



## **FACTUAL HISTORY**

On January 13, 2012 appellant, then a 52-year-old compliance investigator, filed a claim alleging that he sustained an emotional condition in the performance of duty. He asserted that he was targeted and harassed by supervisors due to multiple issues, including violations of the No Fear Act and the Whistle Blower Protection Act. Appellant stopped work on December 20, 2011.

In statements dated March 8, 12 and May 27, 2012, appellant discussed the incidents and conditions at work which he believed caused the emotional condition. He alleged Debra Dietz, a Supervisory Compliance Investigator, and James Borda, a Regional Director, violated the Occupational Health and Safety Act of 1970 and other laws regarding the reporting of hazardous conditions at work. Appellant also asserted that Ms. Dietz and Mr. Borda were in violation of the No Fear Act and that, through various means including sending e-mails, Ms. Dietz and Mr. Borda ridiculed him for his actions to protect the safety and welfare of his coworkers. He claimed that Ms. Dietz ridiculed him when she used the word persistent in his OPPS review to discuss his safety issue concerns and that she harassed him when he raised concerns about an unlocked door in the workplace in December 2010.<sup>3</sup> Appellant asserted that he was subjected to harassment and discrimination when he filed a grievance in September 2011 regarding cancelled salary payments in 2006. He claimed that he was harassed by Ms. Dietz and Mr. Borda through e-mails in April 2012 which indicated that he could not have access to his government computer. Appellant also claimed that supervisors improperly assigned investigations to him and that Mr. Borda harassed him about missing a work meeting in December 2011. He claimed that he was wrongly denied advanced sick leave for 161 hours in January 2012. Appellant submitted medical reports discussing the treatment of his emotional problems.

In statements dated January 18, March 28 and June 22, 2012, Ms. Dietz and Mr. Borda denied that appellant was harassed over his safety concerns or filing of grievances. They maintained that the e-mails to which appellant objected contained language appropriate to their supervisory duties and that his performance evaluations were properly produced. Ms. Dietz and Mr. Borda indicated that the unlocked door reported by appellant was addressed in a timely manner. They stated that appellant was granted 79 hours of advanced sick leave but that the personnel office determined that he could not receive further advanced leave. Ms. Dietz and Mr. Borda indicated that e-mails from April 2012 properly advised appellant that he could not have access to his government computer because he was not on duty during that period. They asserted that appellant was properly assigned work duties.

In a July 19, 2012 decision, OWCP denied appellant's emotional condition claim on the grounds that he did not establish any compensable work factors. It found that he did not show that the employing establishment committed error or abuse with respect to administrative matters or that he was subjected to harassment or discrimination.

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<sup>3</sup> The record contains a copy of this OPPS review from November 2011. Appellant also submitted a January 15, 2012 grievance filed against Ms. Dietz claiming that she produced improper performance ratings. However, the record does not contain any final decision for this grievance. Appellant also submitted copies of a number of e-mails, including those sent to him by Ms. Dietz and Mr. Borda, which he considered to be offensive and to constitute harassment.

In an undated letter received on August 17, 2012, appellant requested a review of the written record by an OWCP hearing representative. He provided additional discussion of his claimed work factors. Appellant submitted copies of e-mails sent by management which had previously been addressed by OWCP. He also submitted an August 18, 2011 grievance which he filed against Ms. Dietz because he felt that one of her e-mails unfairly portrayed him as being incapable of communicating with another case specialist. The document does not indicate that a final decision was issued in this matter.

In an October 4, 2012 letter, a case management specialist for the employing establishment argued that appellant had not established that he sustained a work-related emotional condition.

In a November 5, 2012 decision, OWCP's hearing representative affirmed OWCP's July 19, 2012 decision finding that appellant had not established a work-related emotional condition because he had not established any compensable work factors.

### **LEGAL PRECEDENT**

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.<sup>4</sup> 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.<sup>5</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>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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<sup>4</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>5</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

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

<sup>7</sup> *William H. Fortner*, 49 ECAB 324 (1998).

<sup>8</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.<sup>9</sup> 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.<sup>10</sup>

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.<sup>11</sup> This burden includes the submission of a detailed description of the employment factors or conditions which appellant 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

### ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. OWCP denied his emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, 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 his regular or specially assigned duties under *Culter*.<sup>15</sup> Rather, appellant has alleged error and abuse in administrative matters and harassment and discrimination on the part of his managers and coworkers.

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<sup>9</sup> *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

<sup>10</sup> *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>11</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

<sup>12</sup> *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

<sup>13</sup> *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

<sup>14</sup> *Id.*

<sup>15</sup> *See supra* note 4.

Appellant claimed that the employing establishment committed wrongdoing when it failed to adequately address his concerns about safety in the workplace, produced improper performance evaluations, wrongly denied his leave requests and improperly assigned work duties. With respect to safety matters, he emphasized that his supervisors failed to adequately address his concerns in December 2010 about an unlocked door in the workplace. The Board notes that these claims relate to administrative or personnel matters which would only constitute work factors if appellant established error or abuse on the part of the employing establishment. The Board finds that he has not submitted evidence showing that the employing establishment committed error or abuse with respect to these matters. Appellant filed grievances with respect to some of these matters but the record does not contain a final grievance decision showing such error or abuse. With respect to the matter of the unlocked door, the statements of Ms. Dietz and Mr. Borda show that the matter was addressed and corrected in a reasonable manner. For these reasons, appellant has not established any work factors under FECA with respect to administrative or personnel matters.

Appellant alleged that supervisors harassed him for raising concerns about safety matters in the workplace and that they retaliated against him for filing a number of grievances. He claimed that a number of e-mails sent by Ms. Dietz and Mr. Borda were offensive to him and constituted harassment. The employing establishment denied that appellant was subjected to harassment or discrimination and he has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors.<sup>16</sup> Appellant alleged that supervisors made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.<sup>17</sup> Moreover, the Board has reviewed the e-mails of Ms. Dietz and Mr. Borda submitted by appellant and notes that they do not contain harassing language but rather contain statements appropriate given their supervisory purpose.<sup>18</sup> Thus, appellant has not established a compensable employment factor under FECA with respect to the claimed harassment and discrimination.

For the foregoing reasons, appellant has not established any compensable employment factors under FECA and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.<sup>19</sup>

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.

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<sup>16</sup> See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

<sup>17</sup> See *William P. George*, 43 ECAB 1159, 1167 (1992).

<sup>18</sup> For example, Ms. Dietz and Mr. Borda indicated that e-mails from April 2012 properly advised appellant that he could not have access to his government computer because he was not on duty during that period.

<sup>19</sup> As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

**CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 5, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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