

**United States Department of Labor  
Employees' Compensation Appeals Board**

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L.C., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS BENEFITS ADMINISTRATION, )  
North Little Rock, AR, Employer )

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**Docket No. 13-2123  
Issued: January 8, 2014**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 10, 2013 appellant filed a timely appeal from a March 14, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her emotional condition claim.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. One hundred and eighty days from March 14, 2013, the date of OWCP's decision, was September 10, 2013. Since using September 17, 2013, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is September 10, 2013, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition or an aggravation of her preexisting emotional condition in the performance of duty.

On appeal, appellant contends that she never claimed her condition was exacerbated due to normal working conditions, but was a result of being contacted by her vocational rehabilitation counselor on April 3, 2012 with news of a possible discrimination and privacy violation. She further contends that her main concern was only to obtain her leave back after being placed on advanced sick leave.

## **FACTUAL HISTORY**

On April 23, 2012 appellant, then a 40-year-old claims examiner, filed an occupational disease claim (Form CA-2) alleging a major depressive disorder aggravated by factors of her federal employment. In a narrative statement, she related that she had applied for vocational rehabilitation as stress had begun to affect her health in 2012. Appellant had a telephone interview on March 8, 2012 with Anwar Chowdhury, who was assigned as her vocational rehabilitation counselor. Shortly after, she received an e-mail from Earnestine Russ-Williams, who informed her that she was her new vocational rehabilitation counselor. On April 3, 2012 appellant received information from several people that her rights had been violated as her vocational rehabilitation case had been openly discussed by Grant Swanson, Brian Burgess and Samantha Shirley. She stated that she was taken off of work by her doctor due to the anxiety and stress caused by the situation.

In a January 24, 2012 report, Melinda Fair, an advanced practice nurse, diagnosed recurrent major depressive disorder. She noted that appellant felt irritable and overwhelmed, especially at work. On April 4, 2012 Ms. Fair stated that appellant was approved by vocational rehabilitation for retraining and started attending school only to find that the local rehabilitation staff discussed her case, questioned her eligibility for the program and “froze” her file. Appellant became concerned that the employing establishment had inappropriately shared her case and personal information, especially since her supervisor was contacted. She was in the process of reporting the breach of confidentiality and was concerned that her job might be at risk. On April 26, 2012 Ms. Fair opined that appellant’s depression and anxiety had been exacerbated by a hostile work environment.

In a June 11, 2012 letter, OWCP informed appellant that additional evidence was needed to establish her claim. It afforded her 30 days to submit additional factual evidence and a medical report from a physician explaining how compensable factors of employment caused or contributed to an emotional condition.

Appellant submitted a narrative statement indicating that she filed a privacy complaint and an EEO complaint concerning the information breach. She submitted documentation related to her complaints, including an employee monthly review dated July 10, 2012 and a performance appraisal dated October 31, 2011. Appellant also submitted reports dated December 23, 2010 through June 21, 2012 from Ms. Fair who reiterated the diagnosis.

An e-mail dated May 4, 2012 from Alice Horton noted that a review of appellant's privacy complaint did not meet the criteria for improper disclosure of her personal identifiable information.

In a June 22, 2012 memorandum, Laura Jones, appellant's former supervisor, stated that Mr. Swanson did not come to see her on April 3, 2012 nor had they discussed appellant's file in any manner. Ms. Jones stated that the only time she met with Mr. Swanson was on April 6, 2012 to discuss another employee who had displayed unacceptable behavior in her work area. Appellant was not discussed.

On June 29, 2012 Darold Maxfield, appellant's supervisor, noted that appellant had requested two weeks of advanced sick leave, requesting that her leave terminate on July 6, 2012.

By decision dated October 26, 2012, OWCP denied appellant's claim. It found that she did not establish any violation of her privacy by the employing establishment or any other compensable work factor.

On November 25, 2012 appellant requested a review of the written record by an OWCP hearing representative.

By decision dated March 14, 2013, an OWCP hearing representative affirmed the October 26, 2012 decision.

### **LEGAL PRECEDENT**

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>3</sup> The phrase while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of arising out of and in the course of employment.

In *Lillian Cutler*,<sup>4</sup> the Board noted that workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are situations when an injury or illness has some connection with the employment but nonetheless does not come within the coverage of workers' compensation as they are found not to have arisen out of the employment. When an employee experiences emotional stress in carrying out his or her employment duties, or has fear and anxiety regarding his or her ability to carry out his or her duties, and the medical evidence establishes that the disability resulted from his or her emotional reaction to such situation, the disability is generally regarded as due to an

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<sup>3</sup> See 5 U.S.C. § 8102(a).

<sup>4</sup> 28 ECAB 125 (1976).

injury arising out of and in the course of employment. This is true when the employee's disability resulted from her emotional reaction to her day-to-day duties. The same result is reached when the emotional disability resulted from the employee's emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of the work.<sup>5</sup>

In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of FECA. Thus, disability is not covered when it results from an employee's fear of a reduction-in-force, unhappiness with doing inside work, desire for a different job, brooding over the failure to be given work she desires, or the employee's frustration in not being permitted to work in a particular environment or to hold a particular position.<sup>6</sup> Board case precedent demonstrates that the only requirements of employment which will bring a claim within the scope of coverage under FECA are those that relate to the duties the employee is hired to perform.<sup>7</sup>

To the extent that disputes and incidents alleged as constituting harassment by coworkers are established as occurring and arising from a claimant's performance of his or her regular duties, these could constitute employment factors.<sup>8</sup> However, for harassment to give rise to a compensable disability under FECA there must be evidence that harassment did, in fact, occur. Mere perceptions of harassment are not compensable under FECA.<sup>9</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>10</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>11</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>12</sup>

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he or she claims compensation was caused or

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<sup>5</sup> *Id.* at 130.

<sup>6</sup> See *Lillian Cutler*, *supra* note 4.

<sup>7</sup> See *Anthony A. Zarcone*, 44 ECAB 751 (1993).

<sup>8</sup> See *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

<sup>9</sup> See *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>10</sup> See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

<sup>11</sup> See *William H. Fortner*, 49 ECAB 324 (1998).

<sup>12</sup> See *Ruth S. Johnson*, 46 ECAB 237 (1994).

adversely affected by employment factors.<sup>13</sup> This burden includes the submission of a detailed description of the employment factors or conditions, which 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>14</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 work 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 compensable factors of employment and may not be considered.<sup>15</sup> If a claimant does implicate a factor of employment, OWCP should then consider whether the evidence of record substantiates that factor. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim; the claim must be supported by probative evidence.<sup>16</sup> Where the matter asserted is a compensable factor of employment and the evidence of record established the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.<sup>17</sup>

### ANALYSIS

Appellant attributed her anxiety and depression and an aggravation of her preexisting major depressive disorder to actions by the vocational rehabilitation staff of the employing establishment. The Board must review whether the alleged incidents are compensable employment factors under FECA. Appellant did not attribute her emotional condition to the regular or specially assigned duties of her position as a claims examiner. Therefore, she has not established a compensable factor under *Cutler*.<sup>18</sup>

Appellant's allegations relate primarily to administrative and personnel actions by the vocational rehabilitation staff. In *McEuen*,<sup>19</sup> 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 unless there is evidence of administrative error or abuse. Generally, such actions pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. Absent evidence of error or abuse, the emotional

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<sup>13</sup> See *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

<sup>14</sup> See *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

<sup>15</sup> See *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>16</sup> See *Charles E. McAndrews*, 55 ECAB 711 (2004).

<sup>17</sup> See *Jeral R. Gray*, 57 ECAB 611 (2006).

<sup>18</sup> See *supra* note 4.

<sup>19</sup> See *Thomas D. McEuen*, *supra* note 10.

condition is not employment generated. To determine whether error or abuse has occurred, the Board must examine whether the employing establishment acted reasonably.<sup>20</sup>

Appellant alleged that the vocational rehabilitation staff engaged in improper, open discussions regarding her case and violated her rights to privacy and confidentiality. On June 22, 2012 Ms. Jones, appellant's former supervisor, denied that she and Mr. Swanson had discussed appellant's case on April 3 or 6, 2012. The employing establishment also informed appellant by e-mail from Ms. Horton that her privacy complaint did not meet the criteria for improper disclosure of her personal identifiable information. The Board has held that investigations are an administrative function of the employing establishment that do not involve an employee's regularly or specially assigned employment duties and are not considered to be employment factors.<sup>21</sup> Although appellant generally alleged that the vocational rehabilitation counselors acted abusively, she did not provide sufficient evidence to support her contention. The evidence is insufficient for the Board to find any improper motive to warrant error or abuse in these matters.

The Board has long held that grievances and EEO complaints by themselves do not establish that workplace harassment or unfair treatment occurred.<sup>22</sup> The evidence submitted does not support appellant's allegations of harassment or discrimination on the part of her supervisors or coworkers. She did not submit adequate documentation of the dates such incidents arose, the parties involved or support her allegations with statements from any witnesses.

On appeal, appellant contends that she never claimed her condition was exacerbated due to normal working conditions, but was the result of being contacted by her vocational rehabilitation counselor on April 3, 2012 with news of a possible discrimination and privacy violation. Her emotional reaction to personnel and administrative matters can be described as self-generated and not arising in the performance of duty but due to her personnel frustration in not being permitted to work in a particular work environment. Appellant has not submitted sufficient evidence to establish that the employing establishment acted unreasonably or committed error or abuse. She has failed to establish a compensable work factor.<sup>23</sup> Appellant has not met her burden of proof to establish a claim.<sup>24</sup>

Appellant further contends on appeal that her main concern was only to obtain her leave back after being placed on advanced sick leave. On June 29, 2012 her supervisor, Mr. Maxfield, indicated that appellant had requested two weeks of advanced sick leave, requesting that her leave terminate on July 6, 2012. Approving or denying a leave request is an administrative function of a supervisor.<sup>25</sup> The only issue before the Board, for which OWCP issued a final

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<sup>20</sup> See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

<sup>21</sup> See *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

<sup>22</sup> See *Parley A. Clement*, 48 ECAB 302 (1997).

<sup>23</sup> See *H.C.*, Docket No. 12-457 (issued October 19, 2012).

<sup>24</sup> As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

<sup>25</sup> See *M.P.*, Docket No. 09-1787 (issued September 21, 2010).

adverse decision, is whether appellant established a compensable factor of her federal employment.<sup>26</sup> As the Board has found above, she has not. The Board does not reach questions related to appellant's leave.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional condition or an aggravation of her preexisting emotional condition in the performance of duty.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 14, 2013 Office of Workers' Compensation Programs' decision is affirmed.

Issued: January 8, 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

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<sup>26</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(a), respectively.