United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, OFFICE OF THE IMMIGRATION DETENTION OMBUDSMAN, Houston, TX, Employer	)	**Docket No. 24-0655** **Issued: August 27, 2024**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On June 3, 2024 appellant filed a timely appeal from a May 31, 2024 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 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 appellant's oral argument request, she asserted that she had not attributed her condition to being denied a rotational assignment but instead due to a counseling letter that she received as retaliation for setting up a meeting with a supervisor. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be 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.

[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 on February 7, 2024 in the performance of duty.

FACTUAL HISTORY

On February 10, 2024 appellant, then a 34-year-old administration and program specialist, filed a traumatic injury claim (Form CA-1) alleging that on February 7, 2024 she experienced a panic attack, depressive neurosis, and migraine while in the performance of duty. She related that her supervisor, V.B., retaliated against her and threatened her with termination after she told her that she had set up a meeting with V.B.'s direct supervisor, C.F. On the reverse side of the claim form, V.B. challenged that appellant was injured in the performance of duty, noting that she had not sustained any physical injuries.

The record contains emails from appellant dated January 2024 expressing interest in a rotational position.

In a development letter dated February 20, 2024, OWCP advised appellant that the evidence failed to support fact of injury or causal relationship. It informed her of the factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. OWCP afforded appellant 60 days to submit the requested information.

Subsequently, OWCP received an email dated February 6, 2024 from V.B., who advised appellant that her interim evaluation had been performed the day before and requested that she review and complete it. The record also contains appellant's performance plan and appraisal form for the period October 1, 2023 to September 30, 2024.

In an email dated February 7, 2024, appellant requested a meeting with C.F. to discuss work distribution and communications issues.

On February 7, 2024 V.B. issued appellant a memorandum of counseling/letter of expectations. She noted that after she advised appellant that she needed to discuss her request for a rotation assignment, the tone of appellant's communications changed, and she refused to schedule further meetings. V.B. told her on January 23, 2024 that her request for a rotational assignment had been denied for operational reasons. On January 26, 2024 she asked appellant to update a SharePoint cite but she advised that she was busy with other tasks and subsequently told her that it was not in her position description. Appellant requested training but refused to respond when asked whether she had completed similar assignments. V.B. outlined her expectations for communication, completion of work assignment/following instructions, and need for engagement and collaboration. She indicated that "as it related to conduct, please be advised that any future incidents of this nature may result in disciplinary action, up to and including your removal from the Federal service."

In a statement dated February 21, 2024, V.B. discussed appellant's allegation that she had retaliated against her on February 7, 2024 and threatened her with termination after she told her on that date that she had scheduled a meeting with her supervisor. She related that she had met

with the personnel office to begin the process of drafting the memorandum of counseling (MOC) on January 29, 2024. V.B. asserted that as appellant's supervisor she had the right to counsel employees for misconduct and to assign work. She denied threatening her with termination, noting that the warning in the MOC that future incidents might result in disciplinary action, including removal, was standard language.

In a March 1, 2023 statement, appellant reiterated that her claim was for a traumatic injury that had occurred during the course of one shift on February 7, 2024. She advised that she notified V.B. on February 7, 2024 of her meeting with C.F., and later that day received the MOC. Appellant related that she received the letter even though V.B. had not completed her performance plan or had any other counseling discussions. She advised that she was unable to meet with C.F. as she "shut down." Appellant indicated that she completed a Form CA-1 on February 10, 2024. The employing establishment subsequently submitted the Form CA-1.

On March 5, 2024 appellant again indicated that she filed her claim in response to a "trigger event occurring in one shift on February 7, 2024." She described the events of that date and noted that she did not have knowledge of the fact that her supervisor had begun the process of issuing the MOC on January 29, 2024.

In a development letter dated March 6, 2024, OWCP advised appellant of the factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. It afforded her 60 days to submit the requested information. In a separate letter of even date, OWCP requested that the employing establishment provide additional information within 30 days, including comments for a knowledgeable supervisor regarding the accuracy of appellant's statement.

On March 7, 2023 appellant questioned why the development letters were for occupational diseases rather than traumatic injury claims.

In a statement dated April 2, 2024, appellant asserted that the employing establishment failed to notify her that it was controverting her claim. She maintained that V.B. had willfully refused to file her claim. Appellant maintained that V.B. discriminated against her when she indicated on the Form CA-1 that she had not sustained any physical injuries. She related that V.B. had only supervised her for 40 days when she issued the memorandum of counseling and had not previously communicated expectations. Appellant again advised that she was claiming a traumatic injury due to single shift events that occurred on February 7, 2024. She further alleged that her assignment of work was unreasonable and her area was understaffed. Appellant requested training on SharePoint as it was not within her normal duties. She noted that she did not receive her performance plan until December 13, 2024 when it should have been provided on October 1, 2023, the beginning of the appraisal period. On February 6, 2024 V.B. notified appellant that A.D., a manager, had completed the interim evaluation even though she was only "on a documented performance plan" for 56 days rather than the minimum of 90 days. She maintained that the MOC was erroneously issued as V.B. had only been her supervisor for 40 days and had not initiated an expectation discussion.

On April 3, 2024 the employing establishment related that the employing establishment released the completed February 10, 2024 Form CA-1 to the Employees' Compensation

Operations & Management Portal (ECOMP) on February 13, 2024 but as the no time lost/no medical expenses box had been checked it was not transmitted to OWCP. On February 15, 2024 it received notification that appellant was claiming lost time and transmitted the claim to OWCP. The employing establishment asserted that she claimed an emotional condition to a reaction to an administrative action, and thus was not within the performance of duty. It maintained that appellant had not established error or abuse by management and noted that the MOC was not issued in retaliation after she requested a meeting with V.B.'s supervisor as the process had been begun earlier. The employing establishment advised that a performance plan was initiated in December 2023 and noted that many employees did not receive a plan until that date due to issues with the system. It denied falsifying information on appellant's Form CA-1. The employing establishment denied staffing shortages.

In an undated statement received on April 12, 2024, appellant asserted that the MOC would be rescinded by April 19, 2024 in accordance with alternative dispute resolution (ADR) mediation held April 11, 2024.

In a follow-up to its development letter dated April 12, 2024, OWCP advised that it had conducted an interim review and found that the evidence remained insufficient to establish appellant's claim as she had not alleged work factors within the performance of duty. It informed her that she had 60 days from the March 6, 2024 letter to submit the requested information.

On April 26, 2024 appellant asserted that she was in the performance of duty when she received the February 7, 2024 counseling letter from V.B. in retaliation for setting up a meeting with V.B.'s supervisor. In an accompanying statement of even date, she challenged the employing establishment's finding that there were no staffing shortages. Appellant related that she had requested assistance on October 13, 2024, but only V.B. was onboarded. She asserted that her workload increased, and timeframes became unmanageable. Appellant again reiterated that she filed a CA-1 form as the result of events occurring on February 7, 2024, when she told V.B. that she had set up a meeting with C.F. and subsequently received a false counseling letter even though V.B. had not completed a performance plan revalidation or had a discussion with her prior to this event. She again advised that she did not have knowledge that the counseling letter process had begun on January 29, 2024 and that ADR had indicated that the letter would be rescinded no later than April 19, 2024.

On May 9, 2024 the employing establishment asserted that it had not received a copy of an ADR decision rescinding the MOC or instructing it to rescind the letter. It advised that an inquiry revealed that an agreement had not been reached. The employing establishment requested that appellant upload the decision to ECOMP for review.

In a memorandum of telephone call dated May 21, 2024, appellant related that she would ask about the MOC during an Equal Employment Opportunity (EEO) meeting and see if it was addressed in ADR. In a May 22, 2024 letter, she advised that at the ADR she was told the MOC would be rescinded by April 19, 2024 as it was not a "formal disciplinary letter." Appellant related that she had now asked that the letter be rescinded in writing as part of her EEO complaint.

By decision dated May 31, 2024, OWCP denied appellant's emotional condition claim. It found that she had not established any compensable employment factors and thus had not

established an injury in the performance of duty. OWCP determined that appellant had not established error or abuse in being denied a rotational assignment or receiving a MOC on February 7, 2024. It further found that she had not established harassment by her supervisor, V.B.

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 of FECA,[4] 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.[5] 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.[6]

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.[7]

Workers' compensation law does not apply to 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.[8] 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.[9]

[3] *Supra* note 2.

[4] *C.B.*, Docket No. 21-1291 (issued April 28, 2022); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *M.H.*, Docket No. 23-0467 (issued February 21, 2024); *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *R.C.*, 59 ECAB 427 (2008).

[6] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *See C.C.*, Docket No. 21-0283 (issued July 11, 2022); *S.K.*, Docket No. 18-1648 (issued March 14, 2019); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[8] *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125 (1975).

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

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.[10] Where, however, 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.[11]

For harassment or discrimination to give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment or discrimination did in fact occur.[12] Mere perceptions of harassment are not compensable under FECA.[13]

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.[14] 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.[15]

ANALYSIS

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

Initially, the Board notes that appellant raised work factors that occurred over the course of more than one work shift, including staffing shortages, workload, the denial of a rotational assignment, and matters involving the filing of her claim by the employing establishment. However, appellant repeatedly maintained that she was attributing her emotional condition solely to factors occurring during one work shift on February 7, 2024. She advised on appeal that due to being assigned the work of specialized employees she requested a meeting with V.B.'s supervisor, and V.B. retaliated against her with a MOC. Appellant again maintained that her claim resulted from the retaliatory way she received the MOC on February 7, 2024 and questioned why OWCP

[10] *See R.M.*, Docket No. 19-1088 (issued November 17, 2020); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

[11] *L.R.*, Docket No. 23-0925 (issued June 20, 2024); *M.A.*, Docket No. 19-1017 (issued December 4, 2019).

[12] *See E.G.*, Docket No. 20-1029 (issued March 18, 2022); *S.L.*, Docket No. 19-0387 (issued October 1, 2019); *S.B.*, Docket No. 18-1113 (issued February 21, 2019).

[13] *Id*.

[14] *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *Dennis J. Balogh*, 52 ECAB 232 (2001).

[15] *O.G., id*.

had discussed the rotational assignment in its decision. The Board will thus consider the claim as a traumatic injury and review only the incidents alleged to have occurred on February 7, 2024.

Appellant has not attributed her condition to the performance of her regularly or specially assigned duties under *Cutler*.[16] Instead, she primarily attributed her condition to receiving a MOC from her supervisor, V.B., on February 7, 2024. In *Thomas D. McEuen*,[17] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. 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, such action will be considered a compensable employment factor.[18]

Appellant has not submitted any evidence supporting that V.B. erred in issuing her a MOC on February 7, 2024. She noted that V.B. had only been her supervisor a short time and had not previously conducted any discussions about performance. Appellant contended that she was told during ADR that the MOC would be rescinded no later than April 19, 2024 but did not submit any evidence supporting this assertion. The employing establishment denied receiving a decision from ADR or any instructions to rescind the MOC. V.B. advised that as appellant's supervisor she had the right to counsel employees for misconduct. Although appellant expressed dissatisfaction with the action of her supervisor in issuing the MOC, absent evidence establishing error or abuse, a claimant's disagreement or dislike of such a managerial action is not a compensable factor of employment.[19]

Appellant further maintained that V.B. harassed and retaliated against her in issuing the February 7, 2024 MOC. She additionally alleged that V.B. threatened her with termination.

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.[20] However, the Board has held that unfounded perceptions of harassment or discrimination do not constitute an employment factor.[21] Mere perceptions are not compensable under FECA, and harassment or discrimination can constitute a factor of employment

[16] *Supra* note 8.

[17] *See Thomas D. McEuen*, *supra* note 10.

[18] *M.B.*, Docket No. 29-1160 (issued April 2, 2021); *William H. Fortner*, 49 ECAB 324 (1998).

[19] *See P.T.*, Docket No. 20-0825 (issued September 23, 2022); *E.S.*, Docket No. 18-1493 (issued March 6, 2019).

[20] *S.K.*, Docket No. 23-0655 (issued September 18, 2023); *D.B.*, Docket No. 18-1025 (issued January 23, 2019); *David W. Shirey*, 42 ECAB 783 (1991).

[21] *See C.C.*, Docket No. 21-0519 (issued September 22, 2023); *F.K.*, Docket No. 17-0179 (issued July 11, 2017).

only if it is shown that the incidents constituting the claimed harassment or discrimination actually occurred.[22]

Although appellant alleged that V.B. retaliated against her in issuing the MOC because she set up a meeting with V.B.'s supervisor, she provided no credible corroborating evidence in support of her allegation.[23] She did not submit witness statements or other documentary evidence demonstrating that V.B. issued the MOC because appellant set up a meeting with C.F. Appellant also has not submitted the final findings on any complaint or grievance that she filed with respect to the alleged harassment, such as a final EEO decision or grievance filed with the employing establishment.[24] While she maintained that ADR determined that the MOC would be rescinded, the employing establishment indicated that it had no knowledge of such rescission. In a February 21, 2024 statement, V.B. related that while she issued appellant the MOC on February 7, 2024, she had met with personnel to begin the process of drafting the memorandum on January 29, 2024. She also maintained that the warning in the MOC that future incidents might result in disciplinary action, including removal, was standard language. Appellant has not submitted any evidence supporting harassment, threats, or retaliation by V.B. on February 7, 2024, and thus has not met her burden of proof to establish a compensable work factor with respect to these allegations.[25]

As the Board finds that appellant has not established a compensable employment factor, it is not necessary to consider the medical evidence of record.[26]

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 an emotional condition on February 7, 2024 in the performance of duty.

[22] *Id*.

[23] *R.M.*, Docket No. 22-0472 (issued October 16, 2023).

[24] *See M.E.*, Docket No. 21-1340 (issued February 1, 2023); *B.S.*, Docket No. 19-0378 (issued July 10, 2018).

[25] *See D.F.*, Docket No. 24-0178 (issued April 5, 2024); *E.M.*, Docket No. 19-0156 (issued May 23, 2019); *S.B.*, Docket No. 11-0766 (issued October 20, 2011).

[26] *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 May 31, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 27, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board