United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 14-1135**
	)	**Issued: June 7, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Los Angeles, CA, Employer	)	

Appearances:
Lavake Cowart, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 14, 2014 appellant, through her representative, filed a timely appeal from a February 20, 2014 merit decision and an April 11, 2014 nonmerit 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.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether OWCP properly denied appellant's request to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board. By decision dated February 20, 2013, the Board set aside an April 12, 2012 OWCP decision denying appellant's emotional condition

[1] 5 U.S.C. § 8101 *et seq.*

claim.[2] The Board addressed appellant's allegations that the employing establishment placed her on emergency suspension status beginning December 18, 2010 in retaliation for informing the U.S. Department of Labor Office of Safety and Health Administration (OSHA) of safety violations, and that an employing establishment Police Officer Francoise Carter, acted improperly in twisting her arm behind her back and pushing her forward while escorting her from the premises. The Board instructed OWCP to obtain additional information regarding whether the employing establishment followed its procedures in placing appellant on an emergency suspension. The Board further instructed OWCP to obtain the written statement and investigative report of an employing establishment Police Officer Eugene Rollins, which he completed shortly after the December 18, 2010 incident. After this additional development of the claim, OWCP was to then determine whether the placement of appellant in a control hold by Officer Carter constituted a compensable work factor. The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. Appellant's allegations, the relevant evidence from the prior decision, and the evidence included in the record subsequent to the Board's remand are set forth below.

In an e-mail dated December 5, 2010, appellant and her husband, who also worked for the employing establishment, requested that the employing establishment provide feeder alignment kits for safety reasons. In a December 6, 2010 response, an employing establishment official requested that Gregory Anderson, a manager, address their concerns, noting that the employing establishment would not allow unsafe working conditions.

In a December 17, 2010 e-mail message, Roy Evans, a supervisor, related that on that date he had advised appellant that she was being assigned to work in a different area than where her husband was working. Appellant informed Mr. Evans that she had previously requested reassignment from that other work area. She subsequently obtained a sick leave form and left work.

On December 17, 2010 the employing establishment, citing Article 16.7 of the Collective Bargaining Agreement, placed appellant on emergency off-duty status because she refused to follow reasonable instructions of her supervisor and abandoned her assignment during a time of heavy volume. The employing establishment related that her behavior "was irrational and caused management concern for their safety and the safety of [her] coworkers."

The record contains a copy of Article 16.7 of the Collective Bargaining Agreement, which pertains to emergency suspensions. It provides that an employee can be immediately placed off duty for "intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to [employing establishment] property, loss of mail or funds, or where the employee may be injurious to self or others."

[2] Docket No. 12-1040 (issued February 20, 2013). On January 17, 2011 appellant, then a 53-year-old electronics technician, filed a traumatic injury claim (Form CA-1) alleging that on December 18, 2010 she sustained post-traumatic stress disorder following an attack by an employment establishment police officer. As she attributed her condition to events occurring over the course of more than one workday her claim is properly adjudicated as an occupational disease. *See* 20 C.F.R. § 10.5(q).

In an incident report dated December 18, 2010, Officer Carter related that she and Officer Rollins were instructed to escort appellant and her husband off of the employing establishment's property. She added that after appellant's husband began yelling, she placed appellant in a control hold and instructed her to walk.

In a January 14, 2011 statement, appellant related that on November 10, 2010 her husband had filed a complaint with OSHA after being asked repeatedly to "power up a machine which had water leaking from the roof onto the electrical components." On December 5, 2010 the employing establishment increased her workload. Appellant filed a complaint with OSHA on December 10, 2010 alleging retaliation because of the increased workload and on December 13, 2010 she requested reassignment. On December 16, 2010 Supervisor Evans informed appellant that she would have to work alone in that area. Appellant noted that she had a headache and requested sick leave for December 16 and 17, 2010. She had 1,100 hours of accrued sick leave available for her use at the time of her request. When appellant returned to work on December 18, 2010 she received notice of emergency suspension.

Appellant related in a February 6, 2011 statement that when she and her husband arrived at work on December 18, 2010 their access badges were not working so they used the intercom system to request entry. She clocked in and waited for her work assignment. Supervisor Evans thereafter advised appellant that she and her husband were suspended on an emergency basis and were told to leave. Appellant proceeded to leave the employing establishment, but as she approached the door, Officer Carter informed her that she must be escorted from the property. Officer Carter contended that appellant and her husband knew that they should not have reported to work that day. He and appellant's husband quarreled about whether they previously received notice they should not be on the property. Appellant requested that Officer Rollins provide his name and badge number. When Officer Rollins shone a flashlight and spelled his name for appellant, Officer Carter knocked the flashlight away and twisted appellant's arm. Other officers then arrived and took appellant to a holding area. After approximately 15 minutes, she was released and left the property. On February 7, 2011 appellant related that she was not made aware of her emergency suspension until she attempted to report for work on December 18, 2010.

In a February 12, 2011 e-mail, sent in response to OWCP's request for information, Mr. Anderson asserted that appellant's "only conduct problem was that [appellant] requested instruction for some tasks to be given to her in writing." He related that on December 16, 2010 she refused to work in her assignment, requested sick leave, and then raised her voice, and threatened Mr. Evans. Mr. Anderson maintained that the employing establishment had notified appellant on December 17, 2010 that she was in an "off-duty status."

On February 16, 2011 the employing establishment issued appellant a notice of removal for failing to follow instructions/insubordination on December 16, 2010 when she took sick leave rather than complete her work assignment.

Based upon complaints to OSHA, including appellant's complaint of retaliation, a safety and health investigation commenced. In an e-mail dated April 4, 2011, Ayesha Attoh Mahapatra, counsel for the employing establishment, informed Darrell Whitman, an OSHA investigator, that she was not interested in a settlement conference in this matter. In an April 6,

2011 response, Mr. Whitman acknowledged Ms. Mahapatra's response to OSHA's offer of mediation between appellant and her husband the employing establishment. He stated:

> "I have completed the initial phase of my investigation, which includes reviewing the details of your response, interviewing [appellant and her husband], and weighing documentary evidence submitted by both parties. At this point in the investigation, a weighing of the evidence supports [their] claim of retaliation. Documents in the [employing establishment] response clearly indicate that [appellant and her husband] engaged in protected activity in reporting a workplace hazard to OSHA and the subsequent OSHA site visit confirmed their concern... Further, evidence provided by the [employing establishment], supplemented by evidence provided by [appellant and her husband] indicates that the adverse action taken by local [employing establishment] management against [them], in the form of an indefinite suspension for allegedly refusing a work assignment and a subsequent assault by [employing establishment] security personnel, was pretextual and retaliatory in nature in that local management failed to follow established remedial procedures and took action that was disproportionate to the alleged offense."

Mr. Whitman advised Ms. Mahapatra by e-mail on April 7, 2011 that the results of his investigation supported the complaint made by appellant and her husband that a water leak on high voltage equipment was "a long-term problem." He noted that the documents provided:

> "confirm that [appellant and her husband] were assigned 'additional duties' immediately after [OSHA's] inspection that were not assigned to any other employees in their situation, that *their OSHA reports* were known to local management as early as December 5, 2010 and that they requested accommodation to mitigate the apparent retaliation by [Mr.] Evans, their area manager." (Emphasis in original).

Mr. Whitman stated:

> "These complaints put considerable more detail to the December 18, 2010 incident where [appellant and her husband] were forcibly escorted from the facility for what was alleged by Mr. Evans to be a work refusal. Standing alone, the incident could be read as justification for [their] indefinite suspension. But read in the context of their protected activity, the fact that they were both long-term [employing establishment] employees with no prior history of 'resistance' to [employing establishment] police, and the extreme reaction by Mr. Evans and the [employing establishment] police involved to what was an alleged nonviolent, nonthreatening work refusal, lead to the conclusion that the incident was part of a chain of actions by Mr. Evans designed to retaliate and ultimately terminate [appellant and her husband]."

Mr. Whitman advised that the evidence he had considered bolstered the credibility of appellant and her husband. He also indicated that another investigation had determined that Officer Carter was "overzealous." Mr. Whitman noted that he had not received the second page

of an incident report and questioned whether it was provided to OWCP. Regarding the denial of appellant's workers' compensation claim by OWCP, he stated:

> "I would point out that it was not an investigation that looked at the context of the incident, but relied primarily on a reading of law related to disability claims not whistle-blower claims, and testimony by Supervisor Evans, who in our investigation appears to be the primary source of retaliation against [appellant and her husband]. However, the findings there also not[e] that 'Officer Carter's reaction was overzealous.' I would suspect that [appellant and her husband] may reopen that claim once my [f]inal [i]nvestigative [r]eport is released."

Mr. Whitman concluded:

> "OSHA has been monitoring [appellant's and her husband's] situation for some time and has developed an extensive and detailed investigative file. While it is always possible that evidence could appear to undermine their claims, in this case it appears highly unlikely. Rather, the evidence that has appeared, such as the documents you provided, has tended to reinforce [their] credibility."

Mr. Whitman urged a settlement discussion. In an April 12, 2011 response, Ms. Mahapatra provided approval for a settlement conference.

In a portion of a transcript from a Merit Systems Protection Board (MSPB) hearing held in connection with appellant's husband's appeal of his removal from employment, Officer Rollins testified that on December 18, 2010 a supervisor had informed him that two employees on suspension had entered the building.[3] Officer Carter asked him to assist her in walking them to their cars because they were "in violation of a suspension order." Officer Rollins related that appellant and her husband appeared surprised about the suspension and began asking Officer Carter questions. Officer Carter, appellant, and her husband raised their voices. Officer Rollins related that appellant and her husband stopped a few times while walking to their car to ask questions and their "voices would be raised again." He noted that appellant did not raise her voice at him or argue with him. Officer Rollins spelled his name for appellant at her request. He completed a report regarding the events of December 18, 2010 and submitted it to his supervisor. Officer Rollins did not review Officer Carter's report while writing his own report. He related that he had never had to "make any kind of aggressive move to any employee all these years." Officer Rollins indicated that he was surprised when Officer Carter used control holds. He related that Officer Carter raised her voice even though the policy was to deescalate any situation.

In a July 15, 2011 MSPB hearing transcript, Supervisor Evans indicated that he wanted to give appellant and her husband separate work assignments because they were seen holding hands. He related that they disapproved of their new assignments and left sick. Supervisor Evans placed them on emergency suspension when they returned to work. He indicated that he did not telephone appellant or her husband to inform them of their placement on emergency suspension.

[3] On May 31, 2011 the MSPB revoked the suspension of appellant's husband from December 16, 2010 to January 1, 2011 and ordered back pay.

On July 29, 2011 the MSPB reversed appellant's husband's termination on procedural grounds. In its decision, it noted that both Officer Rollins and Officer Carter wrote contemporaneous reports about the December 18, 2010 incident, but that the employing establishment based the termination only on Officer Carter's report. The MSPB found that Officer Rollins had "testified that his report of this event was very different from Officer Carter's…."

In an August 23, 2011 prearbitration settlement concerning appellant's removal from employment, the employing establishment agreed to expunge all disciplinary action and pay her back pay and leave restoration in exchange for her filing for disability retirement within 60 days.

In a statement to OWCP dated April 8, 2013, appellant contended that an emergency suspension was only proper with suspected criminal activity. She related that she had worked in a hostile environment since December 2006, which culminated in her emergency suspension in December 2010. Appellant submitted evidence relevant to her husband's Equal Employment Opportunity Commission claim.

By letter dated May 31, 2013, OWCP in compliance with the order of remand by the Board, requested that the employing establishment discuss whether Officer Carter's placement of appellant in a control hold on December 18, 2010 was justified. It further requested investigative reports regarding the incident, including a copy of Officer Rollins' report.

In a July 1, 2013 response, the employing establishment asserted that Mr. Whitman, the OSHA inspector, had not made formal findings, but instead set forth his opinion as an advocate and as part of settlement negotiations. It asserted that he spoke only with appellant and her husband and an counsel for the employing establishment. The employing establishment further maintained that it followed procedures by placing her on emergency suspension under section 16.7 of the Collective Bargaining Agreement after she refused to follow her supervisor's instructions. It mailed appellant a letter to her address and telephoned her, but she did not receive either the letter or telephone call. The employing establishment also related that it was proper for Officer Carter to place her in a control hold because she and her husband had accessed the property without authorization after their badges were deactivated. It indicated that Officer Rollins' supplemental statement supported a finding that appellant and her husband had resisted instructions and that she was only then placed in a control hold.

In a July 2, 2013 addendum to his December 18, 2010 incident report, Officer Rollins related that he was instructed to assist Officer Carter escorting appellant and her husband from the property.[4] In this addendum he deviated from his prior statement and now maintained that

[4] In an undated statement Victoria Vasquez, a police officer, related that appellant entered the employing establishment through a broken gate. When appellant could not enter the facility because her badge was deactivated, she rang a gate button. Officer Vasquez instructed officers to escort appellant from the building. She responded to Officer Rollins' request for assistance. Officer Vasquez related that both appellant and her husband "would plant their feet and refuse to move every few steps while walking to their vehicle. [Appellant and her husband] were belligerent, argumentative and had [a] negative attitude." In undated statements, Walter Morgan and Kimberly Hudson, who are both employing establishment police officers, indicated that they assisted escorting appellant to the library.

both were stubborn and curt and did not abide by directions to leave the property.[5] Appellant and her husband wanted to stop and argue rather than walk to their vehicle and were now noted to have been observed with an extremely high degree of obstinacy and surliness. Officer Rollins stated:

> "On two occasions, Officer Carter used a hand-held walk-along technique to encourage the couple to stop their delaying tactics and quickly leave the premises. The first time the technique was used with [appellant], and on a second, separate occasion, with [her husband]. The hand-holds were only for a short duration. [Appellant] was generally cooperative with Officer Rollins, but would make attempts at delaying the departure."

In yet another supplemental statement dated June 29, 2013, Officer Rollins altered his prior opinion and now related that it was appropriate for Officer Carter to use a controlled hold as appellant was not complying with instructions.[6] He explained "During my testimony, I simply intended to convey that a controlled hold would likely not have been necessary, had [appellant and her husband] actually followed through on my verbal commands. But, that did not happen. It is in that narrow context, that I intended to communicate a controlled hold would not have been needed."

By decision dated September 6, 2013, OWCP denied appellant's emotional condition claim. It found that she had not established any compensable work factors. OWCP determined that appellant was not in the performance of duty at the time she was placed in a control hold as she was on emergency suspension and she was being escorted from the premises which was an administrative action. It noted that the escort from the USPS premises was not related to the claimant's regular work duties, but was related to the employing establishment's personnel/administrative functions, which cannot be used as evidence to support coverage under FECA. OWCP further determined that Officer Rollins' supplemental statement established that the control hold by Officer Carter was reasonable. It further found that Mr. Whitman's statement was not a formal finding of fact, but rather an effort to reach a settlement.

On September 10, 2013 appellant requested a review of the written record. She related that the MSPB determined that the employing establishment violated her husband's due process rights in placing him on emergency suspension. Appellant noted that she did not have appeal rights to the MSPB, but that section 16.3 and section 16.4 of the union contract provided that the employing establishment had to give notice prior to taking disciplinary action. She disagreed with OWCP's finding that Mr. Whitman's e-mail was not probative, noting that he was an OSHA investigator and not an advocate. Appellant contended that the unsigned addendum from Officer Rollins was of less weight than his direct testimony provided over two years earlier on June 15, 2011.

[5] The Board notes that the July 2, 2013 addendum refers to Officer Rollins in the third person, but is signed by E. Rollins.

[6] The Board notes that the June 29, 2013 supplemental statement refers to Officer Rollins in the first person and contains his signature.

In a U.S. District Court for the Central District of California, Western Division stipulation and compromise settlement and dismissal between, the federal government agreed to pay appellant and her husband $60,000.00 as a full settlement of their action against the employing establishment. Appellant and her husband agreed to not seek future employment with the employing establishment. The stipulation indicated that it did not constitute an admission of fault by the employing establishment.

By decision dated February 20, 2014, the hearing representative affirmed the September 6, 2013 decision. She found that appellant had not alleged any compensable work factors.

On March 22, 2014 appellant requested reconsideration. She alleged that the witness on behalf of the employing establishment provided different accounts and that the employing establishment violated its policy in placing her on emergency suspension. Appellant maintained that requesting sick leave was not a basis for an emergency suspension. She alleged that she sustained stress performing her work duties.

By decision dated April 11, 2014, OWCP denied appellant's request for reconsideration as she had not submitted evidence or raised an argument sufficient to warrant reopening her case for further merit review under section 8128.

On appeal, appellant argues that Officer Rollins' sworn testimony is credible and that OWCP should have contacted Mr. Whitman, the OSHA investigator. She indicated that she requested sick leave on December 16, 2010 due to special work duties imposed as retaliation.

LEGAL PRECEDENT

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]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[9] 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

[7] *See supra* note 1; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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

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

afforded.[10] 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.[11]

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.[12] 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.[13]

ANALYSIS

The issue presented before the Board is whether appellant has proven one or more compensable factors of employment in support of her emotional condition claim and therefore whether her alleged condition occurred in the performance of duty.[14] Appellant has not attributed her emotional condition to her regular or specially assigned duties in her position as an electronics technician. Therefore, she has not alleged a compensable work factor under *Cutler*.[15]

[10] *See William H. Fortner*, 49 ECAB 324 (1998).

[11] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[12] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[13] *Id.*

[14] An emotional condition claim is distinguishable from a claim for traumatic physical injury. *See Robert T. Romans*, 53 ECAB 620 (June 18, 2002). In *Romans* appellant's alleged traumatic shoulder injury occurred on the premises of the employing establishment during work hours when a policeman conducted a traffic stop for an alleged vehicular infraction. There was no evidence to indicate that appellant was engaged in any activity incidental to his employment during this traffic stop. In another claim for traumatic injury, *Alan G. Williams*, 52 ECAB 180 (issued December 19, 2000) appellant was placed in an emergency off-duty status at 10:00 a.m. and given direct orders to leave the employing establishment premises. Appellant was arrested at 11:50 a.m. by postal inspectors who had to subdue him due to combative behavior. OWCP denied appellant's claim for a traumatic left shoulder injury finding that at the time of his injury appellant was not engaged in any activity incidental to his employment. There was no indication that appellant was handcuffed and arrested due to any actions directly related to his employment. In denying appellant's subsequent request for reconsideration, OWCP noted that the documents submitted by appellant, which did not contain any findings that the employing establishment committed any wrongdoing, were irrelevant. The legal analysis differs in emotional condition claims. In *J.H.*, Docket No. 13-1939 (issued March 18, 2014), for example, one of appellant's allegations was that she was retaliated against when her supervisor caused her to be forcibly removed from the worksite and taken for psychiatric screening. The Board found that the standard for determining whether appellant sustained an emotional condition as a result of her supervisors, or actions taken by management, is whether the employing establishment committed error or abuse.

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

Appellant contended that she sustained an emotional condition as a result of error and abuse by the employing establishment in administrative and personnel actions. She alleged that the employing establishment placed her on emergency suspension on December 17, 2010 in retaliation for filing a complaint with OSHA concerning a safety violation. Appellant further contended that she was not provided proper notice of the emergency suspension, and that Officer Carter acted abusively in placing her in a control hold while escorting her off the premises on December 28, 2010. In *Thomas D. McEuen*,[16] 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 employing establishment and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by management in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the supervisors have acted reasonably.[17]

In a statement dated January 11, 2011, appellant related that on November 10, 2010 she and her husband, with whom she worked, filed a complaint with OSHA after they were repeatedly asked to turn on the power to a high-voltage machine that had water leaking onto it from the roof. On December 10, 2010 she filed an OSHA complaint alleging that the employing establishment increased her workload as an act of retaliation for the November 10, 2010 complaint. Appellant requested reassignment on December 13, 2010. Instead, on December 16, 2010, Mr. Evans assigned her to work alone in the area of the high-voltage machine. Appellant requested sick leave for December 16 and 17, 2010. In a statement dated February 6, 2011, she related that when she returned to work on December 18, 2010 her badge was not working so she entered using the intercom system. Thereafter, Mr. Evans informed appellant for the first time that she was suspended. At the door Officer Carter advised appellant that she was going to escort her off the property and twisted her arm when Officer Rollins was spelling his name for her.

The employing establishment maintained that it did not retaliate against appellant in suspending her on December 17, 2010 and having its police officers escort her off the premises on December 18, 2010. In an e-mail dated December 17, 2010, Mr. Evans related that on that date he instructed her to work in a different area from her husband. Appellant left work after requesting a sick leave form. On December 17, 2010 the employing establishment placed her on emergency off-duty status under section 16.7 of the Collective Bargaining Agreement for refusing her supervisor's instructions and leaving work during a time of increased volume. It alleged that appellant's behavior was not rationale and caused a safety concern. In an e-mail dated February 12, 2011, Mr. Anderson related that on December 16, 2010 she refused her assignment and requested sick leave. He also maintained that appellant threatened her supervisor, Mr. Evans. Mr. Evans, however, did not indicate that she had threatened him.

[16] *See supra* note 9.

[17] *See Brian H. Derrick*, 51 ECAB 417 (2000); *Richard J. Dube*, 42 ECAB 916 (1991).

In a statement dated July 1, 2013, the employing establishment advised that it was appropriate to put appellant in a control hold because she accessed the property without authorization and did not comply with instructions. In a portion of the July 15, 2011 transcript of an MSPB hearing held for appellant's husband, Officer Rollins related that he was surprised that Officer Carter used a control hold on appellant. He additionally indicated that Officer Carter raised her voice even though the policy was to deescalate situations. Officer Rollins confirmed his observation that appellant appeared surprised upon learning of her placement on an emergency suspension from work. In a supplemental statement dated June 29, 2013, however, he asserted that it was appropriate for Officer Carter to use a control hold because appellant did not comply with verbal commands. The testimony of Officer Rollins closest in time to the incident supports that appellant and her husband were peaceably leaving the premises when the employment establishment forced them to hold in place until they could be escorted off premises by police officers. Allegations set forth in prepared statements nearly two years after the incident, which allege that appellant showed obstinacy and surliness and requested information from the employing establishment police officers, does not overcome the initial investigative report and contemporaneous testimony of Officer Rollins.

In support of her claim of retaliation, appellant submitted an August 23, 2011 grievance settlement which expunged all disciplinary action and provided her with back pay in exchange for her filing for disability retirement. The mere fact, however, that the employing establishment lessens or reduces a disciplinary action does not establish that it acted in an abusive manner towards the employee.[18] Appellant also submitted a federal district court settlement in which the government paid $60,000.00 as settlement in her and her husband's actions against the employing establishment. The settlement specifically provided that it did not represent an admission of fault by the employing establishment. Consequently, the grievance and district court settlements, standing alone, do not establish error and abuse by the employing establishment.

Regarding appellant's complaint with OSHA alleging retaliation, Mr. Whitman, in an April 6, 2011 e-mail message, determined that based on interviews and a review of documents, the evidence supported her claim of retaliation. He noted that an OSHA investigation verified her complaint of a workplace hazard and that the evidence also supported that the "indefinite suspension for allegedly refusing a work assignment and a subsequent assault by [employing establishment] security personnel, was pretextual and retaliatory in nature…." In an e-mail dated April 7, 2011, Mr. Whitman related that documents supported that the employing establishment assigned appellant more duties after an OSHA inspection confirmed their complaint that water was leaking onto high-voltage, electric-powered equipment. He concluded that the "extreme reaction by Mr. Evans and the [employing establishment] police involved to what was an alleged nonviolent, nonthreatening work refusal, [led] to the conclusion that the incident was part of a chain of actions by Mr. Evans designed to retaliate and ultimately terminate" appellant. Mr. Whitman characterized the suspension and forcible eviction of appellant from the property by employing establishment security as "disproportionate to the alleged offense."

The Board finds that appellant has submitted sufficient evidence to establish her allegations of administrative error by the employing establishment in her emergency suspension

[18] *See Linda K. Mitchell*, 54 ECAB 748 (2003).

on December 17, 2010 and in having employment establishment police officers escort her from the building on December 18, 2010. While, as discussed, the district court and grievance settlements are insufficient to establish error or abuse, the district court settlement expunges the underlying disciplinary action and provides back pay while the district court settlement awards damages. Officer Rollins' sworn testimony expressly supports that Officer Carter did not follow its own de-escalation policy. While the employing establishment contend that it was proper for Officer Carter to put appellant in a control hold in part because she accessed the property without authorization because she was suspended, there is no evidence or record to show that the appellant was notified of the suspension prior to her arrival at work on December 18, 2010 and she legitimately accessed the property when she was let in to the facility after using an employing establishment intercom system. Officer Rollins' investigative report noted that appellant appeared surprised to learn of the emergency suspension.

Finally, the finding by Mr. Whitman supports appellant's contention that Mr. Evans retaliated against her by suspending her on an emergency basis when she refused to work in an area from which she had previously requested reassignment and asked for sick leave. His opinion adds further credibility to her allegation that the actions taken by the employing establishment both in suspending her for requesting sick leave and having police physically escort her from the building were not warranted by the circumstances, but were instead the retaliatory result of her protected actions in reporting safety violations. While the employing establishment challenged the weight of Mr. Whitman's opinion because it was not a formal finding, the Board concludes that as an OSHA investigator he is a neutral party and his opinion constitutes relevant evidence.

The Board thus finds that appellant has submitted sufficient evidence to establish error or abuse by the employing establishment in suspending her on December 17, 2010, providing her no notice of the emergency suspension, in having the police escort her off the premises, and the placement of her in a control hold when she was following instruction to leave the employing establishment premises. As appellant has established compensable work factors, the case presents a medical question regarding whether her emotional condition resulted from the compensable employment factors. OWCP determined that there were no compensable employment factors and thus did not analyze or develop the medical evidence. The case will be remanded to OWCP for this purpose.[19] After such further development as deemed necessary, it should issue a *de novo* decision on this matter.

CONCLUSION

The Board finds that the case is not in posture for decision.[20]

[19] *See Robert Bartlett*, 51 ECAB 664 (2000).

[20] In view of the Board's disposition of the merits, the issue of whether OWCP properly denied appellant's request for reconsideration is moot.

ORDER

IT IS HEREBY ORDERED THAT the April 11 and February 20, 2014 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 7, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Alec J. Koromilas, Alternate Judge, dissenting:

I respectfully dissent from the majority opinion with regard to finding a compensable factor as a result of events that occurred after appellant was made aware of her emergency suspension. Specifically, I do not believe that appellant has established a compensable factor as a result of being escorted from the employing establishment facility. According to appellant's statement, upon entering the facility with her husband and coworker, her badge was not working, but she was able to enter the facility by using the intercom. Once she reported to her workstation, both she and her husband were given an envelope by a supervisor which contained emergency off-duty status orders. After given time to read same, her supervisor advised that they should leave the building. On the way out, they were stopped by a police officer and told they needed to hold at that location to be escorted off the premises. After this point, the narratives diverge as to what exactly happened. Appellant, by her own statement, acknowledged that after learning of her suspension, she understood that she was to leave the premises. Instead of following the police commands to hold in an area for a moment and to be escorted off the premises, she and her husband became argumentative asking a series of questions to the officers which delayed her exit from the premises. There was a disagreement on the propriety of certain control holds used by the police to effectuate appellant's exit; however, it is clear from all the statements that appellant did not comply and did not peaceably leave the premises as instructed. All parties to the incident state in some fashion that appellant stopped along the way with her husband on a number of occasions between the building and their vehicle arguing, according to the officer's statement, with an "extremely high degree of obstinacy and surliness," speaking

loudly, asking for their names, threatening lawsuits, and disobeying commands to continue to leave the premises.

The Federal Employees' Compensation Act provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[1] The term "in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law, "arising out of and in the course of employment."[2] The phrase "course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.[3]

There is no dispute in this case that at the time appellant was told of her suspension and asked to leave work on December 18, 2010, she was at a place where she reasonably was expected to be in connection with the employment, *i.e.*, on the employing establishment premises. The issue is whether the claimed injury occurred at a time when appellant may reasonably be said to have been engaged in her master's business and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto. I submit that at the time appellant disobeyed the commands of the officers to leave the premises after being informed of the emergency suspension, she ceased to be considered reasonably to have been engaged in her master's business or fulfilling the duties of her employment or engaged in doing something incidental thereto. The claimed injury occurred as a direct result of her repeatedly refusal to leave the employing establishment premises and becoming argumentative with postal police who were attempting to have her comply with the order to leave. There is no evidence that, at the time of her alleged injury, appellant was engaged in any activity incidental to her employment or that her actions bore any relation to the fulfillment of his duties.[4] Appellant has not established that her injuries on December 18, 2010 arose out of her employment. Her injury did not occur while she was engaged in the employing establishment's

[1] 5 U.S.C. § 8102.

[2] *Bernard D. Blum*, 1 ECAB 1, 2 (1947).

[3] *See Eugene G. Chin*, 39 ECAB 598, 601-02 (1988).

[4] *See Jeremiah Bowles*, 38 ECAB 652, 653-54 (1987) (finding that the employee claiming injury during an altercation with police did not adequately show how his involvement in the altercation related to his work).

business or in the duties she was employed to perform. Instead, appellant claims an injury during the altercation with police.[5] Had appellant simply left the premises as instructed by the police, there would have been no need for enhanced police intervention.[6]

For the reasons expressed above, I feel compelled to record this dissent on the issue of a compensable factor relative to the removal of appellant from the premises and would affirm OWCP's decision on this issue.

In all other respects, I concur in the decision of the majority.

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[5] *See Alan G. Williams*, 52 ECAB 180 (2000) (appellant was informed of an emergency suspension order and directed to leave the premises. He refused the requests to do so and the employing establishment police handcuffed him and removed him from the premises. It was found that the action occurred because appellant repeatedly refused direct orders to leave the employing establishment premises and became combative with the postal inspectors who were attempting to have him comply with these orders). *See Clarence Williams, Jr.*, 43 ECAB 725 (1992) (the employee was on the employing establishment premises when he advised two drivers to move their vehicles. Although this action caused police officers to approach the employee and arrest him, he was not handcuffed and arrested due to actions related to any employment duty. Rather, it was found that the employee was arrested for being belligerent and resisting attempts to place him in the patrol vehicle). *See Robert T. Romans* 53 ECAB 620 (2002) (the employee, after a verbal altercation refused police commands to go outside, he was later handcuffed and arrested on the employing establishment premises. It was found that the arrest occurred because of noncompliance with the police orders and had no relationship with the fulfilment of his employment duties

[6] *Compare S.M.*, Docket No.15-1667 (issued April 20, 2016) (appellant refused a modified job offer and her supervisor called the postal police to escort her from the premises. She collected her belongings, willingly complied, and was escorted to the parking lot and left without incident).