

hostile work environment. On September 14, 2005 she became aware of her claimed condition and its relationship to work factors. Appellant stopped work on October 3, 2005 and did not return. In an accompanying statement, she alleged that she sustained stress because the employing establishment advised her that it would not look into her claim that her supervisor in the public affairs office, Captain Lisa Kopczynski, made racist comments and subjected her to discriminatory actions. Appellant asserted that the employer wrongly failed to give credence to witness statements from her coworkers, Peggy Hertel and Michelle Gray, regarding comments made by Captain Kopczynski.²

Appellant submitted a January 6, 2004 statement in which she alleged that Major Rex Sohn sexually harassed her by propositioning her and making unwanted comments about her appearance.³ She claimed that Major Sohn made offensive comments to her about slavery and called her obscene names.

In a June 15, 2005 signed statement, appellant indicated that, about two weeks after the June 2004 hiring of Floretta Sultzer in the public affairs office, appellant was advised by the former secretary, Ms. Hertel, that appellant should watch her back because after Captain Kopczynski “was informed of her new black secretary,” she stated that “she did not want an office full of blacks.” Appellant stated that she did not mention this to anyone at the time. She asserted that Captain Kopczynski unfairly disciplined Lieutenant Eugene Maharry, a coworker in the public affairs office. Captain Kopczynski wrote up Lieutenant Maharry for infractions while failing to discipline others who committed the same infractions and she spoke to him in a loud and argumentative manner. Appellant asserted that Captain Kopczynski improperly replaced two pages of a magazine after the publication was completed, failed to place her in charge of all community relations requests as recommended by another superior, revamped Ms. Sultzer’s position description inappropriately and improperly started a new filing system for Ms. Sultzer.

Appellant also submitted a memorandum for record containing entries for different dates. An August 24, 2005 entry detailed her recollection of a conversation Captain Kopczynski had with her and Ms. Sultzer on that date. The conversation became “heated” when they discussed the activity schedule of the Adjutant General and stated that she and Captain Kopczynski both raised their voices. Appellant asserted that on August 26, 2005 she submitted a draft of a Governor’s weekly report but that Captain Kopczynski did not give her a chance to edit the report before it was finalized. She claimed that Captain Kopczynski refused her request for help in gathering appropriate information for the Governor’s weekly report. On August 30, 2005 appellant and Captain Kopczynski apologized to each other about the August 26, 2005 incident. She claimed that on August 30, 2005 Captain Kopczynski expressed anger regarding statements appellant made about her in the course of an investigation into a claim by Lieutenant Maharry that Captain Kopczynski harassed him. The two had a conversation, lasting two and a half hours, during which Captain Kopczynski stated her belief that the investigation could ruin her

² Appellant also asserted that superiors made racist comments to her and coworkers in 1986 and 1992, but she did not indicate that these claimed events contributed to her current emotional condition.

³ The copy of the statement in the record is not signed. Appellant did not identify the dates of alleged harassment other than to indicate that the harassment started during Major Sohn’s first week of employment.

career and expressed displeasure with having to deal with incompetent workers. Appellant indicated that Captain Kopczynski had someone outside the public affairs office edit the Indiana Guardsman magazine even though there were employees within the office who were competent to perform this task.

In a December 14, 2005 report, Dr. Gregory Correll, Ph.D., an attending clinical psychologist, examined appellant. He stated that she reported that her current stressors were related to racial stressors in that a coworker informed her that a supervisor had stated “no office full of blacks” would be tolerated. Appellant related that, within the past year, she was sexually harassed by a superior who made several unwanted advances. Dr. Correll noted that her history was notable for a prior sexual assault in 1993 by two racist white men who wanted to “make an example” of her. He stated that appellant had symptoms suggestive of post-traumatic stress disorder after the incident, but stated that she seemed to have coped with the prior trauma and was functioning at a fairly high level at work. Dr. Correll diagnosed post-traumatic stress disorder (chronic with recent exacerbation), recurrent major depressive disorder and severe workplace stressors. He recommended that appellant be off work until her symptoms were under greater control and stated that the post-traumatic stress disorder was secondary to the 1993 assault. Dr. Correll noted:

“However, it is also clear that her symptoms were fairly well controlled prior to the significant workplace stressors that she has experienced over the past several months. This seems to have exacerbated her stress disorder and has increased her symptoms of nightmares, flashbacks, anorexia, depression, anxiety and increased her hypervigilance.”⁴

In a March 27, 2006 letter, Captain Kopczynski stated that she did not become appellant’s immediate supervisor until March 1, 2005. She asserted that appellant had numerous nonwork-related stressors during the time she supervised her, including caring for her ill mother. Captain Kopczynski noted that appellant’s allegations of discrimination were not substantiated by an investigation.

In a June 13, 2006 decision, OWCP denied appellant’s claim on the grounds that she did not establish any compensable work factors. It found that appellant failed to submit evidence showing that the agency subjected her to harassment, discrimination or error and abuse with respect to administrative matters.

On June 20, 2006 appellant requested a hearing before an OWCP hearing representative. She indicated that the harassment by Major Sohn started in August 2003 and that, despite her complaints to management, he was not suspended from duty until January 6, 2004 after an officer’s wife complained about him. Appellant stated that a coworker, Ms. Gray, told appellant that she overheard Captain Kopczynski commenting to another coworker, Captain Heather Hirst,

⁴ In an October 20, 2005 note, Dr. Thomas W. Elkas, an attending Board-certified internist, diagnosed anxiety and depression “stemming from work stressors.” In an April 5, 2006 report, Dr. Correll indicated that it would be detrimental to appellant’s mental health to return to work.

that she did not want an office full of blacks.⁵ She asserted that Captain Kopczynski was also angry with her when they discussed a complaint filed by Lieutenant Maharry and when appellant questioned Captain Kopczynski's treatment of Lieutenant Maharry and Ms. Sultzer. Appellant feared Captain Kopczynski would retaliate against her for making a statement in Lieutenant Maharry's complaint. She became upset on October 3, 2005 because the person who was chosen to mediate the complaint by Lieutenant Maharry against Captain Kopczynski did not understand the case. Appellant stated that she began to have flashbacks of her 1993 assault and felt that she had to leave the office. She also became upset on October 3, 2005 because she had learned that Captain Kopczynski would not be investigated for the racial statement she had made and because she would remain in her usual position.

In a June 20, 2005 memorandum, Ms. Sultzer discussed her working relationship with Captain Kopczynski and asserted that she did not receive adequate support to carry out her duties. In a June 20, 2006 memorandum, she asserted that Captain Kopczynski harassed appellant regarding the scheduling of flyovers, including contradicting her when the topic was discussed. On one occasion, Captain Kopczynski approached appellant in an abrupt manner and appellant had to step backwards. Ms. Sultzer noted that on October 3, 2005 Colonel Cathi Kiger asked her to tell appellant to "come down to [human resources]" because Captain Kopczynski was there. She stated that appellant "totally lost it" when she found out that Captain Kopczynski was in the human resources office.

In an April 5, 2006 letter, Colonel Kiger, a human resources officer, stated that an investigation of Captain Kopczynski did not establish instances of racism, but did show that she needed additional supervisor and communications training. She went to the agency Chief of Staff and recommended that alternative dispute resolution or intervention be used in Captain Kopczynski's case. Colonel Kiger noted that the Chief of Staff advised her that Captain Kopczynski had already cleaned out her office and was about to move to a new office. The Chief of Staff then convinced the Adjutant General to agree to hold a mediation. Colonel Kiger stated that on October 3, 2005 she advised appellant about "what we were going to do" with respect to the course of action to be taken with Captain Kopczynski. Appellant told Captain Kopczynski that she was upset about her mother's illness and "stuff going on" in the office. She believed that, regarding racial allegations against Captain Kopczynski, management was "sweeping this under the rug." Colonel Kiger advised appellant that the investigation of Captain Kopczynski found no racism and appellant responded that she thought something must have been proven as she noticed that Captain Kopczynski had cleaned out her office. When appellant entered the room where the mediation session was to be held, she became upset when she saw Captain Kopczynski and immediately left the room.

In a June 19, 2006 statement, Ms. Gray stated that in late summer or early autumn 2004 she went to the public affairs office and heard Captain Kopczynski and Captain Hirst talking behind a closed door. She asserted that neither person was aware of her presence and that she heard Captain Kopczynski state, "I had no say in the selection of individuals in my office and I sure did n[o]t want an office full of blacks in here." Ms. Gray indicated that she reported what

⁵ Appellant indicated that it was in June 2004 when Ms. Hertel also stated to her that Captain Kopczynski had made the comment about not wanting an office full of blacks.

she heard to her supervisor, but she was told to “not stir the pot” because the public affairs office seemed to be working as a team. In a June 22, 2006 statement, Ms. Hertel indicated that she was told by an unspecified individual that Captain Kopczynski had stated that she did not want an office full of blacks (using a derogatory word). She then told appellant to watch her back with respect to Captain Kopczynski.

At the March 6, 2007 hearing, appellant provided additional testimony about her claimed stressors, including the actions of Captain Kopczynski and the events of October 3, 2005. She testified that on October 3, 2005 Colonel Kiger told her and Ms. Sultzer that they had to participate in a mediation session with Captain Kopczynski regarding a claim filed by Lieutenant Maharry. Appellant indicated that prior to returning to work on October 3, 2005, after a period of absence, she had been led to believe that Captain Kopczynski would no longer be her supervisor. She was surprised and upset on October 3, 2005 when she learned that Captain Kopczynski remained her supervisor.

In a May 4, 2007 decision, an OWCP hearing representative set aside OWCP’s June 13, 2006 decision and remanded the case for further evidentiary development. OWCP was directed to obtain additional documents regarding the charges of harassment against Major Sohn.

Thereafter, OWCP requested additional agency comments. In a May 19, 2007 statement, Lieutenant Colonel Theodore Blanford, an equal employment adviser, noted that appellant did not file a formal complaint against Major Sohn, but noted that she spoke to Lieutenant Colonel Norman Purdue about the matter. He indicated that Major Sohn was terminated effective February 20, 2004 and, although confidentiality prevented revealing the reason, it occurred shortly after appellant made her allegations.

In August 17 and 27, 2007 letters, Lieutenant Colonel Brian Dickerson, a staff judge advocate at the agency, noted that statements of retired Lieutenant Colonel Purdue and Lieutenant Colonel Lawrence Powers detailed the circumstances of the charges made against Major Sohn. In an August 18, 2007 statement, Lieutenant Colonel Purdue stated that in October or November 2003 he was appointed to investigate charges against Major Sohn for sexual harassment and creating a hostile work environment. Lieutenant Colonel Purdue indicated that he interviewed appellant during the investigation and that the allegations of sexual harassment and creating a hostile work environment were substantiated. Shortly thereafter, Major Sohn was removed from his assignment. In an August 22, 2007 statement, Lieutenant Colonel Powers stated that appellant told him that Major Sohn made unwanted sexual advances to her. He formally interviewed her and others and concluded that Major Sohn was engaging in unacceptable behavior in the workplace. Lieutenant Colonel Powers informed Major Sohn that he was terminated from the agency.

In an August 31, 2007 decision, OWCP denied appellant’s emotional condition claim on the grounds that she did not establish any compensable work factors. It found that she had not established her claims against Major Sohn.

On October 18, 2007 appellant’s counsel further discussed the stresses caused by appellant’s participation in Lieutenant Maharry’s complaint against Captain Kopczynski. Counsel alleged that on October 3, 2005 appellant was ordered to participate in a mediation

session concerning Lieutenant Maharry's complaint and asserted that her reaction to this situation was a reaction to an assigned duty. He claimed that OWCP did not properly consider the statements of Lieutenant Colonel Purdue and Lieutenant Colonel Powers.

In a May 29, 2008 order, the Board set aside OWCP's August 31, 2007 decision and remanded the case for further adjudication. The Board found that OWCP did not adequately consider the statements of Lieutenant Colonel Powers and Lieutenant Colonel Purdue.⁶

On September 10, 2008 OWCP accepted that appellant sustained an aggravation of preexisting post-traumatic stress disorder and an aggravation of preexisting single episode of major depression, unspecified. In a September 10, 2008 memorandum, it found indicated that the evidence established that Major Sohn subjected her to a hostile work environment and noted that the December 14, 2005 report of Dr. Correll supported the acceptance of her claim for aggravation of post-traumatic stress disorder and depression. Appellant received compensation for total disability.

In a September 25, 2008 form report, Dr. Correll listed the date of injury as October 3, 2005 and the history of injury as "severe workplace stressors." He diagnosed post-traumatic stress disorder and major depressive disorder and indicated that appellant was not fit for work from October 3, 2005 to April 7, 2006. Dr. Correll checked a "yes" box indicating that the diagnosed conditions were caused or aggravated by employment activity and stated, "Sexual harassment, discrimination resulting in untenable conditions."

Appellant was hospitalized on April 2, 2009. The record contains medical notes from her hospitalization, most by Dr. Maria Valena, an attending Board-certified psychiatrist. Appellant reported dealing with issues related to her 1993 sexual assault.⁷ In an April 5, 2009 report, Dr. Valena provided appellant's description of the 1993 sexual assault and noted that she reported workplace sexual and racial harassment episodes in 2004 and 2005. Appellant advised that an investigation found a hostile environment with respect to sexual harassment and racial discrimination, but that her offending supervisor remained in her position and continued to harass her, including labeling her as the instigator of the investigation. Dr. Valena diagnosed major depressive disorder (severe without psychotic features), post-traumatic stress disorder, panic disorder with beginning signs of agoraphobia and severe to catastrophic psychological stressors (including the 1993 sexual assault and a feeling of having been traumatized in the workplace).

In a report of evaluations conducted on April 20 and 21, 2009, Dr. William Hilgendorf, Ph.D., an attending clinical psychologist, noted that appellant was hospitalized on April 2, 2009 with diagnoses of major depressive disorder, panic attacks and post-traumatic stress disorder. Dr. Hilgendorf indicated that appellant reported that her main problem related to symptoms of post-traumatic stress disorder, which stemmed from a sexual assault in 1993, which did not result

⁶ Docket No. 08-197 (issued May 29, 2008).

⁷ In a note dated April 2, 2009, Dr. Valena indicated that appellant reported that in 2005 her agency was being investigated for allegations of sexual harassment and racial discrimination and that this investigation brought on flashback episodes of the 1993 assault.

in conviction of the two perpetrators. Appellant indicated that the symptoms resurfaced in 2005 due to a feeling of being revictimized by sexual harassment and racial discrimination at work. Dr. Hilgendorf reported the findings of psychological testing he performed and indicated that the findings were compatible with post-traumatic stress disorder, major depressive disorder and severe somatic preoccupation associated with worry and even panic.

In April 2009, OWCP referred appellant to Dr. Dennis Rhyne, a Board-certified psychiatrist.⁸ In a May 7, 2009 report, Dr. Rhyne stated that appellant advised him that, during the course of her employment, she was sexually harassed but this was ignored after it was reported to her supervisors. Appellant also reported that a superior commented that she would not “tolerate an office full of blacks” and that “the allegations during the course of her employment” brought back thoughts of her 1993 sexual assault. Dr. Rhyne diagnosed chronic post-traumatic stress disorder and a major depressive disorder and indicated that she had profound stressors, including sexual assault and sexual harassment. He determined that appellant could not perform any work-related duties and stated:

“It is my impression and opinion at this time that a psychological condition due to the work-related incident on October 3, 2005 continues and that in all medical probability there was a permanent aggravation. It is my impression and opinion that [appellant] continues to suffer from an emotional condition due to identified stressors, issues of past trauma of sexual abuse at the hands of rapists and then followed by sexual harassment in the workplace. It is my medical opinion that due to the fact that sexual harassment was a part of the incident of October 3, 2005 as well as the racial nature of the previous attack and the allegations of October 3, 2005, combined to make a sexual as well as a racial trauma from which [appellant] continues to suffer.”⁹

In March 2010, OWCP referred appellant to Dr. Umamaheshwara Kalapatapu, a Board-certified psychiatrist, for an examination and evaluation of the nature and extent of her psychiatric condition. In a revised statement of accepted facts, dated March 10, 2010, it accepted that work factors occurred when, between August and December 2003, Major Sohn repeatedly subjected appellant to sexual advances and derogatory statements. OWCP denied the other work factors claimed by appellant but did not explain why it denied these claimed work factors.

In an April 9, 2010 report, Dr. Kalapatapu indicated that appellant reported that she was asked to participate in a mediation session concerning a charge of racism by a coworker against her supervisor, but that she could not participate because it reminded her of a 1993 sexual assault by two racist white men. Appellant later learned that her supervisor had been reinstated to her former job and, on about October 3, 2005, she felt that the work environment was too hostile for her to continue working. Dr. Kalapatapu described the interview he conducted with her and diagnosed post-traumatic stress disorder, recurrent episode of major depressive disorder (severe,

⁸ Dr. Rhyne was provided a statement of accepted facts but the statement did not contain a detailed description of which of the incidents and conditions described by appellant constituted compensable work factors.

⁹ In a May 14, 2009 form report, Dr. Rhyne stated that appellant had continued symptoms of depression and post-traumatic stress disorder which prevented employment.

without mention of psychotic behavior) and generalized anxiety disorder. He noted that appellant had a history of post-traumatic stress disorder and she later reported that conditions at work reminded her of “past abuse issues.” Appellant had been unable to resolve her symptoms of emotional pain since 2005 and was totally disabled. Dr. Kalapatapu indicated that her impairment was total and permanent and was likely to continue indefinitely. He completed a work capacity evaluation form indicating that appellant was totally disabled.

OWCP requested that Dr. Kalapatapu clarify his report to address whether he felt that appellant’s exposure to harassment by Major Sohn in 2003 contributed to her emotional condition. In a June 4, 2010 letter, Dr. Kalapatapu stated that she reported to him a number of instances between August and December 2003 when Major Sohn sexually harassed her. Appellant indicated that Major Sohn’s actions made her scared and created a stressful work environment, but that she did not “break down.” She further noted that two others provided statements about Major Sohn’s actions, but that only her name was brought up when he was fired in January 2004. Dr. Kalapatapu stated, “Based on the above information, this writer does not believe that the issues have any major impact on her current disability.”

OWCP again requested clarification from Dr. Kalapatapu about the possible effect of the harassment from 2003 and on September 3, 2010, he stated:

“The incident of 2003 may have caused a mild adjustment disorder with mixed emotions for [appellant]. However, she did not report any triggering and reexperiencing any previous traumatic events of her life. When the Major was dismissed from the job, it appears that her adjustment disorder resolved.... As the 2003 incident did not remind [appellant] of any of the [post-traumatic stress disorder] symptoms [appellant] experienced in her life, this writer does not believe that it has any impact on her current disability. This writer also does not believe that the exposure in 2003 caused or contributed in any way to her deterioration in 2005 as [she] had not reported any impact on her mental status in 2003.”

In a December 14, 2010 letter, OWCP advised appellant that it proposed to rescind its acceptance of her emotional condition claim. It noted that it had been accepted that, work factors occurred when, between August and December 2003, Major Sohn subjected her to sexual advances and derogatory statements. OWCP discussed why it did not accept that other claimed work factors occurred in the performance of duty. These included appellant’s claims that Captain Kopczynski replaced two pages of a magazine after the publication was completed, failed to place her in charge of all community relations requests as recommended by another superior, wrote up Lieutenant Maharry for infractions while failing to discipline others who committed the same infractions and spoke loudly and argumentatively to Lieutenant Maharry. Appellant had also claimed that Captain Kopczynski refused her request for help in gathering appropriate information for the Governor’s weekly report, inappropriately revamped Ms. Sultzer’s position description, improperly started a new filing system and had someone outside the public affairs office edit the Indiana Guardsman magazine. OWCP explained that these claimed incidents and conditions all related administrative or personnel matters and appellant had not submitted sufficient evidence, such as the findings of complaints filed against the agency, to establish that the agency committed error or abuse in these matters.

In the proposed rescission, OWCP also found that appellant had not proven harassment or discrimination by Captain Kopczynski. It noted that she alleged that she was informed by coworkers that Captain Kopczynski commented that she “did not want an office full of blacks,” but found that the evidence did not show that appellant actually heard Captain Kopczynski make this statement such that the statement was not directed to her or overheard by her. OWCP noted that, while appellant might have been privy to this information as a third party, there was insufficient evidence to show that Captain Kopczynski made the derogatory statements in her presence and the exposure itself was not established. It indicated that appellant became upset with the agency’s finding that charges of racism against Captain Kopczynski were not supported and that she feared that Captain Kopczynski would target her for removal, but it found that there was no evidence that the agency erred in conducting the investigation and that appellant’s fear of losing her job was not a compensable factor. OWCP noted that, on October 3, 2005, appellant was upset that Captain Kopczynski would remain in her position and that she and Ms. Sultzer would have to participate in a mediation session with Captain Kopczynski, but it found that appellant’s participation in the mediation session was voluntary and that the agency did not err in handling this situation.

OWCP’s proposed rescission found that the medical evidence did not show that appellant had an emotional condition due to the accepted work factor, the harassment by Major Sohn in 2003. While Dr. Correll and Dr. Rhyne, suggested that the harassment by Major Sohn contributed to appellant’s condition in 2005, OWCP found that these opinions were not based on an accurate medical history as the physicians erroneously believed that the harassment occurred close in time to October 3, 2005 rather than late 2003. OWCP found that the weight of the medical opinion evidence rested with the opinion of OWCP’s referral physician, Dr. Kalapatapu, who found that appellant’s exposure to sexual harassment in 2003 did not contribute to her medical condition in 2005. It found that the medical evidence of record did not show that she sustained an emotional condition due to the only accepted work factors, *i.e.*, the incidents of harassment by Major Sohn in 2003 and therefore there was no basis to find that she sustained a work-related emotional condition.

In an undated letter received on January 10, 2011, appellant’s counsel argued that appellant did not become totally disabled on October 3, 2005 due to the harassment by Major Sohn in 2003, but rather she became disabled on that date because she and Ms. Sultzer were ordered to attend a mediation session with an allegedly racist supervisor, Captain Kopczynski. The order to participate in the mediation session caused appellant to have flashbacks to her 1993 assault. Counsel stated that, after she objected to the mediation session, Colonel Kiger ordered her to attend. He indicated that Dr. Rhyne’s opinion showed that appellant sustained a medical condition due to the events of 2005. Counsel alleged that OWCP did not present new evidence and argument to support the proposed rescission action.

In a February 28, 2011 decision, OWCP rescinded its acceptance of appellant’s emotional condition claim. It found that agency error or abuse was not shown regarding the request for appellant to participate in the mediation session on October 3, 2005 or other administrative matters. Appellant also had not shown harassment or discrimination by Captain Kopczynski. OWCP stated that it presented sufficient new argument and evidence, including the opinion of Dr. Kalapatapu, to support the rescission of its acceptance of appellant’s claim.

LEGAL PRECEDENT

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.¹⁰ The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.¹¹ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.¹²

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, OWCP later decides that it erroneously accepted a claim. In establishing that, its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.¹³

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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.¹⁴ 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.¹⁵

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.¹⁶ 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.¹⁷

¹⁰ 5 U.S.C. § 8128.

¹¹ *John W. Graves*, 52 ECAB 160, 161 (2000).

¹² *See* 20 C.F.R. § 10.610.

¹³ *John W. Graves*, *supra* note 11.

¹⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁵ *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹⁶ *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹⁷ *William H. Former*, 49 ECAB 324 (1998).

In determining whether the employer has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹⁸

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors or coworkers are established as occurring and arising from an employee's performance of her regular duties, these could constitute employment factors.¹⁹ However, 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. Mere perceptions of harassment or discrimination are not compensable under FECA.²⁰

An employee 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 employment factors.²¹ This burden includes the submission of a detailed description of the employment factors or conditions which she believes caused or adversely affected a condition for which compensation is claimed and a rationalized medical opinion relating the claimed condition to compensable employment factors.²² 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.²³ Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable certainty and must be supported by medial rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.²⁴

ANALYSIS

In October 2005, appellant claimed that she sustained an emotional condition due to various incidents and conditions at work. On September 10, 2008 OWCP accepted that she sustained an aggravation of preexisting post-traumatic stress disorder and an aggravation of preexisting single episode of major depression. Its only accepted work factor pertained to Major Sohn, a superior, who repeatedly subjected her to sexual advances and derogatory statements between August and December 2003. In a February 28, 2011 decision, OWCP rescinded its acceptance of her claim. It explained that it accepted the incidents of harassment by Major Sohn

¹⁸ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

²⁰ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

²¹ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

²² *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

²³ *Id.*

²⁴ *I.J.*, 59 ECAB 408 (2008).

between August and December 2003; but found that appellant's claim for a work-related emotional condition had not been established because the record did not contain a rationalized medical opinion relating her claimed medical conditions to the accepted work factor.

The Board finds that OWCP, in its December 14, 2010 proposed rescission letter and its February 28, 2011 rescission decision, provided a clear explanation of the rationale for its decision to rescind its acceptance of appellant's claim for an emotional condition. OWCP provided sufficient evidence and argument to justify its determination in this regard.

The Board notes that OWCP properly found that appellant's allegations did not pertain to her regular or specially assigned duties under *Cutler*.²⁵ Rather, appellant alleged error and abuse in administrative matters and harassment and discrimination on the part of a manager. The Board finds that OWCP was correct in accepting that work factors occurred when, between August and December 2003, Major Sohn repeatedly subjected appellant to sexual advances and derogatory statements. The record contains statements which support this finding, including those of Lieutenant Colonel Powers and Lieutenant Colonel Purdue, two individuals who investigated this matter.

The Board finds that OWCP adequately explained why it did not accept any of appellant's other claimed work factors. OWCP discussed claims that her supervisor, Captain Kopczynski, improperly replaced two pages of a magazine after the publication was completed, failed to place her in charge of all community relations requests as recommended by another superior, wrote up Lieutenant Maharry, a coworker, for infractions while failing to discipline others for the same infractions and loudly and argumentatively spoke to Lieutenant Maharry. Appellant also claimed that Captain Kopczynski refused her request for assistance regarding the Governor's weekly report, submitted a Governor's weekly report without giving her a chance to make final edits, inappropriately revamped Ms. Sultzer's position description, improperly instituted a new filing system and had someone outside the public affairs office edit the Indiana Guardsman magazine. OWCP properly explained that these claimed incidents and conditions were all related to administrative matters, mostly relating to Captain Kopczynski's management of work assignments and that appellant had not submitted sufficient evidence to establish error or abuse by Captain Kopczynski in these matters.²⁶ Appellant did not submit the findings of complaints or grievances which showed that Captain Kopczynski committed wrongdoing with respect to these matters. In addition, a number of these claimed work factors relate to Captain Kopczynski's actions towards coworkers and therefore appellant would not have a basis to assert that they constituted work factors with respect to her own claim.

OWCP also indicated that, on October 3, 2005, appellant was upset that she and Ms. Sultzer had to participate in a mediation session with Captain Kopczynski. On appeal, counsel argued that appellant was required to participate in this mediation and therefore this was a work factor because her participation in the mediation was a regular or specially assigned duty under the *Cutler* line of cases. However, OWCP properly pointed out that there was no clear evidence in the record that she was compelled to participate in the mediation session and, in fact,

²⁵ See *Cutler*, *supra* note 14.

²⁶ See *supra* notes 16 through 18.

she did not actually participate in it. It also explained that the mediation was part of an investigatory action and noted that there was no evidence that the agency committed error or abuse in this administrative action. OWCP properly noted that participation in such an administrative action could not be characterized as a regularly or specially assigned duty.

OWCP also properly found that appellant had not shown that she was harassed or discriminated against by Captain Kopczynski. While appellant alleged being informed by coworkers that Captain Kopczynski commented that she “did not want an office full of blacks,” OWCP found that the evidence did not show that appellant actually heard Captain Kopczynski make this statement. OWCP advised that, while appellant might have been privy to this information as a third party, there was insufficient evidence to show that Captain Kopczynski made the derogatory statements in her presence such that the exposure itself was not established. As noted, a claimant must present probative evidence to support a claim of harassment or discrimination and perceptions of harassment or discrimination are not compensable.²⁷ Appellant did not submit probative evidence that Captain Kopczynski subjected her to harassment or discrimination. OWCP noted that she became upset with the agency’s finding that charges of racism against Captain Kopczynski were not supported and that she feared that Captain Kopczynski would target her for removal, but it found that there was no evidence that the agency erred in its investigation and noted that appellant’s fear of losing her job was not compensable.²⁸

OWCP also discussed the medical evidence and properly found that it did not show that appellant’s emotional condition was due to the only accepted work factors, the harassment incidents by Major Sohn in 2003. It correctly found that there was no well-rationalized medical report explaining how these work factors contributed to the emotional conditions arising in 2005. OWCP noted that, while some physicians suggested that Major Sohn’s harassment contributed to appellant’s medical condition in 2005, these opinions were not based on an accurate medical history as these physicians erroneously believed that the harassment occurred close in time to October 3, 2005 rather than in late 2003. Dr. Correll suggested in a December 14, 2005 report that the sexual harassment by Major Sohn contributed to post-traumatic stress disorder and depression in 2005, but his opinion is of limited probative value as he was under the mistaken impression that this harassment occurred several months prior to October 3, 2005 rather than in late 2003.²⁹ The Board notes that this report was relied upon by OWCP when it accepted appellant’s claim, but that OWCP has adequately explained why the report did not provide a proper basis to accept appellant’s claim. OWCP also explained why later medical reports did not establish the claim. In a May 7, 2009 report, Dr. Rhyne, an OWCP referral physician, stated that sexual harassment was part of the October 3, 2005 incident that contributed to appellant’s condition in 2005. On appeal, counsel argued that Dr. Rhyne supported appellant’s claim, but

²⁷ See *supra* note 20.

²⁸ See *supra* note 14. Ms. Sultzer indicated in a witness statement that Captain Kopczynski harassed appellant regarding the scheduling of flyovers and that, on one occasion, Captain Kopczynski approached appellant in an abrupt manner and appellant had to step backwards. However, appellant did not claim that these incidents contributed to her emotional condition and these incidents have not been established as actually occurring.

²⁹ See *supra* note 24 regarding the need for an opinion of a physician to be based on a complete factual and medical background of the employee.

OWCP pointed out that Dr. Rhyne incorrectly believed that sexual harassment occurred in 2005 and it correctly found that this improper history reduced the probative value of his opinion.³⁰

OWCP also properly explained that the weight of the medical opinion evidence rested with the opinion of Dr. Kalapatapu, a Board-certified psychiatrist serving as an OWCP referral physician, who found that appellant's sexual harassment in 2003 did not contribute to her medical condition in 2005. In a September 3, 2010 report, which clarified his April 9 and June 4, 2010 reports, Dr. Kalapatapu provided an opinion that the sexual harassment by Major Sohn in 2003 did not cause or contribute in any way to appellant's deterioration in 2005.

For these reasons, OWCP adequately explained why it rescinded its acceptance of appellant's claim for an emotional condition. It explained that the medical reports of record did not show that appellant sustained an emotional condition due to the only work factors, *i.e.*, the incidents of harassment by Major Sohn in 2003 and therefore there was no basis to find that appellant sustained a work-related emotional condition.

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 OWCP met its burden of proof to rescind its acceptance of appellant's claim for an emotional condition.

³⁰ OWCP also explained why the reports of Dr. Valena and Dr. Hilgendorf did not show that appellant sustained an emotional condition due to the accepted work factors.

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 17, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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