

ISSUE

The issue is whether appellant established that she sustained an emotional condition in the performance of duty.

On appeal, appellant contends that the evidence of record establishes that she sustained the claimed emotional condition.

FACTUAL HISTORY

On January 19, 2010 appellant, then a 43-year-old human resources compensation specialist, filed an occupational disease claim alleging that on August 19, 2009 she first realized that her unbearable headaches and upper body pain were caused by constant harassment from Denise Flores, a regional wage specialist, and Deborah Hollins, a lead wage specialist, which created a hostile work environment. She was also subjected to verbal harassment and yelling and was unfairly accused of incorrectly performing her work duties. Appellant filed an Equal Employment Opportunity (EEO) complaint against the employing establishment which had not yet been resolved.

By letter dated February 23, 2010, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested additional factual and medical evidence. OWCP also requested that the employing establishment respond to appellant's allegations.

In a March 12, 2010 memorandum, Ms. Flores noted that appellant filed a grievance on September 3, 2009 alleging a hostile work environment. She denied appellant's allegation of being subjected to this type of work environment and verbal harassment. Ms. Flores stated that an investigation of appellant's allegation by the employing establishment's EEO office determined that no law, regulation or policy regarding harassment had been violated and that her allegation was false. Appellant did not perform her required work duties in accordance with management's expectations and her performance standards. Her difficulty with understanding the Davis-Bacon survey program for which she underwent training in June 2009 resulted in her difficulty with the performance of her assigned duties. Appellant did not complete her work assignments correctly or in a timely manner. From July 1 to September 2, 2009, Ms. Flores and Ms. Hollins met with appellant's twice a day to review her work and provide very detailed refresher training and instructions for performing Davis-Bacon surveys. In October 2009, appellant was rated as minimally satisfactory due to deficiencies in her work assignments which were regularly returned to her due to repetitive errors. She was counseled on several occasions regarding leave abuse and inappropriate use of the internet during work hours.

In e-mails dated May 15, 2009 to February 24, 2010, appellant alleged several incidents of harassment by the employing establishment. On May 15, 2009 Ms. Flores requested a leave slip because her lunch break went beyond 30 minutes. On July 30, 2009 appellant asked Ms. Flores for an explanation for her request since no other employee was instructed to submit a leave slip for an extended lunch break. During training in San Francisco, California from June 8 through 12, 2009, Ms. Hollins became angry and acted mean towards appellant because she asked Shirley Ebbeson, an employing establishment employee, too many questions about a survey process. From July 7 through September 2, 2009, appellant had to meet with Ms. Flores

and Ms. Hollins twice a day until 90 percent of her work did not contain substantial errors and her work product reflected an efficient use of her time. She denied any substantial errors in her work. On July 9, 2009 appellant contacted Theresa Brandon, a union representative, about filing a harassment claim against Ms. Flores. On July 14 and 15, 2009 she asked Ms. Flores if she could have a witness when she met with Ms. Hollins due to a July 8, 2009 incident in which Ms. Hollins snatched papers from her and hollered at her. Appellant contended that this incident was witnessed by Ms. Flores. On July 30, 2009 she requested that Ms. Hollins place her assignments in her box so that Ms. Hollins could not slap them down on her keyboard. On August 3, 2009 appellant advised the union in writing that she did not want to meet alone with Ms. Hollins. She asserted that Ms. Hollins and Ms. Flores sent her unnecessary, hateful and rude e-mails from July 16, 2009 through April 13, 2010 regarding her work performance. Appellant further asserted that on August 12, 2009 Ms. Flores and Ms. Hollins treated Denise Clark, a 15-year employee, so badly that Cynthia Watson, a regional administrator, immediately granted Ms. Watson's request to transfer to a different section.

On August 20, 2009 Ms. Hollins yelled at appellant when she denied performing her work incorrectly. Appellant left the office and cried and she talked to Ms. Clark and another employee and wrote the union and administration about this incident. On August 28, 2009 Ms. Flores instructed appellant to obtain permission to attend any meetings with a union representative. On September 1, 2009 appellant advised Ms. Brandon that she needed to file a claim because her situation had worsened. On September 2, 2009 Ms. Flores advised appellant that daily meetings were no longer necessary and did not respond to her inquiry about whether she had met her goal. On September 17, 2009 appellant questioned why Ms. Flores wanted her to look for a file in an employee's area and cabinets. On October 6, 2009 she heard Ms. Hollins gossiping on the telephone with Ms. Flores about her interview with Ms. Brandon. This incident was witnessed by LaDonna Vick, Ms. Clark and Susie Rendon, employees. On October 7, 2009 Ms. Brandon requested that necessary action be taken against Ms. Hollins for disclosing confidential information. On November 24, 2009 appellant contended that Ms. Flores was unqualified to be a manager. She denied that her assignments were unfinished as she performed all of her work and that of other employees.

In a step-two decision dated December 22, 2009, the employing establishment denied appellant's September 3, 2009 EEO complaint, finding no violations of any provisions in a union contract.

In a February 1, 2010 e-mail, Teleah Hayes, an employee, advised appellant that she overheard a conversation in which Ms. Hollins discussed appellant's work ethics with an employee. Ms. Hollins stated that on January 28, 2010 appellant sat at her desk and did nothing. Appellant only submitted a small stack of files when she should have turned in more work. Ms. Hollins stated that Rachel Guerrero, an employee, and Ms. Vick could perform all the work that needed to be performed in the office. She discussed a conversation between appellant and Ms. Guerro which upset Ms. Guerro.

In a June 7, 2010 letter, Ms. Clark stated that she transferred to another section in the employing establishment due to hostile treatment she received from Ms. Flores and Ms. Hollins. She witnessed these women harass appellant on several occasions. They had daily meetings with only her. Ms. Hollins disclosed confidential information about the work performance of

appellant and other employees. Ms. Clark heard Ms. Hollins and/or Ms. Flores talk loudly or yell at appellant about her work performance. She believed that they did not like appellant and punished her in any possible manner.

In a June 9, 2010 letter, Rhonda L. Pettitt, an employee, stated that on at least three occasions appellant vented to her about being harassed at work. In one of these incidents appellant was reduced to tears and had to go to the restroom to pull herself together before talking to a union representative. Other times she was on the verge of tears, but was able to calm down and return to her desk.

In a February 24, 2010 memorandum, Betty A. Lopez, the EEO program manager, stated that she reviewed interviews of Ms. Hollins, Ms. Flores and other employees which were conducted by James E. Varsalone, an EEO investigator, in response to appellant's September 10, 2009 harassment complaint. She determined that the evidence did not demonstrate that Ms. Hollins had violated the employing establishment's harassment policy.

Medical records dated March 29 through April 15, 2010, found that appellant had a stress-induced musculoskeletal injury, carpal tunnel syndrome and cervical spondylosis.

In a May 26, 2010 decision, OWCP denied appellant's claim. It found that the factual evidence was insufficient to establish that the incidents occurred as alleged. OWCP also found that the medical evidence failed to establish that appellant sustained a medical condition causally related to the alleged employment factors.

On June 29, 2010 appellant requested a telephone hearing before an OWCP hearing representative.

Medical records dated June 7 through October 15, 2010, advised that appellant had chronic post-traumatic stress disorder and depression due to harassment, a hostile work environment and retaliation.

In a December 27, 2010 decision, an OWCP hearing representative affirmed the May 26, 2010 decision. The hearing representative found that appellant failed to establish any compensable employment factors.

LEGAL PRECEDENT

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her federal employment.⁴ To establish that 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 her condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder;

⁴ *Pamela R. Rice*, 38 ECAB 838 (1987).

and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.⁵

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.⁶ 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.⁷

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.⁸ 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.⁹ 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.¹⁰

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.¹¹ 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.¹²

⁵ See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

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

⁷ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁸ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

⁹ See *William H. Fortner*, 49 ECAB 324 (1998).

¹⁰ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹¹ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹² *Id.*

ANALYSIS

Appellant alleged that she sustained an emotional condition due to several incidents at the employing establishment. Primarily, she alleged instances of harassment and unfair treatment by her coworkers, Ms. Flores and Ms. Hollins. OWCP denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA. The Board notes that appellant's allegations do not pertain to her regularly or specially assigned duties under *Cutler*.¹³ Rather appellant has alleged harassment and unfair treatment or error and abuse by her supervisors in administrative matters.

Appellant contended that Ms. Flores and Ms. Hollins created a hostile work environment by subjecting her to harassment and verbal abuse. She contended that Ms. Hollins snatched papers from her hands and yelled at her on July 8, 2009. Appellant also contended that on August 20, 2009 Ms. Hollins yelled at her when she denied performing her assignments incorrectly. On September 17, 2009 Ms. Flores asked her to look for a file in an employee's area and cabinet. Appellant alleged that on October 6, 2009 she overheard Ms. Hollins gossiping on the telephone with Ms. Flores about her interview with Ms. Brandon. She contended that Ms. Hollins and Ms. Flores unjustifiably accused her of incorrectly performing her work duties and failing to complete her assignments. Appellant stated that they sent her unnecessary, hateful and rude e-mails from July 16, 2009 to April 13, 2010 regarding her work performance. She asserted that Ms. Hollins slapped her work down on her keyboard. Appellant further asserted that during training in San Francisco, California from June 8 through 12, 2009, Ms. Hollins reacted angrily and mean towards her when she questioned Ms. Ebbeson about a survey process. She alleged that on May 15, 2009 Ms. Flores unfairly instructed her to submit a leave slip for an extended lunch break while no other employees in the same situation were asked to submit a leave slip. Appellant contended that Ms. Hollins and Ms. Flores unjustifiably reviewed her work twice a day from July 7 to September 2, 2009 until 90 percent of her work did not contain any errors. She asserted that Ms. Flores never responded to her question about whether she had met her goal upon completion of the review period. Appellant filed an EEO complaint alleging harassment by Ms. Hollins and Ms. Flores.

Appellant's contentions regarding Ms. Hollins' request for a leave slip,¹⁴ the assignment¹⁵ and monitoring of her work by Ms. Flores and Ms. Hollins¹⁶ and filing of an EEO complaint alleging harassment¹⁷ are administrative matters and not compensable absent a showing of error or abuse on the part of the employing establishment. Although she has alleged error or abuse by her coworkers, she did not submit any probative evidence establishing error or

¹³ *Cutler*, *supra* note 6.

¹⁴ *John Polito*, 50 ECAB 347, 348 (1999).

¹⁵ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

¹⁶ *See Lori A. Facey*, 55 ECAB 217, 224 (2004).

¹⁷ *Michael A. Salvato*, 53 ECB 666, 668 (2002).

abuse regarding the above-noted administrative matters. Ms. Flores explained that appellant's work performance was monitored because it did not meet management's expectations and her performance standards. She stated that appellant had difficulty performing surveys under the Davis-Bacon program for which she received training. Ms. Flores also stated that she incorrectly performed her work assignments which were regularly returned to her due to repetitive errors and she completed her assignments in an untimely manner. She related that the review sessions she and Ms. Hollins had with appellant twice a day provided her with refresher training and instructions for performing her surveys. Ms. Flores counseled her on several occasions for abusing leave and inappropriately using the internet during work hours. She stated that appellant received a minimally satisfactory performance appraisal in October 2009 due to deficiencies in her work performance. The Board notes that the counseling sessions¹⁸ and performance appraisal¹⁹ are administrative matters and appellant has not submitted any probative evidence establishing error or abuse regarding these matters. Further, Ms. Flores and Ms. Lopez stated that the investigation of appellant's September 3, 2009 harassment complaint by the employing establishment's EEO office revealed that there was no violation of law, regulation, policy or union by the employing establishment. Appellant did not submit a final EEO decision. While she submitted a December 22, 2009 step two decision, there was no finding that the employing establishment committed error or abuse. The Board finds, therefore, that appellant has failed to establish a compensable employment factor with regard to the above-noted administrative and personnel matters.

To the extent that incidents alleged as constituting harassment by a coworker are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors. However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.²⁰ An employee's charges that he or she was harassed or discriminated against, is not determinative of whether or not harassment or discrimination occurred.²¹ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.²² The factual evidence fails to support appellant's claim for harassment. The record does not support her allegation that she was harassed. Appellant stated that the July 8, 2009 incident was witnessed by Ms. Flores and the October 6, 2009 incident was witnessed by Ms. Vick, Ms. Clark and Ms. Rendon, but she did not submit a statement from any of these individuals describing the incidents as alleged. While Ms. Lewis noted incidents involving appellant's reaction to being harassed at work, she failed to provide any specific details and dates of these incidents. The Board finds that her statement does not constitute sufficient evidence of harassment on the part of the employing establishment. Similarly, Ms. Hayes' statement that she overheard negative comments made by Ms. Hollins to

¹⁸ *Barbara E. Hamm*, 45 ECAB 843 (1994); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

¹⁹ *David C. Lindsey, Jr.*, 56 ECAB 263, 271-72 (2005).

²⁰ *Lorraine E. Schroeder*, 44 ECAB 323 (1992).

²¹ *See William P. George*, 43 ECAB 1159 (1992).

²² *See Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

an employee regarding appellant's work performance is of a general nature and, therefore, is also insufficient to establish harassment on the part of the employing establishment. Ms. Flores denied that appellant was subjected to a hostile work environment based on the finding of the employing establishment EEO office that no harassment law, regulation or policy had been violated and her allegations were false.

Regarding appellant's allegation that she was verbally abused by Ms. Hollins, the Board has generally held that being spoken to in a raised or harsh voice does not of itself constitute verbal abuse or harassment.²³ In the instances she described above, the Board notes that the fact that Ms. Hollins yelled at her on July 8 and August 20, 2009 regarding her poor work performance in a raised tone of voice is insufficient, by itself, to warrant a finding that her actions amounted to verbal abuse as she did not show how such a response would rise to the level of verbal abuse or otherwise fall within the coverage of FECA.²⁴ Although appellant asserted that she was in tears following the August 20, 2009 incident and talked to Ms. Clark and another employee about the incident, the record is devoid of any statement from these witnesses corroborating her version of this incident. Ms. Clark stated in a June 7, 2010 letter, that she heard Ms. Hollins and Ms. Flores talk loudly or yell at appellant about her work performance. She also stated that she witnessed these women harass her on several occasions. However, these statements are insufficient as they are general perceptions made by Ms. Clark without describing in detail specific incidents. Her statements merely note that she has witnessed the described behavior by Ms. Hollins and Ms. Flores. No mention is made of when or where appellant was allegedly subjected to this behavior. Moreover, Ms. Clark's allegation that she transferred to another section due to the hostile behavior of Ms. Flores and Ms. Hollins does not establish that appellant was subjected to the same harassment and hostile behavior. Ms. Flores denied that appellant was verbally abused. The Board finds that appellant has not met her burden of proof to establish verbal abuse.

On appeal, appellant contended that the evidence of record is sufficient to establish that she sustained an emotional condition in the performance of duty. For reasons noted, the Board finds that she has not established a compensable employment factor giving rise to her claimed emotional condition. Therefore, appellant did not meet her burden of proof.²⁵

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has failed to establish that she sustained an emotional condition in the performance of duty, as alleged.

²³ *T.G.*, 58 ECAB 189 (2006).

²⁴ *Peter D. Butt, Jr.*, 56 ECAB 117 (2004).

²⁵ As appellant has not substantiated a compensable factor of employment as the cause of his emotional condition, the medical evidence regarding his emotional condition need not be addressed. *Karen K. Levene*, 54 ECAB 671 (2003).

ORDER

IT IS HEREBY ORDERED THAT the December 27, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 12, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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