United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 24-0178**
	)	**Issued: April 5, 2024**
DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On December 14, 2023 appellant filed a timely appeal from July 3 and November 9, 2023 merit decisions and a December 7, 2023 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 has met his burden of proof to establish an emotional condition in the performance of duty; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

On March 7, 2022 appellant, then a 54-year-old information technology management specialist, filed an occupational disease claim (Form CA-2) alleging that he sustained a stress-related disorder causally related to factors of his federal employment. He maintained that he experienced discrimination followed by harassment and retaliation "by a few select managers." Appellant stopped work on May 26, 2020. On the reverse side of the claim form, the employing establishment advised that appellant had "reported an injury on the date he was terminated in his probationary period."

In a statement dated March 15, 2022, the employing establishment controverted the claim. It asserted that appellant had not complained of harassment or discrimination prior to being let go when his probationary period ended and noted that he did not file a claim until two years after his termination.

In a development letter dated April 15, 2022, OWCP advised appellant of the factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. It afforded him 30 days to submit the requested information.

Subsequently, OWCP received a June 28, 2021 report from Dr. Vivian Chern Shnaidman, a Board-certified psychiatrist.

In a statement dated April 25, 2022, appellant related that he had set forth the details of his harassment and discrimination in an attached Equal Employment Opportunity (EEO) complaint, and an April 5, 2020 e-mail that he sent to the employing establishment. He related that his emotional distress began around November 2019 when he experienced discrimination based on his religion. Appellant indicated that he also experienced discrimination due to his disability on March 30 and 31, 2020. He noted that he was terminated unexpectedly on May 26, 2020. Appellant advised that H.L., a branch chief, had made fraudulent allegations against him. He related that his EEO complaint was in the discovery stage and that an investigative report was available but too large to send.

In a memorandum dated May 19, 2022, M.D., appellant's current first-line supervisor, responded to the allegation of religious discrimination. She related that she could remember only one conversation about religion at work. M.D. advised that a group of coworkers, including appellant, were comparing the Quran and the Bible. She responded that "comparing the two is like comparing apples and oranges because they were written by two different groups of prophets…." M.D. told her coworkers that while she was Christian, she had dated a Muslim and read both the Bible and Quran and did not find significant differences. She advised that the group nodded, laughed, and agreed. M.D. related, "None of the comments I made were made with any ill intent or made in anger towards anyone or any religion."

M.D. further related that she had become appellant's supervisor on March 24, 2020. She was unaware he had a disability. M.D. advised that after the lockdown due to COVID-19 appellant sent an e-mail requesting a sit-to-stand desk. M.D.'s supervisor told her that he needed to provide a note from his physician. Appellant gave her a doctor's note from 2014 and she approved the request. He subsequently requested an electronic sit-to-stand desk which M.D. denied as the

organization used hydraulic sit-to-stand desks. M.D. ordered the desk to be delivered to appellant's home "and the desk was received." She summarized e-mails regarding the request.

The record contains e-mails related to appellant's request for a desk that converted from sitting to standing. In the March 26, 2020 e-mail, D.S., the facilities manager, requested that the desk be sent directly to appellant's home.

In an e-mail dated April 9, 2020, M.D. advised appellant that he had taken an alternative workday but that his schedule reflected that he worked eight hours, five days a week. She requested that he submit an amended telework agreement if he wanted to change his work schedule.

In a memorandum for the record dated April 23, 2020, M.D., H.L., a second-line supervisor, and P.W., appellant's former first-line supervisor, related that appellant had engaged in unacceptable conduct. The managers maintained that he disregarded the chain of command, failed to follow directions on multiple occasions, changed his schedule without authorization, and disparaged other employees.

In an undated and unsigned statement, appellant asserted that the employing establishment had admitted engaging in religious discrimination and making disparaging comments. He related that M.F. asked D.S. for a sit-to-stand desk in the summer of 2019. In fall of 2019, M.F. asked for the sit-to-stand desk that had been used by a coworker who left the employing establishment. Appellant related that when he asked for a standing desk five months later, he was treated differently, and management initially denied that M.F. had gotten such a desk. He maintained that management ignored his performance review. Appellant submitted evidence that he maintained demonstrated harassment, including the requirement to provide medical documentation for the sit-to-stand desk. He noted that H.L. denied giving M.F. a standing desk but that subsequently M.D. confirmed that H.L. approved a desk for M.F. Appellant summarized evidence submitted that he alleged established harassment and discrimination, including a March 30, 2020 e-mail from M.D., noting that H.L. wanted a physician's note in support of his request for a desk and H.L.'s initial denial that M.F. had gotten a desk.

With his statement, appellant submitted numerous excerpts from interviews conducted as part of an EEO investigation. He also submitted e-mail messages. In an e-mail dated April 22, 2020, D.S. indicated that he had added appellant and M.F. to the list for a standing desk.

In a May 26, 2022 statement, the employing establishment challenged appellant's claim as he had not established compensable work factors.

By decision dated August 25, 2022, OWCP denied appellant's emotional condition claim. It found that as he had not established any compensable employment factors, he did not sustain an injury in the performance of duty.

Subsequently, OWCP received an undated statement from appellant, who advised that R.T., a chief information security officer, had agreed to recommend him for a graduate educational

program, which added to his stress and confusion when H.L. terminated him three hours later.[2] He further submitted a statement advising that H.L. had perjured herself when she listed fraudulent dates and asserted that he had not performed his duties. Appellant related that he did not work on July 6, 2019 as it was a federal holiday. He advised that the allegations in the termination letter were not documented in his performance reviews, and that H.L. had committed perjury by indicating that he was a satisfactory employee with no deficiencies prior to his October 2019 performance review.

Appellant submitted a May 26, 2020 letter terminating him from his employment effective upon receipt of the letter. It advised that he had failed to satisfactorily complete his one-year probationary period. The employing establishment found that he failed to meet the standards and core competencies of his position and failed to undertake a plan of action of milestones in accordance with standard operating procedure issued July 6, 2019.

On April 7, 2023 appellant, through his then representative, requested reconsideration and referenced newly submitted medical evidence. He contended that it was error for the employing establishment to request medical documentation prior to purchasing a sit-to-stand desk as it constituted protected health information. The representative noted that the employing establishment had clarified that program officers could purchase sit-to-stand desk if funding was available. He asserted that H.L. did not require that M.F. provide medical information.

An April 17, 2019 message from the employing establishment advised that program officers had the authority to purchase standing desks if funding was available, and that qualified individuals with disabilities could request desks as part of a reasonable accommodation.

In an excerpt from a report of investigation dated October 28, 2020, H.L. asserted that she was not aware of a prohibition against requesting a doctor's note, and that she had not requested any personal medical information from appellant. She related that she had not conducted an investigation into his allegations of religious harassment as an investigation was not needed.

In a statement dated April 14, 2023, the employing establishment advised that the evidence established that appellant "felt persecuted and harassed in the absence of any particularly persecutory or harassing actions on the part of his supervisors of employers." It asserted that M.D. did not make derogatory remarks about Christianity. The employing establishment noted that "the comments were not directed at [appellant] during the conversation. This issue was brought up in an EEO investigation and dismissed." The employing establishment indicated that appellant frequently went outside the chain of command. It related that his request for a sit-to-stand desk attachment was granted, but that a delay occurred as he had "provided his medical to someone other than his supervisor. The make and model differed from the brand [he] wanted," which he also considered harassment. The employing establishment also noted that appellant changed his work schedule and telework days without submitting a new agreement and believed that his supervisor had harassed him when she inquired into the change. It advised that the EEO found that it was not at fault for any of the allegations.

[2] Appellant submitted a copy of an e-mail purportedly from R.T. agreeing to recommend him for the program; however, the e-mail is not legible.

In an undated and unsigned statement, M.D. denied making the statements alleged by appellant regarding religion. She asserted that she did not attack either appellant "or his Christian ideologies, which [he] knows I share with him." M.D. advised that his attorney made the conversation sound like a "prolonged in-depth discussion rather than a watercooler discussion which occurred so quickly only [appellant] and myself remember it taking place." She noted that his work needed improvement even after "many remedial training efforts and attempts." M.D. advised that appellant only requested a sit-to-stand desk after the lockdown due to COVID-19. She noted that she asked only for a doctor's note, not medical documentation. M.D. advised that appellant had requested the desk as part of a reasonable accommodation request. It was approved and delivered to his residence. M.F. was not given a desk by management but instead used a desk that had been left by a coworker and not being used. M.D. denied that appellant was nominated for any awards.

By decision dated July 3, 2023, OWCP denied modification of its August 25, 2022 decision.

Subsequently, OWCP received portions of sworn affidavits from employees of the employing establishment relevant to appellant's EEO complaint. In a page from sworn affidavit dated March 28, 2020, H.L. related that she had received a doctor's note from 2014 indicating that appellant had an injury in support of his request for a sit-to-stand desk. She deleted the note as he was going through the reasonable accommodation process. H.L. did not know when she asked for a doctor's note that the employing establishment's reasonable accommodation process prohibited supervisors from requiring notes. She indicated that appellant agreed to a hydraulic desk after M.D. described how it functioned. H.L. advised that another employee had also requested a sit-to-stand desk, provided a medical note, and, like appellant, received the desk.

In a rebuttal to H.L.'s statement, appellant related that M.F. had also requested reasonable accommodation for a sit-to-stand desk and received it due to favoritism.

M.D., in an affidavit dated October 26, 2020, related that appellant told her he preferred electronic sit-to-stand desks. She advised that he was not denied a reasonable accommodation. M.D. asserted that she did not accuse appellant of communicating with the union during business hours, but instead told him that he was not a bargaining unit employee and thus had to take leave or hold meetings outside work hours. She denied harassing appellant.

In a November 18, 2020 affidavit, P.W. related that appellant disagreed with criticism and believed that he had achieved success without considering that he was receiving external help to meet goals.

On August 17, 2023 appellant submitted three unsigned statements requesting reconsideration. In his first statement, he related that he and M.F. both asked the facilities coordinator for a sit-to-stand desk in the summer of 2019. D.S. told appellant that desks would be ordered in bulk even though employing establishment policy was that those requesting such desk should be provided one. In the fall of 2019, M.F. received a sit-to-stand desk from an employee who had left the agency. M.D. made inconsistent statements about whether H.L. had approved M.F.'s desk. Appellant's wait for the desk aggravated his preexisting back pain. He alleged that his coworker had received "preferential treatment." Appellant asserted that H.L. engaged in

"insider fraud" in disregarding the wait list for reasonable accommodation, and misallocated the assets of the employing establishment for her own gain in giving M.F. a desk from inventory. He noted that she said that she was unfamiliar with the reasonable accommodation policy. In October 2019, appellant received a fully successful performance rating, which showed that he met or exceeded performance objectives. H.L. corroborated that he had "commendable performance" by indicating that from May to September 2019 she had no "significant complaints" about his work. In March 2020, M.D. requested a physician's note for a sit-to-stand desk even though he had previously submitted a note to D.S. Appellant responded that a note was not required for such a request. On April 5, 2020 he advised that he was filing EEO charges and on April 6, 2020 M.D. asked him about his intention. On April 8, 2020 appellant sent an e-mail to H.L. highlighting a "significant achievement" but she responded that he was operating "outside the purview" of leadership. He sent medical information supporting the need for a sit-to-stand desk, which H.L. admitted that she had received. Appellant specified that he required a desk that adjusted electronically. M.D. approved the desk on March 31, 2020 but subsequently changed the approval to a hydraulic lift desk, which did not adequately address his needs. In his April 15, 2020 performance review, P.W. focused on a communication matter that appellant had refuted. Appellant advised that the performance review lacked "constructive dialogue," which was at odds with his "meticulous preparation and dedication to the review process." On April 21, 2020 P.W. issued a pretermination decision. On May 7, 2020 M.D. accused him of unauthorized meetings with the union when he sent an e-mail to the union during his lunch break. A manager agreed to recommend him for a school program, but H.L., P.W., and M.D. were "silent on this advancement," which showed retaliation. On March 26, 2020 appellant was terminated from employment, which "stood in stark contrast to his history of collaboration, teamwork, and consistently high performance."

Appellant submitted a second reconsideration request on August 17, 2023 that was largely similar to his initial request. He advised that H.L. showed discrimination when she gave M.F. a sit-to-stand desk and misused her authority. Appellant maintained that M.D. spoke inappropriately about her religious beliefs at work on November 12, 2019. He indicated that he had modified his workdays to avoid M.D. Appellant described work assignments that he had successfully completed. On February 26, 2020 H.L. disproved his promotion even though he had no deficiencies, which he believed was retaliation for his charge of religious discrimination by M.D. on November 12, 2019. Appellant noted that he had a preexisting history of orthopedic injuries and depression, which were exacerbated by his employment. He submitted a substantially similar third statement requesting reconsideration also on August 17, 2023.

Appellant further submitted a statement dated August 17, 2023 regarding his allegations of insider threat fraud. He identified H.L. as a potential insider threat due to her misappropriation of assets in the employing establishment's reasonable accommodation inventory in 2019. Appellant related that M.F. received permission to take a sit-to-stand desk from inventory when another employee left. He maintained that her ability to get a desk when other employees had to wait was "an act of favoritism, bordering on discriminatory practices." Appellant maintained that H.L. actions had three dimensions, pressure, opportunity, and rationalization, a triangle of fraud. She mobilized against appellant, knowing his "reputation for integrity" and used M.D. and P.W. to protect her while acting against him during his probationary year.

Appellant submitted evidence from his EEO complaint, including an October 21, 2019 performance appraisal that indicated that he had achieved expectations.

By decision dated November 9, 2023, OWCP denied modification of its June 3, 2023 decision.

On December 4, 2023 appellant requested reconsideration. He discussed medical evidence relevant to his back condition, noting that he underwent back surgery in 2014. On May 26, 2019 appellant began working for the employing establishment. One of his coworkers was M.F. An April 17, 2019 message from the employing establishment advised that any employee, both with and without disabilities, could request sit-to-stand desks without documentation. Appellant and M.F. requested sit-to-stand desks through reasonable accommodation in the summer of 2019 and the facilities coordinator put their names on the bulk shipment list. In the fall of 2019, M.F. advised that H.L. had given her permission to get a sit-to-stand desk. Appellant had to wait for the bulk shipment. Deficiencies in management's knowledge of the process delayed his receiving a desk. H.L. erred in finding that appellant required medical documentation to substantiate a need for accommodation. In December 2019, appellant "chose to send" the facilities coordinator a medical note confirming his disability to expedite his request for a sit-to-stand desk. In March 2020, he began working from home and was told by P.W. that he was not eligible for a sit-to-stand desk as a home furnishing. Appellant contacted L.D., a reasonable accommodation coordinator, who told him that desks were available for employees working at home. He advised that M.D. changed his desk request to one of her own choosing, noting that he received the "inferior accommodation" in May 2020. On May 26, 2020 H.L. terminated his employment without prior notice.

Appellant provided additional medical and factual evidence previously of record. He further submitted information from the employing establishment on the role of the decision makers.

In an e-mail dated March 30, 2020, M.D. asked appellant to refrain from adding in parties that she had removed from the e-mail. She advised that after an internal discussion when all was resolved she would add the ones who needed back in the chain.

In an e-mail dated March 3, 2020, L.D. noted that appellant had agreed to provide medical documentation to H.L. and that it was his decision whether to "go forward with providing it."

By decision dated December 7, 2023, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time

[3] *Supra* note 1.

limitation of FECA,[4] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

To establish a claim for an emotional condition in the performance of duty, an employee must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; (2) medical evidence establishing that he or she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.[7]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[8] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage of FECA.[9] When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employing establishment, the disability is deemed compensable.[10] However, disability is not compensable when it results from factors such as an employee's fear of a reduction-in-force, or frustration from not being permitted to work in a particular environment, or to hold a particular position.[11]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially

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[4] *S.S.*, Docket No. 19-1021 (issued April 21, 2021); *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued December 13, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden*, *Sr*., 40 ECAB 312 (1988).

[6] *L.N.*, Docket No. 22-0126 (issued July 15, 2023); *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *S.D.*, Docket No. 23-0898 (issued July 13, 2023); *R.B.*, Docket No. 19-0343 (issued February 14, 2020).

[8] 28 ECAB 125 (1976).

[9] *See L.Y.*, Docket No. 21-0344 (issued June 15, 2023); *M.R.*, Docket No. 18-0305 (issued October 18, 2018); *Robert W. Johns*, 51 ECAB 136 (1999).

[10] *L.E.*, Docket No. 22-1302 (issued December 26, 2023); *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler, supra* note 8.

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

assigned work duties of the employee and are not covered under FECA.[12] Where, however, the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[13]

For harassment or discrimination to give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment or discrimination did in fact occur.[14] Mere perceptions of harassment are not compensable under FECA.[15]

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.[16] 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.[17]

ANALYSIS -- ISSUE 1

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

Appellant has not attributed his condition to the performance of his regularly or specially assigned duties under *Cutler*.[18] Instead, he primarily attributed his condition to matters related to the employing establishment's delay in providing him with a sit-to-stand desk. In *Thomas D. McEuen*,[19] 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

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

[13] *M.A.*, Docket No. 19-1017 (issued December 4, 2019).

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

[15] *Id*.

[16] *R.B.*, *id.*; *O.G.*, Docket No. 18-0359 (issued August 7, 2019).

[17] *Id*.

[18] *Supra* note 8.

[19] *See Thomas D. McEuen, supra* note 12.

matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. However, the Board has also held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, such action will be considered a compensable employment factor.[20]

Appellant related that in the summer of 2019 he and M.F. both asked D.S., the facilities coordinator, for a sit-to-stand desk. D.S. advised that the desk would be ordered in bulk and add their names to the list. Appellant alleged that this was error as employing establishment policy was that all who asked for a desk should be provided with one. In the fall of 2019, M.F. acquired a sit-to-stand desk from inventory when a coworker left. H.L. approved M.F. getting the desk, but required a note from appellant when he asked for a desk even though this was not the policy of the employing establishment. Appellant sent D.S. a medical note regarding his disability in December 2019 to expedite his request.

In support of his claim, appellant submitted excerpts from EEO interviews and complaints. He did not, however, submit any evidence corroborating error or abuse by the employing establishment in an administrative matter. In a statement dated May 19, 2022, M.D. advised that after the lockdown due to COVID-19 appellant requested a sit-to-stand desk, and she told him to provide a note from his physician. She subsequently advised that she had requested only a doctor's note, not medical documentation. Appellant provided a 2014 doctor's note, and she approved his request. M.D. related that she denied his request for an electronic desk as the agency used hydraulic convertible desks. The desk was sent to appellant's residence. On April 14, 2023 the employing establishment asserted that the delay in granting his request for a sit-to-stand desk attachment occurred because he had provided medical evidence to someone other than his supervisor. There is no evidence of record showing error or abuse by the employing establishment in providing a desk to M.F. initially or in approving and delivering a sit-to-stand desk to appellant's residence. As appellant has not submitted the necessary corroborating evidence to establish error or abuse by management in these administrative and personnel matters, he has not established a compensable work factor.[21]

Appellant additionally asserted that the employing establishment erred in failing to consider his performance appraisal rating in terminating his employment during his probationary period. He maintained that the allegations set forth in the termination letter were not in his performance reviews, and noted that H.L. had found that he had no deficiencies. Appellant maintained that the dates of his failure to meet standards were fraudulent, and noted that he did not work on July 6, 2019 as it was a holiday. He indicated that he had received a fully successful performance rating in October 2019, and that H.L. advised that she did not have "significant complaints" with his work.

As noted, matters involving administrative matters such as performance appraisals and terminations are administrative in nature and fall outside the scope of FECA absent a finding of

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

[21] *L.E.*, *supra* note 10; *R.V.*, Docket No. 18-0268 (issued October 17, 2018).

error or abuse.[22] On April 23, 2020 M.D., H.L., and P.W. advised that appellant's conduct was unacceptable. They indicated that he disregarded the chain of command, failed to follow directions on multiple occasions, changed his schedule without authorization, and disparaged other employees. On May 26, 2020 the employing establishment terminated appellant's employment as he had not satisfactorily completed his probationary period. The employing establishment found that he failed to meet the standards and core competencies of his position and failed to undertake a plan of action of milestones in accordance with standard operating procedure issued July 6, 2019. In a November 18, 2020 affidavit, P.W. advised that appellant did not agree with criticism, and failed to consider that his success occurred because he received external assistance. Appellant has not submitted any evidence demonstrating that his termination during his probationary period was done in error. Absent evidence establishing error or abuse, a claimant's disagreement, or dislike of such a managerial action is not a compensable factor of employment.[23]

Appellant additionally attributed his stress-related condition to harassment and discrimination. He asserted that M.D. discriminated against him based on his religion.

To the extent that disputes and incidents alleged as constituting harassment are established as occurring and arising from an employee's performance of his or her regular duties, these could constitute employment factors.[24] However, the Board has held that unfounded perceptions of harassment or discrimination do not constitute an employment factor.[25] Mere perceptions are not compensable under FECA, and harassment or discrimination can constitute a factor of employment only if it is shown that the incidents constituting the claimed harassment or discrimination actually occurred.[26]

In a response dated May 19, 2022, M.D. indicated that a group of coworkers were comparing the Quran and the Bible. She related that comparing the two was not productive since they were written by different prophets. M.D. noted that she was a Christian and that she had not made comments against any religion or with bad intent. On April 14, 2023 it advised that M.D. failed to make disparaging remarks about Christianity or refer to it as a cult. The employing establishment further noted that her comments were not directed at appellant, and were raised during an EEO investigation and dismissed. Although appellant alleged that M.D. discriminated against him based on his religion, he provided no credible corroborating evidence to establish his allegations.[27]

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[22] *R.B.*, Docket No. 19-0343 (issued February 14, 2020); *C.T.*, Docket No. 09-1557 (issued August 12, 2010).

[23] *See R.B., id.*; *E.S.*, Docket No. 18-1493 (issued March 6, 2019).

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

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

[26] *Id*.

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

Appellant further advised that M.D. harassed him by asking about his change in work schedule and telework days and telling him not to communicate with the union. Again, however, he has not substantiated his allegation of harassment and discrimination. In an April 9, 2020 e-mail, M.D. noted that appellant had taken an alternative workday even though that was not his work schedule, and requested that he submit an amended telework agreement if he wanted to change his schedule. On October 26, 2020 she related that she had not told appellant that he was not a bargaining unit employee, and thus had to take leave for union meetings or hold the meetings outside work hours. In an April 14, 2023 statement, the employing establishment indicated that he had changed his schedule and telework days without submitting a new agreement. Appellant has not submitted any evidence supporting that M.D. harassed him by advising him to submit a formal schedule change or informing him he had to have union meetings outside work hours.[28] As noted, unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[29] Consequently, appellant has not established a compensable employment factor.

Appellant also maintained that H.D. discriminated against him in failing to timely provide him with a sit-to-stand desk. He maintained that she showed favoritism in giving another employee a desk and had engaged in fraud for personal gain in allowing M.F. to have a desk from inventory. Appellant has not submitted any evidence substantiating that H.D. discriminated against him in approving a sit-to-stand desk for M.F. prior to providing a desk for appellant. Although he believed that he was subject to disparate treatment because M.F. received a desk from inventory and he had to submit medical evidence and requested reasonable accommodation, he has provided no corroborating evidence to show actions that constituted harassment or discrimination.[30] Therefore, he has not established a compensable employment factor with respect to the claimed harassment and discrimination.

As the Board finds that appellant has not established a compensable employment factor, it is not necessary to consider the medical evidence of record.[31]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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[28] *B.T.*, Docket No. 20-1627 (issued January 11, 2023).

[29] *M.H.*, Docket No. 21-1297 (issued December 20, 2022); *T.Y.*, Docket No. 19-0654 (issued November 5, 2019); *Penelope C. Owens*, 54 ECAB 684 (2003).

[30] *See B.T., supra* note 28.

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

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.[32]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[33]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[34] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[35] If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[36]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. In his reconsideration request, he raised arguments regarding alleged deficiencies in the employing establishment's approving his request for a sit-to-stand desk, and asserted that H.L. had terminated his employment without notice. OWCP, however, previously addressed and considered his contentions. The Board has held that the submission of evidence or argument, which repeats or

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[32] 5 U.S.C. § 8128(a); *see C.V.*, Docket No. 22-0078 (issued November 28, 2022); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.,* 59 ECAB 372 (2008).

[33] 20 C.F.R. § 10.606(b)(3); *see K.D.*, Docket No. 22-0756 (issued November 29, 2022); *see also L.G.,* Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[34] *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

[35] *Id*. at § 10.608(a); *see also D.B.*, Docket No. 22-0518 (issued November 28, 2022); *F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

[36] *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.,* Docket No. 09-1655 (issued March 18, 2010).

duplicates evidence or argument already in the record does not constitute a basis for reopening a claim.[37] Consequently, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).[38]

Moreover, appellant has not provided relevant and pertinent new evidence in support of his request for reconsideration. In support of his request, he resubmitted excerpts of evidence from his EEO complaint. The Board has held that evidence that either duplicates or is substantially similar to evidence previously of record does not constitute a basis for reopening a case.[39]

Appellant further submitted medical evidence and an e-mail dated March 30, 2020 from M.D., who asked him to refrain from adding in parties that she had removed from e-mail. In an e-mail dated March 3, 2020, L.D. noted that appellant had agreed to provide medical documentation to H.L. and that it was his decision whether to provide the documentation. This evidence, however, is not relevant to establishing a compensable work factor. The Board has held the submission of evidence or argument which does not address the issue involved does not constitute a basis for reopening a case.[40] Therefore, appellant is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.[41]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an emotional condition in the performance of duty. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

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[37] *See D.A.*, Docket No. 23-0441 (issued October 12, 2023); *W.C.*, Docket No. 19-0351 (issued August 4, 2020); *Richard Yadron*, 57 ECAB 207 (2005); *Eugene F. Butler,* 36 ECAB 393, 398 (1984).

[38] 20 C.F.R. § 10.606(b)(3)(i) and (ii); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

[39] *See L.E.*, Docket No. 22-0004 (issued April 14, 2023); *C.B.*, Docket No. 22-0144 (issued March 16, 2023); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *Eugene F. Butler*, *supra* note 37; *Edward Matthew Diekemper,* 31 ECAB 224, 225 (1979).

[40] *See P.G.*, Docket No. 20-1419 (issued September 16, 2021); *C.C.*, Docket No. 20-0950 (issued October 29, 2020); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[41] *D.A.*, Docket No. 22-0762 (issued September 30, 2022); *T.G.*, Docket No. 20-0329 (issued October 19, 2020); *C.C.*, Docket No. 17-0043 (issued June 15, 2018).

ORDER

IT IS HEREBY ORDERED THAT the July 3, November 9, and December 7, 2023 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 5, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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