United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 18-0585**
	)	**Issued: February 13, 2019**
DEPARTMENT OF VETERANS AFFAIRS, JESSE BROWN VETERANS ADMINISTRATION MEDICAL CENTER, Chicago, IL, Employer	)	

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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 25, 2018 appellant filed a timely appeal from a December 1, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] Appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated August 21, 2018, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 18-0585 (issued August 21, 2018).

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

On February 17, 2017 appellant, then a 48-year-old health technician, filed an occupational disease claim (Form CA-2) alleging that she sustained an emotional condition while in the performance of duty. She attributed her claimed condition to continuous harassment, bullying, and false allegations made by her supervisor. Appellant noted that she became aware of her condition and that it was caused or aggravated by her employment on October 16, 2016. She stopped work on January 27, 2017.

In an unsigned, undated statement, appellant asserted that her new supervisor had been harassing her since "October 16, 2017."[3] She alleged that her supervisor micromanaged her, stalked and telephoned her at work, threatened her, improperly put her on Absent Without Leave (AWOL) while she was on Family and Medical Leave Act (FMLA) status, and interfered with her job performance. Appellant related that her supervisor walked into a patient's room while she was working to question whether she took breaks/lunch and whether she made false statements regarding her work hours. Her supervisor also had directed her to perform glucose testing on diabetic patients, which was not part of her job duties.

In a February 10, 2017 attending physician's report (Form CA-20), Dr. Brendan Beresford, a Board-certified psychiatrist, diagnosed depression, anxiety and panic due to the stress and harassment/scapegoating at work since 2012.

By development letter dated February 23, 2017, OWCP informed appellant of the factual and medical evidence needed to support her claim. It afforded her 30 days in which to submit such evidence. By letter also dated March 3, 2017, OWCP asked the employing establishment to comment on appellant's allegations of harassment and mistreatment.

In another undated statement, appellant reasserted her previous allegations that her supervisor harassed her in making false allegations about her whereabouts. She alleged that he followed her around, even while she was on duty in a patient's room, three to four times a day. Appellant also alleged that he changed his workout schedule so that he exercised at the same time she did. She noted that she had never attended a disciplinary meeting in 25 years of employment, but that she had attended two meetings since working for this supervisor.

In a statement, appellant noted that T.N. became her supervisor on October 17, 2016. She related incidents with T.N. which she felt amounted to harassment or abuse and cited to exhibits to support her allegations. Appellant alleged that on October 27, 2016 T.N. called her workstation. When she did not answer the telephone, T.N. entered the room where she was sitting with a patient and asked why she did not answer the telephone. Appellant alleged that T.N. told her she lied as

[3] Given the surrounding facts of this case, this date appears to be a typographical error. It should read October 16, 2016.

to her arrival time. They had a discussion regarding T.N. giving her his telephone number and T.N. told her that he would personally check up on her. After T.N. left the room, the patient asked her if T.N. was her boss. Appellant said "no, he's not my boss. God is my boss and he'll soon find that out." She also repeated her comments to T.N. Appellant alleged that T.N. twisted her comments in reference to God to make it seem like she had threatened him. She alleged that was harassment and discrimination against her religion.

Appellant alleged that T.N. wrote her up for putting a third bedrail up on a patient's bed. She asserted that it was for the patient's safety while T.N. indicated that it was a restraint. Appellant indicated that she had never been told in her 25 years of work that only nurses were allowed to raise a third bedrail. She noted that other health technicians and nursing assistants raised and lowered bedrails all the time.

On November 1, 2016 appellant alleged that T.N. disapproved a two-week vacation request. She indicated that T.N. had indicated that he wanted the two weeks broken-up or else it would be denied.

On January 9, 2017 T.N. told her not to answer the call lights as it was not in her job description. She indicated that answering call lights was everyone's responsibility. Appellant informed R.F., T.N.'s supervisor, that T.N. was harassing and creating a hostile environment for her. She alleged that R.F. said that she was the one harassing T.N.

Appellant alleged on January 3, 2017 that T.N. tried to trick her into checking blood sugars, which was not in her job description. She noted that she would check patient's blood sugars for more pay.

On January 27, 2017 appellant was ordered into a second disciplinary meeting. She alleged that T.N. falsely accused her of leaving a patient unattended in a hallway and that she had called somebody lazy. Appellant alleged that she was offended that T.N., who had been stalking her for months and who had threatened that he was going to be her worst nightmare, was now trying to discipline her for allegedly calling somebody lazy.

Appellant alleged that T.N. also harassed her while she was off duty, and improperly placed her on AWOL without inquiry. She alleged that on January 30, 2017 T.N. would not initiate her Form CA-2 as she was not present. Appellant noted on March 16, 2017 that she met with J.B. to obtain evidence for her claim. She alleged that T.N. told her that she was not supposed to be in the building and threatened to call the police if she did not leave, however, she continued to work on her claim and that the police never came. Appellant indicated that she had filed an Equal Employment Opportunity (EEO) grievance against him.

In a January 12, 2017 e-mail, appellant alleged that she felt bullied, offended, and harassed when T.N., did not have a conversation with her about the bedrails placed on a patient and had lied to the patient that the bedrails were put up as a restraint. In a response, R.F. indicated that conversations between a manager and an employee were routine and expected and not considered hostile or bullying. R.F. noted that appellant's e-mails could constitute harassment and/or bullying.

E-mails dated January 23, 24, and 25, 2017 between appellant and T.N concerned the administration of glucose testing. T.N. indicated that health technicians conducted blood sugar testing and requested that appellant complete the training and take the written examination. He noted that he was aware that appellant did not perform glucose testing but indicated that she was sent to the class because management wanted to make sure she knew how to do tests and be signed off on the process involved.

In a January 26, 2017 e-mail to appellant, T.N. noted that appellant should utilize the chain of command. He indicated that she was written up for conduct, not side rails. T.N. also indicated that he would continue to make rounds and communicate with appellant daily to ensure that she had an opportunity to communicate any concerns regarding her assignments.

Leave requests indicated appellant was denied annual leave from November 25 to December 9, 2015, but approved of annual leave November 28 to December 2, 2016 and December 5 to 7, 2016. She was also placed on AWOL for 15 minutes from 7:45 a.m. to 8:00 a.m. on January 26 and 27, 2017.

The employing establishment challenged the claim on March 21, 2017. In a March 21, 2017 statement, T.N. indicated that he had been appellant's manager since October 2016. He noted that he made daily rounds on all the inpatient units and checked on all staff providing direct patient care to make sure that they perform well in their assigned duties and complete their annual competencies. T.N. indicated that before appellant reported to him, she received multiple disciplinary actions for her conduct with coworkers. During the brief time he managed appellant, he had to address several incidents, which either he or others had observed, which appellant characterized as "harassment" and "bullying," even though he treated appellant no differently than he would any other employee who behaved in the same manner. T.N. advised that when he attempted to communicate with appellant about her conduct, she responded by writing several memoranda to R.F., his supervisor, alleging that he was harassing her. He noted that appellant's claim was an attempt to distract from the proper investigation of her conduct with other staff members and himself.

OWCP also received medical reports from Dr. Beresford dated February 24, March 14, April 18, May 17, and June 10, 2017.

By decision dated June 30, 2017, OWCP denied appellant's claim for an emotional condition. It determined that the employment factors which appellant alleged caused or contributed to her emotional condition did not occur as alleged or were not considered compensable factors of employment.

In an appeal request form postmarked July 26, 2017, appellant requested an oral hearing before an OWCP hearing representative, which was held on October 31, 2017. During the hearing, she testified that she had returned to work on June 6, 2017 and worked intermittently thereafter. Appellant reported that the employing establishment had fired her as of September 8, 2017 and she was not working. She alleged that she had been harassed and assigned work that was not part of her job description. Appellant reported that she had been approached and spoken to in a confrontational way on multiple occasions on a daily basis. Appellant's supervisor looked in on her frequently enough to make her feel that she was being spied upon. Appellant alleged that she

had a breakdown in communication with her supervisor both verbally and *via* e-mail. She alleged that she felt threatened by her supervisor who told her that he was going to be her worst nightmare.

In an October 27, 2017 letter, the employing establishment advised that appellant was terminated effective September 8, 2017 due to misconduct and administrative issues.

By decision dated December 1, 2017, an OWCP hearing representative affirmed the June 30, 2017 decision.

LEGAL PRECEDENT

To establish that she sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors.[4]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one'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 to a requirement imposed by the employment, the disability is deemed compensable.[5] 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.[6]

An employee's emotional reaction to administrative or personnel matters generally falls outside FECA's scope.[7] Although related to the employment, administrative, and personnel matters are functions of the employing establishment rather than the regular or specially assigned duties of the employee.[8] However, to the extent the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[9] Assigning work and monitoring performance are administrative functions of a supervisor.[10] The manner in

[4] *See Kathleen D. Walker*, 42 ECAB 603 (1991).

[5] *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[6] *Lillian Cutler, id.*

[7] *Andrew J. Sheppard*, 53 ECAB 170, 171 (2001); *Matilda R. Wyatt*, 52 ECAB 421, 423 (2001).

[8] *David C. Lindsey, Jr.*, 56 ECAB 263, 268 (2005).

[9] *Id.*

[10] *Donney T. Drennon-Gala*, 56 ECAB 469, 475 (2005); *Beverly R. Jones*, 55 ECAB 411, 416 (2004); *Charles D. Edwards*, 55 ECAB 258, 270 (2004).

which a supervisor exercises his/her discretion falls outside FECA's coverage. This principle recognizes that supervisors must be allowed to perform their duties, and at times employees will disagree with their supervisor's actions. Mere dislike or disagreement with certain supervisory actions will not be compensable absent error or abuse on the part of the supervisor.[11]

To the extent that incidents alleged as constituting harassment or a hostile work environment are established as occurring and arising from an employee's performance of her regular duties, these could constitute employment factors.[12] For harassment to give rise to a compensable disability under FECA there must be evidence that harassment did in fact occur.[13] Allegations of harassment must be substantiated by reliable and probative evidence.[14] Mere perceptions of harassment are not compensable.[15]

When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter, OWCP must base its decision on an analysis of the medical evidence.[16]

ANALYSIS

The Board finds that appellant has not established an emotional condition in the performance of duty.

Appellant alleged that she sustained an emotional condition as a result of several employment incidents and factors. The Board must initially review whether these alleged incidents and conditions of employment are compensable employment factors under the terms of FECA. The Board notes that appellant's allegations do not pertain to her regular or specially assigned duties under *Cutler*.[17] Rather, appellant has alleged error and abuse in administrative matters and harassment on the part of her supervisor.

Appellant has attributed her emotional condition to actions of her supervisor, including directives/assignment of work, monitoring of work, disciplinary actions, denial of requests for annual leave, and being placed on AWOL. The Board has long held that assignment of work,[18]

[11] *Linda J. Edwards-Delgado,* 55 ECAB 401, 405 (2004).

[12] *P.T.*, Docket No. 14-2011 (issued February 5, 2015); *see also David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, *supra* note 4.

[13] *Donna J. DiBernardo,* 47 ECAB 700, 703 (1996).

[14] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991).

[15] *See supra* note 13.

[16] *See Norma L. Blank,* 43 ECAB 384, 389-90 (1992). Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo,* 47 ECAB 299, 305 (1996).

[17] *See Lillian Cutler*, *supra* note 5.

[18] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *Beverly R. Jones*, *supra* note 10.

being monitored,[19] investigations,[20] disciplinary matters, and disputes regarding leave[21] are administrative or personnel matters and can only be considered compensable work factors if there is probative evidence of error or abuse.[22] There is no indication that the employing establishment committed error or acted abusively in these instances.

Appellant alleged that her supervisor erroneously issued directives/assignment of work. Regarding appellant's allegations concerning glucose testing, the use of side rails on patients' beds, and the answering of call lights, although the assignment of work duties[23] is generally related to performance of employment, this is an administrative function of the employer and not a duty of the employee. 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.[24] Appellant provided no probative evidence to support that her supervisor committed error or acted unreasonably in exercising his supervisory authority with respect to these administrative matters. T.N. indicated that it was his responsibility to make sure his staff completed their annual competencies. He noted that while appellant did not perform glucose testing, health technicians did conduct such testing. He advised that appellant was sent to class to make sure she understood the process involved and could be signed off on the training. While appellant and T.N. disagreed about the use of side rails on patient beds and the answering of call lights, she provided no evidence that T.N. was unreasonable in requesting that she report her concerns to the registered nurses or him. Appellant has not established a compensable employment factor in this regard.

The incidents and allegations made by appellant of being closely monitored by T.N. are also not compensable. Appellant alleged that on October 27, 2016 she refused to take a telephone call from T.N., who later walked into a patient's room where she was and falsely accused her of not being there when he telephoned. There is no evidence to support that T.N. abused his authority in asking appellant where she was as she did not take his telephone call. This matter was also subject to the first disciplinary meeting which addressed disciplinary issues. Appellant also alleged that T.N. constantly came into the room while she was with a patient to ask what she's doing or if she had her break/lunch. She generally alleged, without providing specifics, that this interfered with the performance of her job and was disruptive. T.N. indicated, in January 26 and March 21, 2017 responses, that he made daily rounds on all the inpatient units to check on all staff providing direct patient care. He advised appellant that he would continue to make rounds and communicate with her daily to ensure she had an opportunity to communicate any concerns regarding her assignments. While appellant may not be comfortable with the level of monitoring

[19] *T.C.*, Docket No. 16-0755 (issued December 13, 2016); *Donney T. Drennon-Gala*, *supra* note 10.

[20] *F.M.*, Docket No. 16-1504 (issued June 26, 2017); *G.S.*, Docket No. 09-0764 (issued December 18, 2009).

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

[22] *Charles D. Edwards*, *supra* note 10.

[23] *J.M.*, s*upra* note 18.

[24] *See M.M.*, Docket No. 06-0998 (issued August 28, 2006); *Michael A. Deas*, 53 ECAB 208 (2001).

provided, this stemmed from her desire to work in a particular environment and is not compensable.[25] Appellant has not established a compensable employment factor in this regard.

Appellant also attended two disciplinary meetings to address disciplinary issues. The first meeting pertained to the events of October 25, 27, and 28, 2016 while the second meeting pertained to allegations of appellant leaving a patient unattended in a hallway and calling someone "lazy." While appellant disagreed with the events and allegations, she has not submitted any evidence that the employing establishment acted unreasonably in holding the disciplinary meetings under the circumstances presented. Any emotional reaction to the disciplinary proceeding is not compensable absent evidence that the meeting was unreasonable.[26] Accordingly, she has not established a compensable factor of employment.

With regard the denial of leave, appellant alleged that T.N. disapproved a two-week continuous vacation request she made on November 1, 2016 and that she was erroneously placed on AWOL on January 26 and 27, 2017. She was denied annual leave from November 25 to December 9, 2015, but approved of annual leave in two blocks of time from November 28 to December 7, 2016. Appellant admitted that she was previously advised that her annual leave had to be broken up that it would be denied. Thus, there is no probative evidence of error or abuse. The record reflects that appellant was placed on AWOL status on January 26 and 27, 2017 for 15 minutes (7:45 a.m. to 8:00 a.m.). Appellant has submitted no probative evidence to show that being placed on AWOL for 15 minutes on January 26 and 27, 2017 was in error. Thus, these administrative matters were not within the performance of duty.[27]

Appellant also attributed the claimed emotional condition to supervisory harassment which created a hostile work environment. She alleged that she had been threatened at work, that T.N. described himself as her "worst nightmare," and that he changed his workout schedule to the same time as hers. The Board finds that appellant submitted no evidence corroborating her allegations of harassment. Harassment can constitute a factor of employment if it is shown that the incidents constituting the claimed harassment actually occurred, however, mere perceptions are not compensable under FECA[28] As she has not substantiated her allegations with probative evidence, appellant has not established a compensable employment factor under FECA with respect to the claimed harassment. Thus, appellant has not established a compensable employment factor with regard to her allegations of harassment.

As appellant has not established a compensable employment factor, the Board need not address the medical evidence of record.[29]

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

[26] *See G.R.*, Docket No. 18-0893 (issued November 21, 2018).

[27] *Supra* note 22.

[28] *B.L.*, Docket No. 18-0965 (issued November 19, 2018); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[29] *A.K.*, 58 ECAB 119 (2006).

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 that she sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2019
Washington, DC

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

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

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