

ISSUE

The issue is whether appellant met her burden of proof to establish an emotional condition in the performance of duty.

FACTUAL HISTORY

On February 8, 2013 appellant, then a 39-year-old senior correctional officer, filed an occupational disease claim (Form CA-2) alleging that she experienced mental stress on the job due to constant harassment from various management officials, which exacerbated her existing mental condition and also caused a new diagnosis of bipolar disorder coupled with dementia. She noted that she first became aware that her postconcussive syndrome, bipolar disorder, dementia, and high blood pressure were aggravated by her work stress and harassment on July 20, 2012. Appellant stopped work on that same date.

In a February 7, 2013 narrative statement, appellant alleged employment-related mental stress from December 2009 to July 2012. Specifically, she attributed her mental stress to sexual harassment by management and inmates. Appellant explained that she was diagnosed on July 21, 1999 with postconcussive syndrome and initially began experiencing mental stress due to her job from December 2009 to July 19, 2012. On July 20, 2012 she was diagnosed with bipolar disorder coupled with dementia. Appellant alleged that her conditions worsened due to stressors that she was experiencing on the job, including being assigned to monitor male inmates while they were showering. She also alleged a hostile work environment due to the harassment, intimidation, and bullying. Appellant related that she was improperly removed from her post and was passed over for promotion. She alleged reprisal for a prior Equal Employment Opportunity (EEO) complaint. Appellant alleged that she was unfairly investigated, had her performance evaluations lowered, was written up, was denied leave to attend funerals for family members, was denied requests for leave without pay (LWOP), and was called derogatory names.

In a letter dated February 22, 2013, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her regarding the type of medical and factual evidence required and afforded her 30 days to submit this information.

OWCP subsequently received medical and factual evidence responding to OWCP's February 22, 2013 development letter.

In a May 11, 2010 report, Dr. David C. Daniel, Jr., Ph.D., a treating clinical psychologist, wrote that he began treating appellant on February 8, 2010 for depression and anxiety. He went on to detail her symptoms and current treatment. Dr. Daniel opined that appellant was capable of performing her usual job duties except for monitoring male inmates while they were showering. He explained that she felt sexually harassed by the inmates during their showers and felt demeaned by their sexual actions which she had to witness.

Appellant submitted evidence regarding her EEO complaint, affidavits, interrogatories, and correspondence regarding her allegations of harassment and discrimination. She submitted a December 29, 2011 EEO letter, which accepted 3 of her 10 allegations for consideration and dismissed the remaining 7 allegations as untimely filed. The accepted allegations included that,

from January 2010 to October 7, 2011, appellant was subjected to harassment, intimidation, and bullying; that appellant was reassigned from her post; and that appellant was not selected for the position of correctional treatment specialist.

The record contains correspondence from appellant and the employing establishment concerning leave requests, disciplinary actions, as well as medical evidence.

In a July 2, 2012 treatment note, Dr. Adrien J. Nelson, a treating physician specializing in psychiatry, wrote that appellant had been hospitalized on June 16, 2012 and was being discharged that day. He released her to return to her regular work duties except for the monitoring of showering inmates.

In a July 23, 2012 letter, the employing establishment noted documentation from Dr. Daniel and Dr. Nelson providing work restrictions. Specifically, Dr. Daniel and Dr. Nelson indicated that appellant was capable of performing her usual work duties except for monitoring naked inmates while they were showering. The employing establishment advised her that it was unable to continue to indefinitely accommodate her and requested further medical documentation regarding her work restrictions, medical diagnoses, and anticipated return to full-duty date.

The record contains several pages from an affidavit completed by C.P., a coworker,⁴ describing the area where the inmates showered and noting that appellant felt sexually harassed by the inmates who were showering. She further related that there were some inmates who liked to display themselves and commit lewd acts while showering to harass the staff monitoring them. C.P. related that there were no consequences for inmates for this behavior even when it was reported.

On March 30, 2013 OWCP received appellant's May 10, 2010 amendment to her EEO complaint to include sexual harassment and retaliation due to being forced to monitor inmates showering during the period April 29 to May 8, 2010. Appellant related that the burglar bars in front of the shower revealed their nudity. As part of her duties she was required to distribute soap and razors, even while the inmates behaved lewdly inside the shower area. Appellant related that she was placed on sick leave because she had a medical restriction regarding monitoring showering male inmates.

In a February 22, 2013 report, based upon a review of appellant's Form CA-2, statements, medical history, medical records, and examination, Dr. Daniel diagnosed postconcussion syndrome and bipolar disorder with paranoid ideation. He opined that appellant's work stress aggravated her bipolar disorder resulting in distrust and anxiety.

On May 12, 2013 OWCP received a May 11, 2010 report from Dr. Daniel noting that appellant had recently been disabled from work as a result of her depression and anxiety. Appellant was reevaluated on April 23, 2010 and, at that time, Dr. Daniel opined that she was capable of returning to work provided that she was not required to monitor any inmates while they showered. Dr. Daniel explained that the restriction was to prevent the inmates from sexually harassing her as she felt sexually demeaned by the inmates' actions in the showers.

⁴ C.P. signed the affidavit on August 2, 2010 while the investigator signed it on August 16, 2010.

By decision dated May 23, 2013, OWCP denied appellant's claim as it found that she failed to establish any compensable factors of employment. It determined that she submitted insufficient evidence to establish any of her allegations.

Appellant subsequently submitted an April 23, 2010 report, wherein Dr. Daniel noted that he had previously recommended that she be excused from work due to work difficulties. Dr. Daniel concluded that she was capable of returning to work on April 23, 2010 with the restriction that she be relieved of monitoring male inmates while they showered.

Dr. Daniel, in a February 22, 2013 report, reviewed appellant's CA-2 statements, noted that he had treated her since 2007, and provided a complete medical treatment history. He opined that, based on her perceptions and work stress, her bipolar condition had been aggravated by her employment.

In reports dated December 3, 2013 and January 6, 2014, Dr. Daniel wrote that appellant had been his patient since 2007 and was diagnosed with postconcussion and bipolar disorders. In both reports, he noted that she discussed her difficulties at work. Dr. Daniel wrote in both reports that, in early July 2012, appellant was hospitalized and attributed her deterioration to work stress. In the December 3, 2013 report, he noted that he was reluctant to release her to return to work. Dr. Daniel, in the January 6, 2014 report, summarized appellant's treatment sessions. Appellant, during a Spring 2010 treatment session, related being upset at being required to monitor male inmates while they showered, and that management had refused her request for a transfer from this position.

On April 2, 2014 OWCP received a list of appellant's daily assignments from August 30, 2009 to March 20, 2010. The daily assignment list showed that appellant was assigned to the special management unit.

On April 7, 2014 appellant's representative at the time requested reconsideration. She argued that appellant's work assignment to monitor male inmates while they showered was a compensable factor of employment. The representative explained that appellant was required to march the male inmates to the showers where shower supplies were distributed, leave them in the shower stalls, and withdraw behind a viewing area with bars, while they showered. Because the bar provided no privacy, appellant could see the inmates' entire nude bodies. The inmates frequently displayed their bodies to her, made lewd gestures, obscene remarks, and inappropriate sexual advances. The representative also argued that the employing establishment committed administrative error by not adhering to a statute pertaining to cross-gender searches, 28 C.F.R. § 115.15(d).

In a July 2, 2014 narrative statement, appellant provided further details regarding the monitoring of male inmates in the shower and their lewd acts. She explained that, during her required rounds, she had to observe all inmate activities within her assigned unit. As a result of the facility's architectural design, there were no partitions on the showers and the showering male inmates were in plain view. At times inmates would expose themselves or perform lewd acts toward her while she was making her rounds.

By decision dated November 20, 2014, OWCP denied modification of its prior decision. It found that the evidence submitted failed to establish that the incidents occurred as alleged and, thus, no compensable factors of employment were established.⁵

In a letter dated October 28, 2015, appellant's representative again requested reconsideration. She argued that appellant's reaction to monitoring inmates in the shower was a compensable factor of employment as it was part of her regular job duties. Counsel further argued administrative error on the part of the employing establishment as it failed to follow established procedures, regulations, and statutes with respect to requiring appellant to monitor inmates. Thus, she argued that appellant had established two compensable factors of employment. Counsel noted that documents submitted to Employee's Compensation Operation and Management Portal included a settlement agreement; affidavits from M.M., a landscape foreman, C.P., cook supervisor, and G.K., a captain; responses to interrogatories from J.Y., warden; a December 16, 2009 letter of counseling regarding appellant's work attire; reports dated July 29 and December 15, 2014 from Dr. Daniel; and an LWOP memorandum. OWCP also received letters from the employing establishment dated July 14 and August 15, 2014.

The July 14, 2010 affidavit of M.M., a landscape foreman, who stated that he was away at training on December 15, 2009 when appellant was sent home for wearing inappropriate attire and described attire appropriate for dress-down day. He related that he had not heard coworkers referring to her by inappropriate terms or names.

In the October 8, 2010 affidavit, G.K., appellant's supervisor, stated that around April 23, 2010 he reviewed a note from appellant's physician restricting appellant from monitoring or working around male inmates while they showered. He related that following receipt of a physician's opinion that she could not monitor inmates while they showered, that he placed her on sick leave from April 1 to 10 and April 29 to May 8, 2010. When appellant returned to work on April 23, 2010, G.K. provided her a different work assignment that did not include monitoring male inmates in the shower. He testified that her five different assignments all exposed her to male inmates while they were showering. G.K. noted that it was common practice to accommodate an employee's medical restrictions for a limited period of time and that he had been aware of adjustments to appellant's schedule. He testified that appellant had returned to her routine work.

In a July 29, 2014 report, Dr. Daniel noted that he had treated appellant since February 8, 2010 and that she had been diagnosed with bipolar disorder with psychosis and postconcussion disorder. He noted that she had been unable to work due to depression and anxiety caused by work stress and feelings of sexual harassment by male inmates. Dr. Daniel described the precipitating cause was appellant's duty of monitoring male inmates while they showered and the inappropriate sexual responses from male inmates. He requested that she be excused from performing this employment duty. On December 15, 2014 Dr. Daniel released appellant to return to her usual work duties.

⁵ On March 23, 2015 counsel appealed to the Board. In an order dated August 19, 2015, the Board granted a request by counsel to dismiss her appeal. *Order Dismissing Appeal*, Docket No. 15-0935 (issued August 19, 2015).

On August 15, 2015 the employing establishment, pursuant to a settlement agreement, granted appellant LWOP for the period June 27, 2012 to July 18, 2014.

In a December 2, 2015 report, Dr. Daniel diagnosed appellant with postconcussive syndrome and bipolar syndrome, which was currently in remission. A history of postconcussion was noted including the symptoms associated with the condition. In Dr. Daniel's notes from March 1 and 30, 2010, he noted that appellant complained of harassment at work. He reported that on April 23, 2010 she was seen for stress as a result of being required to monitor male inmates while they were showering. A letter was written to the employing establishment requesting that appellant be relieved of this duty. Appellant, in the June 9, 2010 meeting, expressed frustration with not being promoted and that the person interviewing her for her EEO complaint was a former warden. Dr. Daniel discussed other work incidents causing her stress, including a three-day suspension, her belief that coworkers were watching her, that she was passed over for promotion numerous times, her fear of being fired, a fitness-for-duty request from the employing establishment, being placed in a LWOP status, and receiving a proposal to fire her. He reported that appellant was treated appropriately and was able to return to work in January 2015. Dr. Daniel concluded that her bipolar disorder had been aggravated by her work stress.

In a December 8, 2015 report, Dr. Victor J. Vautrot, a treating Board-certified psychiatrist, diagnosed adjustment disorder, bipolar disorder, panic disorder, and nightmare disorder. Based on his review of the work allegations and his examination of appellant, he opined that the diagnosed preexisting conditions had been aggravated by her work experiences. The work experiences contributing to the aggravation included having to monitor nude male inmates making lewd gestures, delay in obtaining a work accommodation, and inconsistent application of work accommodations. Dr. Vautrot also noted that two managers made appellant remove her jacket and then snickered at her unique body shape, sent her home for inappropriate dress on a dress-down day, and gave her a letter of counselling. He related that she believed that management failed to follow appropriate rules, statutes, and procedures and ignored her requests for union representation. Dr. Vautrot explained that due to her work stress appellant's adjustment disorder was aggravated resulting in anxiety, suffering, and panic. He concluded that she no longer suffered from the aggravation caused by her work stressors and had returned to work at the employing establishment in January 2015.

By decision dated February 4, 2016, OWCP denied modification of its prior decision as no compensable work factors were established. It found that the evidence of record failed to establish that the employing establishment acted abusively with respect to administrative matters. OWCP also found the evidence of record insufficient to establish harassment or reprisal when the employing establishment required appellant to monitor showering male inmates and the lack of promotion.

LEGAL PRECEDENT

To establish a claim for an emotional condition in the performance of duty, an employee must submit: (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 or her regular or specially assigned duties, or to a requirement imposed by the employment, 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 his or her frustration from not being permitted to work in a particular environment or to hold a particular position.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.¹² When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, it must base its decision on an analysis of the medical evidence.¹³

Administrative and personnel matters, although generally related to 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.¹⁴ 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.¹⁵

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 3; *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 *D.L.*, 58 ECAB 217 (2006); *Jerald R. Gray*, 57 ECAB 611 (2006).

¹² *K.W.*, 59 ECAB 271 (2007); *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

¹³ *Robert Breeden*, *supra* note 7.

¹⁴ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹⁵ See *William H. Fortner*, 49 ECAB 324 (1998).

In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹⁶

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.¹⁷ Mere perceptions of harassment or discrimination are not compensable under FECA.¹⁸ The employee must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹⁹ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.²⁰ An employee must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.²¹

ANALYSIS

On appeal, counsel contends that appellant's primary allegations concerned her assigned duty of monitoring nude inmates in the shower and harassment by management following her request to be relieved of this duty. She alleges that these duties aggravated appellant's preexisting conditions.

The Board finds that appellant has established compensable factors of employment with respect to the monitoring of male inmates in the shower area, and harassment following her request to be relieved of this duty.

Appellant attributed her stress and the aggravation of her preexisting emotional conditions to her actual work requirements of monitoring male inmates while they were showering. The Board has consistently held that emotional reactions to situations in which an employee is attempting to meet his or her position requirements, when supported by sufficient evidence, are compensable.²² Appellant attributed her emotional condition to the regular or specially assigned duties of monitoring male inmates while they showered. She alleged that while performing this duty the inmates made lewd comments and engaged in lewd acts.

The evidence of record establishes that appellant was required to monitor male inmates while they showered between September 15, 2009 and January 1, 2011. An affidavit from her

¹⁶ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁷ *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, *supra* note 7.

¹⁸ *M.D.*, 59 ECAB 211 (2007).

¹⁹ *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, *supra* note 7.

²⁰ *G.S.*, Docket No. 09-0764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

²¹ *Robert Breeden*, *supra* note 7; *Beverly R. Jones*, 55 ECAB 411 (2004).

²² *See Tina D. Francis*, 56 ECAB 180 (2004).

supervisor, G.K., acknowledges that part of her duties involved monitoring male inmates in the shower area. Similarly, C.P., a coworker, provided testimony confirming that monitoring naked male inmates was a part of appellant's job duties and describing the actions of some inmates toward female correctional guards watching them while they showered.

It is appellant's emotional reaction to the requirements imposed by the employing establishment that triggers coverage under FECA. She attempted to perform the duty of monitoring male inmates while they showered and the evidence reflects she did so, but the stress of doing so caused or aggravated her emotional condition. Given that this duty was a part of appellant's regular job requirements, the Board finds that she has established a compensable employment factor related to assigned tasks which required her to monitor male inmates while they were showering.²³

Appellant also alleged harassment and retaliation based on failure of the employing establishment to honor her work restrictions when it reassigned her to the duty of monitoring male inmates while they showered.

The record contains a May 11, 2010 report from Dr. Daniel informing the employing establishment that appellant was disabled from the duty of monitoring inmates who were showering. Supervisor G.K., in an October 8, 2010 affidavit noted that an accommodation was made for her medical restrictions for a limited period of time. He also stated that following receipt of appellant's work restriction from her physicians, that he placed her on sick leave instead of accommodating her work restriction. G.K. in his October 8, 2010 affidavit also related that she recently returned to her regular work assignment. The evidence of record establishes that the employing establishment erred by further harassing appellant following her submission of a medical report restricting her from performing her assignment of monitoring male inmates while they showered. Thus, appellant has also established a compensable employment factor with respect to her allegation of harassment.

Appellant further alleged sexual harassment by management; a hostile work environment; harassment, intimidation, and bullying by coworkers and management; that she was unfairly investigated; that her performance evaluations were lowered and she was written up; that she was denied leave to attend funerals for family members; and that she was called derogatory names. The Board finds, however, that she has not submitted any witness statements or other evidence corroborating these allegations. The Board has held that mere allegations, in the absence of factual corroboration, are insufficient to meet a claimant's burden of proof.²⁴

The Board finds that appellant has established compensable employment factors with respect to her established work duties and harassment. Thus, OWCP must base its decision on an analysis of the medical opinion evidence. The case will be remanded to OWCP for this

²³ *Supra* note 8.

²⁴ *See Pamela D. Casey*, 57 ECAB 260 (2005); *Bonnie Goodman*, 50 ECAB 139 (1998).

purpose.²⁵ After such further development as deemed necessary OWCP shall issue a *de novo* decision on this claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 4, 2016 is set aside and the case is remanded for further proceedings consistent with the above opinion.

Issued: September 21, 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

²⁵ See *T.F.*, Docket No. 12-0439 (issued August 20, 2012); *Robert Bartlett*, 51 ECAB 664 (2000).