United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 15-0547**
	)	**Issued: May 2, 2016**
DEPARTMENT OF HOMELAND SECURITY, FEDERAL AIR MARSHAL SERVICE, Orlando, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 15, 2015 appellant filed a timely appeal from an August 14, 2014 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.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether OWCP properly denied her request for subpoenas.

FACTUAL HISTORY

On July 10, 2013 appellant, then a 46-year-old federal air marshal, filed an occupational disease claim (Form CA-2) alleging that she sustained post-traumatic stress disorder (PTSD), bipolar II disorder, generalized anxiety disorder, and memory loss causally related to factors of

[1] 5 U.S.C. § 8101 *et seq.*

her federal employment. She alleged that supervisors harassed her over the course of 11 years and that she experienced reprisal after she obtained an Equal Employment Opportunity (EEO) settlement in 2006. Appellant further alleged that as part of the reprisal she was a category on a Jeopardy Game Board created by coworkers at her work location.

By letter dated July 12, 2013, OWCP requested that appellant submit additional factual and medical evidence in support of her claim.

In a statement dated July 15, 2013, appellant related:

> "I have been subjected to constant and pervasive harassment by male members of the Orlando Management team for 11 years. I received a favorable settlement in an EEO complaint in 2005/2006 with Agency for unfair labor practices, harassment, and retaliation of me. The circumstances surrounding the settlement are under gag order. Immediately after this EEO settlement the harassment and retaliation continued. I was placed on the Orlando Jeopardy Board and my category was Treasure Hunter due to this favorable settlement in 2005/2006. My work partner killed herself in 2010 and a contributing factor was because she was labeled a lesbian on this Jeopardy Board. I was sexually harassed by my supervisor [M.S.] from January 2011 till his departure in June of 2012."

In support of her claim, appellant related that she had filed an EEO complaint due to sexual harassment, but that it had not been resolved. Although she reported the harassment to management, she claimed management did not file a report of the harassment as required. In 2012 a coworker threw a ball at appellant's head, and when she reported that incident to management, they again failed to act. Appellant claimed that she was not selected for a Tactical Information Sharing System (TISS) position even though she scored higher than the other applicants. Management allegedly removed her from an employment position after erroneously finding her work not acceptable and in November 2013 management again removed her from another position when she reported that K.F., her supervisor at the time, went to an assignment with an empty ammunition magazine. Appellant related:

> "In June of 2012 I was falsely accused by ASAC [Assistant Special Agent in Charge] [H.N.] and disciplined for being late 29 out of 30 days and was only provided the documentation used for this false claim after hiring an attorney and demanding to review this document. After review of this document I was late 1 minute, 1 day in a 30 day period. I was charged with 30 minutes of AWOL for being late that day."

Appellant also maintained that she was prohibited from doing CrossFit training while at work, but that male coworkers were allowed to perform the training. She further maintained that Senior Federal Air Marshal M.S. had called her into a dark room with no witnesses, yelled at her, spit on her, and told her she was a "bitch." Appellant also claimed management gave her a bad performance review because of whistleblowing activities and that male coworkers received more training.

In a statement dated July 16, 2013, S.L., a supervisor with the employing establishment, related that M.S. sexually harassed her and other females in the office. M.S. allegedly told her

he was not afraid of appellant. S.L. related that she and two male coworkers had scored appellant 15 out of 15 points in her interview for a position as a TISS officer, but that a male applicant with a lower score was selected by management for the position. M.D., a special agent in charge, told S.L. that scoring appellant high had put him in a bad position. S.L. further related, "In eleven years there has never been a female in the training department, the same department that created the Jeopardy Board." She indicated that H.N., and M.S. cancelled a workout appellant was doing because they did not want her "building alliances and friendships with her male coworkers. [Appellant] was the only female who participated in these workouts. They ordered me to cancel these workouts for all Air Marshals because [appellant] was participating." In her statement, S.L. also related that M.S. referred to appellant "as a bitch to the Special Agent in Charge." She advised that M.S. and H.N. were misogynistic and bullied women together. S.L. noted, "It is my understanding [appellant] was charged with AWOL for being a few minutes late one day because she used the lavatory before swiping her access card." She reported that a male coworker was gone for five hours yet he was not found to be absent without leave (AWOL).

By letter dated August 22, 2013, OWCP requested that the employing establishment submit comments from a knowledgeable supervisor on the validity of the allegations and the evidence appellant submitted in support of her claim.

In a September 12, 2013 response, M.D. related that to his knowledge appellant was not included in the Jeopardy Board. He further indicated that the Jeopardy Board was not the reason for her work partner's death. M.D. denied that appellant was sexually harassed or that a coworker had thrown a ball at her. He advised that another person was chosen for the TISS position because that individual had not previously worked in a ground position. M.D. asserted that appellant asked to be transferred to a visible intermodal prevention and response (VIPR) position, and that both she and her supervisor were removed from VIPR during an investigation because she failed to timely report that he had insufficient ammunition in his magazine. He indicated that appellant had not been disciplined for being late, but instead she had been "put on notice that she was expected to arrive at work on time after management learned of her attendance issues. A review of her records indicated that she was late 10 times in a 30-day period from 1 to 17 minutes each time." M.D. related that the 30 minutes AWOL was for when she left a meeting early without telling her supervisor. Management advised that appellant was not permitted to attend CrossFit during work hours. M.D. noted, regarding the allegation of M.S. harassing appellant during her mid-year performance review, that M.S.'s office had full length glass windows so the room was not dark as had been alleged and appellant had not told anyone that he swore or spit on her. Finally, he noted that she had received training and had met expectations on her performance appraisal.

By decision dated October 16, 2013, OWCP denied appellant's emotional condition claim finding that she had not established any compensable employment factors.

On November 8, 2013 appellant requested a telephone hearing. By letter dated November 1, 2013, she requested that OWCP issue subpoenas for various individuals who had told her that they would not volunteer information relevant to her claim, but that they would be truthful under oath if required to testify.

On April 15, 2014 appellant submitted additional evidence, including a copy of the Jeopardy Game Board which was in dispute by the employing establishment. The Jeopardy Game Board listed various categories including Treasure Hunter, Ted Bundy, Pickle Smokers, and Tin Men.

On March 14, 2014 the Office of Personnel Management (OPM) approved appellant's request for disability retirement. It found that she was disabled due to PTSD, major depressive disorder, bipolar disorder, generalized anxiety disorder, internal derangement of the right knee, a torn right medial meniscus, and right patella chondromalacia.

On April 15, 2014 OWCP was provided a copy of the EEO complaint along with the settlement agreement and release wherein appellant waived her right to pursue other action and withdrew her complaint. Within the release form, appellant agreed not to discuss the agreement or settlement amount with "individuals other than her attorney, tax preparer, immediate family or as required by a court or government agency."

Appellant submitted a copy of a July 24, 2012 interoffice memorandum from Supervisor R.C. regarding an incident which had occurred in the gym on that same date. Supervisor R.C. reported that another air marshal B.S. had referenced VIPR and said, "[appellant] is now your problem." In an interoffice memorandum from appellant to R.C., signed on August 2, 2012, appellant reported several other incidents where B.S. had referred to her as a "problem child" on July 24, 2012, admitted to using profanity, asked management if she had left for the day in order to get her in trouble, and threw a ball that hit her on the head.

On August 15, 2012 appellant's then supervisor, M.S., denied that he was angry during appellant's performance review. He claimed that he had become upset when he told appellant that he was attaching a memorandum to her file because she had been insubordinate and AWOL and he also noted that she began to write on the evaluation and ignored him when he told her to stop. M.S. related that he did not raise his voice but was "calm and polite" as these events occurred. This meeting occurred on M.S.'s last day in office.

In a September 13, 2012 memorandum, her then supervisor, R.C., advised that he had met with appellant to replace her mid-year performance review by M.S. (her former supervisor) with that of H.N. The attached mid-year performance review indicated that she had challenged H.N. for writing her up for wearing sneakers, for arguing loudly with her coworker, B.S., and because she was late between 4 and 17 minutes in the prior 30 days. Appellant was marked AWOL after changing her work hours without approval and leaving early without approval. It also noted that she was insubordinate and failed to attend a meeting.

By letter dated December 5, 2012, J.C., a union representative, requested management remove the memorandum written by H.N. from her official personnel folder challenging the accuracy of the allegations contained therein. He also asserted that H.N. had altered data to show that appellant was late all but one out of 30 days from May 7 through June 6, 2012 and used this documentation to remove her from operations. J.C. claimed that in reality appellant was one minute late on June 5, 2012 and four minutes late on June 6, 2012 and was otherwise timely in reporting to work. He further asserted that H.N. required her to take AWOL status on June 6, 2012 and that such action was "unprecedented." Finally, J.C. noted that management was making it very difficult to obtain information.

In a memorandum to R.C. dated February 21, 2013, M.H., another federal air marshal and coworker of appellant, related that on or around July 23, 2012 M.S. was giving performance evaluations and he walked over and asked him to come to his office for his evaluation. However, when it was appellant's turn for an evaluation M.S. yelled at her "to come in his office." M.H. also related:

> "I didn't think much of the tone at which [M.S.] used at first, until [M.S.] told [appellant] to shut the door. [She] requested to leave the door open then [M.S] shouted 'shut the door.' [Appellant] said a few other words that I could not hear and [M.S.] again told her to shut the door. After the meeting [she] came out and was visibly shaking. I asked if everything was ok and she stated 'he was yelling at her and that she was scared.'"

In a statement dated August 6, 2013, H.P., a coworker, related that he was appointed to work as a federal air marshal instructor at Orlando on March 5, 2007. He noted in his statement that "This was the first time I was told what the Jeopardy Game Board meant and what it was there for. I heard rumors that such a game existed and I even noticed it hanging on the wall prior to March 5th, 2007, however, when asked about it I was told I was [not] in the circle of trust yet and not to ask about it anymore." H.P. related that before he accepted the position other instructors advised him to refuse the offer because of "illegal acts being committed within the training division" by management, "specifically retaliation and discrimination against the certain individuals that were not liked." On March 7, 2007 he heard a coworker say "This comes from the top. [Appellant] is untouchable until further notice." On March 9, 2007 H.P. attended a meeting with the topic of "how to falsify time sheets and training records" and was told that any staff member who took a stand against management would be terminated. H.P. learned that management had allegedly targeted appellant because of her EEO complaint and settlement. He related that coworkers T.F. and M.R. put appellant and 15 other air marshals on the Jeopardy Game Board, retaliated and discriminated against them, and called them "insurgents." H.P. indicated that M.R. and T.F. created the Jeopardy Game Board.

In a statement dated May 6, 2014, E.C., a retired coworker, related that he had worked with appellant from 2002 to 2013. He shared, "I often witnessed [appellant] being treated less favorably than her male counterparts. I witnessed supervisors [M.S.] and [R.C.] say that [she] did not belong in law enforcement because she was a female. I am also aware that [M.S.] had [her] removed from Operations because he did not like her because she had filed an Equal Employment Opportunity claim in the past."

At the May 8, 2014 telephone hearing, appellant related that she had requested subpoenas because the listed individuals would only provide information under oath. She asserted that M.S. sexually harassed her from December 2010 to August 2012. When she rebuffed him he found her AWOL when she was four minutes late, denied her request for annual leave submitted eight months in advance, refused to let her go to the gym, called her into a dark room, and called her a "bitch." Appellant advised R.C. of the incident and that a coworker, B.S., threw a ball at her head, but he did nothing about the incident.

Appellant reviewed the witness statements provided in support of her claim and noted that H.P. confirmed she was on the Jeopardy Game Board. She maintained that management falsely accused her of being late 29 out of 30 days and that her timesheets were altered by hand.

Management used the erroneous times to remove her from her position. Appellant confirmed that she had settled an EEO claim in 2007 and had a pending EEO claim. Her attorney noted that she could not obtain a copy of the 2007 settlement agreement without an order. The hearing representative related that she would inform the employing establishment by copy of the hearing transcript that she wanted the EEO settlement agreement. Appellant related that she was removed from one position when she sent her supervisor an e-mail telling him that he had an empty bullet magazine. Management accused her of removing his bullets, then told her she should have immediately reported the empty magazine, and disciplined her by removing her from her position due to the incident.

By decision dated August 14, 2014, an OWCP hearing representative affirmed the October 16, 2013 decision. She determined that appellant had not established any compensable employment factors. The hearing representative further denied appellant's request for subpoenas because appellant had not sufficiently explained why the need for subpoenas for various individuals.

On appeal appellant argues that she requires subpoenas to establish harassment and discrimination. She also asserts that she had established harassment and discrimination and questions why OWCP did not consider the medical evidence she submitted in support of her claim.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.[2] 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 frustration from not being permitted to work in a particular environment or to hold a particular position.[3]

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.[4] 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.[5] In determining whether the employing establishment has erred or acted abusively, the Board will

[2] 5 U.S.C. § 8101 *et seq.*; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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

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

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

examine the factual evidence of record to determine whether the employing establishment acted reasonably.[6]

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.[7] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[8] 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.[9] 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.[10]

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.[11] 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.[12]

OWCP procedures provide:

> "An employee who claims to have had an emotional reaction to conditions of employment must identify those conditions. The [claims examiner] must carefully develop and analyze the identified employment incidents to determine whether or not they in fact occurred and if they occurred whether they constitute factors of the employment. When an incident or incidents are the alleged cause of disability, the [claims examiner] must obtain from the claimant, agency personnel and others, such as witnesses to the incident, a statement relating in detail exactly

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

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

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

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

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

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

[12] *Id.*

> what was said and done. If any of the statements are vague or lacking detail, the responsible person should be requested to submit a supplemental statement clarifying the meaning or correcting the omission."[13]

OWCP regulations provide that an employer who has reason to disagree with an aspect of the claimant's allegation should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.[14]

ANALYSIS

Appellant has not attributed her emotional condition to the performance of her work duties under *Cutler*. Instead, she attributed her condition to error and abuse by management in administrative actions and to harassment and retaliation by her supervisor, and coworkers.

Regarding appellant's allegations of error in administrative actions, in *Thomas D. McEuen*,[15] 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.[16]

Appellant maintained that she failed to be selected for a position with TISS even though she was the highest ranked applicant. She also alleged that she was erroneously removed from a position in VIPR when she reported that her supervisor, K.F., went to an assignment with an empty ammunition magazine. As discussed, matters regarding work assignments and transfers are administrative matters and, absent a showing of error or abuse by the employing establishment, are not compensable employment factors.[17] In a July 16, 2013 statement, S.L., a supervisor, related that appellant scored higher than a male coworker in her interview for a position with TISS, but that the lower-scoring male coworker was chosen instead. M.D. related, however, that management selected another individual for the TISS position because that person had not worked in a ground position. He also advised that she and K.F., her supervisor, were removed from VIPR during an investigation when she failed to timely inform management that K.F. had insufficient rounds in his magazine. Appellant has not submitted sufficient evidence to

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17(j) (July 1997); *see also A.K.*, Docket No. 13-79 (issued April 15, 2013).

[14] 20 C.F.R. § 10.117(a); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7(a)(2) (June 2011) (in certain types of claims, such as a stress claim, a statement from the employing establishment is imperative to properly develop and adjudicate the claim).

[15] *See supra* note 4.

[16] *See M.D.*, 59 ECAB 211 (2007); *Richard J. Dube*, 42 ECAB 916 (1991).

[17] *See P.M.*, Docket No. 14-1625 (issued February 23, 2015); *Lori A. Facey*, 55 ECAB 217 (2004).

show error or abuse by the employing establishment in failing to select her for the TISS position or in removing her from the VIPR position during an investigation. Therefore, she has not established a compensable employment factor relating to these two allegations.

Appellant additionally alleged that in June 2012 H.N. falsely accused her of being late 29 days out of 30. H.N. also found appellant AWOL for 30 minutes when she was one minute late. In response, M.D. related that appellant was from 1 to 17 minutes late 10 times during a 30-day period, and that she was found AWOL when she left a meeting early without notifying her supervisor. He indicated that she was "put on notice" rather than disciplined for being late. A statement regarding her mid-year performance review, however, indicates that on June 8, 2012 H.N. determined that appellant was 4 to 17 minutes late for the prior 30 days. The employing establishment has not addressed the discrepancy between H.N.'s finding that she was late each day for the preceding 30 days in her mid-year performance review and M.D.'s finding that she was 1 to 17 minutes late 10 times in a 30-day period. In a letter dated December 5, 2012, J.C., a union representative, asserted that it appeared that H.N. altered appellant's timesheet to show that she was late 30 days from May 7 through June 6, 2012. The Board finds that the record requires further development as to the discrepancies regarding the accusations of tardiness and being AWOL and as to the allegations that documentation was intentionally altered to support a disciplinary action. On remand OWCP should obtain further information from the employing establishment regarding whether H.N. erred in finding that appellant was late each day for a 30-day period from May 7 through June 6, 2012 and obtain all documentation necessary to make a finding as to whether time records were altered by H.N., as alleged in the letter from the union representative on December 5, 2012, to support a disciplinary action.

Appellant has primarily attributed her emotional condition to harassment and discrimination by male coworkers and managers for a period of 11 years. She related that in 2006 she received a favorable EEO settlement based on her allegations of harassment, retaliation, and unfair labor practices. After the EEO settlement, appellant continued to experience harassment and retaliation necessitating a new EEO complaint. Individuals at her work location created a Jeopardy Game Board with categories representing employees. Appellant has proven that she was placed on the Jeopardy Game Board under the category of Treasure Hunter. She alleges this was because of her prior EEO settlement. Appellant maintained that her work partner committed suicide after being identified as a lesbian on the game board. She also argued that managers discriminated against her by refusing to allow her to attend CrossFit while male coworkers were allowed to attend.

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.[18] A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.[19] Appellant submitted a copy of the Jeopardy Game Board, which included the category of Treasure Hunter. In an August 6, 2013 statement, H.P., a federal air marshal instructor, indicated that he was told before he began working at Orlando that management discriminated and retaliated against people that were not liked. He related that on March 7, 2007 an ASAC angrily informed the office that appellant was untouchable until further

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

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

notice. H.P. provided a supportive statement that management targeted her because of her EEO activity. He confirmed his understanding that appellant had been placed on the Jeopardy Game Board by two coworkers.

In a statement dated May 6, 2014, E.C., a retired federal air marshal, related that management treated appellant unfavorably compared with male coworkers, and that M.S. and R.C. indicated that she did not belong in law enforcement because she was female. His statement further alleged that M.S. disliked appellant because of her prior EEO activity. S.L., a supervisor, related in her statement that H.N. and M.S. instructed her to cancel a CrossFit workout because appellant was participating with the men. While M.D. maintained that to his knowledge appellant was not on the Jeopardy Game Board, he did not specifically address or contradict H.P.'s statement that she was on the game board or comment on the supportive statements of E.C. or S.L. OWCP's regulations provide that an employer who has reason to disagree with an aspect of the claimant's allegation should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.[20] On remand, OWCP should request that the employing establishment review and comment on the statements from E.C., H.P., and S.L. and provide evidence supporting its position if it refutes any of the allegations contained in the statements.

Appellant also submitted a July 13, 2007 EEO settlement document, in which she agreed not to discuss the settlement unless "required by a court or government agency." She informed the OWCP hearing representative that she could not provide the settlement without a request by OWCP. The hearing representative indicated that she would request a copy from the employing establishment by information contained in the transcript. However, the employing establishment did not submit the EEO settlement into the record of the case. The Board notes that the type of information being sought is within the custody of the employing establishment and is unavailable to appellant pursuant to the terms of the settlement.[21] On remand, OWCP should obtain a copy of the actual settlement from the employing establishment and any other relevant evidence regarding her allegations of harassment and retaliation. It should inform the employing establishment of the provisions of section 10.117(b) and the likely consequence of its repeated failure to submit the requested information upon request by OWCP.[22]

Appellant also alleges that B.S. called her a "problem child," used profanity, asked management if she had left to get her in trouble, and threw a ball at her. However, she has not submitted any evidence supporting these allegations and therefore she has not established compensable employment factors in regard to these allegations.

Appellant further alleged that M.S., her supervisor from January 2011 until June 2012, sexually harassed her. Her allegations include that he called her into a dark room, yelled and spit on her, and called her a "bitch." In a statement dated July 16, 2013, S.L. related that M.S. sexually harassed the females in the office and referred to appellant as a "bitch" to the ASAC. M.H. related that he witnessed M.S. yell at appellant to come into his office for her performance

[20] 20 C.F.R. § 10.117(a); *see also L.B.*, Docket No. 13-552 (issued November 21, 2013).

[21] *See Marco A. Padilla*, 51 ECAB 202 (1999).

[22] *See Alice F. Harrell*, 53 ECAB 713 (2002).

appraisal and shouted at her to shut the door. After the meeting he noted that she was shaking and told him that M.S. had yelled at her and frightened her. M.H. noted that he had told R.C. about the incident. In a statement dated August 15, 2012, M.S. notified H.N. that during appellant's performance review he was polite and composed, but that appellant became upset when he told her that she was AWOL and insubordinate. He maintained that he did not raise his voice. M.D. advised that the windows to M.S.'s office were full length so that the room could not be dark. He denied that appellant was sexually harassed. M.D., however, did not discuss or in any manner refute the statements provided by witnesses M.H. and S.L. On remand, OWCP should request that the employing establishment review and discuss the statements of M.H. and S.L. and provide any rebuttal evidence from individuals with contemporaneous knowledge of appellant's allegations. Following this and any further development as deemed necessary, OWCP shall issue a *de novo* decision.[23]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.[24]

Issued: May 2, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[23] In view of the Board's disposition of the merits, the issue of whether OWCP properly denied appellant's request for subpoenas is moot.

[24] James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.