

establishment controverted the claim, alleging that the injury was caused by her willful misconduct when she resisted police while being walked off the property.

In a December 18, 2010 police incident report, Francoise Carter, a police officer, related that on that date she responded to a call to escort appellant and her husband to their vehicle and off the property. Officer Eugene Rollins joined Officer Carter in the lobby and they identified themselves. Appellant and her husband began walking with the officers toward their vehicle but repeatedly stopped and argued about what was happening in a loud voice and they threatened the officers with lawsuits. The report stated:

“[Appellant’s] husband started yelling at Officer Carter and waving his hands while stating, ‘What are you going to do shoot me, are you going to shoot me?’ Officer Carter then placed [appellant] in a c-clamp [control hold] and verbally gave her instructions to walk to their car. [Appellant] started to walk, taking approximately five steps.”

Other police officers responded to a call for back up and took appellant to a holding area before escorting her to her vehicle.

By letter dated February 3, 2011, OWCP requested additional factual information from the employing establishment, including an explanation of why appellant was not allowed on the work property on December 18, 2010.

In a December 17, 2010 e-mail message, Roy Evans, a supervisor, related that on December 17, 2010 he advised appellant that she was going to work in an area different from her husband. Appellant told Mr. Evans that she had requested reassignment from that work area. As a result, she requested a sick leave form and left work.

In a statement dated February 6, 2011, appellant related that when she and her husband arrived at work on December 18, 2010 their badges were not working so they used the intercom system to enter and then clocked in and waited for their work assignments. Supervisor Evans notified them that they had been suspended and told them to leave. When appellant and her husband got to the door, Officer Carter informed them that they had to be escorted from the property and told them that they knew they should not have been at work. Appellant related that Officer Carter and her husband quarreled about whether or not they knew they should not have been on the property. When Officer Rollins was asked his name, he shone a flashlight and spelled his name for appellant. Officer Carter then knocked the flashlight away from Officer Rollins and twisted appellant’s arm. Other officers came and took appellant to a holding area, but after around 15 minutes she was released and left the property.

On February 7, 2011 appellant related that she was not aware of her suspension until she got to work on December 18, 2010.

In a February 12, 2011 e-mail responding to OWCP’s request for information, Gregory A. Anderson, a manager, asserted that appellant’s “only conduct problem was that she requested instruction for some tasks to be given to her in writing.” He maintained that on December 16, 2010 appellant left work and requested sick leave after she refused to perform her assignment. Appellant was “loud and threaten[ing] to the assigning supervisor Roy Evans.”

Mr. Anderson maintained that the employing establishment had notified appellant on December 17, 2010 that she was in an “off duty status.”

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

By decision dated March 17, 2011, OWCP denied appellant’s emotional condition claim after finding that she had not established a compensable work factor. On March 21, 2011 appellant requested reconsideration.

On March 28, 2011 appellant submitted timelines of events prepared on January 14, 2011. She related that on November 10, 2010 her husband had filed a complaint with the Department of Labor’s Occupational Health and Safety Administration (OSHA) after being asked repeatedly to “power up a machine which had water leaking from the roof onto the electrical components.”² On December 5, 2010 the employing establishment increased appellant’s work load. On December 10, 2010 appellant filed a complaint with OSHA alleging retaliation due to the additional work load she had been assigned on December 13, 2010. On December 16, 2010 Supervisor Evans told appellant that she would have to work alone in the area. Appellant had a headache and requested sick leave on December 16 and 17, 2010. Appellant had 1,100 hours of sick leave. On December 18, 2010 she received a suspension when she returned to work.³

By letter dated March 21, 2011, appellant requested reconsideration. She maintained that the employing establishment retaliated against her for whistleblower activities. Appellant questioned why Officer Rollins did not submit a statement regarding the December 18, 2010 incident as she was talking with him when she had been “attacked by [O]fficer Carter.”

In an e-mail message dated April 7, 2011, Darrell Whitman, an investigator with OSHA, informed an attorney with the employing establishment that an investigation supported the complaint by appellant that her husband had reported a water leak on high voltage equipment which was “a long-term problem.” He related that documents “confirm that [appellant and her husband] were assigned ‘additional duties’ immediately after the OSHA inspection that were not assigned to any other employees in their situation, that *their OSHA reports* were known to local management as early as December 5, 2010 and that they requested accommodation to mitigate the apparent retaliation by Roy Evans, their area manager.” (Emphasis in the original).

² In an e-mail dated December 5, 2010, appellant and her husband requested from the employing establishment that feeder alignment kits be provided to employees for safety reasons. In a December 6, 2010 response, a manager requested that lower management address the concerns of appellant and her husband and asserted that the employing establishment would not allow unsafe working conditions.

³ On December 17, 2010 the employing establishment placed appellant on emergency off-duty status as she had refused her supervisor’s instructions on December 16, 2010 and abandoned her assignment.

Regarding the description of the December 18, 2010 incident, Mr. Whitman stated:

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

Mr. Whitman noted that evidence supported the credibility of appellant and her husband and urged a settlement. He also noted that an investigation indicated that Officer Carter was “over zealous.”⁴

By decision dated June 17, 2011, OWCP denied modification of its March 17, 2011 decision.

On July 20, 2011 appellant again requested reconsideration. She related that Officer Rollins testified at her husband’s MSPB hearing that Officer Carter’s actions were against procedures. Appellant also noted that Supervisor Evans advised in the hearing that his statements to OWCP that he had left a voice message for appellant and her husband was false.

In a portion of an MSPB hearing transcript, Officer Rollins related that on December 18, 2010 a supervisor informed him that two employees on suspension had entered the building. Officer Carter asked Officer Rollins to assist her in walking them to their cars because they were “in violation of a suspension order.” Officer Rollins related that appellant and her husband appeared surprised about the suspension and began asking Officer Carter questions. Officer Carter, appellant and her husband raised their voices. He indicated that appellant and her husband stopped a few times while walking to their car to ask questions and “voices would be raised again.” Officer Rollins related that appellant did not raise her voice or argue with him. He spelled his name for her at her request. Officer Rollins wrote a report regarding the events of December 18, 2010 and gave it to his supervisor. He did not review Officer Carter’s report. Officer Rollins related that he had never had to “make any kind of aggressive move to any employee all these years.” He indicated that he was surprised when Officer Carter used a control hold on appellant. Officer Rollins related that Officer Carter raised her voice even though the policy was to deescalate any situation.

In a July 15, 2011 MSPB hearing transcript, Supervisor Evans indicated that he wanted to separate appellant and her husband because they were seen holding hands. He related that they disapproved of their assignment and left sick. Supervisor Evans placed them on emergency

⁴ On May 31, 2011 the Merit Systems Protection Board (MSPB) revoked the suspension of appellant’s husband from December 16, 2010 to January 1, 2011 and ordered back pay.

leave when they returned to work. He related that he did not telephone to tell them about their placement on emergency leave.

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

In an August 23, 2011 prearbitration settlement, the employing establishment and appellant settled her grievance. Appellant received back pay and leave restoration and the expunging of any disciplinary action. She agreed to file for disability retirement within 60 days.

On October 24, 2011 appellant requested reconsideration. By decision dated April 12, 2012, OWCP denied modification of its March 17 and June 17, 2011 decisions. It noted that the MSPB claim was pertinent to appellant's husband and that her settlement with the employing establishment did not show error or abuse.

On appeal appellant asserts that OWCP should address her January 2011 occupational disease claim. She maintains that OWCP should consider Officer Rollins' testimony. Appellant attributed her stress to an "unnecessary use of force."

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁵ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁶

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.⁷ However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.⁸

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

⁶ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁷ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

⁸ See *William H. Fortner*, 49 ECAB 324 (1998).

In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.⁹

For harassment or discrimination to give rise to a compensable disability under FECA, 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.¹⁰ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.¹¹ The issue is whether the claimant has submitted sufficient evidence under FECA to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹² The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by OWCP and the Board.¹³

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.¹⁴ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. 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.¹⁵

ANALYSIS

Appellant filed a traumatic injury claim alleging that on December 18, 2010 she sustained post-traumatic stress. She did not attribute her condition to the performance of her work duties under *Cutler*. Instead, appellant maintained that on December 18, 2010 the employing establishment placed her on an emergency suspension without her knowledge as retaliation for

⁹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁰ *See Michael Ewanichak*, 48 ECAB 364 (1997).

¹¹ *See Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

¹² *See James E. Norris*, 52 ECAB 93 (2000).

¹³ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁵ *Id.*

filing an OSHA complaint. She further contends that on that date a police officer inappropriately placed her in a control hold.

Regarding the December 18, 2010 emergency suspension, it is well established that disciplinary actions are administrative functions of the employer and not duties of the employee.¹⁶ Administrative or personnel matters will be considered to be employment factors only where the evidence discloses error or abuse on the part of the employing establishment.¹⁷ Appellant also alleged that the disciplinary action constituted retaliation for filing an OSHA complaint. Harassment and discrimination by supervisor and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.¹⁸ A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.

Appellant maintained that she arrived at work on December 18, 2010 without knowing that she was on emergency suspension. In an e-mail dated February 12, 2011, Mr. Anderson related that the employing establishment placed her on emergency suspension because on December 16, 2010 she had refused to perform her assigned duties, requested sick leave and went home. He asserted that the employing establishment notified appellant on December 17, 2010 of her suspension. In a July 15, 2012 hearing transcript, however, Mr. Evans, her supervisor, related that he had not informed her of the emergency suspension. It is thus unclear from the record whether appellant was advised of the emergency suspension and, if not, whether this was consistent with employing establishment's procedures for emergency suspensions.

Further, appellant has submitted evidence in support of her contention that the employing establishment retaliated against her by issuing an emergency suspension on December 18, 2010. In an e-mail message dated April 7, 2011, Mr. Whitman, an OSHA investigator, advised the employing establishment that the evidence supported that it had assigned appellant additional work duties after an OSHA inspection confirmed their allegation of safety violations. He stated that her suspension and removal from the workplace on December 18, 2010 appeared an "extreme reaction" to her refusal to work and "led to the conclusion that the incident was part of a chain of actions by Supervisor Evans designed to retaliate" against her. OWCP did not specifically consider Mr. Whitman's April 7, 2011 statement in its decisions; consequently, the case must be remanded for it to determine whether his findings support harassment by the employing establishment in suspending appellant on December 18, 2010. On remand, OWCP should also obtain further information from the employing establishment regarding whether it followed its procedures by placing her on an emergency suspension for requesting sick leave on December 16, 2010 in lieu of working her assignment.

Appellant also alleged that on December 18, 2010 Officer Carter, an employing establishment police officer, inappropriately twisted her arm behind her back and pushed her forward while escorting her to her vehicle. She related that on that date Supervisor Evans told

¹⁶ See *Lori A. Facey*, 55 ECAB 217 (2004).

¹⁷ See *M.D.*, 59 ECAB 211 (2007); *Jeral R. Gray*, 57 ECAB 611 (2006).

¹⁸ See *Doretha M. Belnavis*, 57 ECAB 311 (2006).

her and her husband to leave work. When appellant got to the door, Officer Carter told her that she required a police escort. Officer Rollins joined Officer Carter and began walking appellant and her husband to their car. Appellant asserted that she asked the police officers their names, and Officer Rollins got out his flashlight to spell his name for her to write down, when Officer Carter knocked the flashlight out of his hand, twisted appellant's arm and pulled her forward.

The Board finds that OWCP should further develop the factual evidence to determine whether Officer Carter's placement of appellant in a control hold constitutes a compensable work factor. The employing establishment alleged that she was not in the performance of duty at the time because she resisted arrest. OWCP found that the altercation resulted from appellant's raised voice and failure to cooperate with the police officers. Officer Rollins, however, related at an MSPB hearing that he was surprised by Officer Carter's actions and maintained that appellant was not behaving in an aggressive manner. He also indicated that Office Carter had not deescalated the situation in accordance with the policy of employing establishment police but instead had raised her voice. Officer Rollins maintained that he wrote a report regarding the December 18, 2010 incident. His report, however, is not contained in the case record. Mr. Whitman noted that an investigation determined that Officer Carter acted in an overzealous manner; however, the investigative report is also not of record. On remand, OWCP should obtain a copy of Officer Rollins' report and any investigative report regarding the December 18, 2010 incident. It should also obtain a statement from the employing establishment police regarding whether the situation warranted Officer Carter placing appellant in a control hold. After such further development as deemed necessary, it should issue an appropriate merit decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with the opinion of the Board.

Issued: February 20, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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