



that the hearing representative incorrectly determined that appellant played an active role in creating the December 10, 2012 incident.

### **FACTUAL HISTORY**

On December 10, 2012 appellant, then a 44-year-old electrician, filed a traumatic injury claim alleging that he suffered from extreme anxiety due to a hostile work environment that date. He was sitting in a cubicle belonging to Rachel Scott, waiting to talk to Robert Sanderlin, his supervisor, who was in a meeting with Richard S. Banks, a production manager, and Randy B. Ives, a superintendent. Appellant alleged that Mr. Banks used profane language and yelled at him to get out of the cubicle belonging to Ms. Scott, Mr. Banks' assistant. He responded that Mr. Banks could not tell him where to sit. Appellant stated that Mr. Banks threatened to write him up if he did not leave. He got out of Ms. Scott's chair and told Mr. Banks that he could write him up. Appellant became humiliated and shaken when Mr. Banks yelled at him. He felt worse after hearing Mr. Banks, Mr. Sanderlin, Mr. Ives and Darren Davis, a superintendent, laughing about the incident. Appellant alleged that Mr. Ives told a coworker to stay away from appellant because he had been recording people. He stated that he had recorded conversations to prove that Mr. Banks and company had discriminated against him and created a hostile environment. Following the December 10, 2012 incident, appellant requested leave and left work.

By letter dated January 2, 2013, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested that he submit additional factual and medical evidence. OWCP also requested that the employing establishment submit medical evidence if appellant was treated at its medical facility.

In a December 19, 2012 statement, Kellie E. Morrow, an employee, related that on December 10, 2012 appellant asked her if he could sit in Ms. Scott's cubicle to wait for Mr. Sanderlin to talk to him about not getting approved for an award. Ms. Morrow stated that Mr. Banks came storming out of an office and started yelling profanities at appellant and telling him to return to the shop where he belonged. Mr. Banks told appellant that he was sitting in someone's personal space and ordered him to leave or get written up. Ms. Morrow stated that appellant walked toward the shops and calmly told Mr. Banks to write him up. She could tell he was upset by Mr. Banks' tone and embarrassed by his outburst. Ms. Morrow related that, once the office door was closed, she could hear Mr. Sanderlin, Mr. Banks, Mr. Ives and Mr. Davis talking and laughing loudly about the incident. Appellant returned after the meeting adjourned and gave Mr. Sanderlin a leave slip. Ms. Morrow stated that she was very nervous because it seemed a hostile work environment had been created for no apparent reason. She stated that Mr. Banks' tone of voice was very demeaning and cold. Ms. Morrow had never seen him that angry before.

In a December 17, 2012 progress note, Donna M. Paris, a licensed clinical social worker, stated that appellant remained anxious and worried. Appellant was worried about going to work to see Mr. Sanderlin about his request for leave.

In medical records dated April 19 and December 17, 2012 and January 7, 2013, Dr. Patricia Y. King, an attending psychiatrist, advised that appellant had major depressive

disorder due to a hostile work environment. She addressed his work capacity and physical restrictions.

By letter dated January 29, 2013, the employing establishment challenged appellant's claim, contending that he had not established that the December 10, 2012 incident occurred as alleged.

In a December 18, 2012 e-mail, Mr. Davis stated that he was in Mr. Banks' office on December 10, 2012. When Mr. Banks saw appellant sitting at Ms. Scott's desk, he told him to wait in the shop. Appellant responded that Mr. Banks could not tell him where to sit. Mr. Banks explained to appellant that he was not sitting in his own workstation and that Ms. Scott had items/articles of importance that should not be disturbed. He gave appellant a direct order to wait in the shop for his supervisor. Mr. Davis stated that appellant mumbled something that was inaudible to him.

In a January 24, 2013 letter, Paul Hodges, a supervisor, related that he was in his office on December 10, 2012 when he heard a commotion a few cubicles away. He saw appellant walk away and make a profane comment to Mr. Banks.

In a January 25, 2013 statement, Mr. Sanderlin related that he was in a meeting with all the superintendents in Mr. Banks' office on December 10, 2012 when Mr. Banks asked Mr. Ives to step outside his office. Mr. Ives saw appellant sitting in Ms. Scott's cubical which was located next to Mr. Banks' office. Mr. Banks left his office and told appellant that he could not sit there because it was another person's space and contained personnel belongs. He instructed appellant to wait in the shop to talk to Mr. Sanderlin. Appellant refused to leave the cubical and responded that Mr. Banks could not tell him where to sit. After Mr. Banks asked appellant to move for the third time, he left the room. Mr. Sanderlin stated that he could not see Mr. Banks and appellant, but he did not hear Mr. Banks talk loudly or in an inappropriate manner to appellant.

In an undated letter, Mr. Banks related that on December 10, 2012 he instructed appellant not to sit in Ms. Scott's cubical as it was not assigned to him and it contained sensitive information. He refused to leave. Mr. Banks stated that appellant's demeanor and tone were disrespectful, rude and borderline aggressive when appellant responded that he could not tell him where to sit. He gave appellant a direct order to leave the cubicle and to please wait for Mr. Sanderlin in the shop. Appellant got up and left. While leaving Mr. Sanderlin's office a few minutes later, he called Mr. Banks a profane name. Mr. Banks contended that he was not rude and did not display an aggressive posture or tone towards appellant. He simply did not want appellant sitting in employees' work spaces for no reason.

In a January 29, 2013 e-mail, Mr. Ives stated that he was in Mr. Banks' office for a regular staff meeting with Mr. Sanderlin and Mr. Davis on December 10, 2012. Their conversation stopped and Mr. Ives opened the door to see if their conversation was being overheard by any employees. Mr. Ives saw appellant sitting in Ms. Scott's cubicle, which was located near Mr. Banks' office. Mr. Banks, in a nonaggressive tone, instructed appellant not to sit there and to go into the shop. Mr. Ives stated that it was very obvious that appellant became perturbed when he told Mr. Banks that he could sit where he wanted to sit. Mr. Banks again asked appellant to leave and wait in the shop area or he would write him up. In a loud voice,

appellant told Mr. Banks to write him up. He then slowly left the office. Mr. Ives stated that he could not believe how Mr. Banks remained so calm because appellant's voice, attitude and demeanor made him mad. He contended that Mr. Banks acted very professionally and appellant acted like a jerk. Mr. Ives related that the episode was not loud or involved cursing. He had never heard Mr. Banks be loud or verbally abusive towards appellant. Mr. Ives related that Mr. Banks was friendly or professional towards appellant.

In a February 4, 2013 decision, OWCP denied appellant's claim, finding that the weight of the evidence did not establish that the December 10, 2012 incident occurred as alleged. It found that the medical evidence did not establish that he sustained a diagnosed medical condition causally related to an accepted employment factor.

On February 11, 2013 appellant requested an oral hearing before an OWCP hearing representative and submitted medical evidence.

In progress notes and a letter dated May 10, 2012 to February 13, 2013, Dr. King advised that appellant had anxiety and depression symptoms related to a hostile work environment. He also addressed appellant's disability for work.

In a January 30, 2013 progress note, Ms. Paris indicated that appellant was off work, but continued to receive calls from the employing establishment to come into work to address additional paperwork. She stated that he was not looking forward to returning to work.

At the June 17, 2013 oral hearing, appellant testified that on December 9, 2012 Ms. Sanderlin advised him that he was not going to receive a spot award for work performance because Mr. Banks had decided not to give it to a light-duty employee.<sup>2</sup> On December 10, 2012 he wanted to talk to Mr. Sanderlin regarding this matter. Appellant reiterated his allegations regarding the incident on that date, Mr. Ives' actions and his reaction to the incident. He testified that Mr. Banks discovered that appellant had recorded their conversations over the past two years to establish that he was being discriminated against. Appellant stated that he had filed an Equal Employment Opportunity (EEO) complaint against Mr. Banks and Mr. Ives which was at the hearing stage.

In a September 6, 2013 decision, an OWCP hearing representative affirmed the February 4, 2013 decision. She found that the evidence was sufficient to establish that appellant was sitting at a cubicle outside Mr. Banks' office on December 10, 2012 when directed to leave the office and return to the shop. Mr. Banks informed appellant that he should not be sitting in someone else's cubicle. The hearing representative also found that the evidence was insufficient to establish that appellant was verbally abused by Mr. Banks. She determined that appellant was an abusive party and active participant in the December 10, 2012 incident. The hearing representative found that it was not necessary to address the medical evidence as he failed to establish a compensable employment factor.

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<sup>2</sup> The record indicates that appellant had filed prior claims with OWCP.

## LEGAL PRECEDENT

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 adversely affected by factors of his or her federal employment.<sup>3</sup> To establish that he or she sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; (2) medical evidence establishing that he or she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</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>7</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>8</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>9</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 factors of employment and are to be considered by a physician when

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<sup>3</sup> *Pamela R. Rice*, 38 ECAB 838 (1987).

<sup>4</sup> *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>5</sup> 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>6</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>7</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>8</sup> *See William H. Fortner*, 49 ECAB 324 (1998).

<sup>9</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.<sup>10</sup> 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.<sup>11</sup>

### ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of several actions by his supervisors. OWCP denied his emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether the alleged incidents and conditions of employment are covered employment factors under the terms of FECA. The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Cutler*.<sup>12</sup> Rather, appellant has alleged harassment and discrimination and error or abuse in administrative matters on the part of his supervisors.

Appellant contended that on December 10, 2012 Mr. Banks used profane language and yelled at him to get out of Ms. Scott's cubicle. He further contended that Mr. Banks threatened to write him up if he failed to do so. Appellant alleged that Mr. Banks, Mr. Ives, Mr. Sanderlin and Mr. Davis laughed about the December 10, 2012 incident. The statement from Ms. Morrow indicated that on December 10, 2012 she witnessed Mr. Banks yell profanities at appellant when he ordered him to get out of Ms. Scott's cubicle and to return to the shop. She also witnessed him threaten to write appellant up if he failed to do so. Ms. Morrow stated that Mr. Banks' tone of voice was very demeaning and cold. She described appellant's reaction to this incident and stated that she became nervous that Mr. Banks' actions created a hostile environment. The statements of Mr. Banks, Mr. Sanderlin and Mr. Ives related that Mr. Banks did not raise his voice and handled the situation in a professional manner. Mr. Ives stated that he had never heard Mr. Banks speak loudly or verbally abuse appellant. Mr. Banks, Mr. Ives, Mr. Davis and Mr. Hodges related that appellant was rude, disrespectful and nearly aggressive when he loudly stated with profane language that Mr. Banks could not tell him where to sit. Mr. Banks also stated that appellant called him a profane name as he was leaving Mr. Sanderlin's office. Appellant acknowledged that he used profane language in response to Mr. Banks' directive. The Board has recognized the compensability of physical threats and verbal aggression in certain circumstances.<sup>13</sup> Regarding verbal aggression, compensability does not imply that every statement uttered in the workplace will give rise to coverage under FECA.<sup>14</sup> A raised voice in

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<sup>10</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>11</sup> *Id.*

<sup>12</sup> *Supra* note 5.

<sup>13</sup> See *Alton L. White*, 42 ECAB 666, 669-70 (1991) (recognizing the compensability of physical threats and verbal aggression).

<sup>14</sup> See *Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783 (1991).

the course of a conversation does not, in and of itself, warrant a finding of verbal abuse.<sup>15</sup> One yelling incident does not constitute a persistent pattern of harassment. Appellant has not shown how such an isolated incident would rise to the level of verbal abuse or otherwise fall within the coverage of FECA.<sup>16</sup>

Appellant also contended that he was discriminated against by Mr. Banks, Mr. Ives and others. He contended that Mr. Ives told a coworker to stay away from him because he recorded people. Appellant stated that he had recorded Mr. Banks to prove that he had discriminated against him and created a hostile work environment. However, for harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions or feelings of harassment or discrimination do not constitute a compensable factor of employment.<sup>17</sup> An employee's charges that he or she was harassed or discriminated against, is not determinative of whether or not harassment or discrimination occurred.<sup>18</sup> To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.<sup>19</sup> The Board finds that the factual evidence fails to support appellant's allegation of discrimination. Appellant did not submit witness statements from individuals indicating that Mr. Banks discriminated against him or that Mr. Ives told employees to stay away from him to avoid being recorded.

Appellant's allegations regarding Mr. Banks' instructions that he leave Ms. Scott's cubical and return to his shop and threat of disciplinary action,<sup>20</sup> the denial of a performance award<sup>21</sup> and the filing of a EEO complaint alleging discrimination<sup>22</sup> are administrative matters and not compensable absent a showing of error or abuse on the part of the employing establishment. The statements of Mr. Banks, Mr. Sanderlin, Mr. Ives, Mr. Davis and Mr. Hodges, as discussed above, establish that Mr. Banks did not err in the exercise of his supervisory duties by directing appellant to leave Ms. Scott's cubical and to return to the shop or threatening the use of disciplinary action. There is no evidence of record regarding Mr. Banks' decision not to give appellant a performance award. Although appellant filed an EEO complaint

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<sup>15</sup> *Karen K. Levene*, 54 ECAB 671 (2003).

<sup>16</sup> *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers comments such as you might be able to do something useful and here he comes was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (a supervisor's calling an employee by the epithet ape was a compensable employment factor).

<sup>17</sup> *J.C.*, 58 ECAB 594 (2007); *Robert G. Burns*, 57 ECAB 657 (2006); *Lorraine E. Schroeder*, 44 ECAB 323 (1992).

<sup>18</sup> *See Ronald K. Jablanski*, 56 ECAB 616 (2005); *William P. George*, 43 ECAB 1159 (1992).

<sup>19</sup> *See G.S.*, Docket No. 09-764 (issued December 18, 2009); *C.S.*, 58 ECAB 137 (2006); *Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

<sup>20</sup> *See Marguerite J. Toland*, 52 ECAB 294 (2001).

<sup>21</sup> *See Dinna M. Ramirez*, 48 ECAB 308, 313 (1997); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

<sup>22</sup> *Michael A. Salvato*, 53 ECB 666, 668 (2002).

alleging discrimination regarding the actions of Mr. Banks and Mr. Ives, the record does not contain a formal finding of error or abuse to establish these allegations of error or abuse in an administrative matter. As there is insufficient evidence that the employing establishment acted unreasonably in the above-stated administrative matters, the Board finds that appellant has not established a compensable employment factor.

Since appellant has not established a compensable work factor, the Board will not address the medical evidence.<sup>23</sup>

On appeal, appellant's attorney contended that OWCP's decisions were based on incorrect findings of fact and conclusions of law. She asserted that the unsworn statements of management officials did not outweigh appellant's hearing testimony which established that a December 10, 2012 yelling incident occurred as alleged. Counsel further asserted that an OWCP hearing representative did not consider the history provided by appellant in finding against a hostile work environment. She contended that the hearing representative incorrectly determined that appellant played an active role in creating the December 10, 2012 incident. The Board finds that appellant has offered no support for her argument and, for the reasons explained above, he failed to establish an emotional condition while in the performance of duty.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition while in the performance of duty.

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<sup>23</sup> *Karen K. Levene*, 54 ECAB 671 (2003).



**ORDER**

**IT IS HEREBY ORDERED THAT** the September 6, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 2, 2014  
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