

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated May 16, 2013, the Board set aside a November 14, 2012 nonmerit decision denying appellant's request for reconsideration under 5 U.S.C. § 8128.² The Board reviewed the factors of employment to which he attributed his emotional condition and the accompanying factual evidence, including witness statements. OWCP determined that the allegations concerned administrative or personnel matters and that appellant had not demonstrated that the employing establishment erred in these matters. The Board noted that, on reconsideration, appellant attributed his stress to managing difficult employees. Appellant also submitted witness statements supporting that he was responsible for dealing with Scott Larson and Jane Pitre, union representatives and that Ms. Pitre told him that he made her feel like she had been raped. The Board concluded that he had submitted new factual evidence and raised a new legal argument, that daily dealing with difficult employees in his position as manager constituted a compensable work factor. It remanded the case for OWCP to conduct a merit review. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.

In a June 18, 2012 alternative dispute resolution agreement between appellant and the employing establishment, he agreed to voluntarily retire by July 31, 2012 and withdraw with prejudice all equal employment opportunity (EEO) complaints.³ The employing establishment agreed that it would withdraw his proposed removal and provide him with administrative leave on various dates throughout May and June 2012. Neither party acknowledged wrongdoing by signing the agreement.

In a statement dated August 29, 2013, Andrew M. Richards, a district manager, related that he worked as appellant's supervisor or second-line supervisor for three and a half years. During that time, appellant worked as a front-line manager and acting air traffic manager. Alva Metcalf, a coworker, informed Mr. Richards that appellant was not performing well and that he "had difficulty working with others and performing the tasks of an air traffic controller." Appellant received training and instruction but did not improve. Mr. Richards challenged appellant's allegation that he did not receive management support and that the employing establishment ensured that appellant did not receive a promotion. He disagreed with statements made by Timothy Pforsich and Robert Burkhart, appellant's coworkers, as both had retired before appellant's performance worsened. Mr. Richards confirmed that appellant had "professional conflicts" with Mr. Larson and Ms. Pitre but maintained that he "personally supported conduct and discipline action that was taken against Mr. Larson at the request of [appellant] and Mr. Pforsich." Ms. Pitre related that appellant and Mr. Pforsich had targeted her but that she did not feel threatened and that he did not believe the matter warranted investigation. Mr. Richards indicated that appellant supervised 10 experienced air traffic controllers at a low level facility. He denied the existence of a hostile work environment. Mr. Richards stated, "It is correct that [appellant] had some issues with Ms. Pitre and her performing union activities. [Appellant] claims that Ms. Pitre was disruptive and I supported her causing the disruption. That

² Docket No. 13-400 (issued May 16, 2013).

³ The record indicates that appellant retired from the employing establishment effective July 31, 2012.

claim is baseless.” Mr. Richards indicated that management tried to help appellant succeed while on a performance improvement plan (PIP).

In a statement dated September 5, 2013, the employing establishment related that appellant’s EEO complaint was settled without a finding of a hostile work environment. It reviewed the statement of Mr. Richards and reiterated that Mr. Pforsich and Mr. Burkart did not work at the employing establishment during the time appellant’s performance declined. The employing establishment asserted that their statements were “of no value in describing an environment they did not experience or witness.” It maintained that appellant received support after he was placed on a PIP and worked in a small airport and supervised experienced employees in a low stress position with adequate staffing. The employing establishment asserted that it was not a hostile work environment.

On September 26, 2013 counsel maintained that he was not arguing error or abuse by the employing establishment and thus the EEO settlement agreement did not invalidate his contentions. He contended that appellant’s emotional condition arose due to friction dealing with subordinates while trying to meet his position requirements as a supervisor. Counsel asserted that Mr. Richards confirmed that appellant and Ms. Pitre had an acrimonious relationship and that he had difficulty working with her and the other union representative. He questioned why appellant’s work deteriorated so rapidly after his transfer if not for “contentious relationship with his union representatives....” Counsel noted that an employee did not have to show wrongdoing by the employing establishment to be covered by workers’ compensation. He asserted that dealing with the union officials was part of appellant’s job as a supervisor and thus his injury arose in an attempt to meet his position requirements.

By decision dated October 3, 2013, OWCP denied modification of its August 31, 2011 decision. It found that appellant had not established a hostile work environment.

On appeal counsel, cited *D.H.*,⁴ in support of his contention that appellant experienced stress due to dealing with subordinates, including union representatives and that his condition arose out of the performance of his regular or specially assigned duties as a manager. He noted that appellant’s duties relationship with the union representative changed after his promotion and required him to “deal with aggressive union representatives on a daily basis,” creating friction and strain. Counsel stated that OWCP mistakenly considered whether appellant had established error or abuse by the employing establishment even though he had withdrawn any contention of administrative error in a September 26, 2013 letter. He maintains that the employing establishment’s contention that it did not commit wrongdoing was not relevant.

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

⁴ Docket No. 09-439 (issued December 29, 2009).

by the employment, the disability comes within the coverage of FECA.⁵ 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.⁶

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.⁷ 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, it must base its decision on an analysis of the medical evidence.⁸

ANALYSIS

On prior appeal, the Board remanded the case for OWCP to conduct a merit review and address appellant's new legal argument that his emotional condition was compensable as it arose from his regular work duties. On remand, OWCP denied appellant's emotional condition claim after finding that he had not established a hostile work environment.

In a statement received by OWCP on April 25, 2011, appellant indicated that in 2008 he accepted a position as a manager in a work location that was dealing with hundreds of grievances. Mr. Pforsich instructed appellant to negotiate with Ms. Pitre about a religious accommodation issue. Ms. Pitre told appellant on two occasions that he and Mr. Pforsich made her feel like she was being raped. Mr. Pforsich had to assist Ms. Pitre so that she would not lose her medical clearance after she was charged with driving under the influence. He provided a June 6, 2012 statement confirming that appellant was responsible for day-to-day dealings with Ms. Pitre and Mr. Larson. Mr. Richards also noted that appellant experienced conflicts with Ms. Pitre in his capacity as manager. Mr. Pforsich and Mr. Burkhart confirmed that Ms. Pitre told appellant that he made her feel like she had been raped. On September 26, 2013 counsel related that appellant's injury arose from performing his employment duties as his work duties required him to deal with union officials with whom he had a contentious relationship.

The Board has held that emotional reactions to situations in which an employee is trying to meet his or her position requirements are compensation under *Cutler*.⁹ Appellant's job as a

⁵ *Supra* note 1; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁷ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁸ *Id.*

⁹ *See Lillian Cutler*, *supra* note 5.

manager required him to negotiate with union representatives and make day-to-day decisions in his capacity as manager. Where a claimed disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to an imposed employment requirement, the disability comes within the coverage of FECA.¹⁰ Therefore, appellant has established a compensable employment factor.

OWCP found that appellant had not established a hostile work environment. In a statement dated August 29, 2013, Mr. Richards maintained that appellant's performance did not decline until after Ms. Metcalf's promotion and that consequently the statements of Mr. Pforsich and Mr. Burkhart were of reduced value. He also asserted that management adequately supported appellant and tried to help him successfully improve his performance. Counsel noted that appellant was not attributing his condition to any error or abuse by management but instead to the performance of his regular or specially assigned employment duties. Consequently, appellant has not contended error or abuse by the employing establishment or alleging a hostile work environment.

As appellant attributed his emotional condition to the performance of his regular or specially assigned work duties, the case presents a medical question regarding whether his emotional condition resulted from the compensable employment factors. OWCP found there were no compensable employment factors and thus it did not analyze or develop the medical evidence. The case will be remanded to OWCP for this purpose.¹¹ After such further development as deemed necessary, it should issue a *de novo* decision on this matter.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹⁰ See *Robert Bartlett*, 51 ECAB 664 (2000); *Ernest St. Pierre*, 51 ECAB 623 (2000); *Jack M. Terrell*, Docket No. 00-1276 (issued September 18, 2001).

¹¹ See *Robert Bartlett*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 23, 2014
Washington, DC

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

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

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