

gastroesophageal reflux disease/nonerosive reflux disease, loss of memory, insomnia, high blood pressure and obesity due to factors of her federal employment.

In a statement dated December 3, 2012, appellant related that she experienced anxiety attacks and chronic insomnia due to working in a hostile environment beginning in 2007. She described her diagnoses and the settlement of an Equal Employment Opportunity (EEO) claim. Appellant indicated that the administrative judge recommended that she seek a remedy through workers' compensation. She asserted that she was seeking medical expenses rather than wage-loss compensation. In another December 3, 2012 statement, appellant related that beginning in 2006 she experienced emotional and physical reactions due to stress. She described past and anticipated future medical expenses.

On September 23, 2010 the employing establishment approved appellant's request for reasonable accommodation due to problems with concentration, fatigue and migraines and granted her up to five days of telework per week. It also changed her duty station.

In a statement dated December 3, 2012, Diana R. Mitchell, a unit director, related that she had worked with appellant "the last year or so as both colleague and acting supervisor." She asserted that she was "personally unaware of events or workplace environments that may have adversely affected [appellant] for the last five years or so."

On December 18, 2012 OWCP telephoned the employing establishment and talked to Ms. Mitchell, who indicated that she was a new supervisor. Ms. Mitchell related that there was "no one currently at the [employing establishment], who has not retired that can verify any of this information."

On January 8, 2013 OWCP requested that appellant submit a detailed statement describing the factors of employment that she believed caused her stress-related conditions and a medical report from her attending physician addressing the cause of any emotional condition. In another January 8, 2013 letter, it requested that a knowledge supervisor with the employing establishment review appellant's statement and explain whether it concurred or disagreed with her contentions. OWCP informed it that without a reply it could accept appellant's allegations as factual.

On January 24, 2011 the Equal Employment Opportunity (EEO) Commission accepted appellant's complaint of harassment and discrimination based on sex, race and disability and referred it for investigation. It noted that she asserted harassment due to her former supervisor cancelling an action changing her duty station on August 25, 2010, management telling her it had authorized travel in error on October 18, 2010 and management requiring her to work from home rather than in an office after she was granted reasonable accommodation in November 2010.

In an order dated November 16, 2011, an administrative judge with the EEO Commission granted appellant's motion to amend her claim of sexual and racial harassment to include reprisal.

In an EEOC settlement agreement signed February 2, 2012, appellant and the employing establishment resolved that she would not have to pay any amount claimed by the employing establishment and would not receive back pay, compensation, medical expenses or attorney's

fees.² She agreed to withdraw her EEO complaint. The settlement provided that the employing establishment did not admit to any wrongdoing in entering into the agreement.

On February 4, 2013 appellant asserted that the administrative judge for her EEO settlement had advised her to seek compensation through OWCP. She enclosed information regarding her EEO claim. Appellant related that the employing establishment forced her to relocate by changing her duty station and that she “endured years of sexual harassment and [a] racially charged environment.” She also maintained that it erred in investigating her for wrongdoing.

In a February 10, 2011 statement to the employing establishment, appellant asserted that the issue was not her assigned duty station but instead the sexual harassment she experienced from 2006 to January 2010.

In a statement to the employing establishment dated March 28, 2011, appellant related that in the late fall 2007, the person against whom she filed her EEO complaint told her that he wanted to find a married person to f**k. The person repeatedly shared graphic details of his sex life with his wife and mistress. He made comments on two separate occasions about the size of his penis. The person referred to appellant as his “bulldog.” In management meetings appellant had to listen to “locker room talk that ranged from the mundane jock bantering to crude and lewd remarks.” The regional director referred to a rape victim as “taking it.” At a meeting where appellant was the only black person, an individual made a joke about a baby looking like a monkey and at another meeting recounted a joke about a black person portrayed in a movie as looking like a gorilla. In 2009, the person against whom appellant had filed a grievance made sexually explicit comments to a new female hire, who asked for appellant’s help getting out of a car trip with the individual. Appellant convinced management to let the woman fly to the conference but received criticism for her actions.

By decision dated June 12, 2013, OWCP denied appellant’s claim after finding that the evidence was insufficient to show that she sustained an emotional condition in the performance of duty. It determined that she had not established any compensable employment factors.

On appeal, appellant contends that OWCP improperly denied her claim based on its finding that she had not substantiated her allegations of sexual harassment and a hostile work environment based on race. She related that she did not describe every instance that created the hostile work environment but instead provided a sample of events. The individual who harassed appellant also retaliated against her and the EEO administrative judge allowed her to incorporate her allegations of retaliation into her EEO claim. Appellant maintains that the fact that the employing establishment settled her EEO claim and that her claim survived summary judgment establishes a factual basis for her allegations. OWCP did not ascertain her credibility and failed to review the medical evidence. Appellant argues that she met the threshold for establishing sexual harassment.

In response, the Director contends that appellant has not met her burden of proof to establish her emotional condition claim. He maintains that the EEO documents are insufficient

² On February 11, 2013 appellant submitted medical evidence.

as the agreement does not award any back pay or relief to her and provided that the employing establishment did not admit to wrongdoing. The Director concedes that the employing establishment did not respond to the January 8, 2013 request for comments from a supervisor regarding appellant's allegations and thus OWCP could have accepted the allegations as factual under 20 C.F.R. § 10.117(b). He asserts that in this case, however, the employing establishment advised that there was no one that could address appellant's allegations, and that she should have access to any records submitted by the employing establishment in connection with her EEO claim.

Appellant submitted a supplemental pleading on April 10, 2014. She argued that the employing establishment failed to controvert her allegations and challenges the assertion that all persons with knowledge of the identified incidents had retired. Appellant asserts that OWCP failed to assist in the development of her claim.

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.³ 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 frustration from not being permitted to work in a particular environment or to hold a particular position.⁴

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.⁵ 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.⁶ 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.⁷

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence introduced which establishes that the acts alleged or implicated by the

³ 5 U.S.C. § 8101 *et seq.*; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁵ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

⁶ See *William H. Fortner*, 49 ECAB 324 (1998).

⁷ *Ruth S. Johnson*, 46 ECAB 237 (1994).

employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.⁸ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.⁹ The issue is whether the claimant has submitted sufficient evidence under FECA to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹⁰ The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by OWCP and the Board.¹¹

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.¹² 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.¹³

OWCP regulations provide that the employing establishment who has reason to disagree with an aspect of the claimant's report shall submit a statement to OWCP that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support that position.¹⁴ The applicable regulations further provide that the employing establishment may include supporting documents such as witness statements, medical reports or records or any other relevant information.¹⁵ If the employing establishment does not submit a written explanation to support its disagreement, OWCP may accept the claimant's report of injury as established.¹⁶

⁸ See *Michael Ewanichak*, 48 ECAB 364 (1997).

⁹ See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

¹⁰ See *James E. Norris*, 52 ECAB 93 (2000).

¹¹ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹² *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹³ *Id.*

¹⁴ 20 C.F.R. § 10.117(a).

¹⁵ *Id.*

¹⁶ *Id.* at § 10.117(b).

ANALYSIS

Appellant has not alleged that she developed an emotional condition due to the performance of her regular or specially assigned duties or out of a specific requirement imposed by her employment under *Cutler*.¹⁷ She asserted that the employing establishment erred in changing her duty station, notifying her that it had incorrectly authorized travel on October 18, 2010, investigating her and requiring her to work from home in November 2010 after it granted her request for reasonable accommodation.

An employee's emotional reaction to administrative or personnel matters taken by the employing establishment is not covered under FECA absent a finding of error or abuse by it as such matters pertain to procedures and requirements of the employing establishment and do not bear a direct relation to the work required of the employee.¹⁸ The Board finds that appellant has not presented any evidence of error or abuse in the part of the employing establishment with respect to its handling of the above-noted administrative and personnel matters.¹⁹ Consequently, appellant has not established error or abuse in an administrative matter as a compensable work factor.

Appellant also attributed her condition primarily to sexual harassment and a hostile work environment. She maintained that in 2007 a manager told her that he wanted to find someone who was married and shared explicit details of his sexual encounters with both his wife and mistress. At two different times the manager referenced the size of his penis. He referred to appellant as his "bulldog." In 2009, the manager made graphic sexual comments about a new female hire. In meetings with managers, appellant was subjected to "locker room talk" and crude banter. The regional director referred to a female rape victim as "taking it." At one meeting a person joked about a baby looking like a monkey. Appellant was the only black person at the meeting. At another meeting, an individual told a joke about a black person portrayed in a movie as appearing like a gorilla.

For harassment to give rise to a compensable disability there must be evidence that the harassment occurred.²⁰ A claimant's mere perception of harassment is not compensable.²¹ While appellant has provided some details regarding her allegations, the record is similarly deficient with respect to evidence contradicting her assertions. She submitted a detailed statement raising allegations of sexual and racial harassment without, however, specifically identifying the individuals involved. In a December 18, 2012 telephone call, a supervisor with the employing establishment informed OWCP that every person who could comment on her allegations had retired. On January 8, 2013 OWCP requested that a knowledgeable supervisor

¹⁷ See *Lillian Cutler*, *supra* note 3.

¹⁸ See *Thomas D. McEuen*, *supra* note 6.

¹⁹ See *Charles D. Edwards*, 55 ECAB 258 (2004); *Linda K. Mitchell*, 54 ECAB 748 (2003); *James E. Norris*, 52 ECAB 193 (2000).

²⁰ See *Donna J. DiBernardo*, 47 ECAB 700 (1996).

²¹ See *Joel Parker, Sr.*, 43 ECAB 220 (1991).

address appellant's contentions and properly informed the employing establishment that without a response it could accept her allegations as factual.²² It did not receive a response from the employing establishment.

The case will be remanded to OWCP to request that the employing establishment provide a detailed statement from appellant's supervisor or knowledgeable individual addressing the accuracy of all statements provided by her regarding her claim. If the employing establishment does not respond to the request, OWCP may accept appellant's allegations as factual in accordance with its regulations.²³ It should also request that she identify the individuals involved in the incidents she described as causing her emotional condition. After such further development as OWCP deems necessary, it should issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.²⁴

Issued: June 16, 2014
Washington, DC

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

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

²² See 20 C.F.R. § 10.117(b).

²³ See *Alice F. Harrell*, 53 ECAB 713 (2002).

²⁴ Richard J. Daschbach participated in the preparation of the decision but was no longer a member of the Board after May 16, 2014.