

employing establishment illegally placed a “red flag alert” on appellant’s personnel file; OWCP and the employing establishment illegally colluded thus violating appellant’s due process; and OWCP practiced fraud and willful misconduct by misrepresenting facts, not fully addressing all alleged acts of discrimination and by not explaining what a “flag alert” meant under FECA.

FACTUAL HISTORY

This case has previously been before the Board. In a nonmerit decision dated November 17, 2005, the Board found that OWCP properly refused to reopen appellant’s case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).² In a January 14, 2008 decision, the Board found that as her March 2, 2007 reconsideration request was not timely filed and she failed to establish clear evidence of error OWCP properly denied a merit review of her claim in its May 3, 2007 decision.³ The law and the facts of the previous Board decisions are incorporated herein by reference.

On April 10, 2008 appellant filed another occupational disease claim. She indicated that her federal employment aggravated her depression and anxiety and that she developed post-traumatic stress disorder (PTSD) because of it. Appellant stated that she was first aware of her PTSD and its relationship to employment on April 1, 2008. The employing establishment noted that she retired in 2003 and referenced her previous claim, file number xxxxxx622. The instant claim was adjudicated under file number xxxxxx431.⁴ In an attached statement, appellant alleged that mistreatment by management and coworkers at the employing establishment caused a severe nervous breakdown that required hospitalization in 2002 where she was diagnosed with depression and anxiety. She stated that she developed PTSD from this situation. Appellant described her employment duties and stated that she was repeatedly persecuted for filing Equal Employment Opportunity (EEO) complaints, which were inappropriately dispersed throughout the agency. She indicated that since the EEOC found that she had a cognizable claim, this demonstrated error and abuse. Appellant discussed many factors adjudicated in her previous claim, alleging that she was continuously mistreated and persecuted. She maintained that following her EEO activity, a “red flag alert” was placed on her personnel file and this prevented her from achieving career opportunities, including training and job advancement. Appellant concluded that the medical evidence supported her claim. She submitted medical reports from

² Docket No. 05-754 (issued November 17, 2005). On February 25, 2002 appellant a health communications specialist, who last worked on January 16, 2002, filed an occupational disease claim, alleging that employment factors caused an emotional condition. This claim was adjudicated by OWCP filed under file number xxxxxx622. In a September 26, 2002 decision, OWCP denied the claim, finding that appellant had not established an emotional condition in the performance of duty. Appellant retired in 2003. By decision dated October 21, 2003, an OWCP hearing representative found one compensable factor: that, from March 24 to 26, 1999, she and other workers were required to put together approximately 80 two-inch binders in a short turn-around time with inadequate instruction given. The hearing representative, however, found that the medical evidence did not support that her condition was caused by the accepted work factor. In a nonmerit decision dated November 9, 2004, OWCP denied appellant’s reconsideration request. This was affirmed by the Board in its November 17, 2005 decision, Docket No. 05-754.

³ Docket No. 07-2002 (issued January 14, 2008).

⁴ See *supra* note 2.

Dr. A. Benjamin Eubanks, an attending psychiatrist, previously reviewed by OWCP and the Board.⁵

In a June 19, 2008 letter, OWCP informed appellant that it had doubled claim numbers xxxxxx622 and xxxxxx431 and advised her of the type of evidence needed to establish her claim. In correspondence dated June 25, September 5 and December 4, 2008 and March 2, 2009, appellant stated that she filed a new claim because she was not aware that her work caused PTSD until her physician diagnosed it on April 1, 2008 and that the current claim had nothing to do with her prior claim, but was based on the “flag alert” factor.

In reports dated March 17 through May 30, 2008, Dr. Howard M. Maziar, an attending Board-certified psychiatrist, noted appellant’s description of many details of workplace harassment, as shown by witness statements and EEOC findings. He diagnosed severe depression, specific phobia, persecutory ideation, obsessive-compulsive disorder, panic disorder, PTSD, high blood pressure, an eating disorder, gastrointestinal problems and chronic body aches, caused by continuous mistreatment and persecution at work. Dr. Maziar opined that appellant was totally disabled with a poor prognosis.

In undated statements, appellant stated, that since February 1999, she had migraine headaches, exhaustion, chronic fatigue, chest pain, neck and back muscle spasms, upset stomach, loss of hair, crying spells, symptoms of depression, memory loss and poor concentration, due to working in a hostile environment. She reiterated that the current claim was a new claim. Appellant submitted unidentified pages of hearing testimony, a June 12, 2000 memorandum asserting that she was treated disparately and requesting a transfer and documents concerning a position announcement and the selection process dated November 2001. These included two copies of a promotion certificate dated November 15, 2001, signed by Byram Clayton, a hearing resources specialist, and Corinne G. Husten, the selecting official. The two certificates contained different handwritten notations regarding appellant’s race and that she had claimed EEO activity. She also submitted a January 6, 2003 EEOC decision that found that appellant set forth a cognizable claim of a hostile work environment and remanded the case for the employing establishment to obtain further information regarding appellant’s EEO claim.

Following an initial April 2, 2009 OWCP finding that appellant did not timely file her claim, in a June 3, 2009 decision, an OWCP hearing representative found that OWCP did not properly develop the claim and remanded the case for further action.

In an August 21, 2009 letter, OWCP advised appellant that it had determined that her claim was timely filed and informed her of the type of evidence needed to support her claim. On September 14, 2009 she responded that Dr. Maziar documented that her PTSD was caused by employment, indicating that he advised that the following contributed to her diagnosis: (1) management’s gross negligence upon awareness of hostile work environment because appellant was not provided a safe place to work; (2) EEOC’s finding that she had a valid claim; (3) retaliation practices such as instituting the “flag alert” and notifying hiring officials of her EEOC activity; (4) abusive discrimination regarding salary, promotion and performance appraisals; (5) persistent privacy act violations; persistent abusive acts of harassment,

⁵ *Id.*

discrimination, bullying and intimidation; and (6) defamation of character and malicious slander by management. Appellant provided a detailed explanation of each allegation.

In a March 15, 2007 statement, appellant's sister indicated that appellant had told her of the employment conditions that caused her condition. She described appellant's condition since a January 2002 nervous breakdown and indicated that appellant was very distraught when her attorney lost the EEO cases, maintaining that she was betrayed by the attorney. George E. Newman, a friend, provided a May 20, 2007 statement in which he indicated that he witnessed appellant's mental and physical breakdown beginning in January 2002. In a May 26, 2007 statement, appellant's sister reported that appellant shared with her instances of abuse, discrimination and harassment at the employing establishment that led to her January 2002 breakdown. She asserted that appellant's EEO attorney betrayed her and described appellant's current condition. Appellant submitted unverified pages from deposition or hearing testimony and copious materials about file number xxxxxx622.

In a September 17, 2009 report, Dr. Eubanks advised that he concurred with Dr. Maziar's findings and conclusion that appellant's current emotional condition, including PTSD, was caused by repeated harassment and mistreatment at the employing establishment, as evidenced by the EEOC finding of discrimination and witness statements. He indicated that he continued to treat appellant, who was totally disabled.

On November 23, 2009 OWCP asked the employing establishment for clarification as to whether it had placed a "flag alert" on appellant's personnel record, noting that she alleged that it used this as a tool to alert other hiring officials of her EEOC activities and that she was not aware of the "flag alert" until July 21, 2003 when she learned of it while attending an EEOC hearing.

A conference was held on January 28, 2010 between an OWCP claims examiner and Thedford Lee, workforce relations director for the employing establishment, regarding appellant's "flag alert" allegations. Mr. Lee indicated that his office kept promotion records and produced the promotion certifications which were given to hiring officials and that the actual certificates were completed by human resources. He stated that it was not standard protocol and would be highly unlikely for the race and EEO activity of an applicant to be annotated on the promotion certificate prior to it being given to hiring officials and that this was the sort of information requested by EEO investigators. Mr. Lee maintained that it was highly unlikely that the information annotated on the November 15, 2001 promotion certificate had been provided to the hiring officials and that EEO officials and investigators requested this information when an EEO complaint was filed. He stated his belief that the notes on the November 15, 2001 promotion certification were completed after the fact by an EEO official and reiterated that it was highly unlikely that this information would have been provided to the selection officials.

By decision dated February 3, 2010, OWCP found that appellant had not sustained an emotional condition in the performance of duty. It noted that many of the claimed factors of employment had been addressed under file number xxxxxx622 and advised her to follow her appeal rights in that case. OWCP found that the additional claims regarding setting aside personnel records and indicating race and EEO activity on promotion certifications did not occur in the performance of duty. It found that appellant's allegations that a "flag alert" had been

placed on her personnel file and that hiring officials discriminated against her because she had filed an EEO complaint could not be substantiated.

Appellant requested a hearing, that was held on May 7, 2010. She testified about her work history, stating that racial discrimination began when she was hired in 1998. Appellant indicated that she had filed EEO complaints, noting the January 6, 2003 decision that found that she had a plausible claim. She maintained that the employing establishment violated her privacy by leaving EEO information in plain view and that her EEO attorney colluded with the employing establishment. Appellant testified that Mr. Lee's statement was false and used to cover up employing establishment discrimination. She maintained that the fact that personnel records with EEO activity were placed in a separate filing room and that the employing establishment placed a flag on hiring documents to alert hiring personnel and thus keeping her from being hired, were retaliatory, indicating that Mr. Clayton, a human resources specialist, notified a selecting official, Ms. Husten, of appellant's prior EEO activity and she referenced affidavits that they provided. Appellant described her medical condition beginning in August 2000 and continuing.

In an April 26, 2010 report, Dr. Eubanks advised that he had been appellant's psychiatrist since August 15, 2000. He reiterated that her federal employment was the sole cause of her PTSD, noting that he had never encountered such persistent mistreatment and hostile working conditions in his 30 years of practice.

By decision dated July 28, 2010, an OWCP hearing representative affirmed the February 3, 2010 decision. On December 21, 2010 appellant requested reconsideration and submitted an October 6, 2010 report in which Dr. Eubanks reviewed the July 28, 2010 decision. He indicated that the hearing representative did not understand his medical report and that the January 6, 2003 EEOC decision documented a hostile environment and that caused her to decompensate and aggravate her PTSD.

In a nonmerit decision dated January 6, 2011, OWCP denied appellant's reconsideration request. On January 24, 2011 her representative requested reconsideration and submitted a January 24, 2011 report in which Dr. Eubanks stated that it was indisputable that she was harassed at work, based on the EEOC judge's finding. Dr. Eubanks reiterated that this aggravated her preexisting PTSD.

In a nonmerit decision dated June 2, 2011, OWCP again denied appellant's reconsideration request. On June 23, 2011 appellant's representative requested reconsideration and submitted a June 21, 2011 report in which Dr. Eubanks indicated that appellant's PTSD was the issue in the current claim. On July 8, 2011 OWCP again denied her reconsideration request.

On July 16, 2011 appellant's representative requested reconsideration and submitted evidence previously of record. In a January 12, 2012 decision, OWCP reviewed the merits of appellant's claim and found that, as none of the documents submitted substantiated that she established a compensable factor of employment, she did not establish that she sustained an emotional condition in the performance of duty.

LEGAL PRECEDENT

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her stress-related condition.⁶ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.⁷ 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.⁸

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*,⁹ 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.¹⁰ When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.¹¹ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.¹² Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹³ Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁴

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

⁶ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁷ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁸ *Id.*

⁹ 28 ECAB 125 (1976).

¹⁰ *See Robert W. Johns*, 51 ECAB 137 (1999).

¹¹ *Lillian Cutler*, *supra* note 9.

¹² *J.F.*, 59 ECAB 331 (2008).

¹³ *M.D.*, 59 ECAB 211 (2007).

¹⁴ *Roger Williams*, 52 ECAB 468 (2001).

or specially assigned work duties of the employee and are not covered under FECA.¹⁵ Where 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.¹⁶

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations that the harassment occurred with probative and reliable evidence.¹⁷ With regard to emotional claims arising under FECA, the term “harassment” as applied by the Board is not the equivalent of “harassment” as defined or implemented by other agencies, such as the EEOC, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers’ compensation under FECA, the term “harassment” is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or workers. Mere perceptions and feelings of harassment will not support an award of compensation.¹⁸

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish an emotional condition in the performance of duty causally related to factors of her federal employment.

As noted above, appellant had a previous emotional condition claim, adjudicated under file number xxxxxx622, in which she asserted that many factors of employment and harassment and abuse by the employing establishment caused her emotional condition. The last merit decision in that case was that of an OWCP hearing representative dated October 21, 2003. Appellant did not timely file an appeal with the Board of that decision, but in a November 17, 2005 decision, the Board found that OWCP properly refused to reopen her case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). In a January 14, 2008 decision, the Board found that, as her March 2, 2007 reconsideration request was not timely filed and she failed to establish clear evidence of error OWCP properly denied a merit review of her claim in its May 3, 2007 decision.

In the instant case, appellant has not attributed her emotional condition to the performance of her regular work duties or to any special work requirement arising from her employment duties under *Cutler*.¹⁹ Rather, as she asserted in numerous statements, this claim pertains to allegations that the employing establishment inappropriately placed a flag alert

¹⁵ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹⁶ *Kim Nguyen*, 53 ECAB 127 (2001).

¹⁷ *James E. Norris*, 52 ECAB 93 (2000).

¹⁸ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁹ See *James E. Norris*, *supra* note 17.

regarding EEO activity and race on her personnel file and then inappropriately forwarded this to selection officials, which caused PTSD. Appellant asserted that this was proven by an EEOC decision finding in her favor.

Regarding the allegation that, a flag alert was placed on her personnel file, the record contains copies of a promotion certificate dated November 15, 2001 signed by Mr. Clayton and Ms. Husten, that include handwritten notations regarding appellant's race and EEO activity. However, as explained by Mr. Lee, it was not standard protocol and would be highly unlikely, for the race and EEO activity of an applicant to be annotated on a promotion certificate prior to it being given to hiring officials and this included the November 15, 2001 certificate. He stated that this was the sort of information requested by EEO investigators when an EEO complaint was filed. The burden of proof is on appellant to establish an emotional condition claim and there is nothing in the record to indicate when and by whom the notations on the promotion certificate were made. The Board finds that she did not establish a compensable factor of employment in this regard.

As to the January 6, 2003 EEOC decision, this was not a final decision on the merits of appellant's claim and was merely a finding that the claim should go forward. Moreover, this decision was reviewed in file number xxxxxx622 prior to the merit decision dated October 21, 2003. The record before the Board does not contain a final EEOC decision on the merits of appellant's EEO complaints.²⁰

Appellant's allegation that OWCP and the employing establishment illegally colluded and that OWCP practiced fraud and willful misconduct in denying her claim, the Board has held that mere allegations without supporting evidence are insufficient to establish a factor of employment.²¹

The Board concludes that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of her federal employment.²²

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.

²⁰ The Board notes that appellant also submitted pages of hearing or deposition testimony apparently regarding her personnel record. While these pages are unidentified as to who is giving the testimony, there is nothing in the testimony that supports error on the part of the employing establishment. The testimony merely indicates that when an EEO claim was filed, the record would be set aside and the EEO liaison notified.

²¹ *Supra* note 12.

²² *Leslie Moore, supra* note 6. As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Katherine A. Berg*, 54 ECAB 262 (2002).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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