# United States Department of Labor
# Employees' Compensation Appeals Board

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| **V.B., Appellant** | ) | |
| **and** | ) | **Docket No. 14-1596** |
| | ) | **Issued: July 10, 2015** |
| **DEPARTMENT OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION, Winston Salem, NC, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On July 16, 2014 appellant filed a timely appeal of a July 2, 2014 merit 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.

### *ISSUE*

The issue is whether appellant has met her burden of proof to establish an emotional condition or a consequential physical condition while in the performance of duty.

On appeal appellant contends that she has submitted ample proof to establish that she sustained an emotional condition while in the performance of duty and not an emotional reaction to an administrative or a personnel action. She states that although her complaint filed with the

[1] 5 U.S.C. § 8101 *et seq.*

Equal Employment Opportunity Commission (EEOC) was settled, the evidence of record shows that the incidents which served as a basis for her complaint occurred.

## ***FACTUAL HISTORY***

On July 24, 2012 appellant, then a 44-year-old veteran claims examiner, filed an occupational disease claim alleging that on November 18, 2011 she first became aware of her panic attacks, chronic anxieties, migraine headaches, esophageal spasms, and high neurological reflexes. She alleged that on July 18, 2012 she first realized that her conditions were due to a hostile and offensive work environment, and continuous discrimination.

By letter dated August 15, 2012, OWCP requested that appellant submit factual and medical evidence to establish her claim. It also requested that the employing establishment respond to her allegations.

In a July 26, 2012 memorandum, appellant alleged that she was subjected to a hostile and offensive work environment. She was also subjected to discrimination based on her race, gender, and disability. Due to her medical conditions appellant stepped down from a GS-12 to a GS-11 position in March 2012 and was placed on an individual progress review for the first time. While working as a training instructor in October and November 2008 another instructor directed demeaning and belittling comments towards appellant in front of her students. Appellant reported this incident to her supervisor and in February 2009 a manager ordered her and the instructor to work out their problem. The instructor allegedly responded in a derogatory, intimidating, and demeaning tone of voice that he could not work with appellant. He also questioned her ability to perform her job.

In July 2011 appellant was reassigned to a position as a quality review specialist on a development team. She alleged that her team supervisor communicated with her and other team members in an intimidating and derogatory tone.

In early November 2011 appellant was reassigned to an appeals team. Appellant's supervisor had denied her request to be exempt from this assignment. He interrupted a work-related discussion appellant was having with a veteran's service representative by stating that her discussion was not permitted in that area and he ordered her back to work. In a separate incident, appellant's supervisor bullied and threatened her by slapping her desk twice and telling her not to be late for a meeting. He directed offensive ethnic and sexual jokes and statements towards appellant and a female employee while in the presence of her team members. Appellant's supervisor also made derogatory comments on his Facebook page about employees.

Appellant also alleged that her September 26, 2011 request to participate in challenge training sessions was denied on October 6, 2011. On May 11, 2012 her request to participate in the same training was again denied because an assistant director believed that her medical condition prevented her from being ready for the training. Appellant filed a grievance alleging discrimination based on her disability regarding the denial of her training requests. On January 4, 2012 she was removed from the leave transfer program because she had been released by her physician, but stated that her physician did not release her until May 3, 2012. On February 29, 2012 appellant applied for the leave donation program which was approved for

only a few days. On April 23, 2012 her request for 44 hours of advanced sick leave for a period of leave without pay (LWOP) in April 2012 was denied as she had excessive LWOP leave and no accrued leave. Appellant's request for reconsideration regarding this matter of work was denied without explanation. Her January 2012 request for reasonable accommodation to work from home due to her panic attacks was denied, but her office work hours were temporarily changed to four hours a day in March 2012 and six hours a day on April 6, 2012. On May 22 and August 22, 2012 appellant filed a grievance regarding the above-noted alleged incidents. On June 13, 2012 her request for leave under the Family and Medical Leave Act (FMLA) was denied because she had not worked enough hours. On June 28, 2012 appellant's June 14, 2012 request for FMLA leave was approved, but only for two days a week. Following a meeting with upper management and a union representative on July 24, 2012 her request for FMLA leave was approved and backdated to May 23, 2012.

In a July 26, 2012 witness statement, C.F., a coworker, related that both she and appellant were intimidated by their supervisor. She described her own experiences with her supervisor and a coworker. Regarding appellant's experiences, C.F. stated that the supervisor hit appellant's desk twice and told her not to be late for a meeting. During a team huddle the supervisor did not explain that appellant's decision to leave one team for another team was her choice which appeared to be a purposeful slight towards her. He interrupted appellant's discussion with a veteran's service representative by stating that the discussion was not permitted in that particular area.

In an August 6, 2012 letter, B.M., another coworker, related that during training from October 2008 to February 2009, she witnessed numerous occasions where an instructor interrupted appellant while she was conducting a training class. The instructor either disagreed with appellant or corrected her. B.M. and her classmates believed that his behavior was unprofessional.

In an August 6, 2012 letter, M.R.G., a coworker, described an uncomfortable experience she had with a team supervisor.

In an August 14, 2012 letter, S.W., a coworker, stated that, while appellant was conducting a training class, she was interrupted by another instructor who disagreed with her or corrected her. She related that the instructor was condescending and unprofessional. In an undated witness statement, S.W. related that she donated leave to appellant, but was subsequently notified by a human resources representative that her donation would not be processed because appellant no longer qualified for the leave donation program.

In a letter dated August 22, 2012, appellant's husband related that appellant told him about being verbally attacked by a coworker and later being reassigned to the same team as this coworker, and the sexual comments her boss made to her. He described her emotional and physical reaction to these incidents.

In an August 27, 2012 letter, G.M., a union vice president, stated that appellant informed her that during the week prior to February 17, 2009 she and a male employee were ordered by a manager to resolve their conflicts. Appellant felt bullied and threatened by the employee who told her that she did not know how to do her job. G.M. stated that appellant refused to file a

complaint regarding the February 17, 2009 incident because doing so would result in more mental distress. Prior to this incident appellant claims her work ethic was outstanding, but it declined drastically following this incident. G.M. related that in late August or early September 2011 a human resources representative tried to persuade her not to donate leave to appellant.

In a September 21, 2012 witness statement, J.R.A., a coworker, related that he was not coerced into donating 10 hours of leave to appellant.

In an undated narrative statement, S.C., a coworker, stated that he was in a meeting on or about June 13, 2012 when Mrs. M., a human resources liaison, asked appellant if she had answered all of her questions regarding the period of her FMLA leave since appellant was her number one critic.

Appellant submitted numerous medical records dated June 4, 2010 to August 28, 2012 which addressed her emotional and physical conditions, disability status and work capacity. In reports dated August 28, 2012, Dr. Christopher B. Aiken, a Board-certified psychiatrist, found that appellant had panic disorder caused by a colleague's harassment and bullying behaviors.

On August 23, 2012 the employing establishment challenged appellant's claim. It stated that it was unable to provide a thorough response to appellant's allegations because she did not identify the people involved and there was no information regarding her allegations in her file. Management had no record of a complaint received. The employing establishment had submitted appellant's name to serve as an instructor, but there were concerns about her ability to maintain a regular work schedule while on travel. However, appellant had been released to full duty by her medical provider, but she was not selected for the training. She had applied for leave under FMLA multiple times and had been approved. However, the employing establishment had requested clarification regarding the frequency and duration of episodes associated with her FMLA condition. Appellant's physician indicated that the frequency occurred one to two times every one to two weeks and lasted no more than one to two days. The information provided by the medical provider did not support the amount of appellant's absence. Appellant had applied for the voluntary leave transfer program several times and was approved. She had been told not to solicit for leave donations. Employees complained to the human resources office about her solicitation for donated leave. The employing establishment noted that donations were supposed to be anonymous. An employee made an attempt to donate, but did not have annual leave hours, and had been under the mistaken impression that sick leave could be donated. Appellant applied for reasonable accommodation to work at home, but her position was not one that could be performed as telework. She was provided an accommodation of mutual agreement which allowed her to work half days for the next two months as tolerated until she received further documentation of her improvement. Appellant's May 22, 2012 grievance was rescinded as the employing establishment granted her request for the donated leave program.

In an October 18, 2012 decision, OWCP denied appellant's claim. It found that she had failed to provide sufficient evidence to establish a compensable factor of employment.

By letter dated November 7, 2012, appellant requested an oral hearing before an OWCP hearing representative. In a letter dated January 4, 2013, counsel requested that witness

subpoenas be issued to the coworkers who had observed appellant being verbally abused by her coworkers. He also requested a subpoena for records pertaining to disciplinary actions and investigations involving appellant, and her request for reasonable accommodation.

During the March 5, 2013 telephone hearing, appellant made several allegations which reiterated her prior assertions regarding the actions of an instructor and her supervisor who she identified as J.T. and V.H., respectively. She also alleged that his supervisor had declined her request to remove a mirror outside his office which reflected women from the chest down. Appellant realized that her panic attacks were related to her employment after J.T. walked by her while she was attending a training class. She contended that around June 14, 2012, J.T. posted a comment on Facebook stating that he could not determine who the "hoes" were because so many women had tattoos on their lower backs.

Following the March 5, 2013 hearing, appellant submitted a memorandum dated April 4, 2013 in which she contended that several work incidents, as supported by witness statements, constituted compensable employment factors. The allegations included that J.T. repeatedly belittled appellant in front of other coworkers; that in 2011 her supervisor committed error when he assigned her to work with the belittling coworker, J.T., despite the 2009 incident; and that the employing establishment further committed error in denying appellant's request for training outside the office, leave transfer, and FMLA leave. Counsel contended that the medical evidence established that she sustained an emotional condition due to J.T.'s actions.

In a March 7, 2013 letter, S.W. clarified her August 14, 2012 statement, claiming that, on a weekly basis, she witnessed an instructor treat appellant in a condescending manner by interrupting, disagreeing, and correcting her as she taught and conducted general reviews of previously taught subjects.

In another letter dated March 7, 2013, B.M. referenced her prior August 6, 2012 letter and reiterated that she witnessed unprofessional behavior of two instructors that was directed towards appellant while she was teaching a training class from October 2008 to February 2009. It was evident that appellant was nervous and often flustered when interrupted or corrected by one of these instructors.

In a March 11, 2013 letter, the union vice president further described the February 17, 2009 incident. Appellant told her that J.T. had demeaned her in front of students. She reported this incident on several occasions to her immediate supervisor, and her supervisor's manager, called a meeting between appellant and J.T. to work out their problem. When the manager left the room, J.T. immediately started to degrade appellant by telling her she did not know how to do her job. Appellant told the union vice president that she felt bullied, fearful, and intimated by this incident. When the manager returned to the room, appellant broke down and cried. She stated that the manager apologized for making a bad management decision. The union vice president stated that appellant was emotionally distraught over this situation as she was shaking and crying. Appellant became very withdrawn during late 2011 and early 2012. She also lost an extreme amount of weight in a short period of time and a lot of time from work due to panic attacks and other medical issues. Appellant filed an EEO complaint regarding the 2009 incident and her continuous hostile work environment.

In a letter also dated March 11, 2013, C.F. described inappropriate actions of supervisors directed at her and other employees.

By decision dated May 1, 2013, an OWCP hearing representative affirmed the October 18, 2012 decision, finding that appellant had not established a compensable factor of employment. The hearing representative also denied her subpoena requests.

In a July 2, 2013 letter, appellant requested reconsideration and submitted additional evidence. In affidavits dated March 20 and April 8, 2013, G.M. and C.F., respectively, addressed appellant's EEO claim which alleged that she was subjected to a hostile work environment from February 2009 to July 2012.

In a June 11, 2013 statement, D.W., a coworker, related that during his training class from the fall of 2008 to early 2009, he noticed a tense and somewhat adversarial interaction between appellant and J.T. Oftentimes the alleged coinstructor demonstrated a demeaning and negative attitude towards appellant. The coworker did not recall a specific instance or specific times when this occurred. Midway through the course appellant left the classroom and returned visibly upset and appeared to have been crying. She gathered her things and left for the remainder of the day. D.W. stated that no real explanation was given and the matter was dismissed as being a personal matter.

In an October 7, 2013 decision, OWCP denied modification of the May 1, 2013 decision, finding that appellant had not established a compensable factor of employment.

By letter dated April 10, 2014, appellant requested reconsideration and submitted additional evidence and a March 25, 2014 EEO settlement agreement which indicated that appellant had cancelled and withdrawn her complaint against the employing establishment with prejudice and that the employing establishment would pay her a lump-sum payment of $20,000.00 as full and complete resolution of all claims. The agreement stated that it did not constitute an admission of guilt, fault, or wrongdoing by either party. In addition, the agreement was not considered a finding of discrimination against the employing establishment or its employees.

In a March 11, 2014 witness statement, C.F. related her experiences of harassment by the supervisor V.H. She claimed that he bullied appellant. C.F. stated that she was present when he ignored appellant as appellant explained a fundraiser to him. When appellant finished speaking V.H. scheduled her for work along with challenge training knowing that she did not do well in the training area. C.F. stated that appellant was displeased and upset by the actions and comment of an unidentified employee directed towards her. She asserted that appellant was discriminated against based on her gender and disability which included panic attacks and a back condition.

In an undated statement, S.W. reiterated her observations of J.T.'s inappropriate actions directed towards appellant during training class and her attempt to donate 20 hours of leave to appellant.

In a May 23, 2014 memorandum, a human resources liaison contended that appellant was not entitled to a merit review as the documents submitted did not support her allegations. She further contended that, among other things, the EEO settlement agreement did not constitute an

admission of any wrongdoing and all parties agreed that it was not considered a finding of discrimination. The human resources liaison asserted that C.F.'s witness statement was not an official court record or reported document and was not transcribed by the employing establishment's attorney. The substance of her statement was hearsay, and contained contradictions. C.F. had never verbally or formally complained to management about any of her allegations. The human resources liaison contended that S.W.'s statement did not establish that she or appellant had been discriminated against based on gender by J.T. She further contended that the statements of C.F. and S.W. were based on notes taken by unidentified union stewards that were not signed by the witnesses.

In a July 2, 2014 decision, OWCP denied modification of the October 7, 2013 decision, finding that the evidence submitted failed to establish a compensable factor of employment.

## ***LEGAL PRECEDENT***

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by factors of his or her federal employment.[2] To establish that he or she sustained an emotional condition in the performance of duty, a claimant 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.[3]

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.[4] 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.[5]

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[6] However, the Board

[2] *Pamela R. Rice*, 38 ECAB 838 (1987).

[3] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[4] 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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

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

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.[7] 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.[8]

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.[9] 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.[10]

## ***ANALYSIS***

The Board finds that appellant did not meet her burden of proof to establish an emotional or a physical condition causally related to factors of her federal employment.

In the present case, appellant has not attributed her emotional condition to the performance of her regular duties as a claims examiner under *Cutler*.[11]

Appellant contended that she was a victim of harassment, discrimination and verbal abuse by her supervisors and J.T., a fellow training instructor, based on her race, gender, and disability which she alleged created a hostile work environment. Mere perceptions of harassment or discrimination are not compensable under FECA.[12] Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for her allegations with probative and reliable evidence.[13] Witness statements from C.F., B.M., S.W., G.M., and D.W. indicated that appellant's supervisor hit appellant's desk twice, told her not to be late for a meeting, and to end a conversation she was having with an employee. Their statements also indicated that instructors interrupted, disagreed with, and corrected her in a condescending and an unprofessional manner

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

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

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

[10] *Id.*

[11] *Supra* note 4.

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

[13] *Id.*

while she was conducting a training class. They related that appellant felt bullied by the other instructors who believed she was incapable of performing her job.

The Board finds that C.F., B.M., and S.W. failed to either provide any specific details of dates of these incidents or the identity of the individuals who they believed had harassed appellant. The Board finds that their general statements do not constitute sufficient evidence of harassment, discrimination, or verbal abuse on the part of employing establishment personnel.

Similarly, the statements of C.F. and D.W., that they witnessed supervisors V.H. and J.T. ignore and demean appellant, and knowingly assign her work that she could not perform are of a general, unspecific nature and, therefore, are also insufficient to establish harassment, discrimination, or verbal abuse on the part of the employing establishment. D.W. stated that he could not remember specific instances or times when supervisor J.T. displayed the stated behavior. The descriptions provided by C.F. and M.R.G. of their own personal experiences involving inappropriate and uncomfortable actions of their supervisors are not relevant to appellant's claim.

G.M. related that she was told by appellant that supervisor J.T. had demeaned her in front of her students on February 17, 2009, and appellant described her emotional and physical reaction to this incident. Appellant's husband stated that she told him that she was verbally attacked by a coworker and was later reassigned to work with this same coworker and that her boss made sexual comments to her. As neither G.M. nor appellant's husband actually witnessed these incidents, their statements are of limited probative value. Appellant did not submit any witness statements to support her contentions that there was a mirror hanging outside her supervisor's office or that she asked that it be removed and there is no evidence that supervisor J.T. posted derogatory sexual comments on Facebook. The Board finds that the factual evidence fails to support appellant's allegations of harassment, discrimination, and verbal abuse by the employing establishment. Therefore, appellant has not established a compensable employment factor.

Appellant's remaining allegations regarding the assignment and monitoring of work,[14] denial of requests to attend training,[15] denial of request for telework,[16] denial of leave requests,[17] and filing of an EEO complaint alleging discrimination,[18] are administrative matters. These are not compensable without a showing of error or abuse by the employing establishment. Appellant contended that her requests for a reasonable accommodation and leave under FMLA were denied and that she was removed from the leave transfer program. She also stated that the employing establishment temporarily changed her work hours to accommodate her panic attacks and it

[14] *Donney T. Drennon-Gala*, 56 ECAB 469, 475 (2005); *Beverly R. Jones*, 55 ECAB 411, 416 (2004); *Charles D. Edwards*, 55 ECAB 258, 270 (2004).

[15] *R.H.*, Docket No. 13-1193 (issued May 29, 2014); *C.B.*, Docket No. 11-1457 (issued February 10, 2012); *see Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

[16] *Ernest J. Malagrida*, 51 ECAB 287 (2000).

[17] *J.C.*, 58 ECAB 594 (2007).

[18] *Michael A. Salvato*, 53 ECB 666, 668 (2002).

approved her request to be reinstated in the leave donation program and approved her request for leave under FMLA. Regarding the denial of appellant's request to attend training the employing establishment stated that it was concerned about appellant's ability to work a regular schedule while on travel due to her medical condition.

Regarding the denial of her request for telework, the employing establishment determined that her position could not be performed remotely.

The record contains a March 25, 2014 EEO complaint settlement agreement concerning appellant's allegation of discrimination, but the agreement explicitly indicated that there was no finding of wrongdoing by either party or that a finding of discrimination against the employing establishment or its employees was considered.[19]

Regarding the denial of appellant's request for leave under FMLA and participation in the leave transfer program, the employing establishment related that it had approved her requests many times. S.C. witnessed Mrs. M. answer appellant's questions concerning the period of her FMLA leave. While J.R.A. stated that he was not coerced into donating 10 hours of leave to appellant, the employing establishment noted that employees had complained that appellant had improperly solicited them to donate leave in violation of its anonymous leave donation policy. G.M.'s statement that a human resources representative tried to persuade her not to donate leave to appellant failed to either provide any specific details of dates of this incident or the identity of the individual who tried to prevent the leave donation. There was no credible evidence of error or abuse by the employing establishment in handling the above-stated administrative matters. Mere disagreement or dislike of a supervisory or managerial action will not be compensable absent evidence of error or abuse.[20] The Board finds that appellant has not established any error or abuse related to these administrative matters.

As appellant has not established a compensable work factor, the Board will not address the medical evidence.[21]

On appeal, appellant contended that she has submitted ample proof to establish an emotional condition while in the performance of duty. She stated that, although her EEO complaint was settled, the evidence of record showed that the incidents which served as a basis for her complaint occurred. After its review of the case, the Board finds no probative evidence of error or abuse based on the evidence of record.

## ***CONCLUSION***

The Board finds that appellant has not met her burden of proof to establish an emotional condition while in the performance of duty or a physical condition resulting therefrom.

[19] *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

[20] *A.K.*, Docket No. 14-437 (issued June 9, 2014).

[21] *Karen K. Levene*, 54 ECAB 671 (2003).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the July 2, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 10, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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