

ISSUE

The issue is whether appellant has met her burden of proof to establish an emotional condition in the performance of duty, as alleged.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 18, 2017 appellant, then a 64-year-old electronics engineer, filed a traumatic injury claim (Form CA-1) alleging that on March 11, 2014 she was subjected to a hostile work environment, harassment and retaliation while in the performance of duty. She indicated that she developed depression, stress, anxiety, insomnia, body pain, and had been in an approved leave without pay (LWOP) status since March 11, 2014.

A January 3, 2017 witness statement stated that appellant had been suffering from the above-noted conditions due to hostile work environment.

In a January 18, 2017 development letter, OWCP advised appellant that additional evidence was necessary to establish her claim. It requested that she submit additional factual and medical evidence to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a February 16, 2017 statement, appellant clarified that she was claiming an occupational injury (Form CA-2). She claimed that, in 2008, management allowed cronyism and harassment to develop and the work environment became increasingly hostile as her boss, Branch Head R.T., wanted to give her job to one of his favorite employees, M.S., a Caucasian man. In May 2009, appellant filed Equal Employment Opportunity (EEO) complaints and the case was settled in August 2010. She alleged that beginning September 2011, management pursued a series of adverse actions to retaliate against her by issuing unfavorable performance evaluations and denying pay raises; moving her into a smaller office; accusing her of being "disruptive" without evidence; giving her excessive tasks/workload; and highly scrutinizing her work. Appellant claimed that she endured continuous harassment. Management unreasonably interfered with her work performance and created an intimidating, hostile work environment. Appellant identified managers Deputy Technical Director D.C., Department Heads -- G.J., E.C., and D.S., Division Head S.G., and Branch Head L.A, as performing repeated hostility and retaliation against her. She alleged in early 2013, despite her length of experience and service, she was reassigned to a beginner level position and her telework was revoked. Appellant related that her LWOP was initially denied on November 25, 2013 because her medical documentation was determined to be insufficient and she was suspended. Her LWOP was then approved in March 2014 as a reasonable accommodation after an administrative judge (AJ) granted a default judgment in her favor on

³ Docket No. 20-0163 (issued April 16, 2021).

January 29, 2014. However, in October 2015, appellant's LWOP was denied and she was removed from employment on March 11, 2016.

OWCP received psychotherapy progress notes, clinical assessment notes, and in medical reports dated May 18, 2010 through February 14, 2017 from Dr. Ruben Muradyan, a family medical specialist. Dr. Muradyan opined that appellant had been suffering from depression and anxiety for years, secondary to stress and hostile work environment, which contributed to her condition. He also noted other physical conditions and documented appellant's condition in response to various work-related events throughout the years.

Appellant also submitted copies of her EEO claims along with multiple-related documents including: a May 17, 2010 Equal Employment Opportunity Commission (EEOC) Decision Granting Default Judgment on Liability and an August 3, 2010 settlement agreement based on a default judgment that the employing establishment's investigation took longer than the allowed time. No factual findings were made on the merits of appellant's claim.

By decision dated January 29, 2014, the EEOC dismissed appellant's claims without prejudice. The case included appellant's reassignment on or about October 25, 2011, *via* a Performance Expectation Module (PEM), to a lower position doing entry level tasks. The AJ concluded that the record contained a "minimal showing of support" for a default judgment based on her claim of unlawful reprisal for her prior EEO activity when she was reassigned to the PEM. Further, since the investigative record established that appellant was the only Asian/Vietnamese female over 40 who was treated in this manner, the AJ found that the record supported a default judgment that she was unlawfully discriminated against on the bases of her race/color, national origin, sex, and age when she was reassigned to the PEM. The AJ further found that the agency engaged in the improper processing of Complainant's EEO claim by placing improper timelines on the Complainant, made unlawful threats if she failed to meet these short deadlines, then denied her official time/or personal leave time to make the short deadlines.

On February 7, 2014 the employing establishment requested medical documentation to address appellant's reasonable accommodation request. On February 7, 2014 the employing establishment reversed its absent without leave (AWOL) charge for January 16, 17, and 27 to 31, 2014. On February 26, 2014 appellant was in LWOP pay status. On March 12, 2014 the employing establishment approved her February 14, 2014 reasonable accommodation request.

In an April 13, 2015 order, the EEOC ruled on various motions set forth by both appellant and the employing establishment. The AJ concluded: "During the relevant time period the Agency had a three-year records retention policy. Therefore, as of September 2011, when Complainant filed her formal EEO complaints, the Agency was on notice to stop the destruction of relevant or potentially relevant evidence concerning Complainant's claim.... Since the Agency failed to preserve the documents that would be responsive to Interrogatories.... I hereby impose the adverse inference that had those documents been preserved and provided to Complainant, they would have been favorable to the Complainant and unfavorable to the Agency."

On September 15, 2015 the employing establishment requested detailed medical documentation in regard to appellant's March 12, 2014 approved reasonable accommodation and

for her absences since October 10, 2013. It denied her requests for LWOP and, on October 13, 2015, she was charged with indefinite AWOL.

On December 2, 2015 the employing establishment issued a Notice of Proposed Removal. Appellant was separated from federal service on March 11, 2016.

By decision dated November 7, 2016, EEOC issued a decision finding that appellant failed to establish a *prima facie* case of unlawful discrimination or harassment under any previously identified basis. However, the employing establishment was ordered to: (1) ensure that relevant management and EEO employees were trained on how to monitor investigative timeliness to meet compliance standards; (2) prominently post at the employing establishment notices of the finding of discrimination; and (3) compensate appellant for reasonable attorney's fees and incurred costs defined within the decision by submitting the required petition and documentation to support her claim.

In a January 26, 2017 final agency decision, the employing establishment found that appellant had not prevailed on her complaint of discrimination. This concerned appellant's complaints of discrimination with respect to the LWOP/AWOL, notice of proposed removal, and the seizure of her laptop.

By decision dated August 8, 2017, OWCP denied appellant's emotional condition claim, finding that the evidence of record was insufficient to establish a compensable work factor. It explained that there were no accepted events that were factors of employment.⁴ OWCP also found that there were several alleged incidents which did not occur. With regard to appellant's claims filed for harassment and discrimination, it also found that no administrative body had concluded that appellant's allegations were substantiated.

On September 5, 2017 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on February 7, 2018.

By decision dated March 29, 2018, an OWCP hearing representative affirmed the August 8, 2017 decision. In relevant part, the hearing representative reviewed the EEO decisions and orders and found that, although the employing establishment was sanctioned for a record keeping violation, no findings were made that appellant was subjected to harassment or discrimination.

On March 15, 2019 appellant's representative requested reconsideration. The representative alleged that the decisions issued by the employing establishment's EEO office or final agency decisions should not be the basis for determining the compensable factors of employment. He further contended that the AJ's orders dated January 29, 2014 and April 13, 2015 demonstrated discrimination was established on the part of the employing establishment when appellant met the threshold required to support a default judgment. The representative argued that the hearing representative failed to consider that the AJ, in his January 29, 2014 order, granted the

⁴ It accepted that appellant was denied pay increases in 2009 and 2010; that her desk was moved in 2012; that she was reassigned in 2013 to an entry-level position and had her telework benefit cancelled; and that her LWOP was approved in 2014, denied in 2015, and she was removed on March 11, 2016.

default judgment and denied the summary judgement simultaneously, which indicated that EEOC had unambiguously ruled on the merits in favor of the claimant. Appellant also contended that there were contradictory statements and inaccurate facts contained in the hearing representative's decision. Additionally, the representative indicated that EEOC's April 27, 2018 decision vacated two prior agency decisions.

OWCP subsequently received a copy of the EEOC's April 27, 2018 decision, which found that the employing establishment had erroneously issued a final agency decision and that appellant's removal claim was firmly enmeshed in the EEO process. Accordingly, it vacated both final decisions and remanded all the claims for further processing. OWCP noted that it made no determination on the merits of any of appellant's claims.

By decision dated April 25, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a). It found that her March 15, 2019 reconsideration request neither raised substantive legal questions nor included new and relevant evidence.

Appellant appealed to the Board. In an April 16, 2021 decision, the Board found that OWCP had improperly denied appellant's request for reconsideration of the merits of her claim as she had argued a relevant legal argument which OWCP had not previously fully evaluated. This argument pertained to whether the AJ's orders dated January 29, 2014 and April 13, 2015 established unlawful discrimination on the part of the employing establishment as appellant had met the threshold required to support a default judgement. The Board remanded for an appropriate merit decision.⁵

Following the Board's April 16, 2021 decision, OWCP issued a decision on December 7, 2021 and denied modification of its prior decision, finding that the evidence of record was insufficient to establish a compensable work factor.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ has the burden of proof to establish the essential elements of his or her claim,⁷ including that he or she sustained an injury in the performance of duty, and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁸ These are the essential

⁵ *Supra* note 3.

⁶ *Supra* note 2.

⁷ *M.J.*, Docket No. 20-0953 (issued December 8, 2021); *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁸ *M.J.*, *id.*; *O.G.*, *id.*; *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁹

To establish an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) rationalized medical evidence establishing that he or she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.¹⁰

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*,¹¹ 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 under FECA.¹² When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.¹³

Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.¹⁴ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹⁵ Personal perceptions alone are insufficient to establish an employment-related emotional condition, and disability is not covered where it results from such factors 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.¹⁶

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than regular or specially assigned work duties of the employee and are not covered under FECA.¹⁷ Where the evidence demonstrates

⁹ 20 C.F.R. § 10.115; *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *id.*

¹⁰ *E.A.*, Docket No. 19-0582 (issued April 22, 2021); *W.F.*, Docket No. 18-1526 (issued November 26, 2019); *C.M.*, Docket No. 17-1076 (issued November 14, 2018); *C.V.*, Docket No. 18-0580 (issued September 17, 2018); *Kathleen D. Walker*, 42 ECAB 603 (1991).

¹¹ 28 ECAB 125 (1976).

¹² *G.M.*, Docket No. 17-1469 (issued April 2, 2018); *Robert W. Johns*, 51 ECAB 137 (1999).

¹³ *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, *supra* note 11.

¹⁴ *A.C.*, *id.*

¹⁵ *G.R.*, Docket No. 18-0893 (issued November 21, 2018).

¹⁶ *A.C.*, *supra* note 13.

¹⁷ *C.V.*, *supra* note 10.

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.¹⁸

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.¹⁹ Mere perceptions of harassment or discrimination are not compensable under FECA.²⁰ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.²¹ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.²²

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 compensable factors of employment and may not be considered.²³ If an employee does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. If a compensable factor of employment is substantiated, OWCP must base its decision on an analysis of the medical evidence which has been submitted.²⁴

ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant has attributed her emotional condition in part to *Cutler*²⁵ factors. She alleged that, in 2009 and 2010, she was assigned an excessive workload which was highly scrutinized. Pursuant to *Cutler*²⁶ this allegation could constitute a compensable employment factor if appellant establishes that her regular job duties or a special assignment caused an emotional condition. The Board has held that overwork, when substantiated by sufficient factual information to corroborate

¹⁸ See *G.R.*, Docket No. 18-0893 (issued November 21, 2018); *Andrew J. Sheppard*, 53 ECAB 170-71 (2001), 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹⁹ *O.G.*, *supra* note 7; *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

²⁰ *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

²¹ *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, *supra* note 19.

²² *T.Y.*, Docket No. 19-0654 (issued November 5, 2019); *G.S.*, Docket No. 09-0764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

²³ *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *Dennis J. Balogh*, 52 ECAB 232 (2001).

²⁴ *O.G.*, *supra* note 7; *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

²⁵ *Supra* note 11.

²⁶ *Supra* note 11.

appellant's account of events, may be a compensable factor of employment.²⁷ Appellant, however, submitted no evidence supporting her allegation that she was overworked. Thus, the Board finds that she has not established a compensable employment factor under *Cutler*.

Appellant's allegations regarding her dissatisfaction with supervisory actions,²⁸ including assignment of work and telework,²⁹ performance appraisals,³⁰ as well as the handling of disciplinary actions and removal,³¹ relate to administrative or personnel management actions. Administrative and personnel matters, although generally related to employment, are administrative functions of the employer rather than the regular or specially-assigned work duties of the employee. For an administrative or personnel matter to be considered a compensable factor of employment, the evidence must establish error or abuse on the part of the employer.³² Appellant has not submitted any corroborative evidence to establish a factual basis for her allegations that she was improperly assigned work duties, that she was micromanaged, that her unfavorable performance evaluations, reassignment to a lesser position, or her ultimate removal were a result of error or abuse on the part of the employer. She also provided no corroborative evidence to establish a factual basis for her allegations that she was improperly denied requests for reasonable accommodation³³ or denied LWOP³⁴. For these reasons, the Board finds that appellant has not established a compensable employment factor with respect to these administrative matters.

The record reflects that appellant filed several grievances and EEO complaints against the employing establishment. The AJ, by order dated January 29, 2014 found that agency engaged in the improper processing of complainant's EEO claim by placing improper timelines on the complainant, made unlawful threats if she failed to meet these short deadlines, then denied her official time/or personal leave time to make the short deadlines. On April 13, 2015 the AJ granted a default judgment and denied summary judgment, no determination was made on the merits of appellant's claims. The AJ's April 13, 2015 also found that the employing establishment failed to properly retain potentially relevant evidence regarding appellant's EEO complaint. EEOC's November 7, 2016 decision ordered the employing establishment to engage in training on how to monitor investigative timeliness to meet compliance standards, prominently post at the employing establishment notices of the finding of discrimination; and, compensate appellant for reasonable attorney's fees and incurred costs defined within the decision by submitting the required petition

²⁷ *L.S.*, Docket No. 18-1471 (issued February 26, 2020); *R.B.*, Docket No. 19-0343 (issued February 14, 2020); *W.F.*, Docket No. 18-1526 (issued November 26, 2019); *Bobbie D. Daly*, 53 ECAB 691 (2002).

²⁸ *N.S.*, Docket No. 21-0355 (issued July 28, 2021); *T.C.*, Docket No. 16-0755 (issued December 13, 2016).

²⁹ *L.S.*, *supra* note 27; *V.M.*, Docket No. 15-1080 (issued May 11, 2017); *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

³⁰ *See R.B.*, *supra* note 27; *D.I.*, Docket No. 19-0534 (issued November 7, 2019).

³¹ *C.J.*, Docket No. 19-1722 (issued February 19, 2021); *R.D.*, Docket No. 19-0877 (issued September 8, 2020); *D.L.*, Docket No. 09-1103 (issued February 26, 2010).

³² *Thomas D. McEuen*, *supra* note 18.

³³ *R.D.*, Docket No. 19-0877 (issued September 8, 2020); *S.B.*, Docket No. 18-1113 (issued February 21, 2019).

³⁴ *M.R.*, Docket No. 18-0305 (issued October 18, 2019); *A.L.*, Docket No. 17-0368 (issued June 20, 2018).

and documentation to support her claim. Furthermore, OWCP's hearing representative found in his March 29, 2018 decision that the employing establishment was sanctioned for a recordkeeping violation.

The Board finds that this evidence regarding the employing establishment's actions with regard to the appellant's EEO complaint in totality supports a finding that the employing establishment improperly interfered in the processing of appellant's EEO complaint.³⁵ Thus, a compensable employment factor has therefore been established.

Appellant also alleged that she was discriminated against, harassed, retaliated against, downgraded to an entry level position, and removed from employment as a result of cronyism because boss, Branch Head P.T., wanted to give her job to one of his favorite employees, M.S., a Caucasian man. To the extent that incidents alleged as constituting harassment or a hostile environment by a manager are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.³⁶ However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did in fact occur as alleged. Mere perceptions of harassment are not compensable under FECA.³⁷ Appellant did not submit any evidence of record to substantiate that she was harassed or discriminated against. Also, as noted, while she filed several grievances and EEO complaints against the employing establishment, there is no final EEO decision which found that the employing establishment harassed or discriminated against her. Based on the evidence of record, the Board finds that appellant has not established, with corroborating evidence, that she was harassed, discriminated against, and subjected to disparate treatment and reprisals by the employing establishment.

In denying appellant's claim, OWCP did not review the medical evidence submitted on the issue of causal relationship regarding the accepted compensable factor of the employing establishment's error in the processing of her EEO complaint. The Board will, therefore, set aside OWCP's December 7, 2021 decision and remand the case for a review of the medical opinion evidence. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's emotional condition claim.

CONCLUSION

The Board finds that this case is not in posture for decision.

³⁵ See *supra* note 18; *M.R.*, Docket No. 18-0304 (issued November 13, 2018).

³⁶ *W.F.*, *supra* note 27; *F.C.*, Docket No. 18-0625 (issued November 15, 2018); *Kathleen D. Walker*, 42 ECAB 603 (1991).

³⁷ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991). See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence). See also *M.G.*, Docket No. 16-1453 (issued May 12, 2017) (vague or general allegations of perceived harassment, a abuse, or difficulty arising in the employment are insufficient to give rise to compensability under FECA).

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 4, 2024
Washington, DC

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

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

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