

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On appeal counsel contends that appellant has established compensable factors of employment and that his condition is causally related to those factors.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts as presented in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

Appellant, then a 47-year-old supervisor air traffic control specialist, filed an occupational disease claim (Form CA-2) on January 31, 2013 alleging that his post-traumatic stress disorder had been aggravated by his excessive workload and stress from his job duties. He first realized that his post-traumatic stress disorder was employment related on September 16, 2012 and he stopped work on September 24, 2012.

In support of his claim, appellant submitted a report from Dr. Naomi I. Jacobs, a licensed clinical psychologist, who noted appellant's concern of hostility towards Hispanic employees and attempts to fire him. Dr. Jacobs opined that appellant suffered from an aggravation of post-traumatic stress disorder stemming from a June 5, 2012 incident.

In a June 25, 2013 decision, OWCP denied appellant's claim because he failed to establish any compensable employment factors, which an OWCP hearing representative affirmed in a November 13, 2013 decision.⁴ Appellant appealed to the Board, and by decision dated November 14, 2014, the Board affirmed OWCP's November 13, 2013 decision denying his emotional condition claim.⁵ The Board found that appellant failed to establish any compensable employment factors.

The Board found that the following alleged events were not established compensable employment factors: (a) appellant's computer was confiscated on June 5, 2012 by R.G. and R.C.; (b) appellant was not given a reason for confiscation of his computer, nor was he allowed to copy files or work from the confiscated computer; (d) appellant was wrongly accused of running a personal business from his personal computer; (e) the employing establishment failed to verify whether a business existed in appellant's name prior to confiscating his computer; (f) appellant's privacy was violated by a request for his eBay user name; (g) appellant was harassed as part of an organized effort to eliminate Hispanics from employing establishment management;

³ Docket No. 14-0854 (issued November 14, 2014).

⁴ The hearing representative noted that appellant had filed two previous claims for stress and post-traumatic stress disorder. She noted that under OWCP File No. xxxxxx327 he alleged stress due to overwork with an injury date of May 26, 2000. Under OWCP File No. xxxxxx656 appellant alleged post-traumatic stress disorder due to an excessive workload with an injury date of June 5, 2012. Neither claim has been accepted by OWCP.

⁵ *Supra* note 3.

(h) appellant's supervisors were ordered to fire him with no investigation; and (i) appellant was assigned an excessive workload and increased responsibility as he was required to manage staff on and off the clock and also manage air traffic.

On October 28, 2015 appellant, through counsel, requested reconsideration. In support of the request, counsel provided argument and submitted additional evidence.

In a December 29, 2011 e-mail G.O., acting as Director of the National Hispanic Coalition of Federal Aviation Employees, expressed concern regarding reports of harassment and discrimination toward Hispanic employees. He stated that the derogatory Hispanic comments made by two individuals at a December 8, 2011 meeting were abusive, degrading and inflammatory. G.O. alleged that the individuals who made the inappropriate comments were not held accountable. He alleged direct and indirect harassment of Hispanic employees at all levels including allegations that Hispanics were only in their jobs due to their minority status. G.O. questioned how appellant could be investigated and threatened with removal based on a false accusation in an e-mail by a disrespectful employee and no factual basis. He alleged discrimination in the selection of subordinate white males for supervisory positions instead of a higher placed Hispanics.

The record contains e-mail correspondence between P.G., R.G., S.A., and G.O. regarding the choice of replacement for appellant and racist remarks directed at Hispanic employees made during a December 8, 2011 meeting.

In an undated and unsigned statement, appellant alleged a hostile work environment due to the discrimination and abuse aimed at Hispanic employees at the employing establishment. In support of this allegation, he referred to the filing of Equal Employment Opportunity (EEO) complaints by L.O., a manager; G.O., a subordinate supervisor; and A.I., a subordinate supervisor. According to appellant the chaos and abuse during this period impacted him emotionally and was a direct cause of his anxiety and September 16, 2012 loss of focus. He related that his treating physician diagnosed post-traumatic stress disorder due to the employing establishment chaos and abuse.

On October 17, 2015 appellant provided a narrative statement regarding alleged abuse and harassment he incurred along with other Hispanic employees at work. He generally alleged that during the period April 2010 to June 6, 2012 he was informed that he and other Hispanic employees would be denied promotions by the employing establishment. More specifically appellant alleged that he was initially informed that he would be denied promotion to the position of Traffic Management Officer (TMO). After he was promoted to the TMO position, he alleged that he was subjected to hostile treatment and offensive statements and hostile treatment due to his race, including racist comments made during a meeting on December 8, 2011. Appellant alleged that the stress from increased pressure of trying to prove himself capable of performing the duties of the TMO position, while under discriminatory conditions, was overwhelming. He further alleged that he was subjected to an employing establishment investigation of his laptop after complaining about supervisors and coworkers at the employing establishment, and that it was difficult for him to work under the stress of the investigation. Appellant alleged that other Hispanic coworkers were also harassed and investigated at this same time.

In an October 20, 2015 statement, G.O. related that appellant had been a wonderful manager, but noted that appellant had been under significant stress due to his managerial responsibilities. He noted that appellant became burnt-out due to the stress of his job and the 24-hour on-call responsibilities, six days a week. G.O. noted that appellant missed work and sought medical care due to the effects of the stress on his health.

In a second statement dated October 20, 2015, G.O. described a December 8, 2011 all-hands meeting where disparaging remarks were made about Hispanic managers without any correction by management. He stated that C.S. made a comment regarding promotion favoritism by P.G. G.O. also referred to Spanish as “the lingo.” He related that he and A.I. were appalled by C.S.’s comments, but D.R., M.C., and V.D. appeared in agreement. According to G.O. and M.C. then made a comment that L.O. would get the next promotion on a FLM bid as she spoke Spanish. G.O. related that the Hispanic managers at this meeting had been deeply offended by the meeting comments. Upper management had been alerted to the concerns about the meeting statements, but nothing was done. Following this meeting, both he and appellant felt that they were held to a different standard and felt the stress-of-their jobs.

In a statement dated October 21, 2015, J.G. alleged discrimination and a hostile work environment toward Hispanic employees by the employing establishment. He noted that during the summer of 2011 appellant had been promoted to the position of TMO which he described as a high stress and very demanding job. At the time of appellant’s promotion, J.G. stated that people were unhappy with the selection and K.C. made a comment about the number of Hispanics in leadership positions. He also related that several supervisors left as they did not want to work for appellant and had not been selected for the position. Due to the shortage of supervisors and the reason for their leaving put a lot of stress on appellant. J.G. stated that, after appellant was promoted, his decisions were questioned and there were constant complaints. At no time, however, was appellant ever found to have done anything wrong in his decisions. According to J.G. appellant was instructed to make any needed changes with the result that the routing changes improved the operation, but made the command center unhappy. He related things changed at the employing establishment in October 2011 following the retirement announcement of M.M., Air Traffic Manager, and the promotion of his subordinate manager to M.M.’s position. According to J.G. this was the start of the disrespectful behavior towards Hispanic managers and employees.

In November 2011 G.K., whom he described as a disgruntled employee, filed an EEO complaint against appellant for inappropriate comments, which was dismissed as meritless after an investigation. J.G. related that he had been told that in a December 2011 meeting that C.S. made racial comments about Hispanics including that speaking Spanish was the only reason for their promotions. Prior to M.M.’s retirement, J.G. stated that M.M. came into his office during a conversation with appellant and that they were told that R.B. wanted appellant removed from his position due to K.C. stating that appellant had threatened the supervisors. He stated that R.G. did not give appellant any support and had no traffic management background. On June 6, 2012 appellant informed him that his computer had been taken by R.B. without any explanation. He related that he believed appellant’s computer was taken to check for e-mails from J.G. and his brother. According to J.G. appellant felt micromanaged, questioned, and concerned about how to defend himself. J.G. concluded that since December 8, 2011 there have been personal attacks and unwarranted scrutiny on the Hispanic employees.

By decision dated January 22, 2016, OWCP denied modification of its June 23, 2015 denial of the claim. It found that the evidence of record failed to substantiate appellant's claims of overwork and harassment. Specifically, OWCP found that the evidence submitted was insufficient to establish: (a) any changes in appellant's work duties; (b) appellant's allegation of overwork based on his concern about work being done correctly and working a shift for another manager; (c) appellant's allegation of accumulated stress from his position; and (d) that statements appellant had provided substantiated his allegations of overwork or harassment based on ethnicity.

LEGAL PRECEDENT

To establish a claim for an emotional condition in the performance of duty, an employee must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.⁶

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.⁷ 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.⁸ Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employing establishment the disability comes within the coverage of FECA.⁹ 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 a frustration from not being permitted to work in a particular environment or to hold a particular position.¹⁰

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.¹¹ 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.¹² In determining whether the employing establishment has erred or acted abusively,

⁶ *V.W.*, 58 ECAB 428 (2007); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁷ *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁸ *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

⁹ *Supra* note 2; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁰ *J.F.*, 59 ECAB 331 (2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹¹ *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹² *See William H. Fortner*, 49 ECAB 324 (1998).

the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹³

The Board has held that the manner in which a supervisor exercises his discretion falls outside the coverage of FECA. This principal recognizes that a supervisor or manager must be allowed to perform his or her duties and that employees will, at times, disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.¹⁴ Although the handling of leave requests and attendance matters are generally related to employment, they are administrative matters and not a duty of the employee.¹⁵

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that FECA's alleged or implicated by the employee did, in fact, occur.¹⁶ Mere perceptions of harassment or discrimination are not compensable under FECA.¹⁷ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹⁸ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁹ A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.²⁰

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.²¹ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.²² When the matter asserted is a compensable factor of employment and the evidence of

¹³ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁴ *S.M.*, Docket No. 09-2290 (issued July 12, 2010); *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

¹⁵ *C.T.*, Docket No. 08-2160 (issued May 7, 2009); *Jeral R. Gray*, 57 ECAB 611 (2006).

¹⁶ *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, *supra* note 7.

¹⁷ *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁸ *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, *supra* note 7.

¹⁹ *G.S.*, Docket No. 09-0764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

²⁰ *Robert Breeden*, *supra* note 7; *Beverly R. Jones*, 55 ECAB 411 (2004).

²¹ *D.L.*, 58 ECAB 217 (2006); *Jeral R. Gray*, *supra* note 15.

²² *K.W.*, 59 ECAB 271 (2007); *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.²³

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of specific employment incidents and conditions. OWCP denied his emotional condition claim finding that he failed to establish any compensable work factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under FECA.

In the prior appeal, the Board found that appellant's allegations of stress from increased scrutiny and an excessive workload were not substantiated by the evidence of record. The Board also found that his allegations of overwork were nonspecific and general and unsupported by the evidence. The Board concluded that appellant only provided general allegations of harassment and discrimination based on his Hispanic origin. Appellant did not provide specific allegations or instances of discrimination or evidence of a hostile work environment. The Board further found that he failed to submit any corroborating evidence that the removal of his computer and an interrogation on August 15, 2012 were unreasonable or erroneous.

Appellant submitted additional evidence in support of his claim following the Board's prior decision.

The Board finds that appellant has not established a compensable factor of employment with regard to overwork. Appellant generally alleged that he was overworked. However, he provided insufficient corroborating evidence to establish this allegation.

While the record contains allegations that appellant was on-call 24/7, the record does not substantiate that, as a supervisor, he qualified for overtime. He submitted no factual evidence substantiating this allegation, such as earnings and leave statements, time records, or daily work records. Appellant did submit statements from J.G., his supervisor, and G.O., a person he supervised, relating that appellant was overworked due to understaffing. Neither G.O. nor J.G., however, provided specific details or instances where appellant supporting their statement that he was overworked. Both G.O. and J.G. provided generalized statements without any citation to the specific work duties appellant performed or the dates they stated that he filled in for subordinates. In addition, there is no factual evidence corroborating their general allegation regarding understaffing. As with all allegations, overwork must be established on a factual basis to be a compensable employment factor.²⁴ Because appellant has not submitted any evidence corroborating this, overwork cannot be deemed compensable factors of employment.

The Board also finds that appellant failed to establish that his supervisors or coworkers verbally abused him based on his race or ethnicity or created a hostile work environment. As

²³ *Robert Breeden, supra* note 7.

²⁴ *K.S.*, Docket No. 15-1426 (issued December 29, 2015); *Robert Breeden*, 57 ECAB 622 (2006); *Sherry L. McFall*, 51 ECAB 436 (2000).

previously noted, mere perceptions of harassment or discrimination are not compensable under FECA.²⁵ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.²⁶

Appellant provided general allegations of harassment or discrimination based on his Hispanic heritage. He described dealing with Hispanic managers who had filed EEO complaints increased his stress level. However, appellant did not provide specific details regarding his interaction with the individuals involved or any dates. He also alleged that D.R. informed him that he would not be chosen for an open higher position since a Hispanic person occupied the number two position in the front office. However, the evidence of record establishes that appellant was promoted to the TMO position.

Appellant further alleged that B.B., R.G., and R.B. were all involved in an attempt to get him fired. The Board notes that appellant provided no corroborating evidence or witness statements to establish that these individuals were colluding to get him fired.

The record also contains a statement by G.O. who alleged that the employing establishment discriminated against Hispanics. He provided no information regarding any specific incident involving appellant. Moreover, G.O.'s statement regarding discrimination was general in nature with no details regarding any specific incidents regarding appellant or any other Hispanic employee. Appellant did not provide evidence to substantiate his allegations of harassment or discrimination.²⁷

Appellant alleged that he was subjected to a hostile work environment based on his Hispanic ethnicity and the hostile treatment of Hispanic employees. He contended that the harassment and resentment of Hispanics began following his promotion to TMO. The perception of harassment or mistreatment is not sufficient to establish a compensable work factor.²⁸ There must be probative and reliable evidence in support of the allegation.²⁹ The evidence of record does not contain probative and reliable evidence sufficient to establish harassment or a hostile work environment. Although appellant alleged that EEO complaints had been filed by several Hispanic employees, the record contains no findings by the EEO Commission or other administrative agencies on this issue.³⁰ The witness statements and the documents from his supervisor and subordinates made allegations of a hostile work environment towards Hispanics, but do not provide specific examples of harassment involving appellant. These statements by J.G., G.O., S.A., and R.G. concern a replacement for appellant and deal with the racial remarks

²⁵ *Supra* note 17.

²⁶ *Supra* note 18.

²⁷ *See G.S., supra* note 19; *Joel Parker, Sr.*, 43 ECAB 220 (1991) (the Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

²⁸ *G.S., supra* note 19; *J.C.*, 58 ECAB 594 (2007); *Robert G. Burns, supra* note 17.

²⁹ *J.F.*, 59 ECAB 331 (2008); *Robert Breeden, supra* note 7.

³⁰ Such evidence, while not determinative, may constitute substantial evidence regarding a compensable work factor. *See Walter Asberry, Jr.*, 36 ECAB 686 (1985).

made at the December 8, 2011 meeting describe incidents they have had with C.S. and D.R., but do not mention any incidents pertaining to appellant. J.G. and G.O. also provided further details regarding a December 8, 2011 meeting where they stated racist remarks were made about Hispanic employees and general allegations of a hostile work environment for Hispanic employees. However, their statements are insufficient as they are general perceptions by G.O. and J.G. without describing in detail specific incidents involving appellant. They merely note that they have witnessed hostile behavior towards Hispanics. The Board has long held that mere perceptions of harassment or discrimination are not compensable.³¹ Thus, appellant has not established a compensable factor with respect to a hostile work environment.

On appeal counsel argues that the evidence of record establishes that appellant was overworked. Counsel also argues that all elements of entitlement under FECA have been met and thus, OWCP erred in denying his emotional condition claim. As found above, appellant failed to establish any compensable factor of employment with respect to his allegations. He submitted no supporting factual evidence confirmation regarding his allegation that he was overworked and thus, he has failed to establish any compensable factors of employment.

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 met his burden of proof to establish that he sustained an emotional condition in the performance of duty

³¹ *L.S.*, 58 ECAB 249 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 22, 2016 is affirmed.

Issued: May 8, 2017
Washington, DC

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

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

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