

FACTUAL HISTORY

On April 15, 2010 appellant, then a 51-year-old supervisor of air traffic controller, filed a traumatic injury claim alleging that on April 14, 2010 he developed an emotional condition. He received a telephone call from his supervisor, Mark Rios, notifying him that he was being reassigned to another office. Appellant was on annual leave attending a birthday lunch in his honor when he received the call. Mr. Rios asked him to join a telephone conference that would address his involuntary reassignment from a staff manager position to an operational manager position in the Everglades area. Appellant stated that he was shocked as this was the first he learned of this. He told Mr. Rios of a variety of personal and ethical professional issues involved in the situation. As a result of the 20-minute discussion, appellant asserted that his heart began beating rapidly, he felt flushed and faint, started sweating and felt dizzy. He went to his doctor after the call. At the doctor's office, appellant received a voice mail message from Mr. Rios who asked him to join a 2:00 p.m. telephone conference. Mr. Rios spoke with the Acting Air Traffic Manager and the Human Resources Manager and appellant would be reassigned to an operational manager position in the Westside Coastal area. Appellant stated that he could not join the conference call due to his condition. He stated that the "indiscriminate reassignments," within two hours and with no explanation given had exacerbated his symptoms. Appellant stopped work on April 15, 2010.

On April 23, 2010 OWCP asked appellant to submit additional evidence with a detailed description of the employment incidents that contributed to his claimed illness.

Appellant submitted an April 15, 2010 statement from Peter Gulio, a friend, who was at the birthday lunch when appellant received Mr. Rios' call. Mr. Gulio noted that appellant was shaken and became upset. Appellant reported that he was being reassigned to a site where he would be supervising his ex-spouse, her paramour and her paramour's ex-spouse. He submitted a May 5, 2010 letter to Terry Van Dyne, air traffic control manager, requesting that he stay at his current job. Appellant noted that his ex-spouse was an air traffic control specialist in the Miami center and her paramour and his ex-spouse were also air traffic control specialists. He alleged the assignment would negatively impact the performance of his duties. Further, his supervision of these individuals was prohibited by the employing establishment ethics standards.

In a May 10, 2010 statement, appellant reiterated that his illness resulted from being advised that he was being reassigned from his job as support manager, safety and quality control, to an operations position without consultation and where he would be responsible for supervision of his former spouse, her paramour and his former spouse. He asserted that this violated employing establishment ethical standards and could result in disciplinary action against him. Appellant alleged that he was not fully informed of the reasons for reassignment and his interests were not considered. He acknowledged that Mr. Rios left a message for him after the initial call on April 14, 2010 and advised him that the acting air traffic manager and human resource manager considered his concerns and changed his assignment to an operational manager in the Westside coastal area. Appellant submitted medical notes dated April 27 to May 9, 2010 from Dr. Daniel Collins, a psychiatrist, who diagnosed adjustment disorder after appellant was reassigned to another position at work.

In an undated statement, Mr. Rios contended that appellant overreacted to the new work assignment that was based on employing establishment needs. After weeks of research and discussion with managers about improving air traffic service by aligning the manager strengths to the facility needs, he advised appellant of the announcement by telephone because he was on annual leave. Mr. Rios noted that three other managers were reassigned to the same level management position at the same location in Miami, Florida. Appellant was advised that he was being reassigned from support manager to operations manager for the Everglades area, an area of specialization located in the control room of the same building where he was assigned for many years. When appellant was informed about the reassignment, he was concerned about being a single parent, nepotism in the control room, and his ex-spouse working in the coastal area and an issue that he had with another employee assigned to the Everglades area. Mr. Rios advised appellant that on April 14, 2010 all second-level managers would be briefed on the pending reassignments at a 2:00 p.m. teleconference. Mr. Rios briefed the air traffic manager and support manager for administration about appellant's concerns and his assignment was changed to the Westside coastal area which affected the movement of other managers. He telephoned appellant of the change in assignments but there was no answer so he left a voice message. Appellant did not respond or participate in the teleconference. Mr. Rios noted that the employing establishment policy on nepotism did not exclude ex-spouses, although common sense was applied. Appellant was assigned to the Westside area where he would not have any involvement with his ex-wife or the other employees. He noted that over several months, the employing establishment assessed its needs and the changes required that would support its mission. It was decided to split its two areas of operation into separate areas. Mr. Rios noted that all managers were advised of the decision on March 5, 2010 and that it would involve reassignments to meet mission objectives. Managers were requested to advise of their interest. Appellant attended an April 8, 2010 manager's meeting that advised of the reasons for potential movements. On April 14, 2010 a second-level manager's meeting was held to announce a three-phased approach to the changes. Mr. Rios noted that the reassignment of managers was not a new concept and managers were moved around within a facility to meet mission requirements. In this case, several managers needed to be moved and it was not the first time appellant was reassigned. Mr. Rios stated that the reassignment did not impact appellant's grade or salary and provided an opportunity to gain additional salary due to premium pay. An April 15, 2010 memorandum from Mr. Van Dyne, acting air traffic manager, noted the assignment changes for appellant and other managers.

In a June 4, 2010 decision, OWCP denied appellant's claim for an emotional condition. It found that he failed to establish a compensable work factor as the cause of his claimed condition.

On November 20, 2010 appellant requested reconsideration. He stated that he returned to work on July 12, 2010 under threats of termination. Appellant asserted that the employing establishment issued an erroneous personnel action by reassigning him; did not fully inform him why he would be reassigned; and that the reassignment was arbitrary, capricious and unreasonable. In an October 12, 2010 report, Dr. Collins diagnosed chronic adjustment disorder that occurred after appellant was informed of his reassignment.

In a January 25, 2011 letter, Denise Wallace, an employing establishment program consultant, advised that the employing establishment had acted in accord with its policies. On

January 20, 2011 Janice Deak, acting executive officer, noted that since appellant's return to duty in Miami on July 2010, he had a great working relationship with the personnel of the Westside coastal area with no negative feedback. In a January 18, 2011 memorandum, Mr. Rios noted that in the months leading up to April 14, 2010, there was an announcement of six management reassignments. The air traffic manager made an assessment of the facility needs and determined that changes were required to support the mission to place the right people at the right place in the best interest of the mission. Mr. Rios noted support managers were advised of the reassignment on March 5, 2010 and asked to provide feedback. On April 6 and 8, 2010 meetings were held and attendees were advised of the potential relocations. Appellant obtained some information on the pending movement prior to the official announcement. Mr. Rios stated that there were no secrets in the building and appellant was told by a peer he was being considered for reassignment. He noted that Mr. Van Dyne changed appellant's assignment from one operational area to another because of appellant's personal concern about working with his ex-wife. Appellant's allegation that he returned to work on July 12, 2010 under threat of termination was untrue, noting that he was asked to provide updates as to when he would return to work. Mr. Rios noted that appellant was advised on March 5, 2010 of the possible reassignment of support specialist staff and this included second-level managers. Appellant responded by e-mail on March 9, 2010 expressing interest in his reassignment and that of his staff.

An April 14, 2010 record of conference documented Mr. Rios calling appellant to inform him that he was being reassigned to the Everglades area and of a second-level managers' meeting at 2:00 p.m. announcing reassignments. Mr. Rios informed Mr. Van Dyne about appellant's ex-wife and that his ex-wife had a relationship with an employee in the Everglades area. Mr. Rios took this new information into consideration and made an adjustment to assign appellant to the Westside coastal area. In a May 19, 2010 memorandum, Mr. Van Dyne stated that appellant's reassignment was not against employing establishment policy or arbitrary. He noted that management reserved the right to assign work and make administrative relocations. A May 1, 2006 conversation record noted appellant's agreement with and concerns about a prior transfer. A May 18, 2010 e-mail from Mike Walborn noted that he had a conversation with appellant in March or April 2010 in which appellant advocated that support managers band together to stop front office "bullshit" regarding reassignments.

Appellant returned to work allegedly under a threat of termination on May 19, 2010 from Mr. Van Dyne. He asserted that he was required to provide exhaustive information from a disciplinary review of himself and subordinates relating to compensatory time from six years earlier and was suspended for five days for failure to follow instructions even after providing evidence of employing establishment approval of compensatory time. Appellant asserted that he was demoted from supervisory air traffic control specialist (operations manager) to front line manager with a drop in pay and was threatened with additional demotions and disciplinary action and subject to an investigation initiated by Mr. Van Dyne on June 24, 2010. He submitted a June 1, 2010 request for ethical appropriateness of his reassignment to an operations manager position at the Miami center. Appellant submitted a January 15, 2011 letter reiterating his allegations.

In a decision dated March 4, 2011, OWCP denied modification of the June 4, 2010 decision.

On February 28, 2012 appellant requested reconsideration and reasserted that no notification of the pending reassignments was made prior to April 14, 2010. He submitted an October 5, 2010 Merit Systems Protection Board, Atlanta Regional Office decision. In a March 17, 2011 statement, John Mineo, an employing establishment manager at the time of the 2010 reassignments, noted that at no time prior to the April 14, 2010 official announcement was any support manager advised that they were considered for reassignment to an operational manager position. Appellant submitted a June 11, 2010 e-mail from Jorge Rivera, a union representative, who alleged that the assignment of appellant to the operations manager of the Westside area violated an ethics guideline. A June 21, 2010 memorandum from Mr. Van Dyne noted that appellant was in no greater position to evaluate, impact performance ratings, recommend promotions or discipline as an operations manager than he was as a support manager for safety. A February 25, 2012 report from Dr. Collins diagnosed adjustment disorder and opined that the April 14, 2010 work incident caused appellant's psychiatric condition.

In a March 16, 2012 decision, OWCP denied appellant's request for reconsideration on the grounds that it was untimely filed. In a decision dated August 8, 2012, it vacated the March 16, 2012 decision. OWCP determined that the March 4, 2011 reconsideration request was timely filed and appellant had submitted relevant new evidence.

Appellant submitted an April 23, 2010 memorandum from Mr. Van Dyne who informed him of his reassignment to Westside, effective June 6, 2010. He would assume the duties of operations manager and the change was made to enhance the efficiency of the Miami operation center and was in the best interest and met the needs of the employing establishment. Appellant submitted a March 28, 2011 statement from Charlyn Davis who noted participating in a managers meeting in 2010. She did not remember having a discussion with support managers or operation managers regarding staff movement.

The employing establishment submitted a September 11, 2012 memorandum from Mr. Rios who noted that Ms. Davis' March 28, 2011 statement was in conflict with a March 5, 2010 e-mail that he provided, in which she recalled participating in a support managers' meeting and expressed interest in moving between the operations manager and support managers positions. With regard to appellant's reassignment from operations manager to the support manager position, Mr. Rios noted that in December 2011 senior management requested that appellant assume a support managers' position. In March 2012, he was advised that if he wanted to stay in the support manager's position he would have to be reassigned. On March 9, 2012 appellant responded that he wanted to remain in the support manager's position with an operations manager position description and, in September 2012, he was officially reassigned to the support manager position and was not harmed in any way. A March 9, 2010 e-mail from appellant noted his preference and that of his staff regarding their assignments.

In a merit decision dated October 12, 2012, OWCP denied appellant's claim. It found that the claimed emotional condition did not arise in the performance of duty. It found that he did not establish any compensable work factors.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.²

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,³ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.⁴ When an employee experiences emotional stress in carrying out his or her employment duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁵ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁶ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.⁷ Personal perceptions alone are insufficient to establish an employment-related emotional condition.⁸ 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.⁹

ANALYSIS

Appellant alleged that on April 14, 2010 he was informed he would be reassigned from a support manager's position to an operation manager position in the Everglades area. He objected, noting that he would be supervising his ex-spouse, her paramour and the paramour's

² *George H. Clark*, 56 ECAB 162 (2004).

³ 28 ECAB 125 (1976).

⁴ *See Robert W. Johns*, 51 ECAB 137 (1999).

⁵ *Lillian Cutler*, *supra* note 3.

⁶ *J.F.*, 59 ECAB 331 (2008).

⁷ *M.D.*, 59 ECAB 211 (2007).

⁸ *Roger Williams*, 52 ECAB 468 (2001).

⁹ *See Lillian Cutler*, *supra* note 3.

ex-spouse which would put him at risk over allegations of partiality. Appellant alleged that on May 19, 2010 Mr. Van Dyne threatened to terminate him from employment so he returned to work. Prior to April 14, 2010, the employing establishment did not inform staff of the potential for managers to be reassigned and he contended that his reassignment would result in a violation of ethical rules and conduct. The Board will review whether the alleged incidents are compensable employment factors under the terms of FECA. Appellant has not attributed his emotional condition to his regular or specially assigned duties. Therefore, he has not alleged a compensable factor under *Cutler*.¹⁰

In *Thomas D. McEuen*,¹¹ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the facts surrounding the administrative or personnel action established error or abuse by employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹²

On April 14, 2010 Mr. Rios informed appellant by telephone that he would be reassigned from a support manager position to an operation manager's position in the Everglades area. The Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.¹³ The employing establishment denied appellant's allegations and explained how it took his concerns into consideration in reassigning him to a different location. Mr. Rios noted that appellant was reassigned based on employing establishment needs after weeks of research and discussion with managers about improving air traffic service delivery. Three other managers at the same location were also reassigned. Mr. Rios noted that when appellant raised concerns of being a single parent of potential nepotism in the control room with proximity to his ex-spouse, an adjustment was made to assign appellant to the Westside coastal area. Mr. Rios noted that the employing establishment's policy on nepotism did not exclude ex-spouses from working together. Appellant did not submit sufficient evidence to establish that the employing establishment erred or acted abusively with regard to his allegations. The employing establishment reassigned appellant consistent with its policies and considered his concerns. Thus appellant has not established administrative error or abuse in this administrative action and it is not compensable under FECA.

¹⁰ *See id.*

¹¹ *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹² *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹³ *Donald W. Bottles*, 40 ECAB 349, 353 (1988). *See Robert Breeden*, 57 ECAB 622 (2006) (an employee's dissatisfaction with being transferred constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable).

Appellant asserted that, prior to the April 14, 2010 telephone call, the employing establishment did not inform the staff of the potential for managers to be reassigned. He also asserted that his assignment would violate ethical rules of conduct. The Board notes that Mr. Rios explained that, over the previous months, the air traffic managers made an assessment of the facility needs and future changes required to support the agency's mission. He noted that all managers were advised that the decision would involve the reassignment of second level managers on March 5, 2010 and asked to advice of their interest. In a March 9, 2010 e-mail, appellant noted his interest and that of his staff in the reassignment. On April 6 and 8, 2010 meetings were held and managers were advised of the reasons for the reassignments. On April 14, 2010 a second-level managers' meeting was held to announce a three-phased approach to the process. Mr. Rios noted that the reassignment of managers was not a new concept and they were moved around within a facility to meet employing establishment mission requirements. He noted that appellant's reassignment would not violate any ethical rules of conduct. The Board notes that the assignment of work is an administrative function.¹⁴ The manner in which a supervisor exercises his or her discretion generally falls outside the ambit of FECA absent evidence of error or abuse. Appellant's disagreement or dislike of the managerial reassignments is not compensable.¹⁵ The Board finds that appellant has not offered sufficient evidence to establish error or abuse regarding his work reassignments. The evidence does not establish that the employing establishment acted unreasonably.¹⁶ Appellant has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under FECA.

Appellant asserted that on May 19, 2010 Mr. Van Dyne threatened to terminate him if he did not start his new assignment. He asserted that he was required to provide exhaustive information from a disciplinary review relating to compensatory time from six years prior and was suspended for five days for failure to follow instructions. Appellant alleged that he was demoted from supervisory air traffic control specialist (operations manager) to a front-line manager. He was threatened with additional demotions and disciplinary action and subject to an investigation by Mr. Van Dyne on June 24, 2010. His allegation that the employing establishment improperly threatened to discipline him relates to administrative or personnel matters unrelated to his regular or specially assigned duties and does not fall within the coverage of FECA.¹⁷ Although the handling of disciplinary actions and evaluations are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁸ The record, as noted above, fails to establish that appellant was disciplined. Mr. Rios stated that appellant's allegation that he returned to work on July 12, 2010 under threat

¹⁴ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

¹⁵ See *Barbara J. Latham*, 53 ECAB 316 (2002); see also *Peter D. Butt Jr.*, 56 ECAB 117 (2004) (allegations such as improperly assigned work duties, which relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties do not fall within the coverage of FECA).

¹⁶ *D.L.*, 58 ECAB 217 (2006).

¹⁷ See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

¹⁸ *Id.*

of termination was untrue. In a May 19, 2010 memorandum, Mr. Van Dyne noted that employing establishment management reserved the right to assign work. Absent evidence of error or abuse, appellant's disagreement or dislike of his reassignment is not compensable.¹⁹ The Board finds that appellant has not submitted sufficient evidence to establish error or abuse. Appellant has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under FECA.

To the extent that appellant alleged that Mr. Van Dyne threatened to terminate him if he did not return to work, the Board has recognized the compensability of verbal abuse and threats in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.²⁰ The Board finds that the facts of the case does not support any specific incidents of verbal abuse or threats. Appellant provided no corroborating evidence, or witness statements to establish his allegations at a particular time and place.²¹ The employing establishment denied any inappropriate actions. There is no corroborating evidence to support that any interaction with appellant by Mr. Van Dyne or others rises to the level of a compensable employment factor.²²

Consequently, appellant has not established his claim for an emotional condition as he has not attributed his claimed condition to any compensable employment factors.²³ He 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.

On appeal appellant, through counsel, submitted a brief reiterating his allegations, asserting that he has established error or abuse on the part of the employing establishment. The Board has reviewed the entire case record and all the documents appellant submitted in support of his claim as well as the employing establishment's responses. As explained above, the Board finds that appellant has not established his claim for an emotional condition as he has not attributed his claimed condition to any compensable employment factors.

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

¹⁹ See *Barbara J. Latham*, 53 ECAB 316 (2002).

²⁰ *Charles D. Edwards*, 55 ECAB 258 (2004).

²¹ See *William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

²² See *Judy L. Kahn*, 53 ECAB 321 (2002) (the fact that a supervisor was angry and raised her voice does not, by itself, support a finding of verbal abuse).

²³ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the October 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 28, 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