United States Department of Labor
Employees' Compensation Appeals Board

S.O., Appellant	)	
and	)	**Docket No. 20-1271**
	)	**Issued: March 9, 2021**
DEPARTMENT OF HOMELAND SECURITY, U.S. COAST GUARD, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 16, 2020 appellant filed a timely appeal from an April 1, 2020 merit decision of the Office of Workers' Compensation Programs (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 an emotional condition in the performance of duty, as alleged.

FACTUAL HISTORY

On June 11, 2019 appellant, then a 50-year-old paralegal specialist, filed an occupational disease claim (Form CA-2) alleging that she sustained several conditions due to work-related

[1] 5 U.S.C. § 8101 *et seq.*

stress, including bipolar disorder, hypertension, incontinence/flatulence, elevated cholesterol, and diabetes. She indicated that she started working as a paralegal specialist for the employing establishment on October 20, 2014. Appellant maintained that her supervisor, L.M., created a stressful and hostile work environment as time progressed, and indicated that there were Equal Employment Opportunity Commission (EEOC) issues. She asserted that L.M. did not like the way she communicated and asked her if she would quit her job. Appellant noted that she first became aware of her claimed conditions on October 20, 2014 and first realized their relation to her federal employment on July 31, 2018. She stopped work on July 17, 2017.

In a June 10, 2019 statement, appellant further discussed her claimed employment-related conditions and again claimed that her work environment aggravated her health. She maintained that L.M. intentionally exposed her to a hostile work environment and asked if she was going to quit "due to circumstances surrounding my employment." Appellant indicated that, due to workplace stress, she had to go on leave under the Family and Medical Leave Act (FMLA) in July 2018 and then had to file for disability retirement in July/August 2018.

Appellant submitted medical evidence in support of her claim, including reports of Dr. Huong T. Dang, a Board-certified psychiatrist, and Dr. Oladapo Olarinde, a Board-certified family practitioner. In an August 7, 2018 report, Dr. Dang indicated that appellant reported experiencing stress in dealing with her supervisor. She discussed appellant's medical history and diagnosed, *inter alia*, unspecified bipolar and related disorder, and depressive disorder with psychotic features. Appellant also submitted time and attendance summary reports from July and September 2018.

In a June 25, 2019 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim, including a physician's opinion supported by a medical explanation regarding the cause of her claimed emotional condition. It provided a questionnaire for her completion, which posed questions regarding her claimed employment factors. OWCP afforded appellant 30 days to respond.

In response, appellant submitted on July 2, 2019, answers to the questionnaire provided by OWCP. She asserted that L.M. treated her differently on purpose due to her race and that the harassment was continuous in nature. Appellant asserted that L.M. retaliated against her for filing an EEOC complaint in 2016.

Appellant submitted documents relating to the EEOC complaint she filed in 2016. In connection with this claim, she claimed that in October 2015 she was improperly instructed not to take sick leave for the rest of the year and that in December 2015 she was denied compensatory time. Appellant also alleged that on December 24, 2015, L.M. accused her of "gaming the system" when she tried to change her schedule and that on February 15, 2016 she wrongly did not receive holiday pay. She further claimed that on March 1, 2016 she was approved for reasonable accommodation that did not address her needs and that on March 30, 2016 L.M. called her "stupid." Appellant alleged that on September 8, 2016 she was given an improper verbal reprimand when L.M. asked her if she was going to quit her job and that on an unspecified date her work duties were wrongly reduced and her work was delegated to another employee.

Appellant submitted an April 16, 2019 final EEOC decision, which addressed her appeal of a September 28, 2017 final EEOC decision denying her claims of discrimination. In this decision, an EEOC official addressed each of her above-noted claims and found that it had been properly determined in the prior decision dated September 28, 2017 that the employing establishment did not subject her to discrimination or other wrongdoing. The official found that the employing establishment provided reasonable accommodation to appellant for her bipolar disorder by allowing her to change her schedule and that it appropriately handled matters relating to sick leave, holiday pay, and compensatory time. Appellant noted that L.M. explained that she reassigned some of appellant's tasks to another employee because the work schedule of that employee made it more suitable for appellant to perform those tasks. The official indicated that the evidence revealed that L.M. denied that she called appellant stupid on March 30, 2016 after appellant improperly sent out a draft in portable document format (PDF), but that she indicated she might have stated that it would be stupid to put a draft into PDF. She noted that it was confirmed that L.M. told appellant that she was "gaming the system" on December 24, 2015 when appellant attempted to change her schedule in the middle of a pay period to get more holiday time. The official noted it was established that on September 8, 2016 L.M told appellant that she should be careful about what she stated to people. In addition, it was established that L.M. asked appellant whether she intended to quit and that, when appellant stated that she did not, L.M. responded by saying, "Good." The official noted that L.M. advised that she was not angry when she made these statements, but rather wished to provide constructive criticism at a time when appellant was having difficulties communicating with coworkers. She concluded that, when considering L.M.'s comments and actions in context, it had not been shown that L.M. subjected appellant to discrimination or created a retaliatory or hostile work environment.[2]

By decision July 31, 2019, OWCP denied appellant's claim for an employment-related emotional condition. It determined that she had not established a compensable employment factor.

On August 5, 2019 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on January 16, 2020, she testified that there was no person that witnessed or overheard L.M. calling appellant stupid on March 30, 2016. Appellant explained that she was attempting to send a document and did not realize that it was a PDF document. She testified that L.M. threw a stapler at her on October 20, 2014 and explained that L.M.'s actions against appellant progressively worsened and that her statements to appellant became intolerable. Appellant indicated that L.M. asked her whether she was going to quit and asserted that her working conditions caused or worsened her medical conditions. She explained that she had appealed the EEOC decision denying her complaint, but asserted that the ruling was not in her favor because her complaints were not understood.

After the hearing, additional documents were added to the case record, including the employing establishment's January 24, 2020 proposed removal due to appellant's excessive absences, a February 14, 2018 notice of response deadline, August 4, 2016 and January 9, 2017 affidavits that L.M. produced in conjunction with appellant's EEOC complaints, and August 10, 2016 and January 13, 2017 statements appellant produced in response to L.M.'s EEOC affidavits.

[2] Appellant also submitted additional medical evidence in support of her claim.

In her August 4, 2016 affidavit, L.M. indicated that she provided reasonable accommodation to appellant by approving appellant's request regarding telework days. She noted that the human resources office advised her that she could not approve appellant's request to change appellant's schedule on short notice in order to receive pay for federal holidays. L.M. indicated that in December 2015 appellant sent out a draft document as a PDF document despite the fact that such documents are normally sent out in Microsoft Word format. She noted that she had a conversation with appellant, who indicated that she had intentionally sent the document as a PDF document because she thought it was a good idea. L.M. reported that she did not call appellant stupid, but might have stated that it would be stupid to send the draft in the wrong format. With regard to appellant's allegation that she was accused of "gaming the system" with respect to her request to change her work schedule, L.M. explained that she told appellant that it would be improper and gaming the system, to change her schedule in the middle of a pay period in order to receive pay for a holiday. She noted that appellant did not have any accrued sick leave and owed advanced sick leave. Therefore, L.M. denied appellant's request for additional advanced sick leave. She indicated that appellant was advised that she could not take additional advanced sick leave unless the FMLA covered it. L.M. explained that she had taken similar action towards another similarly situated employee.

In an August 10, 2016 affidavit produced in response to L.M.'s August 4, 2016 affidavit, appellant contested L.M.'s assertion that it was reasonable to deny appellant's request to change her workdays to reflect that a given week had a holiday. She claimed that L.M. did, in fact, call her stupid with respect to the matter involving the PDF document, and expressed her belief that L.M. was accusing her of theft when she stated that she was gaming the system. Appellant also generally contested L.M.'s assertions that she had properly handled matters relating to leave usage and work assignments.

In her January 9, 2017 affidavit, L.M. indicated that she recalled meetings with appellant on September 8 and 15, 2016. She explained that she previously had a discussion with appellant and another paralegal and needed to follow-up with appellant regarding a September 8, 2016 e-mail that appellant sent about ineffective communication with the other paralegal. L.M. indicated that she discussed the problems with appellant, but was not angry during the meeting. She noted that during the second meeting on September 15, 2016 she advised appellant that she needed to be careful about what she stated to people and consider their points of view. L.M. indicated that this comment was made in the context of the other paralegal having felt that appellant made various accusations against her. She also noted that, during this meeting, she asked appellant if she was considering quitting because of the communication issues and overlapping schedule problems among the clerks. When appellant indicated that she was not quitting, L.M. noted that she replied, "Good." She explained that the following week after the progress review, appellant told her that she felt that the discussion regarding quitting constituted constructive discharge and that she felt that she was hostile. L.M. noted that she apologized to appellant and told appellant that she was trying to speak openly and plainly. She discussed the assignment of work and explained that all assignments were properly made given the work start times for the various clerks as well as the fact that appellant did not work well with one of the attorneys. L.M. also explained that appellant had been cordial towards her and indicated that she, as the supervisor, had remained cordial towards appellant. She indicated that she did not recall telling appellant that a certain work assignment was none of her business. L.M. indicated that appellant's manner of speaking was at

times vague and imprecise and she noted that had asked appellant to choose her words more thoughtfully.

In a January 13, 2017 statement, appellant asserted that L.M. did, in fact, tell appellant that a work assignment involving redaction of information was none of her business. She restated her belief that L.M. unfairly reprimanded her during the September 15, 2016 meeting and that she made improper comments about her communication skills.

The case record was also supplemented to include the original September 28, 2017 final EEOC decision on appellant's complaint. In this decision, an EEOC official determined that the full evidentiary record did not establish that L.M. subjected appellant to discrimination or created a retaliatory or hostile work environment. She found that the employing establishment provided reasonable accommodation to appellant for appellant's bipolar disorder and appropriately handled matters relating to sick leave, holiday pay, and compensatory time. The official noted that L.M. explained that she reassigned some of appellant's tasks to another employee because the work schedule of that employee made it more suitable for her to perform those tasks. She indicated that the evidence revealed that L.M. denied that she called appellant stupid on March 30, 2016 after appellant improperly sent out a draft in PDF, but that L.M. had indicated that she might have stated that it would be stupid to put a draft into PDF. The official noted that it was confirmed that L.M. told appellant that she was gaming the system, and that she should be careful about what she stated to people. In addition, the EEOC decision established that L.M. asked appellant whether she intended to quit and that, when appellant stated that she did not, L.M. responded by saying, "Good." The official concluded that, when considering L.M.'s comments and actions in context, no improper actions were committed.

By decision dated April 1, 2020, OWCP's hearing representative affirmed the July 31, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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.[4] 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.[5]

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

[3] *Supra* note 1.

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

[5] 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).

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.[6]

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 employment, the disability comes within the coverage of FECA.[7] 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.[8]

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.[9] 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.[10]

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.[11] 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.[12]

[6] *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).

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

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

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

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

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

[12] *Id.*

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an emotional condition in the performance of duty, as alleged.

Appellant alleged that she sustained an emotional condition due to various incidents and conditions at work. Therefore, the Board must initially review whether these alleged incidents and conditions are covered employment factors under the terms of FECA. The Board notes that appellant's claim does not directly relate to her regular or specially assigned duties under *Lillian Cutler*.[13] Rather, appellant claimed that her supervisor, L.M., committed error and abuse with respect to various administrative/personnel matters. She also claimed that L.M. subjected her to harassment and discrimination.

With respect to administrative or personnel matters, appellant claimed that L.M. mishandled matters related to sick leave, holiday pay, compensatory pay, reasonable accommodation requests, and the assignment of work tasks. 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.[14] However, the Board has also held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[15] 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.[16]

The Board finds that appellant has not submitted sufficient evidence to establish the above-noted claims about administrative/personnel matters. Appellant submitted documents from an EEOC claim she filed in 2016, which concerned some of these matters, but the communications did not show that the employing establishment committed error or abuse with respect to these matters. In fact, the case record contains a September 28, 2017 final EEOC decision, which discusses many of these administrative matters and finds that L.M. did not engage in any wrongdoing. The case record also contains an April 16, 2019 final EEOC decision, which affirmed the findings of the September 28, 2017 decision. These decisions provide a great deal of detail from L.M's affidavits (produced in conjunction with the EEOC proceedings and contained in the present case record) in which she provided reasoning for her handling of various administrative/ personnel matters. Appellant has not otherwise presented evidence, such as another final decision of an administrative body, to show that L.M. or other managers committed error or abuse with respect to administrative or personnel matters.[17] Although appellant expressed dissatisfaction with

[13] *See Lillian Cutler*, *supra* note 7.

[14] *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).

[15] *M.S.*, Docket No. 19-1589 (issued October 7, 2020); *William H. Fortner*, 49 ECAB 324 (1998).

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

[17] *See generally M.R.*, Docket No. 18-0304 (issued November 13, 2018).

the actions of L.M., 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.[18] She has not substantiated error or abuse committed by L.M. or other managers in the above-noted matters and, therefore, she has not established a compensable employment factor with respect to administrative or personnel matters.

Appellant also alleged harassment and discrimination by L.M. and claimed that she created a stressful hostile work environment. She asserted that L.M. treated her differently on purpose due to her race and retaliated against her for filing an EEOC complaint in 2016. Appellant also asserted that L.M. made comments and engaged in actions that rose to the level of harassment and discrimination. For example, she alleged that L.M. called her stupid with respect to her production of a PDF document, effectively threatened her job security by asking her whether she intended to quit, and told her that a given work assignment was none of her business. To the extent that disputes and incidents alleged as constituting harassment are established as occurring and arising from an employee's performance of his or her regular duties, these could constitute employment factors.[19] The Board has held that unfounded perceptions of harassment do not constitute an employment factor.[20] Mere perceptions are not compensable under FECA and harassment can constitute a factor of employment if it is shown that the incidents constituting the claimed harassment actually occurred.[21]

The Board notes that many of appellant's claimed instances of harassment/discrimination were extensively discussed in the aforementioned September 28, 2017 and April 16, 2019 final EEOC decisions. It had been determined in these decisions that L.M. did not subject appellant to discriminatory, retaliatory, or otherwise improper actions, and that L.M. did not create a hostile work environment. For example, it was determined that there was insufficient evidence to establish appellant's allegations that L.M. called her stupid or told her that a given work assignment was none of her business. Moreover, there was insufficient evidence to show that L.M. threatened appellant's job when she asked appellant if she intended to quit her job. Rather, she explained that she asked the question due to concern for appellant's welfare and had, in fact, responded, "Good," when appellant indicated that she did not wish to quit. Similarly, L.M. acknowledged that she told appellant that she had to be careful about what she stated to other people and that she had to choose her words carefully, but she explained that she intended to provide appellant with benevolent advice rather than to punish her. Appellant has not submitted sufficient documentary evidence to show that L.M. subjected her to harassment or discrimination.[22] As noted, she submitted final EEOC decisions, but these decisions do not support her claims of wrongdoing by L.M. or other managers. Although it has been established that L.M. made certain comments described above, appellant has not established that these isolated

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

[19] *D.B.*, Docket No. 18-1025 (issued January 23, 2019); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

[20] *See F.K.*, Docket No. 17-0179 (issued July 11, 2017).

[21] *See id.*

[22] *See B.S.*, Docket No. 19-0378 (issued July 10, 2018).

comments rose to the level of harassment or discrimination.[23] Appellant also has not submitted sufficient evidence to establish her harassment/discrimination claims that were not discussed in the final EEOC decisions, such as her claim that L.M. threw a stapler at her. Therefore, she has not established a compensable employment factor with respect to the claimed harassment and discrimination.

On appeal, appellant, argues that her emotional condition claim should have been accepted because she established compensable employment factors and the evidence of record establishes that she is disabled. However, the Board has explained that she has not established a compensable employment factor. As the Board finds that appellant has not established a compensable employment factor, it is not necessary to consider the medical evidence of record.[24]

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, as alleged.

[23] *See generally 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). The Board notes that L.M. indicated that she might have stated in appellant's presence that it would be stupid to put a draft into PDF. However, it has not been established that such a comment was actually made or that it would rise to the level of harassment or discrimination even if it had been made.

[24] *See B.O.*, Docket No. 17-1986 (issued January 18, 2019) (finding that it is not necessary to consider the medical evidence of record if a claimant has not established any compensable employment factors). *See also Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2021
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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