United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 21-0962**
	)	**Issued: February 23, 2023**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, VICTORVILLE, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 11, 2021 appellant, through her representative, filed a timely appeal from an April 15, 2021 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, through her representative, submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of her oral argument request, appellant asserted that oral argument should be granted because it would provide an opportunity to further explain her emotional condition claim. The Board, in exercising its discretion, denies appellant's request for oral argument because arguments on appeal can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

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.

FACTUAL HISTORY

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

On May 31, 2013 appellant, then a 49-year-old disciplinary hearing officer (DHO), filed a traumatic injury claim (Form CA-1) alleging that she sustained an emotional condition due to staff intimidation when reporting misconduct on May 23, 2013, 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 placed office supplies in a former storage area that R.A. then used as an office; the employing establishment denied appellant's request to move her workstation or transfer after the office supplies discussion although R.A. continued to display inappropriate behavior. 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. became disrespectful and loud and made derogatory, profane jokes about murdered law enforcement officers. Appellant also alleged that on February 8, 2013 R.A. received a personal call on his cell phone and stated that utility problems were "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 had not established that the injury or events occurred as alleged. It concluded that the requirements had, therefore, not been met to establish an injury as defined by FECA.

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that, following the April 15, 2021 decision, appellant submitted additional evidence on appeal to the Board. However, the Board's *Rules of Procedures* 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] Docket No. 18-1270 (issued September 4, 2020); *Order Remanding Case*, Docket No. 14-1663 (issued September 29, 2015).

On August 2, 2013 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. She later requested a review of the written record in lieu of an oral hearing. Appellant provided statements dated June 7 and August 2, 2013, and March 6, 2014, alleging discrimination on the basis of race, 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. She 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. Appellant noted that after Coworker R.B., a GS-13 DHO and her former trainee who was also a personal friend of R.A., had been placed in the same DHO office due to an adverse action, R.A.'s demeanor became more aggressive. She also alleged that from May 2010 through 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 be in the office. Appellant noted a January 2013 incident involving a computer in which she was issued a proposed 14-day suspension. She asserted that on several occasions from April 25 through 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. Appellant stated that on April 25, 2013 in her presence, R.A. engaged in small talk with other coworkers, including remarks about marriages, but did not include appellant in the conversation, and on April 26, 2013, R.A. read a newspaper at his desk, "loafed off," and had a loud, profane personal telephone call. On April 30, 2013 she sent a memorandum to Supervisor C noting that R.A. committed waste, fraud, and abuse as he was being paid for work despite the fact that he did not "seem to have much work to do." On May 1, 2013 R.B. told appellant the details of a disciplinary incident involving himself, R.A. and Coworker H., which resulted in a demotion for R.B. and no action against R.A. On May 3, 2013 R.A. wasted time by meeting with several coworkers and showing them a newspaper but did not include appellant. On May 9, 2013 he did not acknowledge appellant all day and went into his office immediately upon her arrival, and on May 10, 2013 R.A. discussed his work schedule and then had a 25-minute personal conversation with Coworker W. On May 16, 2013 R.A. shared breakfast with a coworker then "stood around talking" for 20 minutes. On May 24, 2013 he did not seem to have any work duties, read the paper, and laughed with R.B. On May 30, 2013 R.A. and R.B. used profanity in a conversation in R.B.'s office discussing work and nonwork topics. 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 her, which she reported to supervisors. On June 6 and 7, 2013 R.A. avoided appellant and/or gave her dirty looks.

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 through 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 through 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 modified the July 25, 2013 decision to find that appellant's allegations were factual as the employing establishment had

not contested their occurrence. The hearing representative, however, affirmed the denial of the claim, finding that the incidents alleged did not constitute compensable employment factors. Appellant appealed to the Board.

By order issued September 29, 2015,[6] the Board set aside OWCP's April 9, 2014 decision and remanded the case for OWCP to obtain additional information from the employing establishment.

In a November 4, 2015 development letter, OWCP requested that the employing establishment obtain comments from R.A. "and/or a knowledgeable supervisor" regarding appellant's allegations. It 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. 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 R.B. corroborated his denials.

By decision dated June 29, 2016, OWCP denied appellant's emotional condition claim, finding that the evidence of record was insufficient 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 R.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 a representative of OWCP's Branch of Hearings and Review. By decision dated June 20, 2017, OWCP's hearing representative denied appellant's request for an oral hearing, finding it was untimely filed. The hearing representative exercised his discretion, but determined that the issue in this case could equally well be addressed through 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. She submitted an October 26, 2016 affidavit by R.A. in an EEO proceeding involving a coworker.

[6] *Id*.

R.A. testified that he had been demoted to DHO in 2009 due to disciplinary action for unprofessional conduct while off duty.[7]

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 incidents were not established as factual as they were either vague or uncorroborated.

Appellant appealed to the Board.[8] By decision dated September 4, 2020, the Board set aside the December 20, 2017 decision, finding that the employing establishment had not adequately responded to the November 4, 2015 development letter directed by the Board's prior decision. The Board noted that the employing establishment did not provide the original investigative report or the affidavits of R.A. and R.B. that were included as a part of the investigation. The Board found that, as appellant alleged an employment 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.

On remand, OWCP sent an October 16, 2020 development letter to the employing establishment, again requesting the investigative report and/or affidavits of R.A. and R.B. included in the investigation. OWCP advised that, under its implementing regulations,[9] it may accept a claimant's allegations as factual in the absence of a full reply from the employing establishment. It afforded the employing establishment 30 days to submit the requested evidence. No response was received.

In a development letter dated December 15, 2020, OWCP again requested that the employing establishment provide the information noted in the October 16, 2020 development letter. It reiterated that, in the absence of a full reply from the employing establishment, OWCP may accept the allegations as factual. The employing establishment did not respond.

On March 31, 2021 OWCP obtained a second opinion on the cause of appellant's claimed emotional condition from Dr. Sanford Edward Pomerantz, a Board-certified psychiatrist and neurologist. The statement of accepted facts (SOAF) provided for his review noted that there "are

[7] 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 establish 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.

[8] By order dated July 15, 2020, the Board denied appellant's timely request for oral argument. In exercising its discretion, the Board denied appellant's request for oral argument because her arguments on appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument,* Docket No. 18-1270 (issued July 15, 2020).

[9] *Id*. at § 10.117(b).

no accepted events that were factors of employment." Dr. Pomerantz diagnosed a mild, recurrent episode of major depressive disorder, unrelated to her federal employment. He reiterated in an April 9, 2021 report that the diagnosed condition was unrelated to work factors.

By decision dated April 15, 2021, OWCP denied appellant's claim. It accepted as factual, but not compensable, that R.A. was allowed to work two days per week at the employing establishment due to a settlement agreement, that Coworker R.B. was in his present position due to an agency adverse action, and that appellant and her husband were involved in a "computer-related incident." OWCP found that these were administrative, and personnel matters not covered under FECA and that no error or abuse was shown. It further found that the factual evidence of record was insufficient to establish the remainder of appellant's allegations as factual.

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 timely filed, that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[11] These are the essential elements of 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 a claimant's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.[14] However, disability is not compensable when it results from factors such as an

[10] *Supra* note 3.

[11] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[12] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[13] *See A.M.*, Docket No. 21-0420 (issued August 26, 2021); *S.K.*, Docket No. 18-1648 (issued March 14, 2019); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[14] *See A.M., id.*; *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

employee's fear of a reduction-in-force, or frustration from not being permitted to work in a particular environment, or to hold a particular position.[15]

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.[16] 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.[17]

OWCP's Federal (FECA) Procedure Manual provides that, if an employing establishment fails to respond to a request for comments on a claimant's allegations, OWCP's claims examiner may usually accept the claimant's statements as factual. OWCP's Federal (FECA) Procedure Manual further notes that the Board has consistently held that allegations unsupported by probative evidence are not established and that OWCP's claims examiner should consider the totality of the evidence and evaluate any inconsistencies prior to making a determination.[18]

ANALYSIS

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

Appellant attributed her emotional condition, in part, to R.A. being loud and intimidating with her in August 2009 and June 2010 discussions over office space, using loud profanities in her presence on February 8, April 26, May 13, and 30, 2013, and R.B. using profanities in her presence on February 8 and May 30, 2013. Additionally, she felt intimidated by R.A. grunting at her on May 14, 2013, staring or glaring at her on May 23, June 4, 6, and 7, 2013, and ignoring or excluding her from interactions with groups of coworkers on April 25, May 3, May 9, June 6, and June 7, 2013. The Board finds that R.A.'s conduct, and the profane, vulgar language by multiple

[15] *Lillian Cutler*, *id.*

[16] *C.G.*, Docket No. 20-0058 (issued September 30, 2021); *see R.B.*, Docket No. 19-0434 (issued November 22, 2019); *O.G.*, Docket No. 18-0359 (issued August 7, 2019).

[17] *Id.*

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5d(1) (June 2011). *V.H.*, Docket No. 19-0827 (issued November 20, 2019); *see also L.B.*, Docket No. 17-1671 (issued November 6, 2018); *R.B.*, Docket No. 14-1663 (issued September 29, 2015) (citing Chapter 2.800.5d(1)).

coworkers over a period of weeks, created a hostile work environment that rises to compensable harassment.[19]

The Board further finds that appellant also attributed her emotional condition, in part, to administrative matters. Appellant alleged that managers allowed R.A. to report to the employing establishment on unscheduled days, refused to address his excessive socializing, and did not discipline him for inappropriate behavior. The Board has held that 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.[20] 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.[21] Although appellant expressed dissatisfaction with how managers administered R.A.'s work schedule, and the lack of disciplinary measures, the Board has held that mere dislike or disagreement with certain supervisory actions will not be compensable absent error or abuse on the part of the supervisor.[22] Therefore, she has not established a compensable employment factor with respect to these administrative or personnel matters.[23]

Similarly, appellant noted that she and her husband were involved in a "computer-related incident" for which she received a 14-day suspension. Disciplinary matters are administrative supervisory functions and are not covered under FECA absent error or abuse.[24] There is no evidence of record of administrative error or abuse regarding the imposition of the 14-day suspension. The Board therefore finds that appellant has not established a compensable work factor with regard to the disciplinary suspension.

Appellant also alleged that the employing establishment refused her August 2010 request to move her workstation or to transfer to another work unit and denied her requests for promotion. The Board has held that denials by an employing establishment of a request for a transfer are not compensable factors of employment under FECA as they do not involve appellant's ability to perform her regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.[25] The employing establishment has explained the reasons for its

[19] *See L.C.*, Docket No. 20-0461 (issued June 2, 2021); *C.T.*, Docket No. 08-2160 (issued May 7, 2009) (finding that some statements may be considered abusive and constitute a compensable factor of employment, but that not every statement uttered in the workplace will be covered by FECA); *cf. C.L.*, Docket No. 14-0983 (issued January 23, 2015) (finding that isolated comments not made in the claimant's presence did not establish the existence of a hostile work environment or harassment/discrimination). *See also V.L.*, Docket No. 06-0898 (issued September 8, 2006), *Marlon Vera*, 54 ECAB 834 (2003) (established incidents of managers or coworkers glaring or staring at a claimant may constitute harassment).

[20] *T.L.*, Docket No. 18-0100 (issued June 20, 2019); *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[21] *J.W.*, Docket No. 17-0999 (issued September 4, 2018); *Ruth S. Johnson*, 46 ECAB 237 (1994).

[22] *T.C.*, Docket No. 16-0755 (issued December 13, 2016).

[23] *S.O.*, Docket No. 21-0975 (issued March 10, 2022).

[24] *J.W.*, Docket No. 17-0999 (issued September 4, 2018); *G.M.*, Docket No. 17-1469 (issued April 2, 2018).

[25] *B.O.*, Docket No. 17-1986 (issued January 18, 2019); *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

actions in these administrative matters. Appellant failed to submit any independent evidence to establish that the employing establishment was found in error in its selection procedures. Therefore, she has not established a compensable factor of employment in this regard.[26]

Additionally, appellant alleged discrimination on the basis of race, as management requested that she reschedule Native American Heritage Month programs on short notice in November 2011. As the employing establishment did not deny that this event occurred, the Board accepts it as factual. The Board has held, however, that scheduling workplace events is an administrative function of the employer rather than the regular or specially assigned work duties of the employee, and is not covered under FECA unless error or abuse is shown.[27] Appellant has not submitted witness statements or other documentary evidence demonstrating that the alleged discrimination occurred as alleged.[28] Mere perceptions of discrimination are not compensable under FECA.[29] Therefore, she has not established a compensable employment factor in this regard.[30]

As appellant has established harassment as a compensable employment factor, the case presents a medical question regarding whether her emotional condition resulted from the compensable employment factor. OWCP determined that there were no compensable employment factors and thus did not analyze or develop the medical evidence. The case will be remanded to OWCP for an evaluation of the medical evidence with regard to the issue of causal relationship.[31] After this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding whether appellant has established an emotional condition in the performance of duty.

CONCLUSION

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

[26] *Id*.

[27] *F.W.*, Docket No. 19-0107 (issued June 10. 2020).

[28] *F.W.*, *id.*; *S.O.*, *supra* note 23; *see B.S.*, Docket No. 19-0378 (issued July 10, 2018).

[29] *C.J.*, Docket No. 19-1722 (issued February 19, 2021); *T.G.*, Docket No. 19-0071 (issued May 28, 2019); *Marlon Vera*, 54 ECAB 834 (2003); *see also Kim Nguyen*, 53 ECAB 127 (2001).

[30] *S.O.*, *supra* note 23.

[31] *E.G.*, Docket No. 20-1029 (issued March 18, 2022).

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 23, 2023
Washington, DC

Alec J. Koromilas, 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