# United States Department of Labor
# Employees' Compensation Appeals Board

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| **R.A., Appellant** | ) | |
| **and** | ) | **Docket No. 14-1438** |
| | ) | **Issued: September 16, 2015** |
| **DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Grand Prairie, TX, Employer** | ) | |

*Appearances:*
*Debra Hauser, Esq.*, for the appellant
*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
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On June 13, 2014 appellant, through counsel, filed a timely appeal from a March 31, 2014 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 to review the merits of this case.

### *ISSUE*

The issue is whether appellant sustained an emotional condition in the performance of duty.

### *FACTUAL HISTORY*

On August 15, 2013 appellant, a 30-year-old administrative assistant, filed an occupational disease claim alleging that he sustained an emotional condition in the performance of duty. He explained that he was diagnosed with post-traumatic stress disorder (PTSD) in

[1] 5 U.S.C. § 8101 *et seq.*

October 2010. In June 2012 appellant took a one-month leave of absence so he could be tapered off the medications he was taking for PTSD and insomnia. He alleged that several months later his new supervisor caused both conditions to worsen. The stress was so bad that appellant was put back on medication. He added that this stress also caused or aggravated several physical conditions, including chest pains from panic attacks, attacks that had progressively worsened since October 2010.

Appellant identified the following factors of employment as responsible for his disease: workload, management, modified schedule, unfair treatment, being called names by management, and being accused of malingering. With respect to his workload, he explained that in October 2012, two of the four administrative assistants were promoted, leaving him and one other. The workload was extreme and appellant was taken off his alternate work schedule in December 2012. In February 2013, the other administrative assistant was promoted, and he was left to do the work of four people. Appellant also explained that when he returned to work in July 2012, work assignments were modified to lighten the workload of a coworker so she would not have the same assignment two months in a row. He was also responsible for training three new staffing specialists who started in 2013. Due to the extreme workload, a human resources specialist was assigned to work administrative assistant duties as of July 16, 2013.

Other alleged factors included denial of appellant's request for a compressed work schedule and the apparently inconsistent approval for a change in work hours given to a new administrative assistant. Appellant noted that he was not able to schedule annual leave until the new administrative assistant arrived in June 2013. Through a confidential informant, he learned that one of his supervisors, Leona Smith, had referred to him as "Chunky." Appellant was accused of abusing sick leave.

Appellant pointed out several instances of bullying and harassment, including his supervisor stating that he was not a team player for wanting to remain on his compressed work schedule. He noted that his supervisor had e-mailed him at home on a couple of occasions to inquire about leave matters. Appellant also related an incident on December 19, 2012. He had left his computer unlocked, and when he returned a staffing specialist, Kristen Walker, was sitting in his chair and typing at his computer. Ms. Walker advised that she was "told to do this." When appellant asked whether she does everything she is told to do, she responded "yes," when a deputy chief tells her to. He alleged that his supervisor had instructed Ms. Walker to send an e-mail message from his computer to management stating, "I love you." Appellant submitted a copy of the e-mail in question. The e-mail indicates that messages stating "I love you!" followed by "And Merry Christmas" were sent from appellant's computer to the supervisor and that the supervisor then replied to appellant: "Make sure you secure your screens when you leave your desk. Thanks."

Appellant alleged that stress interfered with his personal life. He discussed his depression and social withdrawal, his worsening pelvic floor dysfunction, the onset of neuropathy in his hands, feet and lower extremities, his weight gain of over 80 pounds, his worsening insomnia and sleep apnea, and the onset of several skin conditions.

Appellant filed an Equal Employment Opportunity (EEO) complaint and was assigned a case number. The complaint, which related to a hostile work environment on the basis of sex, race, and disability, was in the investigation stage.

Matt Mangold was appellant's direct supervisor from October 2010 to June 2012 and again from July 2013 and continuing. He confirmed that in the fall of 2012, two of the four administrative assistants were selected for other positions. The duties of one of the selected administrative assistants were "mostly" absorbed by staffing specialists. Appellant and the other remaining administrative assistant did absorb the duties of the other. His compressed work schedule was changed back to eight-hour days to ensure that there was adequate coverage in the office for the entire week. During this period of staff shortages, other staff from within the unit had routinely been pulled from their assignment to help out in the administrative assistant area. Supervisor Mangold added that appellant was fully capable of performing his daily tasks in accordance with office expectations, and he was not aware that appellant had ever expressed any concern that he was unable to perform his tasks in a timely manner.

With respect to appellant's other complaints, Supervisor Mangold noted that he was unaware of any circumstance in which appellant was denied the right to schedule annual leave. He confirmed that appellant was issued a sick leave abuse letter in 2013 due to the extensive amount of sick leave, annual leave in lieu of sick leave, and leave without pay that he had requested and used. Supervisor Mangold was unaware of any meeting in which appellant was referred to as "Chunky."

In a decision dated January 31, 2014, OWCP denied appellant's emotional condition claim. It found that he had failed to establish a compensable factor of employment.

Appellant requested reconsideration. Supervisor Mangold submitted a performance work plan that stated the following: "[Appellant] was responsible for processing requests on a rotational basis with two other [a]dministrative [a]ssistants during the rating period. He was solely responsible for processing requests due to staff shortages beginning February 2013. There have been several instances where positions were not processed."

In a decision dated March 31, 2014, OWCP reviewed the merits of appellant's case and denied modification of its prior decision. It found the performance work plan of little probative value because it was incomplete, undated, and the author was unknown.

## ***LEGAL PRECEDENT***

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[2] As the Board explained in the touchstone case of *Lillian Cutler*,[3] there are injuries that occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Superficially some of these situations appear to be

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[2] 5 U.S.C. § 8102(a).

[3] 28 ECAB 125 (1976).

distinguishable from others where the injury is held to have arisen out of the employment. However, a careful analysis of these various situations shows that there is a sound legal basis for the distinction. Many of these cases, including the present one, involve disabling emotional reactions to factors in the employment.[4]

When an employee experiences emotional stress in carrying out his employment duties or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true where the employee's disability resulted from his emotional reaction to his day-to-day duties.[5] The same result is reached where the emotional disability resulted from the employee's emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of his work.[6]

By contrast, the Board has held that a disabling condition resulting from an employee's feeling of job insecurity *per se* is not sufficient to constitute a personal injury sustained while in the performance of duty. Likewise, assuming that the employee was unhappy doing inside work, desired a different job, brooded over the employing establishment's failure to give him the kind of work he desired, and as a result of such brooding the employee became emotionally disturbed, this does not establish a personal injury sustained while in the performance of duty.[7]

As *Cutler* explained, where the disability results from an employee's emotional reaction to his regular of specially assigned work duties or to a requirement imposed by the employing establishment, the disability comes within the coverage of FECA. 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 frustration from not being permitted to work in a particular environment or to hold a particular position.[8]

Workers' compensation does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.[9]

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[4] *Id.* at 129.

[5] *Id.* at 129-30.

[6] *Id.* at 130.

[7] *Id.* at 131.

[8] The Board in *Cutler* found that when an employee becomes upset over not receiving a promotion, the resulting disability does not have such a relationship to the employee's assigned duties as to be regarded as arising from the employment. "The emotional reaction in such circumstances can be truly described as self-generated and as not arising out of or in the course of the employment." *Id.* at 131.

[9] *Thomas D. McEuen*, 42 ECAB 566, 572-73 (1991).

As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[10] In claims for a mental disability attributed to work-related stress, the claimant must submit factual evidence in support of his allegations of stress from harassment or a difficult working relationship. The claimant must specifically delineate those factors or incidents to which the emotional condition is attributed and submit supporting factual evidence verifying that the implicated work situations or incidents occurred as alleged. Vague or general allegations of perceived harassment, abuse or difficulty arising in the employment is insufficient to give rise to compensability under FECA. Based on the evidence submitted by the claimant and the employing establishment, OWCP is then required to make factual findings which are reviewable by the Board. The primary reason for requiring factual evidence from the claimant in support of his allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by OWCP and the Board.[11]

## ***ANALYSIS***

The Board has consistently held that emotional reactions to situations in which an employee is trying to meet his position requirements, when supported by sufficient evidence, are compensable.

In *T.J.*,[12] where an acting postmaster alleged stress due to overwork, the Board observed that she was essentially alleging stress while carrying out the regular and specially assigned duties of her position. As the record established that the station was understaffed, that positions could not be filled, and that the employee worked in excess of 40 hours a week, the Board found that the employee had established overwork as a compensable factor of employment pursuant to the principles set out in *Cutler*.

Thus, notwithstanding the subjectivity of the term, the Board recognizes overwork, or an increased workload, as a compensable factor of employment. In *O. Paul Gregg*,[13] where the employee testified as to increased workloads brought about by bulk mailing, papers, and an increase in accountable mail with the use of certified letters to deliver food stamps, the Board found that these matters bore a sufficient relationship to the employee's regular day-to-day duties as a letter carrier to constitute a compensable factor of employment under *Cutler*.

When an employee attributes his emotional injury to an increased workload, he must establish a factual foundation for his claim. In the case of *Joseph E. Mitchell*,[14] when the employee failed to provide any corroborating evidence that his office was understaffed on

[10] *See Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

[11] *Paul Trotman-Hall*, 45 ECAB 229 (1993) (Groom, Alternate Member, concurring).

[12] Docket No. 10-1116 (issued February 14, 2011).

[13] 46 ECAB 624 (1995).

[14] Docket No. 94-1031 (issued November 13, 1995).

Saturdays, the Board found that the record did not support that an increased workload was placed on the employee.[15] In *Frank A. McDowell*,[16] the employee implicated overwork, which was a compensable factor of employment. The Board held, however, that his burden of proof was not discharged by the fact that he had identified an employment factor that might give rise to a compensable disability. The employee also had the burden of submitting sufficient evidence to substantiate his allegation of overwork. The Board found that the evidence presented, a custodial staffing survey cover letter, was insufficient to establish that the employee was overworked. In the case of *Michael Koshtishak*,[17] where the employee did submit adequate evidence to document compensable factors, including being overworked, having an increased caseload, being understaffed, and having to train new staff, the Board found that all of the events and allegations were established as having occurred and, by their nature, arose out of and in the course of the employee's assigned duties. The Board remanded the case for further development of the medical evidence to see that justice was done.[18]

The focus of appellant's emotional condition claim has been his workload. In the fall of 2012, he explained, two of the four administrative assistants were promoted, leaving only him and one other. In February 2013, the other administrative assistant was promoted, and he was left to do the work of four people. He was also responsible for training three new staffing specialists who started in 2013. In July 2013, a human resources specialist was assigned to work administrative duties due to the extreme workload.

Supervisor Mangold, appellant's direct supervisor during certain periods, confirmed the staff shortages. In the fall of 2012, two of the four administrative assistants were selected for other positions. The duties of one of the selected administrative assistants were "mostly" absorbed by staffing specialists, suggesting that appellant and the other remaining administrative assistant absorbed the balance. Supervisor Mangold made clear that appellant and the other remaining administrative assistant fully absorbed the duties of one of the selected administrative assistants. During this period of staff shortages, other staff members from within the unit were

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[15] *See G.W.*, Docket No. 07-2065 (issued September 2, 2008) (the employee made general allegations of being overworked due to understaffing, but she did not provide sufficient details, and her supervisor advised there were no staffing shortages and no extra demands placed on the employee). *Cf. Robert W. Wisenberger*, 47 ECAB 406 (1996) (although overwork may be a compensable factor of employment, the employee appeared to object to the required overtime listing not because he had any difficulty performing his duties during overtime hours but because it interfered with his ability to plan activities with his family).

[16] 44 ECAB 522 (1993).

[17] Docket No. 95-2032 (issued November 5, 1996).

[18] *See also Bobbie D. Daly*, Docket No. 01-2115 (issued July 25, 2002) (finding that the employee had submitted sufficient evidence to substantiate her allegations of overwork in January and February 1998); *Gayle R. Agostinoni*, Docket No. 04-0707 (issued July 26, 2004) (finding that the employee had established compensable factors of employment with respect to her allegation that she was understaffed at the employing establishment beginning July 2000 and as a consequence was overworked); *Elee Brown*, Docket No. 04-2180 (issued February 23, 2005) (finding that the employee had established a compensable factor of employment, as the record supported there was a staff shortage at the base and his employment duties increased causing him to be overworked); *J.T.*, Docket No. 11-0233 (issued January 25, 2012) (finding that the employee had submitted substantial evidence of her heavy workload, lack of adequate staff, and working long hours to complete her regular or specially assigned duties, and as such had established a compensable work factor under *Cutler*).

pulled from their assignments to help out in the administrative assistant area. Although OWCP's concerns about the submitted portion of the performance work plan were justified, the Board notes that it is at least consistent with appellant's allegation that he was solely responsible for processing requests due to staff shortages beginning in February 2013.

As the evidence of record establishes the staffing shortages and additional duties to which appellant attributes his emotional injury, at least in part, the Board finds that appellant has established a compensable factor of employment under the principles announced by *Cutler*. Appellant has attributed his emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employing establishment, and he has established a factual foundation for his claim. Although it is not clear that appellant was left to do the workload of four administrative assistants, as he alleged, Supervisor Mangold substantiated the staff shortages and appellant's absorption of additional duties. That appellant was fully able to complete his tasks in a timely matter does not mean the staff shortages and increased workload caused him no stress. That remains a medical question. Nor does it matter that other staff were pulled from their assignments to help out. This tends to support a recognized need for additional manpower to address the increased workload in appellant's area. Appellant's counsel argues on appeal, and the Board agrees, that appellant has adequately substantiated the overwork he experienced in the course of his employment.

With respect to the December 19, 2012 incident involving the use of appellant's unlocked computer, the Board has held that an employee's complaints about the manner in which a supervisor performs supervisory duties or the manner in which a supervisor exercises supervisory discretion fall, as a rule, outside the scope of coverage provided by FECA. This principle recognizes that a supervisor must be allowed to perform her duties and that employees will at times dislike the actions taken. However, mere disagreement or dislike of a supervisory or management action is not actionable absent evidence of error or abuse.[19] Accordingly, the Board finds that it is not a compensable factor of employment for a manager to send someone to access appellant's office computer to teach him a lesson about leaving it unlocked.

The Board has reviewed appellant's other allegations and the evidence submitted to support his claim, and finds that appellant has established no additional compensable factors of employment. Matters such as the modification of his work schedule, the denial of his request to return to his compressed work schedule, being asked to document sick leave or being contacted at home to inquire about leave matters were all administrative in nature, and appellant has submitted no proof that management's decisions or actions in these matters were erroneous.[20] His perception that he was being bullied and harassed is not sufficient to establish the compensability of the matters alleged. The Board finds no abuse or bullying or harassment in his supervisor's statement that appellant was not being a team player for wanting to remain on his compressed work schedule.

[19] *Bonnie M. Billedeaux*, Docket No. 98-0883 (issued March 23, 2000).

[20] The Board finds no evidence that appellant was denied the use of annual leave until a new administrative assistant arrived in June 2013. Appellant has the burden to prove that any such denial was administratively erroneous.

With respect to the allegation that Supervisor Smith, speaking to others, had referred to appellant as "Chunky," appellant does not allege that she used this epithet in his presence. His emotional reaction was, instead, to hearing something from a "confidential informant." This raises two problems. Appellant has failed to submit probative evidence substantiating that what he heard through the grapevine occurred as alleged. Even if he submitted such evidence, the Board has not recognized the compensability of emotional reactions to such matters.

In *Gracie A. Richardson*,[21] the claimant asserted that she was devastated by perceptions of coworkers gossiping behind her back and spreading rumors concerning her marital and personal relationships. The Board found that her reaction to gossip and rumors was a personal frustration that was not related to her job duties or requirements and, therefore, was not compensable.

In the case of *Mary A. Sisneros*,[22] the claimant called in sick on New Year's Eve, and a coworker had to cover her shift. She learned, in conversation with someone else, that this coworker had called her a "bitch." The Board noted that not every statement uttered in the workplace will give rise to coverage under FECA. The comment made by the coworker was not made directly to the claimant or otherwise in her presence. Rather, his statement was an opinion expressed to a coworker following notification that he would be required to work an additional shift on New Year's Eve. The Board concluded that the comment attributed to the coworker was not a compensable factor of employment. Rather, it appeared that the claimant's emotional reaction arose from her perception that the coworker had not been sufficiently disciplined under the grievance settlement and from her general dissatisfaction with the workplace.

In her brief on appeal, appellant's counsel correctly argues that because appellant has provided evidence to show a compensable factor of employment, OWCP has a duty to evaluate the medical evidence to determine whether a causal relationship exists between the established factor of employment and appellant's medical condition. Indeed, as appellant has established two compensable factors of employment, the Board will set aside OWCP's March 31, 2014 decision denying his claim and remand the case to OWCP for further development. OWCP shall request a statement from appellant's supervisor for the period June 2012 to July 2013 that explains the changes in appellant's responsibilities during that period due to staff shortages, as well as any training he performed. She may also comment on the December 19, 2012 incident involving the use of appellant's unlocked computer to send an inappropriate e-mail message. OWCP shall then review the medical opinion evidence with respect to the issue of causal relationship and, following such further development as may become necessary, shall issue a *de novo* final decision on appellant's claim for workers' compensation benefits.

## ***CONCLUSION***

The Board finds that this case is not in posture for decision. The evidence establishes compensable factor of employment. Further action is, therefore, warranted.

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[21] 42 ECAB 850 (1991).

[22] 46 ECAB 155 (1994).

***ORDER***

**IT IS HEREBY ORDERED THAT** the March 31, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: September 16, 2015
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board