

FACTUAL HISTORY

On July 30, 2015 appellant, then a 32-year-old auditor, filed an occupational disease claim (Form CA-2) for both physical and emotional conditions he attributed to various alleged work-related incidents that occurred over a period of time. He provided a separate statement describing the alleged incidents and his claimed medical conditions. Appellant indicated that he first became aware of his claimed conditions on June 15, 2015, and first realized on July 1, 2015 that they were caused or aggravated by factors of his federal employment. He did not stop work.

On the same Form CA-2, appellant's immediate supervisor, C.E., indicated that appellant was never in nonwork or nonpay status, and that he had been assigned only nonaudit work due to his concerns. He advised that since appellant reported his claimed medical conditions, he had performed this work at home per an existing telework program. C.E. noted that appellant agreed that the employing establishment was fully accommodating him at the present time.

Appellant submitted a July 30, 2015 narrative statement in connection with his present occupational disease claim. He noted that, in early 2013, he was assigned to be the lead auditor for the accounting system of the National Ecological Observatory Network, Inc. (NEON) on behalf of the Office of the Inspector General (OIG) of the National Science Foundation (NSF), a politically sensitive assignment which included his production of an omnibus report dated April 27, 2015.³ Appellant asserted that his audit revealed that NEON had illegally spent \$1.8 million dollars of taxpayer funds between 2005 and 2013 on alcoholic beverages, foreign travel, employee meals, gifts, and expenses for lobbying Congress. He indicated that two of his superiors, M.Q. and A.J., concurred with his findings, but that other senior officials, including A.B. and J.M., disagreed with his assessment, causing a major dispute about NEON's actions. Appellant alleged that, in June 2014, the employing establishment, without legal authority, removed his findings regarding NEON's use of management fees from his report and sent a legal opinion to the NSF's OIG indicating that NEON had not committed fraud. He contended that the employing establishment also obstructed his assignments in order to "teach" him to mind his superiors and, in A.B.'s words, convince him to not "rock the boat." Appellant alleged that management pressured him to withdraw original allegations, and that A.B. telephoned him and threatened him with termination if he persisted with his actions. He reported the claimed misconduct of NEON and the employing establishment to several authorities pursuant to the Whistleblower Protection Act, 5 U.S.C. § 2302, and 5 C.F.R. § 2635.101(b)(11).⁴

Appellant claimed that he was the first federal employee to take advantage of a change in the Whistleblower Protection Act to engage in whistleblower activities while on official time with the full knowledge and consent of the employing establishment. He advised that between late 2014 and the present, he did not perform a single audit and was instead assigned, on an almost full-time basis, to assist in the investigations prompted by his whistleblowing. Appellant

³ Appellant indicated that he started working for the employing establishment on February 27, 2012 as an auditor (0511-series) and that he was later promoted to senior auditor.

⁴ Appellant indicated that these authorities included multiple inspector generals, the U.S. Office of the Special Counsel (OSC), multiple congressional committees, and employing establishment officials. He provided a description of the provisions of 5 U.S.C. § 2302.

noted that a September 21, 2014 Wikipedia article named him as the source of the information provided to Congress and he indicated that the site was hacked with remarks about his mental status and fitness for employment. He asserted that Wikipedia moderators and the employing establishment's OIG investigators verified that an employing establishment official perpetrated the hack, but that he and Congress had been unable to learn the identity of the official, despite making Freedom of Information Act (FOIA) requests. Appellant noted that, on September 25, 2014, the employing establishment's security office opened an investigation of him and alleged that, J.L., a security officer from that office, falsely accused him of making terroristic threats to blow up the U.S. Capitol and threatened to revoke his security clearance eligibility. He asserted that J.L. made other false statements about him, including a statement that she was unaware he was a whistleblower.⁵ Appellant asserted that, around the time J.L. made her accusations, the employing establishment reduced his performance rating from its prior level without justification.

Appellant indicated that, in late 2014, his entire work team was involuntarily transferred to another office as a form of retaliation for his whistleblower activities, and that his new supervisors expressed hostility about his use of official time to pursue whistleblower activities. He indicated that he was summoned to Washington, DC in January and February 2015 to brief the House Committee on Science, Space, and Technology. Appellant noted that several actions resulted from the hearings, including the employing establishment's revocation of NEON's management fee and President Obama's issuance of a directive on the use of management fees. He contended that these actions demonstrated complete acceptance of his findings regarding NEON and he indicated that he prepared a whistleblower disclosure document, dated April 20, 2015, which described his allegations of criminal acts by the employing establishment. Appellant noted that, between April 27 and June 30, 2015, he was relieved of his regular work duties due to his allegations and that management demanded his immediate return to work, an action which violated Generally Accepted Government Auditing Standards (GAGAS).⁶ He described why he felt that his whistleblower case had caused his physical and emotional problems, including anxiety, stress, insomnia, headaches, stomach cramps, obesity, malaise, fatigue, and esophoria.⁷ Appellant claimed that his coworkers avoided him and that management threatened him verbally and in writing with disciplinary action, including threatening him with termination in 2014 and 2015. He indicated that he was frustrated by the lack of meaningful work to perform while the whistleblowing issues were in the hands of investigators. Appellant

⁵ Appellant asserted that the temporal relationship between the public disclosure of his whistleblowing and J.L.'s accusations established a *prima facie* case of whistleblower reprisal in violation of 5 U.S.C. § 2302.

⁶ Appellant claimed that, on May 5, 2015, C.E. responded to his claims of GAGAS violations by management by improperly directing him to perform the critical work functions of his assigned position. The record contains a May 5, 2015 e-mail in which C.E. indicated that he had received an opinion from the employing establishment's legal department that appellant's performing his critical work functions would not violate GAGAS.

⁷ Esophoria is a condition causing a deviation of the visual axis of an eye toward that of the other eye after the visual fusional stimuli have been eliminated. *Dorland's Illustrated Medical Dictionary*, 643 (30th ed. 2003). Appellant indicated that, between January 2013 and November 2014, his weight increased from 185 pounds to over 265 pounds because the stress from work caused him to eat more and to exercise less. He reported that at present he weighed 230 pounds with a height of 5'11".

requested that a formal assignment be made under the Rehabilitation Act to perform nonaudit work on a full-time basis by teleworking at his residence.⁸

Appellant also submitted a March 8, 2015 Notification of Personnel Action (Form SF-50) memorializing his position as an auditor at the GS-12/Step 2 level. In a July 2, 2015 e-mail to C.E., appellant made claims that were similar to those contained in his July 30, 2015 statement.

In an August 13, 2015 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim. It asked him to complete and submit an attached development questionnaire which posed various questions regarding his claimed employment factors. On August 13, 2015 OWCP asked the employing establishment to respond to appellant's claims.

Appellant submitted an August 25, 2015 narrative statement in response to OWCP's development questionnaire. He repeated a number of his assertions regarding the audit of NEON and his whistleblower allegations against the employing establishment. OWCP's questionnaire had asked about the findings of any grievance, Equal Employment Opportunity (EEO) complaint, or other action related to his claim, and appellant responded that he filed actions with several bodies, including the U.S. Merit Systems Protection Board (MSPB) and OSC, but that he did not currently know the specific status of these actions. He advised that his grandmother died in June 2015 and that his wife had a chronic, nonterminal illness, but asserted that he was able to cope with these circumstances and had no major source of stress or anxiety outside of his federal employment.

Appellant submitted a 179-page document dated April 27, 2015 in connection with his whistleblower activities. He alleged that retaliation from his whistleblowing activities resulted in a forced transfer and downgrade in his performance evaluation. Appellant claimed that the employing establishment committed fraud, gross mismanagement, gross waste of funds, abuse of authority, noncompliance with the terms of a grant agreement, intimidation of and retaliation against an informant, and reprisal against a protected whistleblower. He indicated that in April and May 2013 he prepared reports indicating fraud by NEON, but that upper management disagreed with his findings. Appellant provided a detailed description of instances between 2013 and 2015 that he contacted individuals regarding his audit of NEON and he provided excerpts of laws he felt were violated. He alleged that he was illegally punished with negative performance evaluations, including a July 25, 2014 evaluation which he believed contained false statements to justify the downgrade. Appellant indicated that management initially allowed him to work a "gliding" schedule so that he could care for his chronically ill wife, but alleged that in February 2014 a superior, M.Q., wrongly accused him of sick leave abuse. He noted that he takes the generic form of Adderall and accused A.J. or M.Q. of going through the drawers of his work desk and opening his medication bottle. Appellant also asserted that A.J. and M.Q. made derogatory comments about him.

⁸ Appellant also requested that he receive special work equipment and be allowed official time during each workday to address his health issues, including 90 minutes to perform exercises designed to reduce his obesity and 30 minutes to perform eye exercises to treat his esophoria. He requested that he receive these workplace accommodations until August 31, 2016.

Appellant submitted medical evidence in support of his claim. In a July 31, 2015 report, Dr. Patrick Sharp, an attending Board-certified family practitioner and osteopath, advised that he had been appellant's personal physician and that of his family for many years, and indicated that he had read appellant's July 30, 2015 statement. He indicated that appellant presently suffered from anxiety which rose to the level of a medical condition and advised that he reached this conclusion based on appellant's reported symptoms, including feeling nervous and powerless, experiencing malaise and fatigue, having a sense of impending danger, experiencing panic or doom related to his work at the employing establishment, sweating and trembling at work or while thinking about work, and having trouble concentrating or thinking about anything other than his worries related to work. Dr. Sharp advised that appellant had no previous history of anxiety prior to 2013 and noted that since 2013 he experienced a sudden occurrence of anxiety that seemed unrelated to life events outside of his work. Therefore, he concluded that the cause of appellant's anxiety was his job duties and related events described in his July 30, 2015 statement. Dr. Sharp further indicated that he concurred with appellant's request that he receive workplace accommodations until August 31, 2016 or the date when the underlying whistleblower issues were resolved.

Dr. Sharp further noted that appellant suffered from malaise and fatigue at levels that rose to medical conditions and posited that the malaise and fatigue conditions were due to the anxiety condition caused by the stress of his working environment. He advised that he was not aware of any events from appellant's nonwork life prior to 2013 that would explain his current state of malaise and fatigue. Dr. Sharp noted that appellant participated in numerous physical activities prior to mid-2013, including soccer officiating, skiing, and biking, but that he has not routinely engaged in such physical activities since "the NEON engagement began falling apart in mid-2013." He concluded that appellant's malaise and fatigue were directly and indirectly caused by his job duties and associated events as outlined in his July 30, 2015 statement. Dr. Sharp noted that appellant had suffered obesity (defined as body mass index greater than 30) with a weight of 265 pounds and a body mass index of 36.4 as of December 1, 2014 and a weight of 229 pounds and body mass index of 31.5 as of June 27, 2015. He indicated that prior to 2013 appellant routinely maintained a weight of approximately 185 pounds with a body mass index of 25.4 for all of his adult life, and he noted that he was unaware of any events in appellant's life that explained his extremely rapid weight gain in 2013 other than the events described in his July 30, 2015 statement. Dr. Sharp opined that the primary causes of appellant's rapid weight gain were his obsessive eating triggered by his anxiety and his sudden ceasing of routine exercise due to his malaise and lethargy. Therefore, he concluded that appellant's job duties and related events as related in his July 30, 2015 statement were directly responsible for his weight gain and obesity.

Dr. Sharp advised that appellant suffered from esophoria, a condition involving excessive inward turning of the eyes, which included periods of double vision when he could not see objects at any distance unless corrective lenses were worn. He advised that he was unaware of any events in appellant's life that explained his esophoria other than his work beginning in mid-2013 which involved almost no time away from use of his government-issued computer. Dr. Sharp acknowledged that appellant previously had esophoria, but asserted that he was fully cured of the condition prior to it recurring in mid-2013. He concluded that appellant's esophoria beginning in mid-2013 was directly caused by his change in job duties at that time, along with associated events outlined in the July 30, 2015 statement, and specifically by his assignment to full-time office duty that necessitated spending long amounts of time in front of a computer

screen at fixed distance.⁹ Dr. Sharp also found that appellant's work-related anxiety and esophoria caused his headaches and that his work-related anxiety directly caused stomach cramps and indirectly caused him to over eat unhealthy foods, thereby leading to stomach aches. He also indicated that appellant's insomnia was related to his work-related obesity and stomach aches. Dr. Sharp advised that appellant did not have frequent headaches, gastrointestinal distress, or insomnia prior to mid-2013 and that he was unaware of any events in appellant's nonwork life that would explain the existence of these conditions.

Dr. Sharp concluded that appellant's disabilities/medical conditions were precipitated, aggravated, and accelerated by the conditions of employment described in his July 30, 2015 statement. He indicated that, regardless of the veracity of appellant's whistleblower allegations, appellant's working environment was not mentally or physically healthy and noted that his reasonable perception of the hostility of the working environment, coupled with his reassignment to purely sedentary duties, directly caused the medical conditions described in the present report. Dr. Sharp felt that appellant's proposed accommodation and course of treatment was the most efficient and medically sound methodology of returning him to the state of health he was in prior to being exposed to the unhealthy working conditions described in his July 30, 2015 statement. He advised that appellant needed to be given adequate time to perform his prescribed medically-necessary exercises each day during working hours, so as not significantly infringe his personal, nonwork time. Dr. Sharp indicated that, if appellant received the requested accommodations, he could continue to perform the duties he was assigned, effective July 1, 2015, and, barring complications, could return to his regular auditor job by August 31, 2016 without restriction.

In an undated report, Dr. Sharp indicated that the document was produced in support of the claim appellant filed with OWCP.¹⁰ He provided a summary of some of the work incidents and conditions claimed by appellant in his July 30, 2015 statement. Dr. Sharp indicated that he had recommended that appellant undergo further psychological testing by a specialist to verify his diagnosis of anxiety, but that he had been reluctant to undergo such testing for fear that the employing establishment would use the results to terminate his employment. He indicated that he first diagnosed anxiety in mid-June 2015 and noted that all his medical conditions were rooted in this anxiety. Dr. Sharp discussed various accommodations appellant should have at work. He posited that the only source of pressure for appellant's rapid and profound physical and mental deterioration beginning in mid-2013 was "the alleged cover-up of the NEON audit results" and other audits committed by his superiors that he was attempting to blow the whistle upon, the threats made against him those same superiors, and his inability for most of the period, until Congress intervened, to do anything about either. Dr. Sharp concluded that the medical conditions claimed by appellant in conjunction with his Form CA-2 filed on July 30, 2015 were due to his employment with the employing establishment and "the unhealthy, hostile, and allegedly illegal working conditions he has been forced to operate under between mid-2013 and the present."

⁹ Dr. Sharp noted that appellant spent more time in front of a computer screen than his coworkers would ordinarily spend.

¹⁰ Dr. Sharp indicated that he produced the report after OWCP sent appellant the August 13, 2015 development letter.

In a September 11, 2015 narrative statement, appellant's immediate supervisor, C.E., and a regional director for the employing establishment, D.G., responded to appellant's claims and contended that many of his statements were factually incorrect. They noted that they gave appellant work schedule accommodations and were liberal with his leave requests so he could care for his wife. The officials indicated that appellant's time charges from November 2014 to June 2015 revealed that 43.6 percent of his time was spent outside of the office, either in telework or leave status.¹¹ They noted that from October 1, 2014 to May 2, 2015, appellant spent 630.50 hours, 52 percent of his total time, supporting congressional committees and carrying out whistleblowing activities with minimal supervision. The officials indicated that since July 1, 2015 appellant had almost exclusively teleworked. They denied improper allegations of illegal threats of termination, and asserted that there was no evidence to support harassment, discrimination, or error and abuse in administrative issues. In particular, the officials noted that A.B. did not at any point threaten appellant's employment.

The officials further noted that appellant never raised his concerns about his coworkers to his supervisor, except on July 8, 2015 when he notified his supervisor about an errant instant message not intended for him.¹² They indicated that his supervisor immediately counseled the coworker. The officials contended that appellant's assigned tasks were productive and that there was no evidence to demonstrate the alleged management hostility or that the conflicts actually existed. They noted at no time did anyone threaten appellant's employment status, nor had any personnel or disciplinary action been planned or taken. The officials asserted that the inquiry with the employing establishment's security office was appropriate given appellant's actual statements regarding the U.S. Capitol. An investigation disclosed that an employee did use federal resources to hack the Wikipedia entry appellant referenced, and that appellant provided a report of this investigation. The officials indicated that it was not a management official who carried out the Wikipedia modification, but noted that appellant was not entitled to know the employee's name due to the individual's privacy rights.

In a December 21, 2015 decision, OWCP denied appellant's occupational disease claim, as he had not identified any compensable factors of employment. It found that he failed to establish harassment, discrimination, and retaliation as a result of his whistleblower actions. OWCP further noted that appellant had not established management error or abuse in administrative matters.¹³

Appellant requested a hearing with a representative of OWCP's Branch of Hearings and Review. Prior to a hearing being held, he submitted a December 28, 2015 statement in which he

¹¹ The officials addressed parts of the factual presentation of Dr. Sharp's July 31, 2015 report. They indicated that appellant spent far less time in front of the computer than his coworkers, noting that he spent a considerable amount of time discussing issues in his supervisor's office.

¹² The message read, "I guess [appellant's] been TW all week. He [i]s online but not in the office. Is he still not doing work b/c of his "independence?"

¹³ OWCP indicated that appellant's claim for an August 2, 2015 traumatic injury, assigned OWCP File No. xxxxxx245, would be adjudicated separately. In 2015 appellant filed a traumatic injury claim (Form CA-1) alleging that, while refereeing a youth soccer match on August 2, 2015, he sustained a work injury when he ruptured his left Achilles' tendon. File No. xxxxxx245 is not presently before the Board.

alleged that on June 14, 2013 a supervisor, J.M., yelled at him repeatedly in front of witnesses. Appellant claimed that M.Q. improperly ordered him not to talk with Congress or the media about NEON's activities.

Appellant submitted a February 17, 2016 report from Dr. Sharp who indicated that his previously submitted July 31, 2015 report and undated report were partially based on communications with appellant by telephone or the Internet and on evaluations by local medical providers, including a fall 2014 evaluation by the University of Colorado Medical School Health and Wellness Center.¹⁴ Dr. Sharp indicated that, by mid-2013, appellant did not experience a material level of anxiety due to a minor car accident from which he had physically recovered by December 2012 or due to his wife's chronic illness which was diagnosed in 2008. He indicated that appellant's work environment was hostile and unhealthy primarily because he was constantly exposed to individuals whose interests were adverse to his own. Dr. Sharp noted that appellant had accused his entire chain of command of serious malfeasance, giving them ample reason to retaliate against him. He noted, "Therefore, even removing all of the allegations of administrative misconduct, whistleblower retaliation, or whistleblowing during official time from the table -- [appellant's] working environment while performing his regular job duties (including both audit and nonaudit services) was and is inherently hostile and unhealthy so long as [appellant] was a material witness against other employees." Dr. Sharp discussed which reasonable accommodations he felt appellant should be provided, including being able to telework outside the employing establishment's workplace until at least August 31, 2016.

In a March 25, 2016 report, Dr. Lisa M. Griffiths, a clinical psychologist licensed in Colorado where she practiced, indicated that the purpose of her report was to discuss whether appellant had one or more qualifying disabilities as defined under the Rehabilitation Act and, if so, to determine which reasonable accommodations would be appropriate. She indicated that appellant met the criteria for a qualified disability under the Rehabilitation Act because he had a mental impairment that substantially limited one or more major life activities and that results in a substantial impediment to employment. Dr. Griffiths indicated that, if appellant was required to return to a work environment that was likely the cause of his stress and emotional reactivity, it had the potential to have an additional damaging effect on appellant's mental health. The work environment in this case would certainly include any employing establishment office, likely any Department of Defense office, and possibly any Federal Government office. Dr. Griffiths noted that continuing to have appellant report to officials he has accused, or is accusing, of misconduct in his whistleblower disclosures was likely to have a detrimental effect on his mental health. Therefore, to the extent practicable, permitting appellant to report to employing establishment officials not currently or previously involved in his whistleblower activities was recommended.

During the hearing, held on August 23, 2016, appellant repeated a number of his assertions that the employing establishment retaliated against him for his whistleblower activities. He testified that in December 2015 he tape-recorded his superiors and that his supervisor wrongly suspended him from employment for five days in February 2016. Appellant indicated that he filed two claims with MSPB, but that the claims had not been resolved. He

¹⁴ The record does not contain any reports of the local providers referenced by Dr. Sharp, other than the March 26, 2016 report discussed below.

asserted that he charged 2,000 hours to the timekeeping code for whistleblowing. Appellant testified that he resigned his federal employment in April 2014 and claimed that he was improperly forced to resign by management as a form of retaliation for his whistleblower activities.

Following the hearing, a copy of the transcript was sent to the employing establishment for review and comment. In a September 28, 2016 statement, the employing establishment's deputy general counsel for ethics, employment, and administrative law indicated that appellant failed to establish his allegations of any wrong-doing by management. Regarding appellant's allegations of illegal actions by NEON, the deputy general counsel noted that NEON demonstrated poor judgement, but that this did not represent reportable noncompliance with contractual terms and Congress determined that NEON's award and use of management fees was not illegal. The deputy general counsel denied that A.B. threatened appellant's job. Regarding the allegation that A.J. and M.Q. went through his drawers and opened his medication bottles, the deputy general counsel noted there was no evidence this occurred. The security office's concerns about appellant's mental health were prompted by his statements to his peers regarding his desire to blow up the U.S. Capitol, and management took the appropriate action in response. Regarding the allegation that appellant was forcibly transferred and received a downgrade in his performance evaluation due to his whistleblowing, the deputy general counsel noted appellant was not forcibly transferred, but all auditors were informed *via* e-mail that they had to rebalance workload. He denied that appellant's performance ratings were improperly handled, noting he was rated exceeds/fully successful for the period ending June 30, 2012, and he received a fully successful on February 6, July 25, and September 30, 2014, and June 30, 2015.¹⁵

The deputy general counsel provided emails and statements from appellant's superiors concerning some of appellant's actions. In a January 6, 2015 e-mail to appellant, C.E. denied appellant's allegation, made in a prior e-mail, that he prohibited him from talking to Congress. In a September 26, 2016 e-mail to C.E., M.Q. indicated that auditors told him that appellant had expressed his desire to blow up the U.S. Capitol, and he noted that he feared appellant might commit violence in the workplace. In a September 26, 2016 statement, A.B. asserted that she did not threaten appellant's employment in that conversation, or at any other time.

After the hearing appellant submitted additional documents in support of his claim. In a January 14, 2014 memorandum, an official from the employing establishment's OIG indicated that it had been substantiated that an employing establishment employee admitted using his work computer to make revisions to a Wikipedia entry about appellant. The record contains a list of the revisions to the Wikipedia article concerning appellant which indicates that the article was revised to refer to appellant using the terms "retard," "psycho," and "weirdo." In documents from 2015 and 2016, appellant expressed his concerns regarding telework and other work accommodations.

Appellant also submitted a December 10, 2015 report of Dr. Neal L. Present, a Board-certified occupational medicine physician for the Department of Health and Human Services,

¹⁵ The deputy general counsel provided copies of these evaluations. He also noted there were differences between appellant's performance evaluations between 2012 and 2015 due to appellant's going from a GS-11 to a GS-12, noting the GS-12 requirements were more complex.

which is addressed to a reasonable accommodation advisor for the employing establishment. In a December 10, 2015 report, Dr. Presant indicated that he had reviewed Dr. Sharp's July 31, 2015 report. Addressing the opinion expressed by Dr. Sharp in that report, Dr. Presant noted that it was reasonable to assume that appellant would be suffering from situational anxiety secondary to his dispute with the employing establishment and that he would have difficulty working in an office about which he had raised charges of impropriety. He indicated, however, that it remained unclear whether appellant had disability in the context of the Americans with Disabilities Amendment Act of 2008 and that he should see a mental health professional before a determination was made on disability. Dr. Presant noted that, while anxiety may be the likely cause of appellant's malaise and fatigue symptoms, it would be important to perform a full medical investigation to determine whether a nonmental health condition is present. He advised that appellant's weight condition was no worse than that of a substantial portion of the federal workforce and noted that esophoria was typically noted in childhood and was not characteristically linked to anxiety. Dr. Presant noted that appellant's insomnia, headaches, and gastrointestinal distress were likely linked to the anxiety he was suffering secondary to his dispute with the employing establishment. He indicated that it would be useful to clarify Dr. Sharp's role in appellant's care and to obtain medical records from him. Dr. Presant advised that it would be useful to obtain an evaluation from a mental health professional, including an opinion on appellant's work limitations.

In a November 2, 2016 decision, OWCP's hearing representative denied appellant's claim for work-related occupational conditions. She affirmed OWCP's December 21, 2015 decision as modified to reflect that appellant established two employment factors, but did not submit sufficient medical evidence to establish that he sustained a diagnosed condition due to the accepted factors. The hearing representative found that appellant established an employment factor with respect to the fact that he worked at least 2,000 on-the-clock hours on his whistleblower claim while under the protection of the whistleblower laws due to his allegations of fraud, waste, and abuse against the employing establishment NEON, NSF, and other agencies. She also found that appellant established an employment factor with respect to the fact that nonmanagement employee of the employing establishment improperly used federal resources to modify a Wikipedia entry that referenced appellant. The hearing representative found, however, that the reports of Dr. Sharp and Dr. Presant did not contain a rationalized medical opinion relating a diagnosed condition due to the accepted federal employment factors. She noted that Ms. Griffiths was not a physician and that, as causal relation is a medical question that can only be resolved by medical opinion evidence, the report of such a nonphysician cannot be considered in adjudicating that issue.

LEGAL PRECEDENT

An employee seeking benefits under FECA¹⁶ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that the injury was sustained while in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are

¹⁶ *Supra* note 2.

causally related to the employment injury.¹⁷ To establish fact of injury, an employee must submit evidence sufficient to establish that he or she experienced a specific event, incident, or exposure occurring at the time, place, and in the manner alleged.¹⁸ An employee must also establish that such event, incident, or exposure caused an injury.¹⁹ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.²⁰

OWCP regulations define the term “[o]ccupational disease or illness” as a condition produced by the work environment over a period longer than a single workday or shift.²¹ To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.²²

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence.²³ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established employment factors.²⁴

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.²⁵ On the other hand, the disability is not covered where it results from such factors as an employee’s fear of a reduction-

¹⁷ 5 U.S.C. § 8101(1); *B.B.*, 59 ECAB 234 (2007); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁸ *J.C.*, Docket No. 16-0057 (issued February 10, 2016); *E.A.*, 58 ECAB 677 (2007).

¹⁹ *Id.*

²⁰ *R.H.*, 59 ECAB 382 (2008); *Ellen L. Noble*, 55 ECAB 530 (2004).

²¹ 20 C.F.R. § 10.5(q); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.2b (June 2011).

²² *D.H.*, Docket No. 15-1876 (issued January 29, 2016); *D.I.*, 59 ECAB 158 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989).

²³ *F.S.*, Docket No. 15-1052 (issued July 17, 2015); *Tomas Martinez*, 54 ECAB 623 (2003).

²⁴ *P.K.*, Docket No. 08-2551 (issued June 2, 2009); *John W. Montoya*, 54 ECAB 306 (2003).

²⁵ 28 ECAB 125 (1976).

in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.²⁶

ANALYSIS

Appellant alleged multiple conditions due to factors of his federal employment. The Board must initially review whether these alleged factors are compensable under the terms of FECA. The Board notes that an aspect of appellant's claims pertains to his regular or specially assigned duties under *Lillian Cutler*.²⁷

The record shows that, between late 2014 and mid-2015 appellant spent the majority of his work hours working on his whistleblower claims against employing establishment officials, NEON, NSF, and other agencies. He performed this work while on the clock for his job with the employing establishment and under the protection of whistleblower laws. The Board finds that OWCP properly determined that this work constituted a compensable employment factor as it was directly related to his specially assigned duties.²⁸

Appellant alleged that the employing establishment committed wrongdoing with respect to his work assignments, performance evaluations, workplace transfers, disciplinary actions, investigations, leave requests, and requests for work accommodations. 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.²⁹ 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.³⁰ 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.³¹

Appellant did not substantiate any error or abuse committed by the employing establishment with respect to these administrative and personnel matters. In particular, with respect to the assignment of work duties, appellant claimed that his immediate supervisor, C.E., violated GAGAS by directing him to perform the critical work functions of his assigned position.

²⁶ *Gregorio E. Conde*, 52 ECAB 410 (2001).

²⁷ *See supra* note 24.

²⁸ *Id.* OWCP indicated that it had been established that appellant spent at least 2,000 hours working on his whistleblower claim. It did not identify the documents on which it based its figure and the precise number of hours that appellant worked on his whistleblower claim remains unclear from the record.

²⁹ *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

³⁰ *William H. Fortner*, 49 ECAB 324 (1998).

³¹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

However, he did not establish his assertions in the regard.³² Assigning work and monitoring performance are administrative functions of a supervisor.³³ Mere dislike or disagreement with certain supervisory actions will not be compensable absent error or abuse on the part of the supervisor.³⁴ Appellant provided no probative evidence to support that management committed any error or abuse with respect to his work assignments.³⁵

Appellant alleged that on December 3, 2013 management accused him of violating the dress code and ordered him to change clothing when there was no such policy. The Board has held that disciplinary matters such as letters of warning and notices of suspension are administrative actions and are not compensable, unless it is established that the employing establishment erred or acted abusively in its administrative capacity.³⁶ Appellant did not provide any corroborative evidence to support his allegation that the employing establishment committed error or abuse in disciplining him with respect to this or any other matter.³⁷ He noted that on September 25, 2014 the employing establishment's security office opened an investigation of him, and that a security officer, J.L., accused him of being mentally unfit for government service because he made terroristic threats to blow up the U.S. Capitol. Appellant indicated that J.L. threatened to revoke his security clearance eligibility, and alleged that management entirely fabricated these allegations. The employing establishment noted that its response to appellant's threats to blow up the U.S. Capitol were entirely appropriate given that coworkers had reported that the threats were in fact made. The employing establishment retains the right to conduct investigations if wrongdoing is suspected.³⁸ Generally, investigations are related to the performance of an administrative function of the employer and are not compensable factors of employment unless there is affirmative evidence that the employer either erred or acted abusively in the administration of the matter.³⁹ Appellant submitted no corroborative, probative

³² The record contains a May 5, 2015 e-mail in which C.E. indicated that he had received an opinion from the employing establishment's legal department that appellant's performing his critical work functions would not violate GAGAS.

³³ *Beverly R. Jones*, 55 ECAB 411, 416 (2004).

³⁴ *T.C.*, Docket No. 16-0755 (issued December 13, 2016).

³⁵ Appellant expressed his frustration with the lack of meaningful work he did for the employing establishment. The Board has held that an employee's belief that his or her work is not meaningful constitutes frustration from not being permitted to work in a particular environment and is not compensable. *See L.J.*, Docket No. 12-0558 (issued October 4, 2012). Therefore, appellant's dislike for his work duties does not constitute a compensable employment factor.

³⁶ *Sherry L. McFall*, 51 ECAB 436, 440 (2000).

³⁷ During the hearing held on August 23, 2016, appellant testified that in December 2015 he tape recorded his superiors and that his supervisor wrongly suspended him from employment for five days in February 2016. The record does not contain a copy of this disciplinary action and there is no indication that management committed error or abuse with respect to this matter. Appellant also claimed that a superior, M.Q., improperly ordered him not to talk with Congress or the media about NEON's activities. However, he did not establish error or abuse with respect to this administrative action.

³⁸ *Linda K. Mitchell*, 54 ECAB 748 (2003).

³⁹ *Sandra F. Powell*, 45 ECAB 877, 888 (1994).

evidence to support any error or abuse on the part of the employing establishment regarding this matter.

Appellant filed claims with OSC and MSPB with respect to some of the above-described administrative and personnel matters. However, the record does not contain a final decision relating to any of these claims. The Board finds that appellant has not established a compensable employment factor with respect to administrative and personnel matters.

Appellant claimed that his supervisors and coworkers subjected him to harassment and discrimination. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.⁴⁰

The Board notes that OWCP properly accepted one instance of harassment when an employing establishment employee hacked a Wikipedia article referencing appellant and altered it to make derogatory comments about him.⁴¹

With respect to appellant's other claims of harassment and discrimination, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors. Most of appellant's harassment and discrimination claims related to his assertion that management retaliated against him for his whistleblowing activities. The employing establishment repeatedly denied appellant's allegations of retaliation and appellant failed to provide probative corroborating evidence to support that the claimed retaliation occurred. Appellant asserted that he was subjected to multiple improper threats of termination by superiors, including one made in a telephone call by A.B., but he did not provide any evidence to support these assertions. He resigned his federal employment in April 2014 and claimed that he was improperly forced to resign by management as a form of retaliation for his whistleblower activities. However, appellant provided no factual documentation to support his assertion that the employing establishment forced him to resign. The Board has held that unfounded perceptions of harassment do not constitute an employment factor.⁴² Mere perceptions are not compensable under FECA and harassment can constitute a factor of employment if it is shown that the incidents constituting the claimed harassment actually occurred.⁴³ Appellant has not submitted evidence showing that he was subjected to harassment or discrimination in the form of retaliatory acts for his whistleblower activities. Appellant filed

⁴⁰ *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

⁴¹ The Board has held that the use of an epithet, which is derogatory in nature, can constitute harassment and discrimination under FECA. *See Felix Flecha*, 52 ECAB 268, 273 (2001). An employing establishment OIG official indicated that it had been substantiated that an employee used a work computer to make revisions to the Wikipedia entry about appellant. The article was revised to refer to appellant using the terms "retard," "psycho," and "weirdo." The record reveals that precise identity of the offending employee could not be revealed for privacy reasons, but a management official indicated that it was a coworker of appellant rather than a superior.

⁴² *See F.K.*, Docket No. 17-0179 (issued July 11, 2017).

⁴³ *See id.*

claims with OSC and MSPB with respect to his claims that the employing establishment retaliated against him, but the record does not contain a final decision from any of these claims.

Appellant alleged that on June 14, 2013 a supervisor, J.M., yelled at him repeatedly in front of witnesses. He provided no witness statements or probative evidence to support his allegation. An employing establishment official noted that on July 8, 2015 appellant notified his supervisor about an errant instant message he received that was not intended for him.⁴⁴ Appellant has not established that this incident constitutes harassment because the message was not intended for him and he has not shown that the contents of this single message would rise to the level of harassment under FECA.⁴⁵ He alleged coworkers avoided him and suggested that this constituted a form of harassment. The Board has previously addressed the circumstance in which a claimant alleged that avoidance by coworkers contributed to a claimed medical condition and has noted that such an assertion must be established by the evidence of record.⁴⁶ Appellant has not submitted evidence establishing that coworkers avoided him, let alone that such avoidance rose to the level of harassment, and his allegation in this regard must be considered a noncompensable desire to work in a particular environment.⁴⁷

For these reasons, appellant has not established a compensable employment factor under FECA with respect to his claims of harassment and discrimination, other than the above-noted alteration of the Wikipedia entry referencing him.

Appellant has established compensable employment factors with respect to the hours he spent working on his whistleblower claims and the alteration of the Wikipedia page referencing him. However, his burden of proof is not discharged by the fact that he has established an employment factor which may give rise to a compensable disability under FECA. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.⁴⁸

Appellant submitted several reports of Dr. Sharp, an attending physician, but these reports did not contain a rationalized medical opinion relating a specific medical condition to the accepted employment factors. In a July 31, 2015 report, an undated report (produced shortly July 31, 2015), and a February 17, 2016 report, Dr. Sharp indicated that appellant developed anxiety due to being exposed to a hostile work environment, abusive conduct by management with respect to his

⁴⁴ The message read, "I guess [appellant's] been TW all week. He [i]s online but not in the office. Is he still not doing work b/c of his "independence?"

⁴⁵ See generally *C.T.*, Docket No. 08-2160 (issued May 7, 2009) (finding that some statements may be considered abusive and constitute a compensable factor of employment, but that not every statement uttered in the workplace will be covered by FECA). Appellant alleged that other incidents constituted harassment but he did not establish that they actually occurred. He did not establish that A.J. and M.Q. went through his drawers and opened his medication bottles, or that they made derogatory comments about him.

⁴⁶ *Linda C. Kennedy*, Docket No. 04-0874 (issued July 27, 2004).

⁴⁷ See *supra* note 25.

⁴⁸ See *M.D.*, 59 ECAB 211 (2007); *William P. George*, 43 ECAB 1159, 1168 (1992).

whistleblower activities, and the employing establishment's threat to unfairly discipline him. He then posited that appellant suffered a number of physical conditions as a result of this anxiety, including obesity, fatigue/malaise, insomnia, headaches, and gastrointestinal problems. However, for the reasons noted above, the evidence of record does not substantiate appellant's allegations of retaliatory and abusive conduct by management as reported by Dr. Sharp. Therefore, his opinion on causal relationship with respect to appellant's anxiety and the several denoted physical conditions is of limited probative value because it is not based on a complete and accurate factual history.⁴⁹

With respect to appellant's esophoria, Dr. Sharp asserted that this preexisting condition was aggravated by the hours that appellant spent working on his computer. Although he has arguably implicated appellant's regular duties as aggravating his esophoria, Dr. Sharp's opinion regarding this condition is of limited probative value because he did not provide a rationalized medical opinion establishing causal relationship between esophoria and specific employment factors.⁵⁰ Dr. Sharp did not present objective findings on physical examination or diagnostic testing of appellant's esophoria or provide a rationalized medical explanation of how his work duties could have aggravated this condition. His opinion on appellant's esophoria is of limited probative value for the further reason that it is not based on a complete and accurate factual basis.⁵¹ Dr. Sharp indicated that his opinion was based on the fact that appellant was required to watch a computer screen for longer periods than other employees, but this assertion has not been established by the evidence of record.⁵²

The Board further notes that there is no indication that Dr. Sharp examined appellant around the time he produced the above-described reports and this circumstance further reduces the probative value of his reports.⁵³ For the above-described reasons, the Board finds that Dr. Sharp's reports do not contain a rationalized medical opinion relating the claimed conditions to the specific accepted employment factors in the present case and they are not sufficient to establish appellant's claim for multiple occupational conditions.

In his December 10, 2015 report, Dr. Present, a physician employed by the Department of Health and Human Services, generally indicated that it would be reasonable to assume that appellant suffered from situational anxiety secondary to his dispute with the employing

⁴⁹ See *supra* note 23.

⁵⁰ See *supra* notes 22 and 23.

⁵¹ See *supra* note 23.

⁵² In a September 11, 2015 statement, two employing establishment officials indicated that appellant spent far less time in front of the computer than his coworkers, noting that he spent a considerable amount of time discussing issues in his supervisor's office.

⁵³ See generally *Melvina Jackson*, 38 ECAB 443 (1987) (finding that the absence of a physical examination by a physician may affect the weight to be given a medical report). In his reports, Dr. Sharp noted that, to a large extent, he based his assessment of appellant's emotional and physical condition on the July 31, 2015 statement appellant produced in connection with the present claim. He indicated that he communicated with appellant at times by telephone and computer, but he did not identify the instances he did so and the bases of his descriptions of appellant's emotional and physical condition remain unclear.

establishment. However, his report is of limited probative value on the relevant issue of this case because he did not provide a clear, rationalized medical opinion that appellant's claimed medical conditions were related to the two specific accepted employment factors.⁵⁴ Dr. Present's report is of limited probative value for the further reason that he did not examine appellant.⁵⁵ Therefore, his opinion would not be sufficient to establish appellant's claim.

Appellant submitted a March 25, 2016 report of Dr. Griffiths, a licensed clinical psychologist.⁵⁶ Although Dr. Griffiths made reference to appellant's need to stay away from the employing establishment workplace, which she called the "likely" cause of his diagnosed conditions, her report is of limited probative value on the relevant issue of this case because she did not provide a clear opinion, supported by medical rationale, that appellant sustained a claimed condition due to either of the specific employment factors accepted in this case.⁵⁷

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 did not meet his burden of proof to establish an occupational disease or illness due to factors of his federal employment.

⁵⁴ See *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

⁵⁵ See *supra* note 52. Dr. Present's report was produced in the context of determining whether appellant needed special accommodation. There is no indication that he was asked to provide an opinion on the cause of appellant's physical and emotional conditions.

⁵⁶ In its November 2, 2016 decision, OWCP indicated that this report did not constitute medical evidence because it was not produced by a physician within the meaning of FECA. Under FECA, the report of a nonphysician does not constitute probative medical evidence and section 8101(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice under State law. See 5 U.S.C. § 8101(2); *R.S.*, Docket No. 16-1303 (issued December 2, 2016). OWCP did not adequately explain its determination that Dr. Griffiths was not a physician under FECA and the Board notes that she would qualify as a physician under FECA and her report would be considered medical evidence. See generally Federal (FECA) Procedure Manual, Part 3 -- Medical, *Overview*, Chapter 3.100.3a (October 1990) regarding the definition of a clinical psychologist. See also *Ruthie M. Johnson*, Docket No. 05-0822 (issued September 7, 2005).

⁵⁷ *D.R.*, Docket No. 16-0528 (issued August 24, 2016).

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2018
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