



On appeal, appellant attorney asserts the fact that she worked voluntary overtime, was not given a performance appraisal and could not handle her normal job functions, are compensable factors of employment.

### **FACTUAL HISTORY**

On July 21, 2006 appellant, then a 48-year-old contract specialist, filed a (Form CA-2), occupational disease claim, alleging that she sustained an emotional condition causally related to factors of her federal employment. She previously stopped work on October 6, 2003 and was removed from employment effective October 14, 2005. By letter dated August 16, 2006, the Office informed appellant of the evidence needed to support her claim. Appellant was given 30 days to respond.

In a September 14, 2006 letter, Barbara J. Adkins, injury compensation program administrator at the employing establishment, controverted the claim. She noted that no supporting documentation had accompanied the claim and that appellant was on annual leave, sick leave or leave-without-pay for most of the period from August to December 2003. Ms. Adkins noted that appellant requested overtime on August 21, 2003 but the request was denied because she had been absent for most of the pay period. She explained that overtime was routinely approved at the employee's request based on their individual workload. Multiple attempts were made to support appellant in completing contracting actions and finding tools to assist her and accommodate her request for reduced hours. Ms. Adkins stated that appellant had difficulty completing complex contracts and provided a copy of her position description.

By decision dated September 21, 2006, the Office denied the claim.

On July 27, 2007 appellant requested reconsideration. She provided a diary of events occurring from September 17, 2001 to December 22, 2003 and described her medical condition. From September 24, 2001 to June 16, 2002 she worked in the food services division, was given no work and was then transferred. Appellant stated that she was "hit hard" when told in August 2003 that she had to work additional hours, noting that she had voluntarily worked 200 hours overtime since October 1, 2002 and was being treated negatively by management. On October 6, 2003 her medical provider advised that she should work only six-hour days. Appellant did not get an award at the end of the fiscal year and, in November 2003 she filed an Equal Employment Opportunity Commission (EEOC) complaint. She requested Family and Medical Leave Act (FMLA) leave beginning December 22, 2003 and has not worked since. Appellant provided employee records, including time sheets from June 19, 2002 to April 2, 2005, overtime records from July 28, 2002 to September 6, 2003, leave used for fiscal years 2002 through 2005, with schedules showing that she worked 145.25 hours of overtime from July 28, 2002 through November 11, 2003 and 175.25 overtime hours from January 12 through September 6, 2003. She submitted a copy of testimony given on April 4, 2003 at an EEOC fact-finding conference. Appellant stated that she was given no job description or performance appraisal while working in food services, but that she received appropriate pay and transferred to another employing establishment.

Judith A. Crown, a deputy director in food services, testified that the position description from appellant's previous employment in public works was used because she was the first full-time employee in the position. A specific position description was not developed because the position was evolving and appellant was moved into a different organization until she transferred in June 2002. Ms. Crown acknowledged that her agency did not complete a performance appraisal when appellant transferred and, to her knowledge, food services was not contacted by her new agency. Appellant submitted an EEOC no fault settlement agreement signed on December 18, 2003. The settlement agreement awarded her \$50,000.00 and \$3,000.00 in attorney's fees regarding several claims filed. In August 28, 2002 and August 18, 2003 e-mails, Captain Steven R. Belk, chief of the western regional contracting office, advised that, as the end of the fiscal year was approaching, he expected that all employees would work overtime. In the 2003 e-mail, he noted that the previous year had been "rough" regarding workload and staffing.

In a September 17, 2001 report, Dr. Richard Ling, a Board-certified internist, advised that appellant had significant stressors at work and diagnosed acute anxiety. On April 2, 2002 Dr. Russell D. Hicks, a Board-certified internist, diagnosed major depressive disorder, single episode. By report dated November 23, 2005, Dr. John P. Haws, Board-certified in psychiatry, advised that appellant was first seen in June 2002 with an initial diagnosis of situational depression, changed in January 2003 to prolonged adjustment disorder, which progressed to major depression disorder in March 2003. In a March 16, 2006 report, Dr. Jeff Bremer, Ph.D., a clinical psychologist, noted conducting mental status and psychological examinations. He diagnosed major depression, single episode, without psychotic features, chronic; anxiety disorder; dysomnia, amotivation, anergia, gastric bypass scheduled, psychosocial stressors and financial stressors. Dr. Bremer advised that appellant could not return to her employment or similar placement. On April 14, 2007 he advised that his clinical impressions were unchanged and that she could not work an eight-hour day due to her chronic symptoms of depression and anxiety, but could work from two to four hours daily.<sup>2</sup>

By decision dated September 5, 2007, the Office denied modification of the September 21, 2006 decision.

On October 1, 2007 appellant, through her attorney, filed an appeal with the Board. In an order dated May 12, 2008, the Board granted the Director's motion to remand the case to the Office. The Director noted that when appellant's claims were bifurcated, all evidence relevant to the claimed factors that occurred after September 14, 2001 were not associated with the record. On remand, the Board instructed the Office to review all claimed employment factors that occurred after September 14, 2001 and issue a *de novo* decision.<sup>3</sup>

On August 8, 2008 the Office asked appellant to provide additional information about her claim. In a September 8, 2008 response, appellant reported that she began working in the department of logistics for food services on September 23, 2001 in a dark, smelly, room with mice and no desk, computer, telephone or office supplies. She was given nothing to do for nine months and was not provided performance standards. In June 2002, she began another job

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<sup>2</sup> 5 U.S.C. § 8101(2); *Sean O'Connell*, 56 ECAB 195 (2004).

<sup>3</sup> Docket No. 08-16 (issued May 12, 2008).

dealing with medical providers and noted that the employing establishment lost 40 percent of its staff in 2003 causing an increased workload for everyone. Appellant began working six hours a day in October 2003 but was not permitted to work overtime by occupational health. She was never counseled about poor performance and no assistance was given to her. In a November 6, 2008 decision, the Office denied appellant's claim, finding that she did not establish a compensable factor of employment.

Appellant, through her attorney, timely requested a hearing that was held on May 26, 2009. At the hearing, she reiterated that in the nine months she worked at logistics she had nothing to do and did not receive a performance appraisal. Appellant applied for and transferred to a new job beginning in June 2002. She stated that her workload increased in 2003 due to loss of staff and that her assigned contracts had a due date, which required overtime to get the work done. Appellant was under medical care for her depression during the period and, in September 2003, her counselor advised her to cut her workday to six hours and not work overtime. Her attorney argued that she had established four compensable factors of employment: the lack of work at food services; that she was not given a performance appraisal by logistics there; that she had difficulty handling her normal job duties in early 2003; and that she had to work a tremendous amount of overtime. Appellant resubmitted evidence regarding her overtime hours.

In a August 14, 2009 decision, an Office hearing representative found no compensable employment factors and affirmed the November 26, 2008 decision.

### **LEGAL PRECEDENT**

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.<sup>4</sup>

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*,<sup>5</sup> the Board noted that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.<sup>6</sup> There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.<sup>7</sup> 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

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<sup>4</sup> *Ronald K. Jablanski*, 56 ECAB 616 (2005).

<sup>5</sup> 28 ECAB 125 (1976).

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> See *Robert W. Johns*, 51 ECAB 137 (1999).

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.<sup>8</sup> A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.<sup>9</sup>

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 the Act.<sup>10</sup> 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.<sup>11</sup>

### ANALYSIS

Appellant alleged that she was overworked, stating how upset she became when told on August 18, 2003 that overtime was expected. Her reaction upon receiving the memorandum would be considered self-generated as she did not work overtime after that date and began working six-hour days. Appellant provided extensive records including time sheets and overtime schedules, showing that she worked 145.25 hours of overtime from July 28, 2002 through November 11, 2003 and 175.25 overtime hours from January 12, 2003 through September 6, 2003. The Board has held that overwork, when substantiated by sufficient factual information to corroborate the claimant's account of events, may be a compensable factor of employment.<sup>12</sup> While the employing establishment noted that the overtime was voluntary, as shown by Captain Belk's August 2002 and August 2003 e-mails, the evidence establishes that the job was heavy and demanding, due in part to understaffing. Appellant's overtime, even if voluntary, is related to the performance of her regular or specially assigned duties and constitutes a compensable employment factor.<sup>13</sup> The argument on appeal that she had difficulty performing her normal job duties in early 2003 is too general in nature to be compensable, as appellant did not explain what aspects of her job at that time, other than overwork, caused stress.

Appellant alleged that, while working in food services logistics from September 14, 2001 to June 2002, she was given little work to do. The Board note that the assignment of work is an administrative function of a supervisor and, absent error or abuse, frustration at not being assigned what an employee may consider meaningful work is not a compensable factor of employment but is frustration from not being permitted the particular work desired.<sup>14</sup> Similarly,

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<sup>8</sup> *Lillian Cutler*, *supra* note 5.

<sup>9</sup> *Roger Williams*, 52 ECAB 468 (2001).

<sup>10</sup> *Charles D. Edwards*, 55 ECAB 258 (2004); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

<sup>11</sup> *Kim Nguyen*, 53 ECAB 127 (2001).

<sup>12</sup> *Bobbie D. Daly*, 53 ECAB 691 (2002).

<sup>13</sup> *Ezra D. Long*, 46 ECAB 791 (1995).

<sup>14</sup> *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

the fact that she was not given performance standards is not compensable. Ms. Crown explained that appellant was the first full-time employee at the particular job in the division and they were crafting her duties. Appellant used the position description from her prior employment in public works. She transferred to another employing establishment within the year. An employee's emotional reaction to an administrative or personnel matter is generally not covered by workers' compensation.<sup>15</sup> Where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.<sup>16</sup> The record, however, does not establish that management acted erroneously in these administrative matters.<sup>17</sup> The record supports that appellant was not given a performance appraisal prior to transferring in June 2002 and Ms. Crown acknowledged that one should have been given. Appellant successfully transferred to another agency within the department with a promotion, and the new agency did not ask for an appraisal of her performance. The Board finds that the facts in evidence do not rise to the level of error or abuse.<sup>18</sup>

Appellant submitted an EEOC global settlement agreement signed by her on December 18, 2003; however, the parties agreed that neither party admitted to misconduct or wrong doing. There are no findings or admissions to show that the employing establishment erred. Appellant, therefore, did not establish harassment or discrimination on the part of the employing establishment.<sup>19</sup>

Appellant established a compensable factor of employment regarding overwork, as characterized by extensive overtime from July 28, 2002 through September 6, 2003. The Office did not review the medical evidence. The case will, be remanded to the Office to analyze the medical evidence.<sup>20</sup> After such further development deemed necessary, the Office shall issue an appropriate decision on the merits of this claim.

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<sup>15</sup> *L.S.*, 58 ECAB 249 (2006).

<sup>16</sup> *J.C.*, 58 ECAB 594 (2007).

<sup>17</sup> *See Beverly R. Jones*, 55 ECAB 411 (2004).

<sup>18</sup> *G.S.*, 61 ECAB \_\_\_\_ (Docket No. 09-764, issued December 18, 2009).

<sup>19</sup> 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.<sup>19</sup> With regard to emotional claims arising under the Act, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other employing establishments, 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 the Act, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by co-employees or workers. Mere perceptions and feelings of harassment will not support an award of compensation. *James E. Norris*, 52 ECAB 93 (2000).

<sup>20</sup> *Tina D. Francis*, 56 ECAB 180 (2004).

**CONCLUSION**

The Board finds that this case is not in posture for decision regarding whether appellant established that she sustained an emotional condition in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 14, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for proceedings consistent with this opinion of the Board.

Issued: October 8, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board