

FACTUAL HISTORY

On June 22, 2011 appellant, then a 49-year-old human resources specialist, filed a traumatic injury claim alleging that on June 22, 2011 the human resources (HR) chief went to appellant's office and, in an intimidating manner, stood over her and advised that there were two more openings for the HR conference but that she was sending the HR assistant, not appellant. She also alleged that the HR chief personally invited coworkers to a staff meeting but ignored her. Appellant stated that, on that date, she had feelings of frustration, severe anxiety, embarrassment with distress, a racing heartbeat, and a feeling of fear. She also noted feelings of nausea and vomiting, muscle tension, anxiety, and uncontrollable nervousness. The employing establishment controverted the claim.

In multiple statements and documents, appellant listed factors that she alleged caused her emotional condition. She alleged that the HR chief engaged in disparate treatment of her and created a hostile work environment. Appellant contended that the HR chief approved an extended lunch for other women in the office to attend a farewell luncheon for an HR assistant, but appellant was not invited and the HR chief approved of this behavior. She alleged that she was not allowed to attend a training conference that was important to the conduct of her job. Appellant stated that when the HR chief informed her that she was not going to the conference, she stood over her in an intimidating manner. She alleged that she was excluded from a staff meeting until a coworker asked about why she was excluded. Appellant also noted that her name was omitted on a routing slip that was sent to all other HR specialists and assistants. She alleged that she had to endure bullying and harassment, such as comments as, "Who's turn is it to watch [appellant]?" Appellant contended that others with less seniority were assigned a private office before her, which made it difficult for her to conduct confidential interviews. She alleged that on one date she was called into the HR chief's office three times in 30 minutes to discuss a leave request. Appellant further alleged that the employing establishment violated her privacy and HIPAA rights. She alleged that the HR chief recalled her disability retirement application after her immediate supervisor approved and signed it, thereby maliciously and purposely delaying the process. Appellant also alleged that the HR chief found her documentation insufficient to provide support for her May 16, 2011 absence and request for continuation of pay. She noted a severe lack of communication between the HR chief and herself. Appellant contended that, on that date, she suffered a severe anxiety attack. She had uncontrollable crying spells, problems breathing, was extremely nervous, and was shaking. Appellant also felt dizzy and faint. She noted that she was afraid to go back to work and could not deal with the harassing, disparate, and intimidating treatment from the HR chief.

In a March 25, 2011 statement, Alicia Williams, chief HR officer, stated that, while copying appellant's application package for disability retirement, her desk copier was out of ink, so she printed the completed form on the main copy machine. When she went to the copier to retrieve the documents, the form was not there. Ms. Williams discovered that another employee had retrieved them and given them to appellant. She denied that she was looking to review appellant's medical documents, but stated that she was only trying to ensure that the forms were completed correctly and appropriate attachments submitted. Ms. Williams also noted that she had counseled appellant to not scan her medical documents in e-mails or have them sent by facsimile (fax), but that on February 23, 2011, she picked up medical documentation off the floor near the fax machine with regard to appellant.

In an August 8, 2011 letter, Sam Robertson, assistant HR officer for the employing establishment, controverted the claim. He alleged that he was present at the June 13, 2011 meeting between appellant and Ms. Williams, and at no time did Ms. Williams stand over appellant in an intimidating manner. Mr. Robertson did note that Ms. Williams informed appellant about who was authorized to attend the HR conference in Orlando, and explained that she authorized appellant to attend the Dallas conference in July 2011. He also attached a summary of complaints made by appellant from July 2009 to June 2011 regarding administrative matters. Mr. Robertson noted that with regard to the farewell luncheon, although Ms. Williams did approve a request for certain employees to take an extended lunch, Ms. Williams did not know who was invited, or not invited, to the luncheon, and the employees attending the luncheon invited each other without input from her.

Appellant also submitted medical reports by Dr. Raul Jimenez, a Board-certified psychiatrist, dated from June 6 to 24, 2011. After noting her prior treatment and problems with her supervisor, Dr. Jimenez diagnosed severe major depressive disorder recurrent type and generalized anxiety disorder.

By decision dated February 1, 2012, OWCP denied appellant's claim as it found that she had not established a compensable factor of employment.

On February 17, 2012 appellant requested an oral hearing before an OWCP hearing representative. At the hearing held on June 5, 2012, she testified that she was intimidated by the HR chief, Ms. Williams; that Ms. Williams violated HIPAA and her privacy; that Ms. Williams did not put her on a routing slip, denied her training, delayed her return to work and would not grant her request for a reasonable accommodation.

In support of her allegation that her medical records were accessed without her authorization, appellant submitted a March 31, 2011 letter to her from Joan M. Ricard, a director at the employing establishment, wherein she indicated that, after conducting a fact-finding investigation, it was determined that appellant's occupational health record was accessed without her authorization on February 22 and 25, 2011, that the employing establishment implemented appropriate measures to prevent this from happening again, and that it made apologies for any inconvenience concerning this situation.

Following the hearing, the employing establishment responded to the hearing transcript with comments. Mr. Robertson stated that appellant's supervisor, Ms. Williams, had not accessed appellant's medical records, but had merely requested the dates of appellant medical appointments to verify times when appellant was off work.

By decision dated August 23, 2012, an OWCP hearing representative noted that appellant's statements submitted prior to the hearing and her testimony during the hearing demonstrated that her claim was for an occupational disease as the events occurred over more than one day or work shift. The hearing representative found that appellant had established two compensable factors of employment: (1) her medical records were reviewed without her permission; and (2) the HR chief left appellant's retirement papers exposed when they were sent to the copy machine. However, she also found that appellant's claim remained denied as the

medical evidence did not connect appellant's emotional condition to the established compensable factors of employment.

By letter dated July 17, 2013, appellant requested reconsideration. She alleged that she never received the denial notice from OWCP or the written record. Appellant reiterated her prior arguments about factors that led to her emotional condition. She alleged that she was in constant fear of losing her job. Appellant also noted that on July 17, 2012 she was escorted out of the office despite having invoked Family and Medical Leave Act rights to care for her elderly mother who had passed on July 1, 2012. She alleged that, upon returning to work, she had to meet with the harassing official on July 17, 2012 and was handed termination papers. Appellant also noted that she had a prior stress claim for a prior employer, and that her supervisor made numerous comments about her prior claim.

Mr. Robertson responded for the employing establishment in a September 10, 2013 letter, noting that appellant must have received the denial notice because she filed a request for an oral hearing. He also alleged that no one at the employing establishment knew about appellant's prior claim for an emotional condition. The employing establishment noted that appellant attended training in May 2011, and was approved for training in July 2011 but did not attend because she was not at work from June 14, 2011 to February 2012. It contended that the comment "it's not my day to watch him/her" was made by one person to and about all staff in the office, and not just appellant. Mr. Robertson noted that once appellant objected, these remarks ceased. A fact-finding investigation found that the HR chief had nothing to do with these remarks and that it was not a hostile work environment. The employing establishment noted that appellant was not released to return to work from June 13, 2011 (the date of her alleged injury) until February 2012. On January 25, 2012 the employing establishment received a fax from Dr. Jimenez advising that appellant could return to work, and appellant returned to work on February 27, 2012. On June 11, 2012 appellant was given a notice of proposed removal for excessive absences, and was given until July 27, 2012 to submit a response. Dr. Jimenez noted that appellant was separated from employment for the reason of disability retirement effective August 10, 2012.

By decision dated October 28, 2013, OWCP denied modification of the prior decision.

LEGAL PRECEDENT

To establish a claim that she sustained an emotional condition in the performance of duty, an employee must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.

An occupational disease or illness means a condition produced by the work environment over a period longer than a single workday or shift.² Workers' compensation law does not apply

² 20 C.F.R. § 10.5(q).

to each and every injury or illness that is somehow related to an employee's employment.³ 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.⁴ 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.⁵

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.⁶ However, the Board has 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.⁷ 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.⁸

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the facts alleged or implicated by the employee did, in fact, occur.⁹ Mere perceptions of harassment or discrimination are not compensable under FECA.¹⁰ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹¹ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹² Perceptions and feelings alone are not compensable. To establish entitlement for benefits, a claimant must establish a basis in fact for the claim by supporting his or her allegations with probative and reliable evidence.¹³

³ *L.D.*, 58 ECAB 344 (2007).

⁴ *A.K.*, 58 ECAB 119 (2006).

⁵ 5 U.S.C. §§ 8101-8193. *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

⁷ See *William H. Fortner*, 49 ECAB 324 (1998).

⁸ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁹ *K.W.*, 59 ECAB 271 (2007).

¹⁰ *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *J.F.*, 59 ECAB 331 (2008).

¹² *G.S.*, Docket No. 09-764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005).

¹³ *L.M.*, Docket No. 13-267 (issued November 15, 2013).

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.¹⁵ 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.¹⁶

ANALYSIS

In the present case, appellant filed a claim for an emotional condition related to her federal employment. She provided allegations of harassment, a hostile work environment, improper actions by her supervisor, and improper exposure of personal documents. The initial question presented is whether there are compensable work factors established by the evidence.

Appellant made allegations with regard to harassment and hostile work environment. Mere perceptions of harassment, however, are not compensable under FECA.¹⁷ The Board finds that appellant's allegations of harassment are not supported by the record. There is no evidence that appellant was discriminated against in being intentionally excluded from meetings or routing slips or that the HR chief stood over her in an intimidating manner. Appellant alleged that the HR chief allowed her colleagues to not invite her to a luncheon, but this was totally outside of the HR's chief's knowledge, or for that matter, responsibilities. The fact that appellant may have felt excluded from a farewell luncheon was not relevant to appellant's employment. Although there may have been a comment made with regard to "Whose turn is it to watch [appellant]," the evidence indicates that the comment was made about many others and was not repeated after appellant complained. There is no evidence that anyone at the employing establishment knew about appellant's prior claim for an emotional condition filed with regard to a prior employer. Accordingly, appellant has not shown a compensable factor of employment with regard to harassment or hostile work environment.

Appellant also contends that she suffered a compensable factor of employment with regard to her supervisor's actions and other administrative matters. The Board notes that a supervisor must be allowed to perform their duties and at times employees will disagree with their supervisor's actions.¹⁸ The manner in which a supervisor exercises his or her discretion

¹⁴ *D.L. 58 ECAB 217 (2006).*

¹⁵ *Supra* note 9; *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

¹⁶ *Robert Breeden*, 57 ECAB 622 (2006).

¹⁷ *Supra* note 9.

¹⁸ *Supra* note 13.

falls outside of FECA's coverage.¹⁹ Appellant contends that the administrative decisions as to who should be authorized to attend a training conference, handling of leave requests, assignment of office space, discussion with regard to appellant's absences from work, or appellant's termination constitute compensable factors of employment. However, appellant has not shown any error or abuse on the part of the employing establishment with regard to these administrative matters.²⁰ Mere disagreement or dislike of a supervisory or managerial action will not be compensable absent evidence of error or abuse.²¹ Accordingly, appellant has not shown a compensable factor with regard to these administrative matters.

OWCP found that appellant had established error or abuse by the employing establishment with regard to two matters, *i.e.*, that appellant's medical records were reviewed without her permission and that her retirement papers were exposed when they were sent to the copy machine, retrieved by a coworker, and returned to her. Such administrative or personnel matters, although generally related to the employee's employment, are administrative functions of the employer, not regular or specially assigned work duties of the employee, and are not covered under FECA. However, the Board has 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.²² In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²³ The Board finds that, although appellant did establish that these events occurred as alleged, the employing establishment was not acting unreasonably when it reviewed appellant's medical records without her permission and when a coworker retrieved appellant's retirement papers from the copy machine and returned them to her. With regard to appellant's allegation that her medical records were accessed without her permission, there is no evidence that appellant's personal information was misused or stolen. The employee's supervisor had a work-related purpose for requesting the information because of a need to check the dates of appellant's medical appointments. There is no decision by any administrative body establishing a Privacy Act violation. Finally, it was reasonable for the employing establishment to send the March 31, 2011 letter notifying appellant that her occupational health record had been accessed without her authorization and that appropriate measures had been taken to prevent it from happening again.

With regard to appellant's claim that her retirement papers were exposed at the copy machine, the Board notes that appellant, a HR specialist who was responsible for handling retirements, also printed her personal retirement papers on a shared printer where it was reasonable for a coworker to pick them up and return them to appellant. Similar situations are common and, without evidence of malice or misuse of appellant's personal information, this incident does not constitute error or abuse.

¹⁹ *C.O.*, Docket No. 14-516 (issued June 5, 2014).

²⁰ *See R.C.*, Docket No. 13-1636 (issued June 16, 2014).

²¹ *A.K.*, Docket No. 14-437 (issued June 9, 2014).

²² *L.B.*, Docket No. 13-1582 (issued September 25, 2014).

²³ *L.Y.*, Docket No. 13-242 (issued August 20, 2013).

Accordingly, the Board finds that appellant has not established a compensable factor of employment. Since appellant has not established a compensable work factor, the Board need not address the medical evidence.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 to 10.607.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 28, 2013 is affirmed, as modified.

Issued: February 27, 2015
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

²⁴ See *Margaret S. Krzycki*, 43 ECAB 496 (1992).