



## **FACTUAL HISTORY**

On February 6, 2012 appellant, then a 39-year-old information technology specialist, filed an occupational disease claim for chest pain and panic attacks due to work-related stress.<sup>2</sup>

Appellant provided a statement dated February 25, 2012 which explained that he was unable to satisfactorily complete or update budgetary and procurement documentation because his supervisor, Kurt F. Benz, failed to provide adequate training. Management also denied numerous transfer requests from July to October 2011. Thereafter, appellant received letters of concern for substandard performance on October 13 and November 1, 2011.<sup>3</sup>

Appellant also alleged that Mr. Benz and Greg Knutson, the technical supervisor for budget and procurement actions, forced him to work overtime in violation of the labor agreement on June 24, 2011.<sup>4</sup> A few days later, during a June 30, 2011 meeting, Mr. Benz and Mr. Knutson chided appellant about a network security software order. In general, appellant alleged that Mr. Knutson spoke to him in a rude and condescending manner.

On September 28, 2011 appellant alleged that he sustained a panic attack at work, but the acting supervisor, Chris Combs, failed to call for an ambulance. In September and October 2011, Mr. Benz showed appellant his triple bypass surgical scars and remarked that he could not do anything about stress on the job. He also allegedly belittled appellant's preexisting post-traumatic stress disorder related to military service.

Mr. Benz and Jose Maldonado, the chief of human resources, notified appellant on October 13, 2011 that he would receive a letter of concern. When appellant asked for a union representative, Mr. Benz telephoned a union representative, who commented that she was not available in person. When a union representative was told by Mr. Benz that a performance improvement plan was in place, she advised him to afford appellant 60 days to correct matters pursuant to the labor agreement. However, Mr. Benz signed the letter of concern. Appellant also made requests for union representation at meetings with management on October 4, 7 and 31, 2011, each of which was denied.

On October 31, 2011 Mr. Benz mistakenly informed appellant that he had not accrued sufficient leave time to attend to his wife's childbirth and discussed the prior letter of concern. Thereafter, appellant experienced chest pain and shortness of breath. Mr. Benz ridiculed him while both were waiting for the ambulance to arrive.

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<sup>2</sup> Appellant originally filed a Form CA-1. OWCP adjudicated his claim for traumatic injury as one for occupational disease

<sup>3</sup> The case record contains three such letters signed by Mr. Benz and dated October 13, 31 and November 1, 2011, respectively.

<sup>4</sup> In a June 27, 2011 e-mail, Mary O'Haver, the union steward, informed Mr. Benz that "an employee was mandated to work overtime within an hour prior to their departure." The employee was not identified. Ms. O'Haver then cited Article 19, Section 5 of the labor agreement requiring the employing establishment to make "reasonable efforts to notify employees of the possibility of overtime work or the requirement to work overtime far enough in advance to allow employees to adjust to the requirement."

In a March 12, 2012 letter, Mr. Benz detailed that appellant started work at the employing establishment on March 27, 2011. For the first three months, he performed well with regards to property accountability and hand receipt tasks. Appellant was then assigned the line item budget for the 2012 fiscal year. Although he completed the first phase of the project in less than two weeks, he struggled to make further progress through August 2011. In September 2011, appellant was assigned the “horse blanket,” a comprehensive budgetary and procurement document, which he also failed to complete. During an October 3, 2011 meeting that was attended by a union representative, he stated for the first time that Mr. Benz’s directions and expectations were unclear and that he wanted to transfer. The following week, Mr. Benz drafted a letter of concern for unsatisfactory performance, which a union representative advised appellant not to sign during a teleconference. He gave copies of the letter to appellant on October 31 and November 1, 2011. From September to November 2011, appellant was on intermittent leave due to illness and his wife’s childbirth.

Appellant submitted medical evidence. The September 27, 2011 emergency department records signed by Dr. Sharif Eusufzai, an internist, indicated that appellant sustained stress, anxiety and chest pain at work and that his job was “demanding.” Chest x-rays exhibited minimal bibasilar atelectasis. In an October 7, 2011 report, Dr. Crystal A. Pearson, a psychologist, noted that appellant had a “high pressure” job that caused him to experience stress, anxiety, depression, irritability and sleeplessness. Appellant’s requests for a transfer to a less demanding position were denied. In addition, he previously sustained post-traumatic stress disorder due to disturbing events that transpired while he was serving in the military. Following a mental status examination, Dr. Pearson diagnosed post-traumatic stress disorder and work stress.

The October 17 and 31, 2011 emergency department records signed by Dr. Regan F. Lyon, an emergency physician, and Dr. Stacy L. Fennell, an osteopath specializing in emergency medicine, stated that appellant sustained chest pain and anxiety at work twice. On both occasions, the condition arose after appellant was reprimanded by a superior.

In a November 1, 2011 report, Dr. Michael A. Dawes, a psychiatrist, related that appellant experienced stress and anxiety that worsened after he began to work for the employing establishment more than six months prior. In particular, Mr. Benz placed “unreasonable expectations” on appellant and “ridicules him.” Appellant also complained of hallucinations, specifying that he saw a soldier cutting his wrists in an attempted suicide. Dr. Dawes conducted a mental status examination and observed anxiety, depression, affect congruent to immediate thought content and conditional suicidal ideation. He noted that appellant was minimally cooperative and constantly writhing. Dr. Dawes diagnosed post-traumatic stress disorder, panic without agoraphobia, depressive disorder and conditional suicidal ideation with chronic life stressors.

Dr. Josie A. Cigarroa, a psychiatrist, remarked in a November 10, 2011 report that appellant did not receive training at work, which caused increased stress and triggered symptoms of his post-traumatic stress disorder. The denial of appellant’s transfer request further exacerbated his condition. The mental status examination was unremarkable. Dr. Cigarroa diagnosed post-traumatic stress disorder, depressive disorder, panic without agoraphobia and

relational and occupational stressors.<sup>5</sup> In December 7 and 19, 2011 reports, she noted that appellant's recent return to work retriggered symptoms of post-traumatic stress disorder, including flashbacks, tinnitus, hypervigilance and social isolation. Dr. Cigarroa concluded in January 20 and February 2, 2012 reports that appellant was unable to work due to recurring panic attacks. She advised, "A work environment that is suitable for [appellant] is one that is left up to [his] discretion...."<sup>6</sup>

An undated note from Dr. Abelardo Rodriguez, a Board-certified family practitioner, recommended that appellant "be placed in a less stressful job situation."

A March 15, 2012 letter from the employing establishment's human resources department informed appellant that his medical condition, which limited his ability to perform his normal duties, could not be reasonably accommodated.

By decision dated March 23, 2012, OWCP denied appellant's claim, finding the evidence insufficient to establish any compensable factors of employment.

On April 2, 2012 the employing establishment terminated appellant's employment effective April 6, 2012 on the grounds that he was unfit for duty.

Appellant requested a telephonic hearing, which was held on July 12, 2012. He testified that his medical condition was due, in part, to his workload, which was larger than normal and included inventory, contracts, budgets and meetings. Appellant added that Mr. Benz did not provide written feedback or verbal counseling before disciplining him, frequently rescheduled deadlines, retaliated against him for complaining to human resources and treated him in a condescending manner.

In an August 6, 2012 letter, Mr. Benz asserted that appellant received adequate training and guidance from management as well as templates of line item budgets and fiscal plans. He also maintained that appellant's workload was "no different than in previous years." Mr. Benz pointed out that appellant usually asked for an ambulance and a leave of absence whenever he was presented with a letter of concern.

In an August 7, 2012 letter, Christy L. George, a human resources specialist, attested that Mr. Benz verbally counseled and issued letters of concern to appellant due to his failure to meet deadlines or otherwise perform in a satisfactory manner. She noted that appellant used sick leave prior to deadlines and returned to work thereafter. Ms. George confirmed that appellant was on leave without pay pursuant to the Family and Medical Leave Act (FMLA) for the period November 7, 2011 to February 6, 2012; however, he did not return, citing a work injury. Appellant submitted medical records to the employing establishment's medical officer, who determined that he was unfit for work but could not be accommodated. When he failed to

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<sup>5</sup> Dr. Cigarroa presented similar findings in November 17 and 23, 2011 reports.

<sup>6</sup> Dr. Cigarroa later added in a February 21, 2012 progress note that she could not determine whether appellant's condition stabilized.

provide additional medical records regarding his return to work, the employing establishment terminated his employment.<sup>7</sup>

In an August 10, 2012 statement, appellant disputed Mr. Benz and Ms. George's accounts. He asserted that Mr. Benz was a poor supervisor and that he was unlawfully terminated because he utilized FMLA leave.

On September 26, 2012 OWCP's hearing representative affirmed the March 23, 2012 decision.

Appellant requested reconsideration on October 22, 2012 and accused OWCP of bias. He also provided an October 10, 2012 note from Dr. Rodriguez stating that "[his] medical condition is related to his regular duties."

On January 15, 2013 OWCP denied modification of the September 26, 2012 decision.

### **LEGAL PRECEDENT**

To establish a claim that he or she sustained an emotional or stress-related condition in the performance of duty, an employee must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) medical evidence establishing that he or she has an emotional or stress-related disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the condition. If a claimant implicates a factor of employment, OWCP should determine whether the evidence of record substantiates that factor. Allegations alone are insufficient to establish a factual basis for an emotional condition claim and must be supported with probative and reliable evidence. If a compensable factor of employment is established, OWCP must then base its decision on an analysis of the medical evidence.<sup>8</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to a claimant's employment. In the case of *Lillian Cutler*,<sup>9</sup> the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition under FECA. When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that a disability resulted from this emotional reaction, the disability is generally regarded as due to an injury arising out of and in the course of employment. This holds true when the disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work. On the other hand, there are disabilities that have some causal connection with the claimant's employment but nonetheless fall outside FECA's coverage because they are found not to have arisen out of employment, such as when a disability results

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<sup>7</sup> Ms. George noted that appellant filed an appeal of his termination with the Merit Systems Protection Board.

<sup>8</sup> *G.S.*, Docket No. 09-764 (issued December 18, 2009).

<sup>9</sup> 28 ECAB 125 (1976).

from a fear of a reduction in force or frustration from not being permitted to work in a particular environment or hold a particular position.<sup>10</sup>

Administrative and personnel matters, although generally related to the claimant's employment, are administrative functions of the employing establishment rather than the regular or specially-assigned work duties of the claimant and are not covered under FECA.<sup>11</sup> However, the Board has held that an administrative or personnel matter will be considered an employment factor where the evidence discloses error or abuse on the part of the employing agency. In determining whether the employing establishment erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>12</sup>

### ANALYSIS

Appellant claimed that he sustained an emotional condition as a result of stress on the job. The Board must initially review whether the claimed incidents or activities constitute compensable factors under the provisions of FECA.

Appellant alleged that his emotional condition was due, in part, to increased duties involving inventory, contracts and budgets as well as frequent meetings. Mr. Benz, on the other hand, maintained that the workload was the same as in prior years. As noted, allegations alone are insufficient to establish a factual basis for an emotional condition claim and must be supported with probative and reliable evidence. In this case, appellant did not provide sufficient evidence to establish a factual basis for his allegation. He neither offered evidence showing that he performed an inordinate amount of work nor detailed how performance of his job duties induced stress. Thus, the Board finds that appellant did not establish a compensable employment factor under *Cutler*.<sup>13</sup>

Essentially, appellant attributed his emotional condition to particular acts and omissions by management. An employee's complaints about the manner in which a supervisor or manager performs his or her duties or the manner in which he or she exercises his or her discretion ordinarily fall outside the scope of coverage provided by FECA. This principle recognizes that a supervisor or manager must generally be allowed to perform his or her duties and employees will sometimes dislike the actions taken. However, absent evidence of error or abuse, mere disagreement or dislike of a supervisory or managerial action will not be compensable.<sup>14</sup>

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<sup>10</sup> *William E. Seare*, 47 ECAB 663 (1996).

<sup>11</sup> *M.C.*, Docket No. 10-1628 (issued June 8, 2011); *Matilda R. Wyatt*, 52 ECAB 421 (2001).

<sup>12</sup> *M.D.*, 59 ECAB 211 (2007); *Ruth S. Johnson*, 46 ECAB 237 (1994). *See also Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

<sup>13</sup> *See supra* note 9.

<sup>14</sup> *T.G.*, 58 ECAB 189 (2006); *Marguerite J. Toland*, 52 ECAB 294 (2001).

Appellant alleged that Mr. Benz provided inadequate training, failed to provide written feedback or verbal counseling, issued several letters of concern for substandard performance, rescheduled deadlines and mistakenly informed him that he did not accrue sufficient leave time to attend to his wife's childbirth; that Mr. Benz and Mr. Knutson criticized him about a network security software order; and that management denied each of his transfer requests. None of these purported incidents, however, implicated a compensable factor of employment. The Board has held that training,<sup>15</sup> monitoring of an employee's job performance,<sup>16</sup> performance appraisals,<sup>17</sup> assignment of deadlines,<sup>18</sup> leave matters,<sup>19</sup> criticism and reprimands<sup>20</sup> and job transfers<sup>21</sup> are administrative functions of the employing establishment rather than duties of the employee. Unless the evidence discloses error or abuse on the part of the employing establishment, they are not compensable employment factors. In this case, the evidence is not sufficient to establish that Mr. Benz, Mr. Knutson, or management in general acted in an erroneous or abusive manner. Appellant also asserted that Mr. Benz was a poor supervisor. This relates to an employee's dissatisfaction with perceived poor management and constitutes frustration from not being able to work in a particular environment or to hold a particular position that is not compensable under FECA.<sup>22</sup>

Appellant alleged that Mr. Combs failed to call for an ambulance when he sustained a panic attack on September 28, 2011. A supervisor's failure to take appropriate actions to correct potentially hazardous situation, which would fall into the category of administrative or personnel functions, is a compensable factor of employment if the factual circumstances established error or abuse by the superior in dealing with the claimant.<sup>23</sup> In this case, appellant did not present probative and reliable factual evidence to corroborate that this event transpired.

Appellant also alleged that the employing establishment violated the labor agreement on several occasions. First, Mr. Benz and Mr. Knutson forced him to work overtime on June 24, 2011. Second, Mr. Benz signed the letter of concern on October 13, 2011 after a union representative expressly advised him to afford appellant 60 days to resolve the performance

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<sup>15</sup> *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

<sup>16</sup> *James P. Inzetta*, Docket No. 03-1899 (issued October 27, 2003).

<sup>17</sup> *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

<sup>18</sup> *A.S.*, Docket No. 08-2276 (issued July 17, 2009).

<sup>19</sup> *J.C.*, 58 ECAB 594 (2007).

<sup>20</sup> *Roger W. Robinson*, 54 ECAB 846 (2003).

<sup>21</sup> *James W. Griffin*, 45 ECAB 774 (1994).

<sup>22</sup> *Cyndia R. Harrill*, 55 ECAB 522, 529 (2004).

<sup>23</sup> *Kim A. Baranosky*, Docket No. 03-678 (issued July 9, 2004).

issues. Last, all of appellant's requests for union representation at meetings on October 4, 7 and 31, 2011 were denied. While assignment of overtime,<sup>24</sup> performance appraisals<sup>25</sup> and disciplinary actions<sup>26</sup> are administrative functions of the employing establishment rather than duties of the employee, violation of the collective bargaining agreement can show error or abuse on the part of the employer.<sup>27</sup> In this case, appellant did not present probative and reliable factual evidence to substantiate that these events occurred.<sup>28</sup>

Appellant alleged that Mr. Benz ridiculed his health problems at work as well as his preexisting post-traumatic stress disorder related to military service, showed him triple bypass surgical scars and retaliated against appellant for complaining to human resources for mistreatment; that Mr. Benz and Mr. Knutson spoke to him in a rude and condescending manner; and that management unlawfully terminated him because he utilized FMLA leave. To the extent that disputes and incidents alleged as constituting harassment, discrimination or retaliation by coworkers and supervisors are established as occurring and arising from appellant's performance of his or her regular duties, these could constitute employment factors.<sup>29</sup> Nonetheless, for harassment or discrimination to give rise to a compensable disability, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under FECA.<sup>30</sup> In this case, appellant did not present witness statements, administrative findings or decisions or other documentation corroborating that Mr. Benz, Mr. Knutson or management harassed or treated him disparately. In the absence of probative and reliable evidence establishing compensable factor of employment, he failed to discharge his burden of proof.

Appellant contends on appeal that the medical evidence established his emotional condition claim. Because he did not establish a compensable factor of employment, a review of the medical evidence is unnecessary.<sup>31</sup>

Appellant may submit new evidence or argument as part of a formal 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>24</sup> *Ronald Potter*, 51 ECAB 688 (2000).

<sup>25</sup> *Supra* note 17.

<sup>26</sup> *Supra* note 8; *McEuen*, *supra* note 12.

<sup>27</sup> *Ronald E. Cardin*, Docket No. 03-181 (issued April 25, 2003); *Carlos Tamayo*, Docket No. 96-2438 (issued April 27, 1999).

<sup>28</sup> The Board notes that a June 27, 2011 e-mail from Ms. O'Haver, the union steward, informed Mr. Benz that "an employee was mandated to work overtime within an hour prior to their departure" in violation of Article 19, Section 5 of the labor agreement. *See supra* note 4. However, this e-mail did not identify appellant as this employee.

<sup>29</sup> *See, e.g., Mary J. Summers*, 55 ECAB 730 (2004). *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

<sup>30</sup> *Summers, id.*; *Donna Faye Cardwell*, 41 ECAB 730, 741 (1990).

<sup>31</sup> *See Lori A. Facey*, 55 ECAB 217 (2004).

**CONCLUSION**

The Board finds that appellant did not establish that he sustained an emotional condition while in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 15, 2013 and September 26, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 19, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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