United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 15-1057**
	)	**Issued: December 7, 2015**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Mountain Home, TN, Employer	)	

Appearances:
Debra Hauser, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 6, 2015 appellant, through counsel, filed a timely appeal from a January 14, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On November 13, 2013 appellant, then a 52-year-old nurse, filed an occupational disease claim (Form CA-2) alleging that she sustained anxiety, stress, and post-traumatic stress disorder

[1] 5 U.S.C. § 8101 *et seq.*

(PTSD) as a result of an "offensive, oppressive, and intimidating work environment." She stopped work on October 12, 2013 and did not return.

In a report of contact dated February 25, 2013, Rebecca Messer, a nurse, related that on that date she was unable to locate a fellow nurse, appellant, on the C-Ground Advanced (CGA) unit. She stated:

> "The nurse returned to the unit approximately 30 minutes later and advised that she had gone to take another patient that she discharged to the pharmacy. [She] was advised that she needed to report to the charge nurse of ICU [intensive care unit] when she was going to be off the unit and that a NA [nurse assistant] was floating between the units and could have taken the patient to [the] pharmacy and that escort could have been called. The nurse advised that she stepped into PCU [progressive care unit] and advised them that she was taking a patient to [the] pharmacy. Accord[ing] to her Martha Stewart [a nurse] was at the nurse's station."

On March 15, 2013 Mildred Stacy Swenson, the nurse manager of the Special Care Unit (SCU), related that she conducted a meeting on March 6, 2013 to investigate whether appellant had left CGA on February 25, 2013 without notice. Appellant told Ms. Swenson that she informed Ms. Stewart that she was taking a patient out of the unit, but noted that Ms. Stewart was at a computer and did not seem to have heard what she said. Ms. Swenson advised appellant to ensure that "the nurse being communicated with acknowledge[d] her and understood she was leaving the unit."

On May 1, 2013 the employing establishment issued appellant a proposed three-day suspension for abandoning a patient on February 25, 2013. It noted that she was the primary caregiver for two patients. The employing establishment stated:

> "One of these [v]eteran patients was being discharged, and you made the decision to leave [CGA] in order to take the discharged patient to the pharmacy to pick up medication. Before you left [CGA], you failed to provide an appropriate hand-off report to another qualified medical professional to ensure a continuum of patient care; thus, abandoning the other [v]eteran patient that was assigned to your care."

In a response dated May 8, 2013, appellant denied abandoning a patient. She explained that she had two discharged patients waiting for transportation from the hospital. One of the patients was eating a meal. Appellant informed the patient who was eating that she would be absent while taking another patient to his transportation. She told the patient to ring the call bell, which also rang in the PCU, if he needed anything. Appellant notified Ms. Stewart that she was leaving and that she had agreed to watch the patient. The discharge took longer than anticipated because the patient needed to pick up medication from the pharmacy. Approximately one month later, Ms. Swenson conducted an investigation into the incident. Five weeks later, Carol Dubay, a fellow nurse, told appellant that "she would recommend a three-day suspension without pay, and that she would consider notifying the State Board of Nursing regarding the events of that day because it was a case of patient abandonment." Appellant indicated that Ms. Stewart did not remember that she told her that she was leaving the unit. She stated, "I then asked the other

nurse who was present, Chris Guess, RN [registered nurse], what he remembered. He told me that he recalls me telling Ms. Stewart that I was leaving, and, moreover, he considered himself to have been informed as well, and thus monitored the call lights himself in my absence."

In an undated statement, Mr. Guess related that, on the date in question, appellant informed him that two of her patients had been discharged and that she was taking one of the patients to the pharmacy and his car. He moved his computer between the PCU and CGA. Appellant's patient asked Mr. Guess how long it would be until he could leave. Mr. Guess told the patient that it would be a little bit longer and then went to care for another patient. He stated, "A few weeks later, M[s.] Stewart and I were contacted by [tele]phone by M[s]. Swenson and asked about the events of the day in question. At that moment, it was difficult placing days and times and faces together due to the busy nature of the unit, but after careful thought, I believe the above statements are an accurate account of the events of that afternoon."

On July 1, 2013 the employing establishment reduced the May 1, 2013 notice of proposed suspension to a reprimand for abandoning a veteran patient.

On July 26, 2013 the union filed a grievance challenging the July 1, 2013 reprimand. It noted that Mr. Guess provided a statement confirming that appellant had notified him that she was leaving the unit. The union asserted that Ms. Swenson's action in contacting Mr. Guess by telephone while he was busy showed poor management and inadequate fact finding.

In an August 7, 2013 meeting regarding a fact finding investigation into the February 25, 2013 incident, Mr. Guess advised that on March 6, 2013, when he was initially asked about the incident, he had difficulty remembering the events of that day. Subsequently, he advised that appellant, on that date "let me know she had two discharges and that she was taking one out to get his medicines."

In a report of contact dated August 9, 2013, another nurse advised of a discrepancy in medication. Appellant related that she had dropped some hydromorphine in a sharps box. In another statement dated August 9, 2013, Ms. Swenson related that on August 8, 2013 John Carter, a charge nurse, advised that appellant was crying and she told him that she was in a lot of pain. As nurses had informed her earlier that there was a missing hydromorphine vial, a police investigation was initiated.

On August 14, 2013 a police officer related that he investigated allegations that appellant may have diverted drugs based on her "erratic behavior and numerous policy violations with administering medications" on August 8 and 9, 2013. He indicated that the case was closed without criminal charges as it appeared administrative in nature.

On August 21, 2013 the employing establishment advised appellant that it had rescinded the July 1, 2013 reprimand for abandonment of a veteran patient. On August 21, 2013 the employing establishment issued her a proposed reprimand for failing to follow proper policy and procedure on February 25, 2013 when she failed to hand-off a patient before leaving the floor "to take the discharged patient to the pharmacy to pick up medication." It determined that appellant failed to follow a hand-off technique called identification, situation, background, assessment, and recommendations (ISBAR).

In a memorandum to Ms. Dubay dated August 23, 2013, appellant alleged that Ms. Swenson had created a hostile work environment.

On September 20, 2013 the union filed a grievance challenging appellant's August 21, 2013 proposed reprimand for failing to follow proper procedures. It asserted that management did not "make any effort to reconcile conflict statements by developing additional evidence." The union alleged, "[Appellant] followed the 'past practice' of no full ISBAR being used for lunches, breaks and/or short absences from the patient area." It further alleged that employees currently did not understand the proper procedures to follow ISBAR.

In a statement dated October 11, 2013, appellant related that she took a temporary position as a nursing supervisor in August 2008. She believed that she could return to her position as a charge nurse at the end of the temporary position, but another employee took her place. Appellant tried to get a position at her old location, but was notified that the area was not hiring new nurses. Later several new nurses were hired at that location. Ms. Dubay told appellant that she was not performing adequately because she was not rounding or answering her pages. She issued appellant written counseling in October 2010 because she was late, but another employee who missed her shift because she thought she was not scheduled for work received no disciplinary action. In 2012 appellant requested reasonable accommodation due to fibromyalgia and insomnia. In December 2012 Ms. Swenson suggested that she seek counseling and a change of medication after a death in the family. Appellant replied that work stress contributed to her condition. She stated, "[Ms. Swenson] told me that multiple coworkers had complained to her that I was hysterical yet I was never approached with this until I requested leave for my psychological state."

Appellant further related that in April 2013 she sought treatment at the emergency room for shingles. Management denied her request to use leave under the Family and Medical Leave Act (FMLA) for shingles as the condition was not listed on her FMLA paperwork. It marked appellant as absent without leave (AWOL). Subsequently she added shingles to her FMLA papers and the employing establishment granted her approved leave. On July 21, 2013 appellant injured her back while assisting a patient who was about to fall. When completing her claim for a traumatic injury (Form CA-1), a manager told her that her claim might not be approved and that she should have used a lift. Appellant was not able to sign the claim form electronically and had to get a new claim form cosigned. She alleged that Ms. Swenson discussed her injury with her husband, a doctor, in violation of patient confidentiality.

Appellant indicated that on August 8, 2013 she experienced significant pain in her back and asked a coworker to administer medications to her patients. Ms. Swenson did not allow appellant to "hand off" her patients to her coworker. She charged appellant with patient abandonment on August 22, 2013 which was later reduced to a failure to follow procedure. Management investigated appellant for drug use. Ms. Swenson tossed paperwork at her and, on August 16, 2013, again informed her that she needed to have a magnetic resonance imaging (MRI) scan study to diagnose nerve compression.

On November 14, 2013 Cindy Metcalf, an Equal Employment Opportunity (EEO) manager, indicated that she had investigated appellant's allegation that Ms. Swenson created a hostile work environment, but found that the allegation was not substantiated.

In a December 8, 2013 response to appellant's allegations, Ms. Swenson responded that the employing establishment, after investigation, had found that she had not created a hostile work environment. She indicated that she began working as a staff nurse in the SCU in 2010 when appellant was a nursing supervisor. On December 28, 2012 Mr. Carter told Ms. Swenson that appellant could not stop crying. Ms. Swenson suggested that appellant go home and request that her physician "possibly evaluate her medication." She stated, "It is correct that there were multiple occasions that the staff would come to my office concerned about [appellant's] behavior and the safety concerns with her patients. I would at that time go and check on her and on several occasions have sent her home because of her emotional status." On July 21, 2013 appellant injured her back. She and Ms. Swenson had difficulty completing an OWCP claim form because of problems with the electronic system. Ms. Swenson did not tell her that her claim would be denied because she did not use a lift. She did not discuss the injury with her husband. Rather, she informed appellant of the advice that he had given her when she suffered leg and back pain. On August 16, 2013 appellant informed Ms. Swenson that she had L4 and L5 nerve compression that was not improving and Ms. Swenson told her that based on her experience MRI scan studies were not always conclusive. Ms. Swenson denied accusing appellant of using FMLA to drop off her grandson at school, but instead related that appellant had told her that she was late because her daughter was not taking her son to school.

Regarding the February 2013 incident,[2] Ms. Swenson indicated that appellant received disciplinary action for leaving a patient while taking another patient to the car. Appellant asserted that she handed off her patient to Ms. Stewart but she and the rest of the staff denied receiving the hand off. In June 2013, four months later, Mr. Guess indicated that appellant had handed off the patient to him. He did not specifically address why he did not relay this information when nursing supervisors were asking for appellant's location.

On December 10, 2013 the employing establishment mitigated the proposed August 2013 reprimand and instead issued an admonishment for failing to follow proper procedures.

In a statement dated December 12, 2013, Ms. Dubay related that appellant could have returned to her usual position after her detail but instead had applied and was selected for a position as a nurse supervisor. Staff complained about her work as a nurse supervisor. On February 25, 2011 appellant elected reassignment to her prior position in the SCU. She received written counseling on October 5, 2010 because she used excessive leave. Appellant requested FMLA for depression but did not attribute her condition to work.

By decision dated January 29, 2014, OWCP denied appellant's emotional condition claim, finding that she had not established any compensable work factors.

On February 4, 2014 appellant requested an oral hearing. In a statement dated December 18, 2013, received by OWCP on March 10, 2014, she related that Ms. Dubay told her that she would be charged AWOL the next time she left "to pick up my daughter and grandson when they were having car problems…." Ms. Dubay verbally attacked appellant over the telephone. Beginning in August 2012, coworkers informed Ms. Swenson of the time that she

[2] Ms. Swenson refers to the incident where appellant took one of her patients off the unit and left the other patient as occurring in February 2012 rather than February 2013, but this appears to be a typographical error.

arrived at work. Ms. Dubay notified appellant that she could no longer insert peripherally inserted central catheter (PICC) lines. In March 2013 Ms. Dubay and Ms. Swenson sent an e-mail advising that appellant should not be granted unscheduled leave. In May 2013 management charged her with abandoning a patient and in June 2013 Ms. Swenson started tossing mail to her. In August 2013 management changed the charge of abandonment to a reprimand for not following instructions. It also moved her from her position in SCU to same day surgery and recovery, which required her to work with patients who were heavier and required more care. Appellant stated, "When I asked Ms. Swenson about these assignments, I was told that I knew my restrictions and that she was not there to babysit me."

On July 16, 2014 appellant requested reconsideration in lieu of an oral hearing. On August 13, 2014 OWCP accepted her withdrawal of her hearing request.

By decision dated September 5, 2014, OWCP denied appellant's request for reconsideration as she had not submitted evidence or raised an argument sufficient to warrant reopening her case for further merit review.

On December 2, 2014 appellant again requested reconsideration. In support of her request, she submitted witness statements.[3] In a statement dated October 20, 2014, Karen Rochelle, a coworker, related that appellant told her that Ms. Dubay and Ms. Swenson instructed her to no longer insert PICC lines.

In a statement dated October 31, 2014, Sammie Sharpe, a union representative, related that, at meetings with Ms. Dubay and Ms. Swenson, appellant was "badgered, belittled, and even had her thought processes questioned." On August 8, 2012 Ms. Dubay charged appellant as AWOL when she was not able to contact anyone to state that she would be late arriving. Management later allowed her to use FMLA. Appellant had to submit another FMLA request when she had shingles. On October 23, 2012 management denied her request for reasonable accommodation. At a May 1, 2013 meeting, appellant was charged with abandoning a patient on February 23, 2013, and Ms. Dubay told appellant that she was not thinking critically. Ms. Sharpe indicated that Mr. Guess was disciplined for submitting his statement supporting that appellant told him that she was leaving the PCU.

Ms. Sharpe further related that on May 10, 2013 appellant called PCU for assistance with a patient who was not stable and she was told that it would take some time to respond. A cardiologist told her to take the patient to the emergency room, where the patient "coded upon arrival." Ms. Swenson told appellant that she should have called a Code Blue rather than follow the instructions of the cardiologist. On May 15, 2013 agents questioned appellant about narcotics after she dropped medication into a sharps container. Ms. Swenson accused appellant of taking a patient to a floor at a change in shift and leaving him without assuring proper care. On July 24, 2013 she told her that her OWCP claim for a traumatic back injury might not be accepted and further informed her that she was not her babysitter and that she knew her restrictions. On August 2, 2013 appellant had to redo her claim form because Ms. Swenson had

[3] The record contains a September 21, 2014 statement from Cynthia Robbins. The record also contains an October 15, 2014 statement from appellant's daughter.

not signed it. Management moved her on August 26, 2013 to the same day surgery unit without orientation.

On November 20, 2014 Janice Bowden, another union representative, advised that, at a July 24, 2013 meeting, Ms. Swenson told appellant that she was not her babysitter, that she knew her restrictions, and that her OWCP traumatic injury claim might not be accepted. On August 26, 2013 management transferred her to same day surgery without notice or orientation to same day surgery. Management questioned appellant about her arrival time to determine whether she was late. Ms. Bowden related that she "had the opportunity to observe firsthand the emotional and physical effects of the disparate treatment towards [appellant] at the hands of management at this facility."

In a response dated December 22, 2014, the employing establishment asserted that appellant was not treated differently than her coworkers and that the incidents described by Ms. Sharpe were "based on normal policies and procedures, hearsay and her own personal opinion." It noted that Ms. Bowden's statement was her "personal opinion."

By decision dated January 14, 2015, OWCP denied modification of its January 29, 2014 decision.

On appeal counsel argues that appellant has shown error and abuse by management falsely accusing her of patient abandonment. She maintains that Ms. Dubay threatened to notify the state nursing board that appellant had abandoned a patient after receiving Mr. Guess' statement. On August 21, 2013 the employing establishment issued a proposed reprimand for failing to follow procedures, even though appellant had complied with past practice. The union filed a grievance on her behalf, which the union argues supports the allegations of harassment pursuant to *Gaston Ray Weathers*,[4] and *K.M.*[5] Counsel also contends that appellant's supervisors created a hostile work environment by ignoring a witness statement that showed that she had not abandoned a patient. Statements by Ms. Bowden and Ms. Sharpe supported that Ms. Dubay and Ms. Swenson belittled appellant. Management found her AWOL when she was absent on August 8, 2012 even though it was related to medical issues covered under FMLA. Counsel also summarized the medical evidence of record.

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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.[6] On the other hand, the

[4] Docket No. 05-0386 (issued June 10, 2005).

[5] Docket No. 10-0072 (issued April 25, 2011).

[6] 5 U.S.C. § 8101 *et seq.*; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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.[7]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[8] 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.[9] 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.[10]

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 employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[11] A claimant must establish a factual basis for her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[12] The issue is whether the claimant has submitted sufficient evidence under FECA to establish a factual basis for the claim by supporting her allegations with probative and reliable evidence.[13] The primary reason for requiring factual evidence from the claimant in support of 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.[14]

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.[15] If a claimant does implicate a factor of

[7] *Gregorio E. Conde*, 52 ECAB 410 (2001).

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

[9] *See William H. Fortner*, 49 ECAB 324 (1998).

[10] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[11] *See Michael Ewanichak*, 48 ECAB 364 (1997).

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

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

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

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

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, it must base its decision on an analysis of the medical evidence.[16]

ANALYSIS

Appellant has not attributed her emotional condition to the performance of her job duties under *Cutler*.[17] Instead, she alleged that she experienced stress due to error and abuse by the employing establishment in administrative actions and harassment by her supervisors.

In *Thomas D. McEuen*,[18] 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.[19]

Appellant alleged that the employing establishment wrongfully disciplined her based on its finding that she abandoned a patient on February 25, 2013. Matters involving discipline and investigations into allegations of wrongdoing are administrative functions of the employing establishment and not a duty of the employee.[20] As discussed, an administrative or personnel matter is an employment factor only where the evidence discloses error or abuse by the employing establishment.[21] The employing establishment retains the right to investigate an employee if wrongdoing is suspected or as part of the evaluation process.[22]

Appellant stated that on February 25, 2013 two discharged patients were waiting for transportation. She told Ms. Stewart, a nurse, that she was leaving the unit to take one of the patients to the pharmacy and then to his vehicle. Ms. Stewart, who was at her computer, did not acknowledge that she had heard. Appellant told the other patient to ring a call bell if he needed

[16] *Id.*

[17] *See Lillian Cutler*, *supra* note 6.

[18] *See Thomas D. McEuen*, *supra* note 8.

[19] *See Richard J. Dube*, 42 ECAB 916 (1991).

[20] *N.Y.*, Docket No. 12-0886 (issued March 26, 2015); *Donney T. Drennon-Gala*, 56 ECAB 469 (2005); *Thomas O. Potts*, 53 ECAB 353 (2002).

[21] *Id*.

[22] *Sandra F. Powell*, 45 ECAB 877 (1994).

anything. She returned to the unit after 30 minutes. A month later, Ms. Swenson conducted an investigation into the events occurring on February 25, 2013. Ms. Dubay told appellant that she might notify the State Board of Nursing that appellant had abandoned a patient. Appellant asked Mr. Guess, who was also present on February 25, 2013, what he remembered about the incident and he confirmed that she told him that she was leaving the unit.

The Board finds that appellant has not established that the employing establishment committed error or abuse when investigating her for possibly abandoning a patient on February 25, 2013 or issuing discipline in connection with this incident. In a statement dated February 25, 2013, Ms. Messer related that she was unable to locate a nurse in the CGA unit and that no other nurses or clerks knew where appellant had gone. In an undated statement, Mr. Guess indicated that appellant told him that she was leaving to take one of her patients to the pharmacy and his vehicle. He advised that when Ms. Swenson initially questioned him by telephone about the incident, he was busy and unable to remember what happened. On December 8, 2013 Ms. Swenson indicated that an investigation revealed that appellant left her unit for 45 minutes without a proper hand off. She related that in June 2013, four months after the incident, Mr. Guess advised that she had handed-off the patient to him.

After an investigation of the incident, on May 1, 2013 the employing establishment issued appellant a notice of a proposed three-day suspension for abandoning a patient on February 25, 2013. On July 1, 2013 it reduced the proposed suspension to a reprimand for abandoning a patient. The employing establishment subsequently lessened the reprimand to an admonishment for not following proper procedures. Ms. Swenson explained that at the time the employing establishment issued the May 1, 2013 proposed suspension the other nurses and staff denied that appellant handed off her patient. After receiving Mr. Guess' statement, it reduced the proposed suspension first to a reprimand for abandoning a patient and then to an admonishment for failing to follow established procedures. While the disciplinary actions taken by the employing establishment were subsequently reduced, the mere fact that the employer lessens or reduces a disciplinary action does not, in and of itself, establish error or abuse.[23] There is no admission or acknowledgment of error by the employing establishment or any final administrative or grievance decision showing that it erred in issuing disciplinary action based on the February 25, 2013 incident.[24] Consequently, appellant has not established a compensable work factor.

Appellant further has not demonstrated error or abuse by the employing establishment in other disciplinary actions and investigations. She maintained that in October 2010 Ms. Dubay wrongly gave her written counseling for being late. In a December 12, 2013 statement, Ms. Dubay related that she issued appellant written counseling on October 5, 2010 because she used excessive leave. Appellant has not submitted any evidence showing error or abuse by the employing establishment in this administrative matter.

Appellant also asserted that management investigated her for drug use. On August 9, 2013 a nurse advised that medication was missing. The nurse noted that appellant explained that

[23] *See Linda K. Mitchell*, 54 ECAB 748 (2003); *supra* note 15.

[24] *See J.S.*, Docket No. 06-2080 (issued December 20, 2007).

she had dropped hydromorphine into a sharps box. Ms. Swenson instituted a police investigation after nurses told her that appellant had been crying and was in pain around the time of the missing medication. The investigation did not show criminal activity. As noted, the employing establishment has the right to investigate suspected wrongdoing.[25] Appellant has not submitted any evidence supporting her allegation of error by management in investigating the missing medication and thus has not shown error or abuse by the employing establishment.

Appellant further contended that she was transferred without notice to same day surgery, that Ms. Dubay told her that she could no longer place PICC lines, and that Ms. Swenson monitored her arrival time at work. She submitted witness statements supporting that these events occurred as alleged. However, the assignment of work and the monitoring of work are administrative functions of the employing establishment rather than a duty of the employee and, absent evidence of error or abuse, are not compensable.[26] Further, the denial by the employing establishment of a request for a transfer or the desire for a different job are not compensable under FECA as they do not involve a claimant's ability to perform her regular or specially assigned work duties but rather constitute a desire to work in a different position.[27] Appellant has submitted no evidence showing how these actions by her employer constituted error or abuse and thus has not established a compensable work factor.

Appellant also maintained that she was unable to return to her former position after accepting a detail. Ms. Dubay, however, related that she did not return to her prior position at the end of her detail because she applied for and received a position as a supervisor. Appellant, consequently, has not factually established her allegation. Additionally, as discussed, the desire for a different position is not compensable under FECA.[28]

Appellant maintained that in March 2013 Ms. Dubay and Ms. Swenson sent an e-mail indicating that managers should not approve her requests for unscheduled leave. She also asserted that in April 2013 the employing establishment denied her request to use leave under the FMLA for shingles until the condition was added to her FMLA paperwork. On October 31, 2014 Ms. Sharpe advised that in August 2012 Ms. Dubay found appellant AWOL. Subsequently, management allowed her to use leave under the FMLA. Although the handling of leave requests and attendance matters are generally related to employment, they are administrative matters and are not a duty of the employee.[29] Consequently, the denial of leave requests is not compensable absent a showing of error or abuse.[30] Appellant has not submitted any corroborating evidence to support that the employing establishment acted unreasonably with regard to leave matters.

[25] *See M.M.*, Docket No. 15-1221 (issued September 14, 2015).

[26] *Jeral R. Gray*, 57 ECAB 611 (2006); *see also supra* note 14.

[27] *See Charles D. Edwards*, *supra* note 12.

[28] *See Hasty P. Foreman*, 54 ECAB 427 (2003).

[29] *C.T.*, Docket No. 08-2160 (issued May 7, 2009); *Jeral R. Gray*, *supra* note 26.

[30] *James P. Guinan*, 51 ECAB 604 (2000).

Appellant also maintained that Ms. Swenson discussed her medical condition with her husband. Ms. Swenson denied telling her husband about her condition. She asserted that she informed appellant of the advice her husband gave her after her own back injury. Appellant has not submitted any evidence corroborating that Ms. Swenson disclosed information about her medical condition.

Appellant further alleged that Ms. Swenson had difficulty completing a claim form electronically after her July 2013 injury. Ms. Swenson acknowledged that she experienced problems with the electronic system when completing the claim form. Appellant, however, has not demonstrated how Ms. Swenson's initial difficulty completing her claim form would rise to the level of error or abuse as there is no evidence that this action was unreasonable.[31]

Appellant additionally maintained that Ms. Swenson harassed her and created a hostile work environment. She alleged that Ms. Swenson threw paper at her, accused her of using FMLA to drop off her grandson at school, told her that she needed counseling and new medication, and informed her that her claim might not be accepted. Appellant also indicated that Ms. Swenson told her that she knew her work restrictions and was not her "babysitter. She maintained that Ms. Dubay verbally attacked her on the telephone and told her that she would mark her as AWOL if she left work to pick up her daughter and grandson. Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.[32] A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.[33] Additionally, the Board has recognized the compensability of verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.[34]

Ms. Swenson denied accusing appellant of using FMLA to take her grandson to school. Instead, she related that appellant told her that she was late for work because she had to take her grandson to school. After she could not stop crying at work on December 28, 2012, Ms. Swenson suggested that she see her physician for a possible change in medication. Appellant has not demonstrated how Ms. Swenson's suggestion that she might need a medication change after she was unable to stop crying would constitute harassment. On November 14, 2013 an EEO manager with the employing establishment related that an investigation revealed that Ms. Swenson had not created a hostile work environment. While appellant submitted witness statements from Ms. Sharpe and Ms. Bowden, neither provided any detailed description of actions that could be considered harassment, discrimination, or verbal abuse. In an October 31, 2014 statement, Ms. Sharpe advised that Ms. Dubay and Ms. Swenson "badgered and belittled" appellant at meetings and that Ms. Dubay told her that she did not engage in critical thinking. In a November 20, 2014 statement, Ms. Bowden related that she received "disparate treatment" from management and Ms. Swenson told her that she was not her babysitter. Neither Ms. Sharpe

[31] *See T.M.*, Docket No. 15-0715 (issued July 7, 2015).

[32] *T.G.*, 58 ECAB 189 (2006); *Doretha M. Belnavis*, 57 ECAB 311 (2006).

[33] *C.W.*, 58 ECAB 137 (2006); *Robert Breeden*, 57 ECAB 622 (2006).

[34] *See Mary A. Sisneros*, 46 ECAB 155 (1994).

nor Ms. Bowden, however, describes any specific instances of alleged harassment. While Ms. Sharpe noted that Ms. Dubay told her she did not think critically and Ms. Bowden stated that Ms. Swenson told her she was not her babysitter, such isolated comments would not rise to the level of verbal abuse or harassment.[35]

On appeal counsel argues that the employing establishment erred in charging appellant with patient abandonment after it received the statement by Mr. Guess. As discussed, however, she has not submitted any evidence finding wrongdoing by the employing establishment in its disciplinary action. Counsel contends that the fact that the union filed a grievance on appellant's behalf shows error by the employing establishment, citing *Gaston Ray Weathers*.[36] In *Weathers* the Board found that the claimant had not shown error in administrative matters, noting that the union refused to file a grievance for appellant. The filing of a union grievance alone, however, is not sufficient to show error or abuse by the employing establishment.[37]

Counsel also maintains that statements by Ms. Bowden and Ms. Sharpe support that Ms. Dubay and Ms. Swenson belittled appellant and that management erroneously found her AWOL.[38] As the Board has discussed, however, the statements by Ms. Bowden and Ms. Sharpe are insufficient to show harassment and discrimination. Appellant further has not shown error by her employer in initially denying her request for leave under FMLA on August 8, 2012.

Counsel further discussed the medical evidence of record. It is well established that in an emotional condition claim, however, a claimant must first establish compensation work factors before the medical evidence is considered.[39] As appellant has not established a compensable work factors, the Board will not address the medical evidence.[40]

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty.

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[35] *See Denise Y. McCollum*, 53 ECAB 647 (2002) (appellant did not show that her supervisor's statement that she was full of piss and vinegar would rise to the level of verbal abuse or otherwise fall within the coverage of FECA).

[36] Docket No. 05-0386 (issued June 10, 2005).

[37] *See Joan Jean Shaffer*, Docket No. 96-2400 (issued August 17, 1998).

[38] Counsel also cited, *K.M.* Docket No. 10-0072 (issued April 25, 2011). In *K.M.*, the Board found that appellant did not submit any decision showing administrative wrongdoing or other evidence of administrative error in administrative actions. It found, however, witness statements supported harassment and remanded the case for further development. As discussed, however, in this case appellant has not supported her allegations of harassment by supervisors.

[39] *Richard Yadron*, 57 ECAB 207 (2005).

[40] *See Lori A. Facey*, 55 ECAB 217 (2004); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board