United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, VICTORVILLE, Victorville, CA, Employer	)	**Docket No. 23-0882** **Issued: February 8, 2024**

Appearances:
Appellant, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 8, 2023 appellant filed a timely appeal from an April 6, 2023 merit decision of the Office of Workers' Compensation (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish a diagnosed emotional condition causally related to the accepted compensable factor of her federal employment.

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances as set forth in the Board's prior decisions and prior order are incorporated herein by reference. The relevant facts are set forth below.

On May 31, 2013 appellant, then a 48-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, he became angry when she placed office supplies in a former storage area that he 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 him 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.

Appellant also submitted medical evidence.

In reports dated June 18, 2013, Dr. Arlene Braham, Board-certified in public health and general preventive medicine, recounted appellant's description of unwanted attention and vulgar, loud, conduct by a coworker beginning in August 2009. Appellant attributed her stress to the coworker's behavior. Dr. Braham noted a May 23, 2013 occupational injury and diagnosed "[s]ituational stress." She held appellant off work through August 18, 2013, referred her to a psychiatrist and prescribed medication. In a June 25, 2013 report, Dr. Braham noted that appellant had her first appointment with a psychologist.[3]

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.

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[2] Docket No. 21-0962 (issued February 23, 2023); Docket No. 18-1270 (issued September 4, 2020); *Order Remanding Case*, Docket No. 14-1663 (issued September 29, 2015).

[3] In a July 9, 2013 report, Dr. Venkat Devineni, a Board-certified cardiologist, recounted appellant's complaint of palpitations associated with dyspnea over a seven-year period.

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 in lieu of an oral hearing. She 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. 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 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. Appellant 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. She noted that a January 2013 incident involving a computer in which she was issued a proposed 14-day suspension. Appellant 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, and refused to acknowledge her even if no other coworkers were present. She 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 appellant sent a memorandum to Supervisor C. noting that he 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 her 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 her all day and went into his office immediately upon her arrival, and on May 10, 2013 he 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 appellant, which she reported to supervisors. On June 6 and 7, 2013 he avoided her 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 R.A.'s 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.

Appellant also submitted medical evidence.

In reports dated from July 27, 2009 through September 4, 2013, Dr. Richard Jones, an osteopathic physician Board-certified in family practice, diagnosed hypothyroidism, cough, and unspecified goiter. He first mentioned appellant's anxiety symptoms in a May 2, 2013 report. In an August 20, 2013 report, appellant reported "problems at work" necessitating stress management and medication.

In a July 7, 2013 report, Dr. Judith E. Turian, a licensed clinical psychologist, recounted appellant's history of work stress commencing in 2009 related to R.A.'s "inappropriately familiar remarks to the female secretarial staff, [R.A.'s] vulgar language," unprofessional conduct, and hostility. She recounted that [R.A.] had ignored appellant, "physically blocked [appellant's] passage in a doorway, and he leaves the room when [appellant] walks in." On mental status examination, Dr. Turian noted depressed mood and anxious affect. Appellant also had insomnia, daily panic attacks, poor appetite, and anhedonia. She diagnosed post-traumatic stress disorder (PTSD), stress-induced migraine headaches, and occupational psychosocial and environmental problems. Dr. Turian prescribed weekly psychotherapy "to deal with anxiety, depression and hypervigilance stemming from [appellant's] feelings of being unsafe at work" and held appellant off work for 12 weeks. In an August 28, 2013 work slip, she held appellant off work through November 1, 2013.

In reports dated from October 29, 2013 through February 18, 2014, Dr. Thomas B. Jackson, a psychiatrist, recounted appellant's symptoms of anxiety and depression and summarized her treatment history. He prescribed medication.

In a March 19, 2014note, Dr. Turian related that appellant "initially experienced stress at work when [R.A.] began working with [appellant] and exhibiting inappropriate behavior." Appellant's stress escalated over time. Dr. Turian opined that "[t]he stress and depression for which [appellant] is currently being treated are specifically related to the hostile workplace conditions."

By decision dated April 9, 2014, OWCP's 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, the Board set aside OWCP's April 9, 2014 decision and remanded the case for OWCP to obtain additional information from the employing establishment.[4]

In a November 4, 2015 development letter, OWCP requested that the employing establishment obtain comments from R.A. "and/or a knowledgeable supervisor" regarding

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

appellant's allegations. It afforded the employing establishment 30 days to submit the necessary evidence.

In response, C.C., appellant's immediate supervisor, provided a February 9, 2016 email noting that he had "nothing to add." In a February 26, 2016 email, 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 email, 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 that 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. R.A. testified that he had been demoted to DHO in 2009 due to disciplinary action for unprofessional conduct while off duty.[5]

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

[5] 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 her 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.

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.[6] 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.[7] 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. It advised that, under its implementing regulations, it may accept a claimant's allegations as factual in the absence of a full reply from the employing establishment. OWCP 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.

In a March 31, 2021 report, Dr. Sanford Edward Pomerantz, a Board-certified psychiatrist and neurologist and OWCP second opinion physician, reviewed the medical record and a statement of accepted facts (SOAF). The SOAF, dated February 11, 2021, noted that there were "no accepted events that were factors of employment." Dr. Pomerantz diagnosed a mild, recurrent episode of major depressive disorder, unrelated to appellant's federal employment. He opined that there was not a "direct work injury from a depression expressed with irritability toward a coworker." Dr. Pomerantz indicated that appellant's condition had resolved with no functional impairment, and that she could resume her date-of-injury position. He reiterated in an April 9, 2021 report that the diagnosed condition was unrelated to work factors. Dr. Pomerantz concluded that "there was never an actual direct work[-]related injury that was verifiable."

By *de novo* decision dated April 15, 2021, OWCP again 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

[6] By order dated July 15, 2020, the Board denied appellant's timely request for oral argument. In exercising its discretion, the Board denied her 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).

[7] Docket No. 18-1270 (issued September 4, 2020).

"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.

Appellant, through her representative, appealed to the Board.

By decision dated February 23, 2023, the Board found that R.A.'s conduct and the profane, vulgar language by multiple coworkers over a period of weeks, created a hostile work environment that rose to compensable harassment. The Board remanded the case to OWCP for an evaluation of the medical evidence with regard to the issue of causal relationship, to be followed by a *de novo* decision in the case.

By decision dated April 6, 2023, OWCP denied appellant's emotional condition claim as the medical evidence of record did not establish a causal relationship between the diagnosed conditions and the accepted compensable employment factor. It found that the reports of Dr. Braham, Dr. Jones, and Dr. Turian did not provide medical rationale explaining their conclusions that the diagnosed conditions were caused or aggravated by working with R.A. OWCP further found that Dr. Pomerantz opined that appellant's conflict with R.A. was not work related as there was no verifiable occupational injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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.[8] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[9]

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.[10]

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

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

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

[10] *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).

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.[11] However, disability is not compensable when it results from factors such as an 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.[12]

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.[13] 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.[14]

ANALYSIS

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

Dr. Pomerantz, a second opinion physician, had negated causal relationship as there was no verified employment injury. The Board finds, however, that, as the SOAF provided to Dr. Pomerantz was prepared on February 11, 2021 prior to the Board's February 23, 2023 decision accepting the compensable employment factor, his opinion was based on an incomplete, inaccurate factual history. When a second opinion specialist renders a medical opinion based on an incomplete or inaccurate SOAF, the probative value of the opinion is diminished or negated altogether.[15] As Dr. Pomerantz based his opinion on a SOAF that, is incomplete under the present circumstances of the case, his report is not based on an accurate factual framework and cannot represent the weight of the medical evidence.[16]

Once OWCP undertakes to develop the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[17] Accordingly, the Board finds that

[11] *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).

[12] *Lillian Cutler, id.*

[13] *R.B.*, Docket No. 21-0962 (issued February 23, 2023); *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).

[14] *Id.*

[15] *L.B.*, Docket No. 17-1020 (issued July 10, 2018).

[16] *Id.*

[17] *Id.*

the case must be remanded to OWCP. On remand, OWCP shall prepare an updated SOAF, which fully and accurately explains the accepted employment factor, and request that Dr. Pomerantz submit a clarifying report regarding whether appellant sustained an emotional condition as a result of the compensable employment factor.[18] Following this and other such further development deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2023 decision of the Office of Workers' Compensation is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 8, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[18] *See K.S.*, Docket No. 18-0845 (issued October 26, 2018).