, however, further found that the incidents alleged by appellant did not constitute compensable employment factors. Appellant appealed to the Board.

By order issued September 29, 2015,[7] the Board set aside OWCP's April 9, 2014 decision and remanded the case for OWCP to obtain the requisite information from the employing establishment and determine whether her allegations were factually substantiated and for clarification as to which of the alleged employment incidents had been accepted as factual and the evidentiary basis for those findings.

[6] The Board notes that this coworker's full name is not contained in the case record.

[7] *Id*.

In a November 4, 2015 letter, OWCP requested the employing establishment obtain comments from R.A. "and/or a knowledgeable supervisor" regarding appellant's allegations, as follows: a June 2010 conflict with R.A. over office space; denial of appellant's request to move offices; R.A.'s inappropriate behavior with female secretaries; appellant was asked to reschedule Native American Heritage Month events; appellant asked that R.A. not report to the employing establishment on unscheduled days; R.A. made disrespectful jokes on February 7, 2013; R.A. said "pain in the ass loudly" during a personal telephone call on February 8, 2013; R.A. gave appellant a dirty stare on May 23, 2013; R.A. engaged in excessive personal conversations and ignored appellant from May 3 to 30, 2013; on May 14, 2013, R.A. grunted and returned to his office when informed that mango bread had been brought in by appellant; R.A. reported to the workplace on June 4, 2013, a nonscheduled day; R.A. glared at her on June 4, 6, and 7, 2013. OWCP afforded the employing establishment 30 days to submit the necessary evidence.

In response, C.C. provided a February 9, 2016 e-mail noting that he had "nothing to add." In a February 26, 2016 e-mail, R.A. categorically denied appellant's allegations. He asserted that he had been "nothing but professional in [his] dealings with this worthless individual" who was also a "habitual liar." Additionally, R.A. characterized appellant's complaints as "petty juvenile games" and a ploy to obtain money from the employing establishment. In a March 9, 2016 e-mail, M.R., a special investigative assistant, noted that a June 8, 2015 investigation of appellant's allegations resulted in a finding of insufficient evidence as R.A. denied the allegations and Coworker B. corroborated his denials.

By decision dated June 29, 2016, OWCP denied appellant's emotional condition claim as the evidence of record failed to establish a compensable factor of employment. It accepted as factual, but not compensable, that R.A. worked at the employing establishment two days a week under a settlement agreement, that Coworker B. was in his position due to an agency adverse action, and that there was a computer-related incident involving appellant and her husband with proposed disciplinary action. OWCP found that these incidents were administrative or personnel matters not within the performance of duty, and that no error or abuse was shown. It found that the remainder of the allegations listed in the November 14, 2015 development letter were not established as factual.

On October 7, 2016 appellant requested an oral hearing before an OWCP hearing representative.[8] By decision dated June 20, 2017, OWCP's hearing representative denied appellant's request for an oral hearing as it was not timely filed within 30 days of the June 29, 2016 decision. The hearing representative further indicated that he exercised his discretion, but determined that the issue in this case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence.

On July 6, 2017 appellant requested reconsideration of the June 29, 2016 OWCP decision, alleging that the evidence of record established a pattern of harassment, sexual harassment, and racial discrimination. She submitted an October 26, 2016 affidavit by R.A. in an EEO proceeding

[8] The postmark is of record, but is illegible.

involving a coworker. R.A. testified that he had been demoted to DHO in 2009 due to disciplinary action for unprofessional conduct while off duty.[9]

By decision dated December 20, 2017, OWCP denied modification of its prior decision. It found as factual, but not compensable, that R.A. was disciplined for unprofessional conduct prior to working at the employing establishment, that he was allowed to work two days a week at the employing establishment due to an agency adverse action, and that appellant and her husband were involved in a computer-related incident with subsequent disciplinary action. OWCP noted that these were administrative incidents not within the performance of duty. It found that the remaining 30 incidents were not established as factual as they were either vague or uncorroborated.

LEGAL PRECEDENT

An employee seeking benefits under FECA[10] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[11] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[12]

To establish an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying an employment factor or incident alleged to have caused or contributed to his or her claimed emotional condition; (2) medical evidence establishing that he or she has a diagnosed emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the accepted compensable employment factors are causally related to the diagnosed emotional condition.[13]

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

[9] By decision dated July 28, 2017, OWCP denied reconsideration as the July 6, 2017 request was not timely filed within one year of the June 29, 2016 OWCP decision and failed to demonstrate clear evidence of error. In a December 4, 2017 letter, appellant alleged that OWCP had not properly adjudicated her claim. In a December 11, 2017 letter, OWCP noted that the delay between appellant's October 2016 request for an oral hearing and the June 20, 2017 decision provided little time for her to request reconsideration. It would therefore perform a merit review and issue a *de novo* decision in the claim.

[10] 5 U.S.C. § 8101 *et seq*.

[11] *A.J*., Docket No. 18-1116 (issued January 23, 2019); *Gary J. Watling*, 52 ECAB 278 (2001).

[12] 20 C.F.R. § 10.115(e); *M.K*., Docket No. 18-1623 (issued April 10, 2019); *see T.O*., Docket No. 18-1012 (issued October 29, 2018); *see Michael E. Smith*, 50 ECAB 313 (1999).

[13] *See S.K*., Docket No. 18-1648 (issued March 14, 2019); *M.C*., Docket No. 14-1456 (issued December 24, 2014); *Debbie J. Hobbs*, 43 ECAB 135 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

employment, the disability comes within the coverage of FECA.[14] 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.[15]

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.[16] 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.[17]

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.[18] 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, it must base its decision on an analysis of the medical evidence.[19]

ANALYSIS

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

OWCP has determined that appellant has established two factual, but noncompensable factors of employment. On prior remand OWCP sought additional factual information from the employing establishment consistent with the Board's order. Amongst other items it obtained a statement from a special investigative assistant, M.R., who summarized a June 8, 2015 investigation of appellant's allegations. However, M.R. did not provide, and OWCP did not obtain, the original investigative report or the affidavits of R.A. and R.B. that were included as a part of the investigation.

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

[15] *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Gregorio E. Conde*, 52 ECAB 410 (2001).

[16] *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[17] *P.B.*, Docket No. 17-1912 (issued December 28, 2018); *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[18] *See O.G.*, Docket No. 18-0359 (issued August 7, 2019); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[19] *Id*.

The Board finds that because appellant alleged a factor, in this case sexual harassment, OWCP was obligated to obtain a copy of the investigative memorandum and accompanying affidavits and other supportive material in the employing establishment's possession.[20] It did not do so in this case and thus the record before the Board does not contain the necessary evidence to determine whether the employing established committed error or abuse in either of the two instances which have been found factual.

The Board therefore finds that it is unable to make an informed decision regarding appellant's allegations as the employing establishment did not fully respond to the request for comment made by OWCP in the November 24, 2015 development letter.[21]

Although it is a claimant's burden of proof to establish his or her claim, OWCP is not a disinterested arbiter, and it rather shares responsibility in the development of the evidence, particularly, when such evidence is of the character normally obtained from the employing establishment or other government source.[22]

To avoid piecemeal adjudication of the claim, the Board will remand the case to OWCP for retrieval of the investigative report referenced by M.R. to be followed by a *de novo* decision as to whether appellant has established a compensable factor of employment for which she sustained an emotional condition in the performance of duty, as alleged.

CONCLUSION

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

[20] *R.V.*, Docket No. 18-0268 (issued October 17, 2018); *see K.W.*, Docket No. 15-1535 (issued September 23, 2016) (remanding the case for further development by OWCP when the employing establishment did not provide an investigative memorandum in an emotional condition claim based on sexual harassment).

[21] *Id.*; *see R.A.*, Docket No. 17-1030 (issued April 16, 2018).

[22] *R.V.*, *supra* note 20, *see K.W.*, Docket No. 15-1535 (issued September 23, 2016) (remanding the case for further development by OWCP when the employing establishment did not provide an investigative memorandum in an emotional condition claim based on sexual harassment).

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 4, 2020
Washington, DC

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

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

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