



## **FACTUAL HISTORY**

On October 5, 2007 appellant, then a 57-year-old physician, filed an occupational disease claim alleging that she developed stress, anxiety, depression, adjustment reaction and elevated blood pressure due to attacks by the acting chief of staff of mental health, Dr. Antonio Fernandez, and Dr. Judy Brannen, Chief of Staff. She stated that she was in her office evaluating a patient on September 6, 2007 when Dr. Fernandez knocked on the door, required her to stop treating the patient and gave her a letter of demotion.

In a letter dated November 15, 2007, OWCP requested additional factual and medical evidence in support of appellant's claim. Appellant submitted reports from Dr. David Israel, a clinical psychologist, and Dr. Seema Gadiwalla, a Board-certified internist, diagnosing anxiety, depression and adjustment reaction. The physicians stated that she had an unexpected confrontation with her supervisor who demoted her. Dr. Israel indicated with a checkmark "yes" that appellant's emotional conditions were caused or aggravated by the implicated employment event. He stated, "While providing medical care to a patient this employee was publicly humiliated and a change of work ... was thrust upon her." On September 26, 2007 Dr. Israel found that appellant was unable to work for an indefinite period of time.

Appellant submitted a memorandum dated September 5, 2007 from Dr. Fernandez, regarding reassignment of staff. Dr. Fernandez stated that care would be impeded if alternate arrangements for coverage were not devised, due to the resignation of a staff physician. He informed appellant that she would be reassigned to the acute psychiatry inpatient unit as a part-time inpatient psychiatrist with the duties of managing up to 10 patients, daily rounds, supervision of one resident and responsibility for documentation related to patient care. Dr. Cynthia Maghakian, Director of Inpatient Psychiatry, was to be appellant's immediate supervisor. Dr. Fernandez stated that appellant's current duties within the substance abuse treatment program (SATP) would be reduced, but that she would continue as the Director of the Opioid Agonist Treatment Program and provide clinical care to patients in this program as well as maintaining her current outpatient caseload. He relieved appellant of her duties as Director of the SATP, smoking cessation clinic, morning walk-in clinic and morning administrative meetings. Dr. Fernandez stated that, along with Dr. Frank Crow, he would assume administrative oversight of SATP.

Dr. Maghakian completed a witness statement describing the events of a September 6, 2007 meeting. She noted that appellant arrived 20 minutes into the meeting. Dr. Fernandez announced that appellant was reassigned to work in inpatient psychiatry under Dr. Maghakian's supervision. He also stated that she was relieved of her duties as director of SATP and that he would assume these duties. Dr. Maghakian stated that she and her coworkers were shocked. Appellant stated that she had been demoted while treating a patient and protested the action. Dr. Maghakian noted that Dr. Fernandez stated that he had been unable to reach appellant earlier in the day. He stated that he often asked staff to do things they might not want to do. Appellant replied that Dr. Fernandez had not removed another employee's title. Dr. Fernandez disagreed that someone would be permanently hired to take over appellant's duties; he indicated that he thought that she would be the director again. He also noted that he had not written the letter, but that the letter was "from upstairs, he just signed it."

Joy B. Barnes, the administrative officer at the employing establishment, submitted a statement that on September 6, 2007 she attempted to schedule a meeting between appellant and Dr. Fernandez, but was unable to correlate schedules until 1:00 p.m. Dr. Fernandez asked that she accompany him to appellant's office at 10:30 a.m. to provide appellant with a letter. Ms. Barnes noted that when appellant opened the door she was with a patient. Dr. Fernandez stated that he needed to give appellant a letter and handed it to her. Ms. Barnes suggested that all three go into an office for privacy. After appellant saw the contents of the letter, she was visibly upset and refused to accept it. She requested a meeting with Dr. Brannen who agreed to meet with her but only if Dr. Fernandez and a human resources representative came to the meeting as well. Appellant was not interested in proceeding under those circumstances. On September 28, 2007 the union provided documents to Ms. Barnes that appellant was suffering from high blood pressure and would be on indefinite leave. Ms. Barnes hand-delivered them to Dr. Fernandez' secretary.

In a statement dated February 24, 2008, Eslena Eldridge, nurse practitioner in SATP, claimed that Dr. Fernandez had recommended on June 27, 2007 to close the substance abuse residential program (SARP) and made his recommendation at a meeting with appellant. SARP was a program within the SATP. Ms. Eldridge disputed the assertion by Dr. Fernandez that there was no research, no outcome studies nor patient detoxification services being conducted in SARP. She further alleged that Dr. Fernandez openly humiliated appellant in front of all the top-level executives and administrators by denigrating the SARP program.

Dr. Maghakian submitted a second statement dated February 20, 2008. She noted that Dr. Fernandez announced appellant's reassignment during a weekly staff meeting. Dr. Maghakian had not been aware that she would be appellant's supervisor until that meeting. She stated that appellant was confused as to why the reassignment was not temporary or why she was not allowed to maintain her SATP directorship. Dr. Fernandez had stated that he would take over the SATP program until another full-time employee could be hired. He stated that he was not aware of the contents of the letter, but that he had just signed it. Dr. Maghakian stated, "While other directors have worked on the inpatient psychiatry unit, they have also been actively engaged for years in working with the acutely ill psychiatric population. In addition NO DIRECTORSHIP TITLES were concomitantly removed." She stated that no other attending physicians had been under her supervision; rather they had continued to be under the direct supervision of the chief. Dr. Maghakian stated that appellant had only covered the ward on two days in the recent past and that merely covering an inpatient unit for back-up on call did not make her qualified or capable to take on the acute psychiatric inpatient position. With respect to appellant's allegation that appellant had been singled out as the only physician required to sign in or out each day, Dr. Maghakian noted that she had never been asked to sign in or out either manually or in the computer.

As to appellant's allegation that she was the only physician required to sign in or out each day, appellant also submitted two statements from coworkers. Coworker Dr. Sultana A. Salam stated in her note dated February 28, 2008 that she had not been required to sign in or out on a daily basis. Similarly, coworker Dr. Kirk Nelson also noted on February 28, 2008 that he had not been required to sign out when leaving his tour of duty for outside activities, such as personal errands.

In a statement dated October 15, 2007, appellant reported that on September 6, 2007 Dr. Fernandez came to her office and requested that she stop treating a patient and step outside. Once she did so, Ms. Barnes recommended privacy but Dr. Fernandez nonetheless gave her a memorandum dated September 5, 2007 demoting her from Director of SATP to the position of staff physician reporting to Dr. Maghakian, Director of the Inpatient Psychiatry Unit. Appellant stated that she had not performed the duties of a staff physician for 26 years and was reassigned with no orientation, training or unit specific competencies. She noted that during the September 6, 2007 staff meeting, Dr. Fernandez announced that she was being reassigned to work on the inpatient psychiatry unit as an attending physician and relieved of her duties as Director of SATP. On August 16, 2007 she had received a threatening message from Dr. Fernandez questioning and challenging her professional ethics. Appellant contended that she was being forced out and replaced with absolutely no justification. She stated that management's actions created a hostile work environment such that she had no choice but to leave or retire.

Appellant had previously coordinated a meeting on May 16, 2007 to discuss upcoming changes in the SARP. Dr. Brannen, Chief of Staff, allegedly attacked appellant at this meeting asking her why she was wasting her time and questioned whether appellant needed more staff as her daily census was consistently low. After that meeting, she allegedly went into Dr. Fernandez' office and "screamed" about whether appellant came to work on time, whether she took too much time off and whether she used too much sick leave and whether appellant was ready for retirement. Appellant alleged that many coworkers overheard these remarks and that Dr. Fernandez informed her later that date that management was trying to get rid of her.

At a meeting on June 27, 2007, Dr. Fernandez stated to staff that SARP did not do research, did not have outcome studies or do outpatient detox. He allegedly opined that it was a useless program and should be closed. Appellant questioned whether she was needed for the upcoming meeting with the Director on June 29, 2007 and Deanne Seekins, Associate Director, advised that she would not be needed. Appellant left the meeting. She noted that Dr. Fernandez had been acting chief for only three months and had no knowledge of the SARP.

Appellant filed an Equal Employment Opportunity (EEO) complaint alleging discrimination for receiving the letter of reassignment on September 6, 2007, the time and attendance issue on and the resulting hostile work environment. She included Dr. Brennan's alleged actions on May 16, 2007 and Dr. Fernandez' alleged statements of June 27, 2007.

The patients of the SATP ward submitted a petition to the employing establishment, dated October 2, 2007, requesting that appellant be reinstated as director. In a statement dated November 30, 2007, Judi Thomas, a nurse who had attended the May 16, 2007 meeting, stated that Dr. Brannen arrived late for the meeting and that when appellant discussed the need for additional staff, Dr. Brannen stated that there was adequate nursing staff as the census was low and that it was a waste of time to discuss staffing during the meeting.

Appellant submitted an August 16, 2007 message that she received from Dr. Fernandez requesting that she send him a note when she arrived in the morning and when she left at the end of her duties. She responded that she had been signing in and out for three to four months and

would continue to do so. Appellant also asked Dr. Fernandez, "Also who is asking you to prepare a report about my work ethics? Is there a complaint against me?"

In response to appellant's allegations, Dr. Fernandez admitted knocking on appellant's office door at 10:30 a.m. on September 6, 2007. He denied asking her to stop treating the patient. Dr. Fernandez stated that the memorandum dated September 5, 2007 made no mention of a demotion from her position as Director of SATP. He stated, "The memorandum was a simple reassignment to accommodate the changing needs of the service line due to acute shortage of psychiatrists. [Appellant] was being assigned the inpatient unit which was under the Directorship of Dr. Cynthia Maghak[ian]. It was decided that [appellant] receive assistance during the period of transition to the unit from Dr. Maghakian."

Dr. Fernandez disagreed with appellant's assertions that she had not performed the duties of a staff physician in the acute psychiatric unit for 26 years. He noted that all psychiatrists performed inpatient psychiatric duties whenever on call and that she had volunteered her services to the inpatient unit during staff vacations or sick time. Dr. Fernandez stated that appellant needed no orientation training or unit-specific competencies as she had been performing such duties for 26 years. He described her qualifications and noted that the majority of her patient population in SATP had dual diagnoses of substance abuse and psychiatric conditions. Dr. Fernandez stated, "[Appellant's] experience led me to believe that the decision to reassign her to the inpatient unit was good for our veterans."

In regard to the September 6, 2007 meeting, Dr. Fernandez reported that appellant passed the memorandum around to her colleagues and that he did not announce to the group or make a statement that she was relieved of her duties as Director of the SATP. He denied threatening her on August 16, 2007, denied that the employing establishment was trying to get rid of her and denied that Dr. Brannen started screaming in his office. Dr. Fernandez stated that it was not unusual for the Director of one program to work under the direction of inpatient psychiatry. He stated his opinion that the SARP did not provide research, outcome studies or outpatient detoxification services, but that he had advocated for the program to remain open with increased access to veterans in need of substance abuse treatment. Dr. Fernandez denied stating that the program was useless or needed to be shut down. He noted that appellant worked Monday through Friday from 8:00 to 4:30 p.m. or 8:30 to 5:00 p.m.

By decision dated May 2, 2008, OWCP denied appellant's claim finding that she failed to establish a compensable factor of employment.

On July 3, 2008 appellant requested reconsideration. She argued that she was in the performance of duty when the alleged incidents occurred. Appellant submitted a statement from Dr. Maghakian alleging that Dr. Fernandez humiliated appellant and treated her with disrespect and discriminated against her based on her age, sex and culture.

Appellant also submitted the EEO investigative report. On March 27, 2008 she had met with an EEO Counselor. Appellant stated that following Dr. Julius' retirement in May, Dr. Fernandez became acting chief and he began to ask her to sign in and out each day. She stated that she was the only physician required to sign in and out. Appellant testified that the reassignment in the area of acute psychiatry was outside her training as she had worked in the

addictions area for 26 years. She stated that during 26 days she had only covered Dr. Maghakian's job for two days. Appellant alleged that would greatly increase her workload.

Dr. Brannen informed the investigator that appellant was temporarily reassigned and that once the vacancies were filled and the construction on SATP finished, "It was likely [appellant] would return to all her previous duties and no longer have any responsibilities on the inpatient unit." She further stated that she had met with the entire psychiatry staff and had established expectations for time and attendance during the spring of 2007. Dr. Brannen stated that there were never any concerns about appellant's time or attendance.

Dr. Fernandez stated that due to time pressure caused by the precipitous resignation of a psychiatrist, he was rushed to provide appellant a new temporary-duty assignment. The decision to reassign her was made, in part, due to his ability to take on her duties, as substance abuse was his area of expertise. Dr. Fernandez did not ask appellant to send time or attendance e-mails; he asked her that if she was going to send him such e-mails, they should be sent when she arrived rather than later in the day. He summarized these statements on September 24, 2008.

On April 2, 2008 Dr. Maghakian told the EEO investigator that she resigned from the employing establishment in October 2007. She stated that appellant received the September 5, 2007 memorandum on Thursday September 6, 2007 shortly before the weekly staff meeting. Dr. Maghakian stated that after Dr. Amenra Tuason resigned, she worked with Dr. Fernandez to fill that position, but was unaware of his decision to reassign appellant under her supervision. Dr. Maghakian believed the reassignment was punitive and made in attempt to force appellant to leave. She stated that Dr. Fernandez did not like women and had problems with female employees. Dr. Maghakian stated that there were other physicians willing to do the job and that both appellant and Dr. Nelson had been excluded from the reassignment discussions because of their heavy workloads. She stated that she worked late and that appellant worked late with her. Dr. Maghakian strongly disagreed with the decision to reassign appellant to her unit under her supervision as it would have required retraining. She stated that appellant never reported for this duty. Dr. Maghakian opined that appellant was subjected to harassment and a hostile work environment.

Appellant submitted the letter of resignation from Dr. Tuason dated August 17, 2007, which listed his last day of work as September 9, 2007.

By decision dated October 23, 2008, OWCP denied modification of the May 2, 2008 decision and again found that appellant had not established a compensable factor of employment.

In a statement dated January 25, 2009, Jessie B. Harvey, a workers' compensation specialist at the employing establishment, advised that she was aware of appellant's preexisting condition of hypertension in 2007. Appellant informed her that she was running seven programs by herself and worked 10 hours a day as well as weekends, with little leave. Ms. Harvey opined that appellant claimed to be overwhelmed with work and that management had refused to provide assistance. Appellant provided a list of workload encounters which was intended to establish that she saw three to five times more patients than her coworkers. She listed 3,906 encounters while the next highest number listed by a physician was 1,323.

On March 11, 2009 appellant requested reconsideration. She reiterated that her emotional condition was caused by being overworked, understaffed and thwarted in her efforts to secure additional staffing. Appellant also attributed her emotional condition to the new duties she was assigned and fear of her inability to perform these duties. She also alleged a hostile work environment. Appellant submitted a report from her employer listing the psychiatrists employed from January 1 through September 1, 2007 and a listing of the number of encounters. She claimed it demonstrated that she had more patient encounters during this period than the other physicians listed.

On February 4, 2009 Dr. Anthony M. Mancini, a clinical psychologist and acting associate chief of mental health service from July 2006 through February 2008, stated that appellant's staff was reduced by a full-time psychiatrist and full-time nurse practitioner in August 2006. Appellant was the sole psychiatrist assigned to manage seven different mental health programs with no support staff, which was an enormous workload forcing her to work long hours every day and on weekends. Dr. Mancini stated that she had been assigned the heaviest patient care workload among the psychiatrists at the employing establishment and that her requests for additional staff were denied. He opined that appellant should have been provided additional staffing.

Ms. Barnes completed a statement on February 9, 2009. She served as the administrative officer for mental health service from January 1994 until her retirement in January 2009 and was responsible for preparing the necessary paperwork for additional staff requests. She was required to provide statistical data to support staffing requests and was aware that appellant had the heaviest workload among the psychiatrists. Ms. Barnes stated, "I am aware that the seven programs that [appellant was] responsible for have been historically staffed by two full[-]time board-certified psychiatrists and one full[-]time nurse practitioner." She stated that appellant had no assistance with these programs from June 2006 until September 2007. In a statement dated January 25, 2009, Dr. Tuason opined that appellant was overworked, that he witnessed her working 10 hours a day and often on weekends.

Dr. Fernandez responded on April 8, 2009 and stated that appellant was in charge of "essentially" one program, SATP, which included several component programs. He stated in September 2007 there had been "a full complement" of support staff including psychologist, counselors, addiction therapist, social workers, psychology technicians and clerks. On April 7, 2009 Dr. Fernandez compared appellant's workload with his own for the period September 1, 2006 through August 31, 2007 through a patient care encounter summary (4/13/09 undated) and found that his was greater based on the number of encounters. On January 23, 2009 he noted that the employing establishment had instituted a new policy of how encounters were to be reported, which now listed both inpatient and outpatient encounters.

In a decision dated June 11, 2009, OWCP denied modification of its prior decision.

Appellant requested reconsideration on August 12, 2009. She alleged that OWCP failed to address the additional employment factors implicated in her last request for reconsideration. By decision dated October 15, 2009, OWCP declined to reopen appellant's claim for consideration of the merits on the grounds that she failed to submit new evidence or argument.

On May 20, 2010 appellant requested reconsideration and submitted additional medical evidence.

By decision dated August 30, 2010, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions finding that she had not established a compensable factor of employment.

### **LEGAL PRECEDENT**

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>2</sup> the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.<sup>3</sup> There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.<sup>4</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 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>5</sup> In contrast, a disabling condition resulting from an employee's feelings of job insecurity is not sufficient to constitute injury sustained in the performance of duty within the meaning of FECA. Thus disability is not covered when it results from an employee's fear of a reduction-in-force, nor is disability covered when it results from such factors as an employee's frustration in not being permitted to work in a particular environment or to hold a particular position.<sup>6</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 FECA.<sup>7</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>8</sup> A claimant must support his or her allegations with probative and reliable

---

<sup>2</sup> 28 ECAB 125 (1976).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> See *Robert W. Johns*, 51 ECAB 136 (1999).

<sup>5</sup> *Cutler*, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Charles D. Edwards*, 55 ECAB 258 (2004).

<sup>8</sup> *Kim Nguyen*, 53 ECAB 127 (2001). See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.<sup>9</sup>

### ANALYSIS

Appellant alleged that her work factors caused an emotional condition. OWCP denied her claim on the basis that no compensable factors had been established. The Board must review whether the allegations are sufficient to establish compensable factors under FECA. The Board finds that appellant has established a compensable factor of employment.

Appellant attributes in part her emotional condition to the stress of carrying out her normal daily workload, even before the added stress of the news of the reassignment. The Board has held that conditions related to stress resulting from situations in which a claimant is trying to meet his or her position requirements are compensable.<sup>10</sup> In support of this aspect of her claim, appellant has submitted evidence of an extremely heavy workload and statistics of her doing considerable more work than her colleagues. She submitted a statement from Ms. Harvey reviewing appellant's workload encounters and stating that this established that appellant saw three to five times more patients than her coworkers. Appellant listed 3,906 encounters while the next highest number listed by a physician was 1,323. She also submitted a report from the employing establishment listing the psychiatrists employed from January 1 through September 1, 2007 and the listing of encounters verified that she had 3,906 patient encounters during this period, more than the other physicians listed.

Dr. Mancini, the former acting associate chief of mental health service, submitted a statement dated February 4, 2009 stating that appellant's staff was reduced by a full-time psychiatrist and full-time nurse practitioner in August 2006. He stated that appellant was the sole psychiatrist assigned to manage seven different mental health programs with no support staff and that this was an enormous workload forcing her to work long hours every day including weekends. Dr. Mancini opined that appellant had been assigned the heaviest patient care workload and management among the psychiatrists at the employing establishment.

Ms. Barnes completed an additional statement on February 9, 2009 and stated that she served as the administrative officer for mental health service at the employing establishment from January 1994 until her retirement in January 2009. She stated that she was responsible for preparing the necessary paperwork for requests for additional staff. Ms. Barnes stated that she was required to provide statistical data to support staffing requests and was aware that appellant had the heaviest workload among the employing establishment psychiatrists. She stated, "I am aware that the seven programs that [appellant] is responsible for have been historically staffed by two full[-]time board-certified psychiatrists and one full[-]time nurse practitioner." Ms. Barnes stated that appellant had no assistance with these programs from June 2006 until September 2007. In a statement dated January 25, 2009, Dr. Tuason opined that appellant was overworked, that he witnessed her working 10 hours a day and often on weekends.

---

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

<sup>10</sup> *Richard H. Ruth*, 49 ECAB 503 (1998).

In response of April 7, 2009, Dr. Fernandez compared appellant's workload with his own for the period September 1, 2006 through August 31, 2007 through a patient care encounter summary and found that his workload was greater but utilized an alternate method of analysis.

Appellant has submitted documentation and witness statements supporting that she regularly worked 10-hour days and on weekends. While Dr. Fernandez disputed her allegations as to whether she had the most patient encounters and noted her hours of work were from 8:00 a.m. to 4:30 p.m. or 8:30 a.m. to 5:00 p.m., he neglected to respond to her allegations of working long hours and weekends to accomplish her work. This information should have been readily available to the employing establishment and submitted to OWCP. As the employing establishment has not adequately disputed these allegations and appellant has substantiated her allegations with sufficient evidence, the Board accepts appellant's allegations regarding her workload as factual in accordance with OWCP's regulations.<sup>11</sup> The Board finds that appellant has submitted substantial evidence of her heavy workload, lack of adequate staff and working long hours to complete her regular or specially assigned duties and as such has established a compensable work factor under *Cutler*.<sup>12</sup>

Appellant also attributed her emotional condition to her reassignment or demotion from Director of SATP to a staff physician working under Dr. Maghakian. She objected to both the means by which the information was provided her and the change of her work duties. The Board has held that the assignment of work duties is an administrative function of the employer and not a duty of the employee.<sup>13</sup> Although appellant has substantiated through witness statements that the method of her reassignment was unprecedented, she has not established any error or abuse in either the change of work duties or the method by which she was notified of the change. Dr. Fernandez stated that she was reassigned due to the needs of the employing establishment, especially because of the retirement of a staff physician. This need was further substantiated by Dr. Maghakian. In determining whether the employing establishment erred or acted abusively,

---

<sup>11</sup> See *Alice F. Harrell*, 53 ECAB 713 (2002).

<sup>12</sup> *Trudy A. Scott*, 52 ECAB 309 (2001) (where appellant alleged that she suffered from an emotional breakdown when she was required to take on extra duties, such as staff scheduling, when a supervisor left her job. The employing establishment did not dispute that her duties changed or that there was a staff shortage but denied that appellant's workload was overly stressful. The Board held that conditions related to stress resulting from situations in which an employee is trying to meet his or her position requirements are compensable. The record, consisting of appellant's performance evaluation and the affidavit of a witness, established that she had a heavy and demanding workload, in part due to understaffing and hiring delays with the employing establishment. The Board found that her increased workload, with the requirement that she take over scheduling duties of a departed employee, was a condition of her specially assigned duties and was to be considered a compensable work factor); *William J. Blankenship*, Docket No. 97-1071 (issued January 7, 2000) (where the Board found that appellant established a compensable work factor from his heavy workload when he was assigned additional duties, in addition to his regular duties, after a coworker resigned. Appellant had the sole responsibility to create a criminal enforcement program which required him to learn new computer skills and was given more regions to cover with additional laws to enforce). See also *Richard H. Ruth*, *supra* note 10 (where the Board held that emotional reactions to situations in which an employee is trying to meet his or her position requirements, when supported by sufficient evidence, are compensable).

<sup>13</sup> *V.W.*, 58 ECAB 428 (2007).

the Board finds it acted reasonably. The record does not establish that the reassignment was in error or abusive.<sup>14</sup>

Appellant also attributed her emotional condition to her fear of her inability to perform these newly assigned duties. The record establishes that she has not performed the new duties. The Board has consistently held that the possibility of a future injury does not form a basis for the payment of compensation under FECA.<sup>15</sup> As appellant has not attempted the new duties, there is no basis for concluding that she would not be capable of performing these duties based on her lack of training. Her reaction is self-generated and results from her frustration in not being permitted to work in a particular environment or to hold a particular position.<sup>16</sup>

Appellant attributed her emotional condition to a series of harassing encounters with her supervisors beginning in May 2007. She stated in a May 16, 2007 meeting, Dr. Brannen attacked her at this meeting asking why she was wasting her time and noting that appellant did not need more staff as her daily census was consistently low. Appellant submitted a witness statement dated November 30, 2007 from Ms. Thomas stating that Dr. Brannen arrived late for the meeting on May 16, 2007 and that when appellant discussed the need for additional staff, Dr. Brannen stated that there was adequate nursing staff as the census was low and that it was a waste of time to discuss staffing during the meeting. While she has submitted evidence that the events occurred, she had not substantiated her allegation of error or abuse on the part of Dr. Brannen in the method that she corrected appellant. The Board has held that mere disagreement or dislike of a supervisory or of a managerial action will not be compensable absent error or abuse.<sup>17</sup> For this reason appellant has not established Dr. Brannen's statements as a compensable factor of employment.

Appellant alleged that after the meeting Dr. Brannen began screaming in Dr. Fernandez' office asking whether appellant came to work on time, whether she took too much time off and whether she used too much sick leave and whether she was ready for retirement. She alleged that many coworkers overheard these remarks and that Dr. Fernandez informed her later that date that management was trying to get rid of her. He has denied that these events occurred and appellant has submitted no corroborating evidence contradicting his statement. Therefore, the Board finds that she has not substantiated these events and the events cannot constitute compensable employment factors.

Appellant alleged that on June 27, 2007, Dr. Fernandez stated that SARP was a useless program and should be closed. Dr. Fernandez stated that she took his remarks out of context and that he did not advocate closing SARP. Appellant submitted a witness statement date February 24, 2008 from Ms. Eldridge who stated that Dr. Fernandez recommended on June 27, 2007 to shut the program down and that he made this recommendation at a meeting with appellant. Ms. Eldridge stated that Dr. Fernandez openly humiliated appellant in front of all the

---

<sup>14</sup> *M.D.*, 59 ECAB 211 (2007).

<sup>15</sup> *Manuel Gill*, 52 ECAB 282 (2001).

<sup>16</sup> *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>17</sup> *D.L.*, 58 ECAB 217 (2006).

top-level executives and administrators by denigrating the SARP program. Generally, complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall outside the scope of coverage provided by FECA. This principle recognizes that a supervisor or manager must be allowed to perform his or her duties and employees will at times, dislike the actions taken.<sup>18</sup> The Board finds that although appellant has established that Dr. Fernandez denigrated her program, she has not established that these statements were outside the scope of his duties and discretion. For these reasons, appellant has not established that this employment incident is a compensable factor of employment.

Appellant also alleged a hostile work environment. She did not clearly detail what aspect of her employment not already addressed constituted a hostile work environment. The Board has reviewed appellant's allegations and finds that she has not submitted sufficient evidence to establish a hostile work environment. For an allegation of a hostile work environment to give rise to a compensable disability under FECA, there must be evidence that harassment did, in fact, occur. Mere perception of harassment is not compensable under FECA. An unsubstantiated allegation of harassment is not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting her allegations with probative and reliable evidence.<sup>19</sup> Appellant has not submitted sufficient evidence to establish harassment or a hostile work environment by the employing establishment.

Appellant alleged discrimination due to the fact that she was required to sign in and out each day, whereas no other employee was required to do so. In support of her allegation, she submitted a message from Dr. Fernandez dated August 16, 2007 requesting that appellant send him a note in the morning and one when she left as he had to prepare a report on when she signed in and out. She responded and stated that she had been signing in and out for three to four months and would continue to do so. Appellant submitted a series of statements from her coworkers including Dr. Maghakian, Dr. Salam and Dr. Nelson asserting that they did not sign in or out. In response to this allegation of discrimination, Dr. Fernandez stated that he did not ask her to send time and attendance e-mails, but did ask that if she was going to do this to send the e-mails when she arrived rather than later in the day. For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did, in fact, occur. The Board finds that appellant has not established that being required to sign in and out of work was discriminatory. The evidence did not establish specifically that she was required to sign in. Dr. Fernandez disputed that appellant had been required to sign in, but that if she was going to do so, to send the notes contemporaneously with the event, *i.e.*, in the morning and evening. Further, the evidence reflects no discriminatory intent surrounding the signing in and out. Although appellant submitted statements from other coworkers who were not required to do this, it does not establish that there had been a discriminatory motive for her to have been required to sign in, if in fact she had been so required. Thus, the Board does not find that she established a compensable factor of discrimination.

---

<sup>18</sup> C.S., 58 ECAB 137 (2006).

<sup>19</sup> *Alice M. Washington*, *supra* note 14.

As appellant has submitted sufficient evidence to establish a compensable *Cutler* employment factor, the stress of meeting the obligations of her current position even prior to receiving the notice of reassignment, OWCP must review the medical evidence. OWCP found that there were no compensable employment factors and did not analyze or develop the medical evidence. The case will be remanded to OWCP for this purpose. After such further development as deemed necessary, OWCP should issue a *de novo* decision on this claim.<sup>20</sup>

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 30, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for additional development consistent with this decision of the Board.

Issued: January 25, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

---

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