



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 23, 2011 appellant filed a claim for occupational disease (Form CA-2) alleging that she was subject to harassment and bullying by management and coworkers, including having a noose hung in the office.

OWCP initially denied appellant's claim on April 4, 2011, finding that the evidence of record failed to establish that the incidents occurred as alleged.

On April 11, 2011 appellant requested reconsideration. By decision dated July 8, 2011, OWCP denied modification of the April 4, 2011 decision, finding that appellant had not established any compensable work factors. Appellant again requested reconsideration on August 2, 2011. In a decision dated October 31, 2011, OWCP noted that "the majority of your claim cites work factors which were previously claimed" under File No. xxxxxx247. It again found no compensable work factors were established. On November 15, 2011 appellant again requested reconsideration. In a decision dated February 13, 2012, OWCP found that appellant had not established any compensable work factors. The decision stated that the evidence was now sufficient to establish "your supervisor improperly called your psychologists office" in early 2010, but this was not a compensable work factor. Appellant again requested reconsideration on February 21, 2012. By decision dated June 8, 2012, OWCP found that no compensable work factors had been established.

On June 22, 2017 appellant appealed the June 8, 2012 decision to the Board. By order dated February 27, 2013, the Board remanded the case to OWCP.<sup>3</sup> The Board noted that in its June 8, 2012 decision OWCP had referred to File No. xxxxxx247 pertaining to a claim for emotional condition filed on January 24, 2010. As most of the alleged employment factors had been considered under that claim. The Board remanded the case to combine the case files for proper adjudication of the issue.

On remand OWCP combined File No. xxxxxx247 with the present claim, File No. xxxxxx429, with xxxxxx247 serving as the master file.<sup>4</sup>

The combined case record establishes that by decision dated July 22, 2010 under File No. xxxxxx247, OWCP accepted the following as compensable work factors: (1) Between late 2007 and January 2008 a noose was hanging in an employee's desk area and upon notifying management it was not removed and no action was taken until late January 2008; (2) a coworker

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<sup>2</sup> Docket No. 12-1434 (issued February 27, 2013); Docket No. 14-1423 (issued November 21, 2014).

<sup>3</sup> *Supra* note 2.

<sup>4</sup> In the initial claim (OWCP File No. xxxxxx247), appellant filed a Form CA-2 on February 24, 2010, alleging that she was subject to harassment, being singled out, having work taken away, being subject to changing schedules and worksites. She also made an allegation in a March 3, 2010 statement of seeing a noose hanging at one of the carrier's cases.

called appellant “cuckoo” and made “cuckoo” sounds in her vicinity following a conversation about the noose; (3) a note left for a supervisor regarding her route used derogatory language; and (4) appellant’s supervisors and coworkers had access to her personal medical information and the contents of her Equal Employment Opportunity (EEO) complaints; and (5) her supervisor contacted her physician to request private health information and refused to honor her doctor’s note. It, however, found the medical evidence of record was insufficient to establish an employment-related emotional condition due to any of the compensable factors.

On January 20, 2011 OWCP accepted the claim for major depressive disorder, single episode and adjustment disorder, mixed anxiety and depressed mood. It advised appellant that if she had lost time due to the employment injury, she could claim compensation by submitting a CA-7 claim for compensation. On May 17, 2011 appellant submitted a Form CA-7 claim for compensation for wage loss during the period January 25 to April 18, 2010. OWCP paid appellant compensation for the period claimed.

Appellant submitted a March 1, 2012 statement alleging additional employment factors under File No. xxxxxx420. She alleged her privacy had been violated by a Supervisor Sloan, who called her physician. According to appellant, she was subject to disparate treatment and derogatory comments. She alleged that on February 15, 2011 she was referred to as “the trash” by supervisors and her supervisor’s violation of regulations had caused a hostile environment. Appellant also referred to a Supervisor Walicki, who she alleged retaliated against her for filing EEO complaints. She noted a letter of warning and stated that her route was “screwed up” and caused her stress.

By decision dated March 17, 2014, OWCP reviewed appellant’s March 1, 2012 allegations and found no additional compensable work factors had been established. Appellant appealed to the Board.

In a November 21, 2014 decision, the Board reviewed the March 17, 2014 decision and found that appellant had established an additional compensable work factor in that the employing establishment had contacted appellant’s treating physician by telephone.<sup>5</sup>

On December 30, 2014 appellant submitted a September 13, 2013 decision of the Merit Systems Protection Board (MSPB).<sup>6</sup> She contended in her MSPB appeal that she submitted medical evidence in February 2012, and the employing establishment had improperly failed to consider her request to be restored to her position. The MSPB decision found that although OWCP had not accepted disability commencing in February 2011, OWCP had accepted an emotional condition and was paying medical benefits. According to the MSPB, “appellant’s absence in 2011-12 was substantially related to a compensable medical condition.” Therefore, “because the [employing establishment] failed to recognize that appellant was absent due to her

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<sup>5</sup> Docket No. 14-1423 (issued November 21, 2014). *Order Denying Petition for Reconsideration* (issued April 22, 2015).

<sup>6</sup> The evidence was submitted to the Board on a petition for reconsideration. The Board noted in an order denying the petition for reconsideration (issued April 22, 2015) that the MSPB decision was not before OWCP and could not be reviewed on appeal docketed as No. 14-1423.

compensable injury, it failed to recognize that her attempt to return to work was a request for restoration [of her position] and therefore treated her request solely as one for reasonable accommodation.” MSPB found the employing establishment had erred because it waited three weeks to restore appellant’s position.

On May 18, 2015 appellant requested reconsideration. She argued that incidents on November 14, 2012 had caused an employment-related condition and Dr. Michael Schwartz had submitted a statement regarding the incidents. Appellant asserted OWCP had addressed this evidence, or the MSPB findings.

By decision dated December 30, 2015, OWCP reviewed the merits and denied modification. It found appellant had not established any additional compensable work factors. OWCP reviewed the final order from MSPB and that the order found that the employing establishment had erred in restoring leave for a closed period, but did not discuss any compensable factors of employment and did not contain an admission of error by the employing establishment regarding the FECA claim.

Appellant again requested reconsideration on January 20, 2016. She asserted that statements dated July 29, 2011 and March 1, 2012 that related the effects of Supervisor Walicki’s “unreasonable demands,” and this evidence had not been properly reviewed. In addition, appellant asserted that the December 30, 2014 MSPB decision showed error by the employing establishment. She also referred to the employing establishment contacting her physician, and asserted that she was told she could not submit a Form CA-7.

By decision dated August 17, 2016, OWCP reviewed the merits and denied modification of its prior decision. It found appellant had not established any additional compensable work factors.

### **LEGAL PRECEDENT**

Appellant has the burden of proof to establish by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.<sup>7</sup> This burden includes the submission of detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.<sup>8</sup>

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers’ compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee’s frustration over not being permitted to work in a particular environment or to hold a particular

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<sup>7</sup> *Pamela R. Rice*, 38 ECAB 838 (1987).

<sup>8</sup> *Roger Williams*, 52 ECAB 468 (2001); *Anna C. Leanza*, 48 ECAB 115 (1996).

position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.<sup>9</sup>

A reaction to an administrative or personnel matter is generally not covered as it is not related to the performance of regular or specially assigned duties.<sup>10</sup> Nevertheless, if the evidence demonstrates that the employing establishment erred, acted abusively or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.<sup>11</sup>

### ANALYSIS

In the present case, OWCP accepted the claim for major depressive disorder, single episode, severe, and adjustment disorder, mixed anxiety and depressed mood. The accepted compensable work factors are: (1) Between late 2007 and January 2008 a noose was hanging in an employee's desk area and upon notifying management it was not removed and no action was taken until late January 2008; (2) a coworker called appellant "cuckoo" and made "cuckoo" sounds in her vicinity following a conversation about the noose; (3) a note left for a supervisor regarding her route used derogatory language; and (4) appellant's supervisors and coworkers had access to her personal medical information and the contents of her EEO complaints; and (5) her supervisor contacted her physician to request private health information and refused to honor her doctor's note.

The only issue presented on appeal is whether appellant has established any additional compensable work factors. Appellant indicated on appeal that on May 17, 2011 she submitted a Form CA-7 claim for wage-loss compensation during the period January 25 to April 18, 2010. However, there was no Form CA-7 claim for a particular period of wage-loss resulting from the accepted injuries that was submitted prior to the August 17, 2016 OWCP decision. OWCP did not deny any claim for wage loss in the August 17, 2016 decision on appeal.

Following the Board's November 21, 2014 review of the merits of the claim, appellant continued to allege that she had established other compensable factors of employment. In her May 18, 2015 request for reconsideration appellant alluded to incidents that occurred on November 14, 2012. However the record does not contain any evidence or other clarification relating to such events. Appellant's vague and unsubstantiated allegation is not compensable.<sup>12</sup>

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<sup>9</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>10</sup> *See Brian H. Derrick*, 51 ECAB 417, 421 (2000).

<sup>11</sup> *Margreat Lublin*, 44 ECAB 945, 956 (1993).

<sup>12</sup> *M.P.*, Docket No. 09-2248 (issued September 27, 2010). Appellant's vague and unsubstantiated allegation of intimidation is not evidence of error or abuse; *see also J.T.*, Docket No. 11-233 (issued January 25, 2012). An unsubstantiated allegation of harassment is not determinative of whether such harassment or discrimination occurred.

Appellant's January 20, 2016 reconsideration request referred to statements dated July 29, 2011 and March 1, 2012. She submitted an August 1, 2011 statement with allegations regarding the supervisor, but it is not clear whether there was a July 29, 2011 statement. The record contains a March 1, 2012 statement from appellant with allegations against her supervisors. This evidence was reviewed by OWCP in the March 17, 2014 decision and by the Board in its November 21, 2014 decision. It does not establish any additional compensable work factors.

Appellant also submitted a September 13, 2013 decision from the MSPB. The Board notes that an MSPB decision can be evidence of error by the employing establishment that supports a finding of a compensable work factor,<sup>13</sup> but the Board reviews the evidence and makes a determination as to the probative value to the claim under FECA.<sup>14</sup> The Board finds the September 13, 2013 MSPB decision is of little probative value with regard to a compensable work factor under FECA. The MSPB decision acknowledged that OWCP had not accepted disability or paid wage-loss compensation for absences in 2011 and 2012. Yet the decision determines that "appellant's absence in 2011 to 2012 was substantially related to a compensable medical condition." The employing establishment was therefore held to have erred in February 2012 when appellant submitted medical evidence, and the employing establishment failed to properly consider this as a request to restore her position. The Board does not agree that the evidence had established that appellant's absences from February 2011 to February 2012 were "related to a compensable medical condition." Appellant had not claimed wage-loss compensation. OWCP had not made a determination as employment-related disability commencing February 2011. Accepting a claim and paying medical benefits does not establish a period of disability.<sup>15</sup> Any finding of error by the employing establishment that was based on a finding that appellant was absent due to a compensable medical condition is not supported by the record. The Board accordingly finds that the September 13, 2013 MSPB decision does not establish a new compensable work factor based on error in an administrative matter.<sup>16</sup>

On appeal, appellant refers to the recent filing of a Form CA-7. As noted above, there was no claim for a specific period of compensation submitted prior to the August 17, 2016 decision on appeal. The Board reviews only evidence that was before OWCP at the time of the final decision on appeal.<sup>17</sup> Appellant may pursue any claim for a specific period of disability with OWCP, but for the reasons discussed above, appellant has not established any additional compensable work factors.

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<sup>13</sup> *J.F.*, 59 ECAB 331 (2008) (finding by MSPB that appellant's assignment to parcel sorting was unreasonable lacked adequate support in a proceeding under FECA, and did not establish error by the employing establishment).

<sup>14</sup> *Id.*

<sup>15</sup> *Ronnie J. Griffin*, Docket No. 95-2297 (issued July 14, 1997) (entitlement to medical benefits does not establish entitlement to disability compensation); *see also E.A.*, Docket No. 10-0339 (issued September 14, 2010) (medical evidence was sufficient to accept the claim, but not to establish a period of disability).

<sup>16</sup> *Supra* note 13.

<sup>17</sup> 20 C.F.R. § 501.2(c)(1).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

**CONCLUSION**

The Board finds that appellant has not established any additional compensable work factors in support of her emotional condition claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 17, 2016 is affirmed.

Issued: March 13, 2017  
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