

FACTUAL HISTORY

Appellant, widow of the deceased employee, filed a claim for death benefits on July 5, 2011.² In an attached letter, she stated that the employee, a 51-year-old supervisory customs and border protection officer (CBPO) at the time of his death, complained about stress at work. Appellant indicated that the employee was under investigation following an incident with staff, was recently transferred to baggage control, and felt that he was not being treated fairly, noting that he was unable to sleep or eat well, and was concerned about the investigation and his job.

An official superior's report of the employee's death, signed by Mona L. Aliipule, chief CBPO at the employing establishment on June 13, 2011, indicated that the employee complained of chest pain at work on June 12, 2011; paramedics were called, and the employee was transported to Daniel Freeman Marina Hospital. She stated that his death occurred at 6:30 p.m. that evening, at the hospital. Valentino D. Palle, supervisor of passenger operations stated that at approximately 5:00 p.m. on June 12, 2011 the employee entered a supervisor's office, had his right hand on his chest, and requested help. He was advised to remove his shirt and gun belt and lay upon a table. A 911 call was placed. Mr. Palle indicated that the employee was alert and responsive when taken to the hospital. Darin K. Heisch, a supervisor, indicated that the employee complained of chest pain at work on June 12, 2011. He reported that at around 5:00 p.m. he found the employee sitting at a table with his uniform shirt off, talking with fellow officers and that, after questioning the employee about his symptoms, he recommended that the employee go to the hospital. Paramedics were called and transported the employee to the hospital. Mr. Heisch indicated that he followed the ambulance to the hospital and described events until he was told that the employee had died.

The death certificate, signed by Dr. Mark Galbraith, a Board-certified family physician, indicated that the immediate cause of death was cardiac arrest with an underlying cause of coronary artery disease. On June 24, 2011 Dr. Galbraith described a history that the employee had right chest pain and died in the ambulance on the way to the hospital. He indicated that the direct cause of death was cardiac arrest, and that contributing causes were smoking and stress.

In correspondence dated May 7, 2012, OWCP requested that appellant and the employing establishment respond to the claim. In a July 16, 2012 response, Anthony Owens, the employee's supervisor, indicated that on or about May 21, 2011 he temporarily reassigned the employee from passport control operations to baggage control operations because an officer that the employee supervised had made a complaint against him, and he decided to transfer the employee during the pendency of any investigation. Mr. Owens indicated that the employee remained at the same level and grade and kept his same responsibilities as a supervisor. On August 22, 2012 W. Jeannette Lewis, assistant director of mission support indicated that, around the time of the employee's transfer, three investigations were being conducted involving him. She stated that the first resulted in a letter of reprimand and that the other two were pending at the time of his death and were in relation to complaints or allegations by coworkers and that these were closed upon his death. Ms. Lewis attached a June 10, 2011 letter of reprimand

² A copy of the certificate of marriage, issued by the State of California, indicates that appellant and the employee were married on October 18, 1992.

addressed to the employee for engaging in activities that created the appearance of a conflict with his official duties and responsibilities. This referred to the March 2, 2011 incident when he arrived in full uniform two and a half hours before the beginning of his shift, to meet his brother-in-law who was arriving from Asia, and asked another officer to speed up the immigration process. Only when questioned did the employee identify the incoming passenger as his brother-in-law. The letter indicated that the employee's interactions with his relative created the appearance of a conflict of interest between his official duties and his personal interest.

By decision dated February 28, 2013, OWCP denied the claim because the evidence of record failed to establish that the employee's death was caused by any work factors.

On January 9, 2014 appellant, through counsel, requested reconsideration. She asserted that difficult relations between the employee and his subordinates rose to the degree of harassment and was therefore compensable. In August 20 and 21, 2013 affidavits, appellant stated that the employee worked overtime and would occasionally comment about the agency being understaffed and that he was overworked, and that he would be called in on his day off and holidays when others did not show up for work. She related that, in the months prior to his death, his personality, sleep, and eating habits changed. Appellant indicated that in 2008 the employee began having difficulty with a subordinate officer who filed three complaints of harassment against him that were found unsubstantiated, and that in 2011 he was transferred and two investigations were being done at the time of his death. She indicated that the employee was in good health at the time of his death.

Also submitted were a number of employing establishment documents, obtained through Freedom of Information Act (FOIA) requests, dated from September 12, 2008 to June 13, 2011, especially during the period February 18 to May 21, 2011.³ These included descriptions of complaints made by passengers and coworkers regarding statements and actions of the employee. An August 9, 2010 letter informed the employee that three investigations of workplace harassment complaints filed against him were not substantiated and the cases had been closed. He was, however, cautioned against future misconduct. In a September 9, 2010 memorandum, the employee disputed allegations made against him.⁴ A May 21, 2011 "letter of instruction," discussed a May 17, 2011 complaint that the employee was engaging in inappropriate conduct and that a review was ongoing. At that time he was reassigned from passport operations to baggage control operations. In undated statements, a number of officers working the evening shift commended the employee.

In a December 5, 2013 report, William W. Deardorff, Ph.D., a psychologist, described his review of "declarations, medical records, and other materials available for review." He described medical records dating from 1997 to 2007, indicating that these did not mention cardiac symptoms prior to the employee's sudden death, stating that a causative link between occupational stress and sudden cardiac arrest had been firmly established in medical literature. Dr. Deardorff indicated that he had reviewed a "statement of facts" and documents from the

³ A good portion of the identifying information was redacted from the documentation received in response to the FOIA request.

⁴ This was apparently in response to a complaint made by a passenger.

employing establishment. He commented that the employee was getting conflicting and mixed messages in feedback from the employing establishment, and opined that this kind of experience represented high job strain as evidenced in large group studies. Dr. Deardorff further indicated that the employee's wife described many symptoms of subclinical or clinical depression in response to the work situation over the 12 to 24 months prior to the employee's death. He reviewed medical literature related to risk factors for coronary artery disease and sudden cardiac death. Dr. Deardorff concluded that occupational stress contributed to the employee's death.

In a merit decision dated July 8, 2014, OWCP found that the allegations that the employee was harassed at work had not been established as factual and denied appellant's claim that the employee's death was employment related.

LEGAL PRECEDENT

An appellant has the burden of proving by the weight of the reliable, probative and substantial evidence that the employee's death was causally related to his or her employment.⁵

To establish her claim that the employee sustained stress in the performance of duty, which precipitated his death, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that his death was due to or aggravated by an emotional reaction; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his death.⁶

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*,⁷ 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.⁸ 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.⁹ A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁰

⁵ *L.R. (E.R.)*, 58 ECAB 369 (2007).

⁶ *See Martha L. Watson*, 46 ECAB 407 (1995).

⁷ 28 ECAB 125 (1976).

⁸ *See Robert W. Johns*, 51 ECAB 137 (1999).

⁹ *Supra* note 7.

¹⁰ *Roger Williams*, 52 ECAB 468 (2001).

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.¹¹ Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.¹²

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations that the harassment occurred with probative and reliable evidence.¹³ With regard to emotional claims arising under FECA, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other agencies, such as the Equal Employment Opportunity Commission, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under FECA, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by co-employees or workers. Mere perceptions and feelings of harassment will not support an award of compensation.¹⁴

In cases involving emotional or stress-related 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.¹⁵ 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.¹⁶

ANALYSIS

Appellant, the widow of the employee, alleges that the employee's heart attack and death were caused by stress at work. OWCP denied the claim, finding that appellant did not establish any compensable employment factors. The Board must, therefore, review whether these alleged

¹¹ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹² *Kim Nguyen*, 53 ECAB 127 (2001).

¹³ *James E. Norris*, 52 ECAB 93 (2000).

¹⁴ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁵ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁶ *Id.*

incidents and conditions of employment are covered employment factors under the terms of FECA.¹⁷

Appellant made a general contention on reconsideration that the employee worked overtime and on his days off. She, however, did not provide sufficient evidence to document the alleged overwork. Consequently, this allegation was not established by the evidence.¹⁸ Appellant did not further attribute the employee's stress to the performance of his regular duties as a customs officer or to any special work requirement arising from his employment duties under *Cutler*. Rather, her additional contentions pertained to claimed harassment by coworkers and investigations these necessitated.

Appellant asserted that difficult relations between the employee and subordinate employees rose to the degree of harassment and was therefore compensable. She argued that the fact that some of the complaints were found unsubstantiated was sufficient to establish harassment. If disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from the employee's performance of his regular duties, these could constitute employment factors.¹⁹ The evidence, however, must establish that the incidents of harassment or discrimination occurred as alleged to give rise to a compensable disability under FECA.²⁰ The record in this case does not fully describe the content of the allegations made by coworkers. In addition to the August 9, 2010 letter finding some complaints unsubstantiated, the record also includes a letter of instruction dated May 21, 2011, when the employee was transferred, and a June 10, 2011 letter of reprimand. The Board finds that the evidence of record does not establish a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coworkers.²¹ The supportive statements submitted by appellant are general in nature and do not refer to specific events. She did not submit sufficient evidence to substantiate allegations of harassment and discrimination.²²

To the degree that appellant is also alleging error and abuse on the part of the employing establishment in conducting investigations of the complaints, investigations are an administrative function of the employing establishment that do not involve an employee's regular or specially assigned employment duties.²³ As noted above, 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.²⁴ However, if the evidence discloses error or abuse on the part of the employing

¹⁷ See *R.K.*, Docket No. 08-144 (issued June 3, 2008).

¹⁸ See *Bonnie Goodman*, 50 ECAB 139 (1998).

¹⁹ *Janice L. Moore*, 53 ECAB 777 (2002).

²⁰ *Id.*

²¹ *Supra* note 14.

²² See *Robert Breeden*, 57 ECAB 622 (2006).

²³ *Beverly A. Spencer*, 55 ECAB 501 (2004).

²⁴ *Supra* note 11.

establishment in an administrative function, it will be considered a compensable factor of employment.²⁵

On appeal appellant's attorney referenced the case *Rene John Rutkofske*²⁶ as supportive of appellant's contention that error and abuse occurred because complaints against the employee were determined to be unsubstantiated. As noted, the record supports that complaints were made against the employee by coworkers and passengers, and investigated. In *Rutkofske*, in addition to filing an EEO complaint against Mr. Rutkofske, a coworker continued to harass him and filed warrants for his arrest regarding claimed incidents that occurred at work, for which he spent a day in jail. In that case, the Board found that Mr. Rutkofske's reaction to a coworker bringing false criminal charges against him for an alleged incident that occurred at work was sufficient to establish a compensable employment factor.²⁷ In the case at hand, the record only indicates that complaints were filed against the employee and some were determined to be unsubstantiated. The record also includes letters of instruction and reprimand; the employee was transferred shortly before his death, and was under investigation at that time. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²⁸ The employing establishment retains the right to investigate an employee if wrongdoing is suspected.²⁹ The Board finds that in this case the employer acted reasonably and did not commit error or abuse in investigating the complaints against the employee. Appellant has failed to establish a compensable factor of employment in this regard.

Lastly, as to appellant's argument on appeal that OWCP decisions were deficient, in its February 28, 2013 decision, OWCP correctly determined that appellant had submitted insufficient evidence to support her contentions. In the July 8, 2014 decision, OWCP fully discussed appellant's allegations of harassment and concluded that appellant had not established a compensable factor of employment.

As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record.³⁰

Appellant 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.

²⁵ *Supra* note 23.

²⁶ Docket No. 96-407 (issued June 19, 1998).

²⁷ Appellant also referenced the case, *S.C.*, Docket No. 12-553 (issued November 9, 2012). *S.C.* was in reference to a matter involving whether OWCP met its burden of proof to rescind acceptance of a claim and is therefore not probative to the issues in the instant case.

²⁸ *M.D.*, 59 ECAB 211 (2007).

²⁹ *K.W.*, 59 ECAB 271 (2007).

³⁰ *Katherine A. Berg*, 54 ECAB 262 (2002).

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that the employee's June 12, 2011 death was due to employment-related stress.

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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