

about the assignment and began assaulting me by hitting me several times hard in the arm.”² Appellant stated that he asked Ms. Nicholson why she put her hands on him and stated that it was very inappropriate for her to do so. Ms. Nicholson responded that he had acted like he was not paying her any attention. Appellant added: “I know as a man, I am not being taken seriously by reporting incidents of assaults by females, but I was raised not to hit women and I do not welcome them hitting me. In truth, I do not feel safe in my work environment and I am in constant fear for my employment.”

Ms. Nicholson responded that she approached appellant, Emily Idowu, and Nadine Webster sitting at a table in the main canteen. She informed each employee of their next assignment. Ms. Idowu and Ms. Webster got up from the table, but appellant remained seated and had his hands clasped in front of him on the table “with a blank stare/day dreaming look on his face.” Because of their friendship and a genuine concern for him, Ms. Nicholson felt comfortable lightly tapping him with her fingertips on his wrist to see if he was all right. She stated that appellant looked up at her and proceeded to get up from the table with a smile on his face. Appellant asked Ms. Nicholson why she was touching him. Because of his smile and demeanor, Ms. Nicholson did not know whether he was serious. She stated that she was sorry for touching him, but she wanted to be sure that he was all right because he did not acknowledge or respond to her instructions and had a blank stare as if he did not hear her. While continuing to smile, appellant again stated, “Liz you touched me.” Ms. Nicholson again apologized and told him it would not happen again.

Acting Manager of Distribution Operations (MDO) Brenda Scales stated that appellant approached her to tell her about the incident. Appellant stated that Ms. Nicholson told him to unload a trailer on the container dock. He stated that he heard her instructions, but did not acknowledge her. Ms. Nicholson then hit him on his hand. Ms. Scales “asked [appellant] to show me how she hit him; [he] lightly tapped me on my hand.”

Ms. Webster advised that she did not witness the incident in question.

Dr. Derrick J. Johnson, a psychologist, evaluated appellant on April 23, 2014. He first saw appellant in June 2013. Appellant received weekly sessions to address anxiety and depressive symptoms, which he stated were related to undue harassment and stress he experienced from managers and supervisors beginning in April 2011. He had terminated his sessions in September 2013, but recently returned for services on March 28, 2014 due to an incident where he reported a supervisor hit him on his arm to get his attention. Appellant reported that this incident caused him a great deal of anxiety and depressive symptoms.

Appellant participated in four hours of testing and one hour of diagnostic interview. It was clear from Dr. Johnson’s professional observation that appellant was currently experiencing depressive and anxiety-related symptoms. “[Appellant] has supported his assertion through his written documentation that the workplace has become very stressful for him and has caused him financial and emotional hardship.” The results of the evaluation confirmed that appellant was experiencing symptoms related to depression and anxiety. “The current clinical impressions

² Appellant used a Form CA-2 to file his traumatic injury claim. The record indicates that he was also pursuing an occupational disease claim, under OWCP File No. xxxxxx282, based on incidents beginning April 18, 2011.

appear to represent that circumstances surrounding [appellant's] employment has caused him a great deal of stress which has result[ed] in his feelings of helplessness, hopelessness, irritability, loss of appetite and sleep, suicidal ideation, and pending doom of the future." Dr. Johnson concluded: "It is my professional opinion that [appellant] has experienced significant stress at work and his job has been a major contributing factor to his diagnosis of anxiety and depression."

Appellant advised that he had filed a grievance, but did not know its status. He also filed an Equal Employment Opportunity complaint, which was still in the informal stage.

In a decision dated June 15, 2014, OWCP denied appellant's injury claim on the grounds that he failed to establish that he was injured in the performance of duty. Specifically, the evidence was insufficient to establish that a medical condition arose during the course of employment and within the scope of compensable work factors. OWCP found that being touched on the hand by Ms. Nicholson was not a factor of employment. The evidence did not support appellant's allegation that she assaulted him by hitting him in the arm. "No evidence was submitted to support that this incident arose to a level of abuse on the part of the employing [establishment] which would be considered compensable under [FECA]."

Appellant requested reconsideration. He cited the cases of *Seeta Sookdeo*, Docket No. 02-1451 (issued August 7, 2003) and *Constance G. Patterson*, 42 ECAB 206 (1989). Appellant argued that Ms. Nicholson and Ms. Scales had a credibility issue.

Ms. Webster stated on August 1, 2014 that after Ms. Nicholson instructed her, Ms. Idowu, and appellant to load mail on a truck, appellant got up and left the canteen. She and Ms. Idowu remained seated."

Jessica Carson stated on June 10, 2014 that she was in the cafeteria on March 17, 2014 talking to another employee. She noticed Ms. Nicholson enter the cafeteria and approach appellant, Ms. Webster, and Ms. Idowu. "I don't know what was said or done, but saw when [appellant] get up and proceed to leave the room in a heated conversation with Liz. I started to ask Nadine and Emily what happened but they left out right after Liz and [appellant]."

Ms. Scales stated on March 24, 2014 that appellant had told her pretty much the same story as Ms. Nicholson.

In a decision dated December 31, 2014, OWCP reviewed the merits of appellant's case and denied modification of its prior decision. It found that the evidence did not support his allegation of being assaulted by Ms. Nicholson. The evidence supported an unwanted touch, but there was no evidence that the incident rose to the level of abuse on the part of the employing establishment.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty,³ but workers' compensation does not cover

³ *Supra* note 1 at 8102(a).

each and every illness that is somehow related to the employment. As the Board explained in *Lillian Cutler*, 28 ECAB 125 (1976), when an employee experiences emotional stress in carrying out his or her employment duties or has fear and anxiety regarding his or her ability to carry out his or her duties, and the medical evidence establishes that the disability resulted from his or her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation because they are not found to have arisen out of employment, such as when disability results from an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.

Further, as the Board explained in *Thomas D. McEuen*, 42 ECAB 566, 572-73 (1991), workers' compensation does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.

As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁴ In claims for a mental disability attributed to work-related stress, the claimant must submit factual evidence in support of his or her allegations of stress from harassment or a difficult working relationship. The claimant must specifically delineate those factors or incidents to which the emotional condition is attributed and submit supporting factual evidence verifying that the implicated work situations or incidents occurred as alleged. Vague or general allegations of perceived harassment, abuse, or difficulty arising in the employment are insufficient to give rise to compensability under FECA. Based on the evidence submitted by the claimant and the employing establishment, OWCP is then required to make factual findings which are reviewable by the Board. 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.⁵

Physical contact arising in the course of employment, if substantiated by the evidence of record, may support an award of compensation if the medical evidence establishes that a condition was thereby caused or aggravated.⁶

ANALYSIS

It is not disputed that Ms. Nicholson, a 204-B supervisor, touched appellant on March 17, 2014 in the main canteen at work. The distinction drawn by OWCP between touching and abuse is not dispositive of whether appellant has established a compensable employment factor. The

⁴ See *Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

⁵ *Paul Trotman-Hall*, 45 ECAB 229 (1993) (Groom, Alternate Member, concurring).

⁶ *Alton L. White*, 42 ECAB 666 (1991) (although there was some discrepancy as to the nature and extent of the physical contact, the evidence firmly established that the supervisor made physical contact with the claimant in the course of employment).

statements from appellant and Ms. Nicholson establish that there was physical contact between them. Physical contact was made in the course of employment. There is no issue as to the time, place, or activity elements of work connection. The physical contact had its origins in the workplace. Accordingly, the Board finds that appellant has established a compensable *Cutler*-type employment factor.

Appellant has cited cases to support the compensability of the physical contact. Those cases are noted together with the case of *M.B.*, Docket No. 07-1289 (issued September 25, 2007). In *M.B.*, the claimant, a mail processing equipment mechanic, was seated at his workbench when the supervisor approached to tell him something. Although he did not indicate what was stated, the claimant alleged that he shook his head in response. He alleged that the supervisor then hit him and asked, "Did you hear me?" The supervisor indicated that he only touched the claimant's right shoulder with his index finger to get the claimant's attention. He explained that he had asked the claimant at least three times if he needed any additional tools or parts to do his job, but the claimant turned away and did not respond to the questioning. After the supervisor touched the claimant's shoulder, the claimant jumped out of his seat and yelled, "DON'T YOU TOUCH ME! DON'T YOU EVER LAY YOUR HANDS ON ME." The claimant alleged that the supervisor had used his whole hand and hit him on the upper arm.

OWCP denied the claimant's emotional condition claim. It accepted the supervisor's account of touching the claimant on the shoulder to get his attention. Appellant's account of being hit was not supported by the record. The Board explained, however, that the distinction drawn by OWCP between touching and hitting was not dispositive of whether the claimant established a compensable employment factor. The reason for the physical contact and the amount of force involved were also not determinative. Both the claimant and the supervisor agreed that there was physical contact between them and physical contact by a coworker or supervisor may give rise to a compensable work factor if the incident occurred as alleged. Accordingly, the Board found a compensable employment factor. As OWCP did not review the medical opinion on the issue of causal relationship, the Board remanded the case for further action.

The cases of *Alton L. White*, *Seeta Sookdeo*, and *M.B.* apply squarely to the facts of the present case. It is not a question of whether the physical contact rose to the level of abuse.⁷ It is simply a question of whether physical contact arising in the course of employment is substantiated by the evidence of record.

In denying appellant's claim for want of a compensable work factor, OWCP did not have reason to review the medical opinion evidence on the issue of causal relationship. The Board will therefore set aside OWCP's December 31, 2014 decision and remand the case for a review of the medical opinion evidence, including the opinion given by Dr. Johnson, the attending psychologist. After such further development as may be necessary, OWCP shall issue a *de novo* decision on appellant's emotional injury claim.

⁷ The abuse referred to in *McEuen* relates more to administrative fault for abuse of power or position, such as might be found in cases of harassment, discrimination, and the like. It has not typically been interpreted to mean physical contact or assault, for which the conventional analysis of coverage is available.

With respect to appellant's argument that Ms. Nicholson and Ms. Scales have a credibility issue, the Board can find no meaningful discrepancies in their account of events. If anyone suffers from a credibility issue, it is appellant. His demonstration to Ms. Scales of what Ms. Nicholson did to him that morning, which is consistent with Ms. Nicholson's account, cannot be squared with how he described the incident in making his claim for compensation benefits, namely, that Ms. Nicholson assaulted him by hitting him several times hard in the arm. The discrepancy may not matter on the issue of compensability, but it is likely to become an issue on the element of causal relationship. A physician's opinion is of limited probative value if it is based on an inaccurate history.⁸

CONCLUSION

The Board finds that this case is not in posture for decision on whether appellant sustained an emotional condition in the performance of duty. The evidence establishes a compensable factor of employment. Further development is therefore warranted.

ORDER

IT IS HEREBY ORDERED THAT the December 31, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: July 11, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

⁸ *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).