

ISSUE

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

FACTUAL HISTORY

On March 8, 2013 appellant, then a 55-year-old flood insurance specialist, filed an occupational disease claim (Form CA-2) alleging that she sustained stress causally related to her workload and Equal Employment Opportunity (EEO) activity. She stopped work on February 27, 2013 and returned to work on March 4, 2013.

By letter dated March 18, 2013, OWCP requested that appellant provide additional factual and medical information in support of her claim. It also asked the employing establishment to provide comments on her allegations by a knowledgeable supervisor.

In a statement dated March 26, 2013, appellant related that Sandra Keefe, a supervisor, began working in her division after women complained about sexual harassment, discrimination, and bullying. Ms. Keefe began bullying and abusing the women. Appellant related that she began working for the employing establishment in June 1999 and that her job required more than 40 hours a week. She maintained that she worked 496 hours in November and December 2012 and overtime for several months before she stopped work in February 2013. Appellant asserted:

“I am on a 24-hour standby to receive phone calls for drills and/or report for duty in the Response and Recovery Center. So this requires always being cognizant of work, resulting in no adequate downtime for rest. I am required to carry a blackberry at all times. Over the past few years I received work e-mails from my supervisor 24/7 requesting/or tasking work assignments. This has been exhausting, and taken a toll on my health and wellbeing.”

Appellant indicated that in 2008 she was assigned duties as a team leader, but could not complete the additional job duties. Management took away her team leader responsibilities, but she continued to be unable to accomplish her assignments within her work hours. Appellant indicated that when she was deployed for a natural disaster in Texas, she “worked over 297 hours in five consecutive weeks.”

Appellant further maintained that a male coworker sexually harassed her from 1999 to 2002. She filed an EEO complaint that was informally resolved. In 2008 appellant learned the man who harassed her had continued harassing other women. The harasser received a letter of warning and promotion. In 2008 Ms. Keefe gave appellant increased job duties as team leader that she knew she could not accomplish as reprisal for filing an EEO complaint. The supervisor was verbally abusive. On July 16, 2008 appellant became distraught and hid in an office. In 2009 she filed an EEO complaint because her former harasser was placed in a superior position to her, but the employing establishment believed that it was within the agreement. In September 2012 appellant informed management that she experienced harassment by Ms. Keefe but management did not take action. On February 27, 2013 she “felt weak and exhausted and overwhelmed by [her] workload and the ongoing harassment.” Appellant indicated that she was

hospitalized in November 2008 and on February 27, 2013 due to stress at work. Her subordinates also received abuse.

Shari Brand, a coworker, related in a March 27, 2013 e-mail that she and appellant experienced sexual discrimination and retaliation at work.

Frank Pagano, appellant's supervisor, advised in an April 11, 2013 e-mail that appellant believed that she experienced a hostile work environment and was not able to travel due to her medical condition. Appellant also advised that she was "not comfortable with handling some additional work assignments." The employing establishment changed her supervisor and increased her telework days in response. Mr. Pagano related:

"From the time that I became [appellant's] supervisor (end of January 2013) until present, I have not been aware of any staffing shortages which might affect this employee's workload. With regards to extra workload, the lead for messaging for National Flood Insurance Reform legislation shifted from HQs [Headquarters] to Region in the last several weeks. This has impacted many employees with regards to the pace of operations, to include [appellant]."

Mr. Pagano related that appellant generally performed her duties as expected but had some issues around September 2012.

In statements dated December 13 and 14, 2013, Linda Taylor, a coworker, related that Ms. Keefe created a hostile work environment.

Marsha Brewer, a coworker, advised in a February 2, 2014 statement that employees were "sometimes required to work in excess of 100 hours per week for multiple weeks in a row without a day off. We seldom eat regularly when deployed to a disaster area. In addition to the stressful physical conditions that we must endure we also work in a very hostile office environment." Ms. Brewer maintained that employees were "isolated, talked down to, called cancers, and subjected to verbal abuse so much so that threats of suicide have been made."

On February 6, 2014 Mark Lujan, a coworker, indicated that he had witnessed hostility by Ms. Keefe toward appellant.

By decision dated February 21, 2014, OWCP denied appellant's emotional condition claim. It found that she had not established any compensable work factors.

Appellant, through counsel, requested reconsideration on February 10, 2015. In support of her request, she submitted a September 12, 2002 informal resolution of her complaint of sexual harassment and a hostile work environment. The resolution provided that Lonnie Ward would not supervise her, harass her, or assign her work in the future. It indicated that it did not constitute an admission of discrimination or wrongdoing by the employing establishment.

Appellant also submitted a January 7, 2008 counseling memorandum from the employing establishment to Mr. Ward. The counseling letter discussed allegations that he had made "inappropriate comments and jokes that were considered lewd, offensive and/or sexual in nature" to multiple female employees over the past year and a half. It provided guidelines to prevent the

alleged behavior in the future, advising that he should “refrain from making comments, telling jokes or other storytelling activities for which the content could reasonably be perceived as sexual, suggestive and/or offensive in nature during work hours or while on travel....” The employing establishment indicated that the counseling memorandum was not a disciplinary action but could be used in the future if the difficulties continued.

A November 11, 2009 Equal Employment Opportunity Commission (EEOC) settlement agreement provided that the employing establishment would pay appellant \$5,000.00, give her a step increase, remove a reprimand issued February 24, 2009 by Ms. Keefe, and allow her to telework as settlement for her complaint of sexual harassment and discrimination and reprisal. A September 1, 2011 EEOC settlement agreement provided that the employing establishment would pay appellant back pay of \$3,824.00, retroactively increase her step level, and adjust the date of her within-grade increase as resolution of her complaint of discrimination and a hostile work environment. Both agreements provided that they did not constitute an admission of wrongdoing by the employing establishment.

Appellant submitted intermittent earnings and leave statements from 2002, 2005, 2008, and 2012 showing that she worked overtime. The statements indicated that she worked around 182 hours of overtime in November and December 2012.

On March 10, 2014 Ms. Brewer related that she and appellant worked under stressful conditions due to the need to respond to disasters, including working 100 hours per week for consecutive weeks without a day off. She also maintained that managers bullied employees and removed appellant from her position after she alleged that Ms. Keefe created a hostile work environment. Ms. Brewer related that appellant and coworkers feared for their safety, noting that their supervisor believed coworkers were after him such that he checked his desk and vehicle for explosive devices.

On August 16, 2014 Ms. Brand advised that she was part of a 2007 investigation of a sexual harassment complaint by appellant against Mr. Ward. She related, “I reported that I witnessed the immediate aftermath of [appellant’s] continued rebuffs of Lonnie Ward’s requests for sexual favors.... [Appellant] was afraid of Mr. Ward and did not want to be left alone.”

Mr. Lujan, in an October 12, 2014 statement, asserted that appellant worked outside her usual duty hours including nights and weekends. The hours were not documented but he knew that she worked the extra hours because he either worked with her or received e-mails from her during this time. Mr. Lujan advised that appellant’s job duties increased after a change in legislation and that they both “worked many hours outside regular hours to meet the stakeholder and [employing establishment’s] needs....” He noted that she cried about work and “shared the emotional stresses associated [with] her job responsibilities and described her work environment as hostile.”

Yvonne Jubang, a coworker, maintained in an October 17, 2014 statement that appellant’s work required her to be on call 24 hours a day every day and to “respond to e-mails and phone calls at all times in the event of any emergency.” Ms. Jubang related that when working disaster relief her hours were irregular, involved travel, and required “functioning under

intense physical and mental stress.” She advised that appellant dealt with disasters that required her to “work 12-hour shifts or more, 7 days a week” with little rest or time for meals.

In a statement dated February 3, 2015, counsel argued that her earnings and leave statements verified that she worked overtime and that witness statements and EEO resolutions confirmed that she experienced harassment. He noted that her harasser received a counseling memorandum verifying he made improper comments and jokes. Appellant submitted time cards showing that she worked more than 70 hours for months before February 2013 and for 496 hours in November and December 2012. Citing *Lillian Cutler*,³ counsel noted that an emotional condition from trying to meet position requirements was compensable. He further cited Board case law finding that overwork constituted a work factor. Counsel maintained that the witness statements verified appellant’s allegation of stress performing her job duties and overwork. He also contended that she provided sufficient supporting evidence to show that she experienced harassment at work. Counsel further asserted that the medical evidence showed that appellant sustained an emotional condition as a result of the identified work factors.

In a decision dated June 3, 2015, OWCP denied modification of its February 21, 2014 decision. It found that appellant had not established a compensable employment factor.

On appeal counsel argues that earnings and leave and witness statements confirm that appellant worked extensive hours and performed stressful duties. He thus contends that she established overwork and stress meeting her job requirements as compensable work factors, noting that the employing establishment did not dispute her allegations. Counsel also maintains that witness statements and the results of EEO complaints support that appellant experienced harassment and discrimination. He asserts that the medical evidence is sufficient to show that she sustained a medical condition as a result of the compensable work factors.

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.⁴ 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.⁵

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

³ 28 ECAB 125 (1976).

⁴ 5 U.S.C. § 8101 *et seq.*; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, *supra* note 2.

⁵ *Gregorio E. Conde*, 52 ECAB 410 (2001).

employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.⁶ A claimant must establish a factual basis for her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.⁷ 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.⁸ 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.⁹

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.¹⁰ 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.¹¹

OWCP's 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 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.”¹²

⁶ See *Michael Ewanichak*, 48 ECAB 364 (1997).

⁷ See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

⁸ See *James E. Norris*, 52 ECAB 93 (2000).

⁹ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁰ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, 2.804.17(j) (July 1997).

OWCP regulations provide that an employing establishment who has reason to disagree with an aspect of the claimant's allegations should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.¹³

ANALYSIS

Appellant attributed her stress, in part, to trying to complete her job duties. She related that she was on 24-hour standby as part of her work requirements and had to respond to e-mails and blackberry messages 24 hours a day. In 2008 management assigned appellant team leader duties, but she was unable to accomplish the work within her regular-duty hours. She related that in November and December 2012, she worked 496 hours and that before she stopped work in February 2013, she worked overtime for several months. Appellant advised that she commonly worked more than 40 hours regularly, trying to complete her job duties. She contended that she was exhausted from her workload.

The Board has consistently held that emotional reactions to situations in which an employee is trying to meet her position requirements are compensable.¹⁴ The Board has also held that overwork, when substantiated by sufficient factual information, may be a compensable work factor.¹⁵ In support of her claim, appellant submitted statements from coworkers corroborating her allegation of stress from trying to meet her production requirements and overwork. In February 2 and March 10, 2014 statements, Ms. Brewer advised that employees at times worked more than 100 hours per week for multiple weeks. On October 12, 2014 Mr. Lujan verified that appellant worked nights and weekends in the course of her employment, noting that he either worked the hours with her or received e-mails from her during the extra hours. He indicated that legislations changed causing an increase in duty hours. On October 17, 2014 Ms. Jubang advised that appellant had to respond to e-mails and to telephone calls 24 hours a day, that she had to travel for disaster relief and that she sometimes worked 12-hour shifts or more every day of the week dealing with disasters.

Mr. Pagano, in an April 11, 2013 e-mail, advised that after he became appellant's supervisor in January 2013 there were no staffing shortages but that a change in legislation caused a shift from headquarters to regions which altered the "pace of operations" for all employees, including appellant. The employing establishment did not dispute her description of her job duties as requiring her to be on call 24 hours a day, or to work overtime, especially during disaster response. Appellant submitted earning and leave statements confirming that she worked overtime at various dates in 2002, 2005, 2008, and 2012. Where a claimed disability results from an employee's emotional reaction to her regular or specially assigned duties or to an imposed employment requirement, the disability comes within the coverage of FECA.¹⁶ The

¹³ 20 C.F.R. § 10.117(a); *see also P.M.*, Docket No. 14-1625 (issued February 23, 2015).

¹⁴ *See D.W.*, Docket No. 13-1692 (issued September 23, 2014); *Richard H. Ruth*, 49 ECAB 503 (1998).

¹⁵ *See Bobbie D. Daly*, 53 ECAB 691 (2002).

¹⁶ *Robert Bartlett*, 51 ECAB 664 (2000); *Ernest St. Pierre*, 51 ECAB 623 (2000).

Board finds that appellant has alleged that she experienced stress trying to meet the duties of her employment and thus has identified a compensable employment factor under *Cutler*.¹⁷

Appellant additionally attributed her stress-related condition to sexual harassment by Mr. Ward, a supervisor, and harassment by Ms. Keene, also her supervisor. 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 must substantiate allegations of harassment and discrimination with probative and reliable evidence.¹⁹

Appellant contended that Mr. Ward sexually harassed her from 1999 to 2002. She submitted a September 12, 2002 informal resolution agreement by the employing establishment resolving her complaint of sexual harassment and a hostile work environment. It provided that Mr. Ward could not supervise her, assign her work, or harass her at work. The resolution did not contain an admission of discrimination by the employing establishment. On January 7, 2008 the employing establishment issued a counseling memorandum to Mr. Ward instructing him to avoid making inappropriate or sexual comments or jokes. The letter indicated that it did not constitute a disciplinary action but could be used as documentation “if problems persist and personnel action becomes necessary.” In a statement dated August 16, 2014, Ms. Brand advised that she witnessed in 2007 the effect of appellant’s rejection of Mr. Ward’s “requests for sexual favors.”

Appellant further maintained that Ms. Keefe harassed her and created a hostile work environment. She provided witness statements from Ms. Brewer indicating that employees were verbally abused and bullied. Appellant also submitted November 11, 2009 and September 1, 2011 EEOC settlements finding that she was entitled to monetary compensation and step increases. The settlements did not include an admission of fault by the employing establishment.

Mr. Pagano related on April 11, 2013 that appellant believed that she had experienced a hostile work environment, but he did not otherwise address her allegations of harassment and sexual harassment, the witness statements, the counseling memorandum to Mr. Ward, or the resolutions of her complaints of harassment and discrimination. OWCP’s regulations provide that an employer who has reason to disagree with an aspect of the claimant’s allegations should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.²⁰

The case will be remanded to OWCP to request that the employing establishment provide a detailed statement from a supervisor or other knowledgeable individual addressing the accuracy of her allegation of sexual harassment and harassment. If the employing establishment

¹⁷ See *supra* note 2; see also *M.G.*, Docket No. 14-1538 (issued April 16, 2015).

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).

²⁰ 20 C.F.R. § 10.117(a); see also *L.B.*, Docket No. 13-0552 (issued November 21, 2013).

does not respond to the request, OWCP may accept her allegations as factual in accordance with its regulations.²¹

As OWCP found there were no compensable employment factors, it did not analyze or develop the medical evidence. On remand, after developing the factual evidence, it should review the medical evidence to determine if appellant established an emotional condition due to the accepted compensable work factors of stress performing her job duties, including the need to work overtime, and, if found established, harassment and sexual harassment. After such further development as deemed necessary, OWCP should issue an appropriate decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 21, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²¹ See *R.C.*, Docket No. 13-1636 (issued June 16, 2014); 20 C.F.R. § 10.117(b).