

to retaliation for reporting her concerns of a hostile work environment. She stopped work on July 13, 2017.

In a July 10, 2017 report, Carrie Springer, Ph.D., a licensed psychologist, and in July 20 and 25, 2017 reports, Dr. Troy Noonan, a Board-certified psychiatrist, diagnosed post-traumatic stress disorder (PTSD) primarily related to appellant's work environment.

In a July 31, 2017 supplemental statement, appellant related that her work-related PTSD started when she teleworked as a budget analyst and after she began her supervisory position as a branch chief on March 20, 2016. She noted teleworking for almost two years in the same office before accepting the branch chief position. When appellant teleworked, she experienced problems with M.B., the former deputy chief. She alleged that M.B. was the responsible government contact for drug testing and that she was selected for a random drug test. After appellant commented on the testing procedures, she believed an investigation ensued, which caused bias and retaliation by M.B. as she was again randomly selected for the next drug testing event. In July 2015, M.B. refused to sign-off on appellant's telework agreement paperwork, which she had prepared 90 days in advance of expiration of her telework agreement, and signed it approximately four days before it expired. Appellant alleged that the delay caused her stress as to whether she would have a job and/or be approved for telework the next year. She indicated that she then applied for and accepted the supervisory position effective March 20, 2016.

From March 20 through July 27, 2016, appellant alleged 35 incidents of harassment and retaliation from upper management. Beginning March 20 through July 22, 2016, M.B. harassed her regarding her requests to work beyond the 80-hour pay period, which she needed in order to complete a project M.B. had assigned her. On several occasions, including but not limited to March 25 and 31, April 8 and 11, June 16, July 11, 22, and 24, 2016, she alleged that M.B. subjected her to unwelcome comments and conduct when she referred to subordinate employees' race and targeted female employees for criticism during meetings, even after appellant provided written and verbal indications that she was uncomfortable with M.B.'s comments. On April 20, 2016 M.B. prevented her from performing her supervisory duties when she directed her not to update her subordinate employees' performance objectives.

On June 16, 2016 appellant reported her concerns of hostile work environment and discrimination of her employees to upper management. Thereafter, she alleged M.B. and Division Chief D.H., retaliated against her. On June 17, 2016 M.B. made harassing and negative statements regarding her performance in front of a work colleague. On June 21, 2016 D.H. verbally counseled her for allegedly unprofessional conduct and going "behind his back" to report her concerns. He demanded a detailed e-mail of what was discussed. Between June 16 and July 11, 2016, M.B. and D.H. significantly increased the number of tasks assigned to her. She expressed her concerns regarding the extra workload in a July 11, 2016 letter. On July 11, 2016 M.B. subjected her to unwelcome conduct when she touched her right shoulder, arm, and thigh and leaned over her to type on her keyboard.

On July 13, 2016 appellant reported M.B.'s continued harassment of her and the hostile work environment to K.L., deputy director, who directed her to file a complaint with the Office of the Inspector General (OIG) as opposed to an Equal Employment Opportunity (EEO) complaint. On July 27, 2016 M.B. and D.H. directed her to stop all telephone calls and e-mails to M.B., stop

working on weekends, and to not to work additional hours that would count as compensatory time without prior approval. Appellant asserted that M.B. was removed from her position as a result of her OIG complaint and, on November 20, 2016, D.W. became the new deputy division chief.

On November 20, 2016 D.H. and D.W. held a meeting where her subordinate employees were allowed to air any issues they harbored against her, which subjected her to embarrassment and obstructed her ability to be an effective supervisor. On December 6, 2016 M.B. rater, and D.H. reviewer, provided her a negative and inaccurate performance appraisal of “3” for Fiscal Year 2016, which was the lowest she had ever received and made no sense given her contributions.

On December 6, 2016 appellant notified D.W. that she had been diagnosed with PTSD. Beginning on December 6, 2016 and continuing, upper management failed to accommodate her requests for reasonable medical accommodations, violated the Rehabilitation Act, and subjected her to a separate approval process after partial accommodations were granted. On February 17, 2017 D.W. verbally counseled her for disrupting the work environment in front of one of appellant’s subordinate employees. On March 1, 2017 D.H. sent her an e-mail indicating that he was astonished that she “still did not know what was expected of her.” On March 18, 2017 D.W. prevented her from performing her work assignments when she ordered her not to collaborate with other divisions regarding a plan to merge the divisions. On March 20, 2017 D.H. and D.W. made unwelcome comments and prevented her from meeting her performance objectives when they attacked her “loyalty” and “professionalism” for briefing another individual on how to improve the division.

On several dates, including but not limited to April 12 and May 4, 12, and 15, 2017, she alleged D.W. subjected her to unlawful medical inquires, which were overly broad in scope, unnecessarily burdensome, and where she had already provided sufficient medical documentation. On several dates, including but not limited to April 19 and May 5, 17, 18, 19, 22, 24, and 25, and June 6, 2017, D.W. unlawfully disclosed her confidential medical information *via* shared e-mail accounts without her consent and without proper document classification markings.

On several dates, including but not limited to April 12 and May 4 and 10, 2017, D.W. terminated her approval to receive leave from the employing establishment’s Leave Bank Program. On several dates, including but not limited to April 12 and May 4, 8, 17, and 30, 2017, D.W. ordered her to report to work or work from home to meet excess demands for Leave Bank Approval, despite being on approved full-time or part-time leave under the Family and Medical Leave Act (FMLA). On May 3, 2017 D.W. subjected her to unwelcome comments and chilling behavior when she shared with her that D.H. “chewed her butt out,” or words similar to that effect, for having her report to work while on FMLA. On May 5, 2017 D.W. subjected her to unwelcome comments and behavior when, in response to her attempt to discuss reasonable accommodations, D.W. told her she was unfit for duty and ordered her to leave the workplace and request leave.

On June 25 and July 2 and 9, 2017 D.W. refused to meet with her and be briefed on tasks with approaching suspense dates, knowing that she could not finalize the tasks without first completing the briefing. On July 3 and 5, 2017 D.W. engaged in an intimidating and threatening manner toward her when she told her that no one trusted, respected, or liked her, and then sent her an intimidating e-mail requesting a meeting about a subject appellant thought was resolved, which

caused C.G., a senior representative, to recommend that D.W. be issued an anti-harassment reprimand.

On July 14, 2017 D.W. denied appellant's request to utilize the Leave Bank for doctor approved leave in violation of the Rehabilitation Act on the basis that her disabling condition was "chronic." On July 14, 2017 D.W. wrote an e-mail noting her intent to deny appellant's requests for leave without pay for the remaining time that her physician would not allow her to return to work and threatened her with absent without leave.

On July 27, 2017 D.W. e-mailed appellant about the procedure to request reasonable accommodations through the EEO office. On July 28, 2017 appellant requested a reasonable accommodation through the EEO for leave, paid or leave without pay, a change of supervisor, and permission to relocate.

In a September 7, 2017 development letter, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised appellant of the medical and factual evidence necessary and instructed her to respond to the attached questionnaire to substantiate the factual elements of her claim. OWCP afforded appellant 30 days to submit the necessary evidence.

In a September 7, 2017 letter, OWCP requested that the employing establishment respond to appellant's factual allegations and provide additional information. It afforded 30 days for a response. The employing establishment did not provide a response.

On September 28, 2017 appellant responded to OWCP's questionnaire. She stated that she immediately began experiencing a hostile work environment due to discriminatory acts towards herself and her subordinates by her immediate supervisor when she was hired into her position effective March 20, 2016 and that the harassment was daily. Appellant indicated that she had filed an OIG complaint, which resulted in the removal of her initial supervisor. She also filed an informal discrimination complaint and a formal complaint on September 19, 2017, which were pending an investigation. Appellant noted the effect her medical diagnosis of acute PTSD had on her work and home life. She also noted a prior history of depression, but stated that the depression was well controlled until she began her current position on March 20, 2016. Copies of the OIG complaint, a November 3, 2016 letter from the OIG, and informal and formal complaints of discrimination were received along with additional medical evidence.

The November 3, 2015 letter from the OIG found that an informal climate assessment of appellant's division resulted in insufficient information to support further inquiry or investigation into the unprofessional relationship, time and attendance fraud, and improper qualified personnel hiring. The letter indicated that it referred the hostile working environment allegation and the results of the informal J-21 climate assessment to the J-2 leadership, who had taken action concerning the matter. In a September 28, 2017 letter, appellant stated that the J-2 chain of command had removed M.B. as her supervisor as a result of the OIG findings.

By decision dated October 17, 2017, OWCP denied appellant's claim for an emotional condition finding that she had not met her burden of proof to establish compensable employment factors.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,² the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under FECA.³ When an employee experiences emotional stress in carrying out his or her employment duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁴ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁵

Where a claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.⁶ Personal perceptions alone are insufficient to establish an employment-related emotional condition.⁷ On the other hand the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force, or her frustration from not being permitted to work in a particular environment, or to hold a particular position.⁸

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.⁹ 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.¹⁰ In determining

² 28 ECAB 125 (1976).

³ See *Robert W. Johns*, 51 ECAB 137 (1999).

⁴ *Supra* note 2.

⁵ *J.F.*, 59 ECAB 331 (2008).

⁶ *M.D.*, 59 ECAB 211 (2007).

⁷ *Roger Williams*, 52 ECAB 468 (2001).

⁸ See *supra* note 2.

⁹ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹⁰ See *William H. Fortner*, 49 ECAB 324 (1998).

whether the employing establishment erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹¹

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.¹² Mere perceptions of harassment or discrimination are not compensable under FECA.¹³ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹⁴ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁵ A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.¹⁶

ANALYSIS

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

The Board notes that appellant has attributed her emotional condition in part to *Cutler*¹⁷ factors. Appellant alleged that from June 16 through July 11, 2016 she wrote letters expressing her concerns about the ability to handle her workload when the number of tasks assigned to her significantly increased; on March 18, 2017 she could not complete her work assignment because D.W. ordered that she desist from collaborating with another division regarding a task to merge divisions; and, on June 25 and July 2 and 9, 2017, she could not finalize her tasks before completing a briefing with D.W. who declined to meet with her and be briefed on tasks which had approaching suspense dates. Pursuant to *Cutler*¹⁸ these allegations could constitute compensable employment factors if appellant establishes that her regular job duties or a special assignment caused an emotional condition. The Board has held that overwork, when substantiated by sufficient factual information to corroborate appellant's account of events, may be a compensable factor of employment.¹⁹ The Board finds, however, that appellant submitted no evidence supporting her allegations of overwork or inability to do her work with regard to deadlines or timeframes and that she was not provided with adequate tools to perform her job. Without

¹¹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹² *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

¹³ *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, *supra* note 12.

¹⁵ *G.S.*, Docket No. 09-764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

¹⁶ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁷ *Supra* note 2.

¹⁸ *Supra* note 2.

¹⁹ *See Bobbie D. Daly*, 53 ECAB 691 (2002); *T.M.*, Docket No. 15-1774 (issued January 20, 2016).

evidence substantiating these allegations, appellant has failed to meet her burden of proof to establish a compensable factor of employment under *Cutler*.²⁰

Appellant has also alleged error and abuse in administrative matters on the part of her supervisors. These incidents identified by appellant include: being selected twice for random drug testing; refusal and delay by management in signing off on her telework agreement; refusal of requests for compensatory pay, leave, use of Leave Bank, and accommodation; comments regarding her performance on June 16 and 17 and July 24, 2016 and March 20, 2017; verbal counseling by management; an improper performance appraisal; being pressured to return to work against her physician's orders; and one instance of inappropriate touching.

As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of FECA.²¹ Absent evidence establishing error or abuse, a claimant's disagreement or dislike of such a managerial action is not a compensable factor of employment.²² Appellant's selection for drug testing, approval for telework, work assignments, management's comments and directives, verbally counseling, performance evaluation, and the handling of leave requests, and the monitoring of appellant's activities at work are administrative functions of the employer, and not duties of the employee.²³ Appellant has not established a compensable factor of employment as she has not submitted corroborating evidence of error or abuse in these administrative and personnel matters.²⁴

Appellant has alleged that on several dates, management had unlawfully disclosed her confidential medical information *via* shared e-mail accounts without her consent and without proper document classification markings. The Board has held that the unauthorized disclosure of confidential information can be a compensable factor of employment if corroborated by factual evidence and causally connected to the claimant's federal employment.²⁵ The question becomes whether the disclosure of appellant's confidential medical information was necessary to address management's issues at the time of the e-mails.²⁶ However, the record is devoid of any information as to why appellant's confidential medical information was released and what, if anything, was done with the information. As such appellant has not established that this alleged action was a compensable factor of employment.

Appellant has further attributed her emotional condition to retaliation, discrimination, harassment, and a hostile work environment by management during the period March 20, 2016 to

²⁰ *K.S.*, Docket No. 15-1426 (issued December 29, 2015).

²¹ *Carolyn S. Philpott*, 51 ECAB 175 (1999).

²² *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

²³ See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

²⁴ *Supra* note 22.

²⁵ *Dorthea M. Belnavis*, 57 ECAB 331 (2006).

²⁶ See *G.R.*, Docket No. 15-0052 (issued September 22, 2017).

July 27, 2017. However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under FECA.²⁷ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.²⁸

The Board notes that appellant indicated that she had filed an OIG complaint against M.B., her former supervisor, and that the actions in the identified incidents were retaliatory, harassment, or discriminatory.²⁹ The November 3, 2015 letter from the OIG found that an informal climate assessment of appellant's division resulted in insufficient information to support further inquiry or investigation into the unprofessional relationship, time and attendance fraud, and improper qualified personnel hiring. However, the OIG letter indicated that it had referred the hostile working environment allegation and the results of the informal J-21 climate assessment to the J-2 leadership, who had taken action concerning the matter. Appellant alleged that her OIG complaint resulted in the removal of M.B. as her supervisor. The Board notes that OWCP had allotted time for the employing establishment to respond to appellant's allegations. However, no response was received. Nevertheless, OWCP found that appellant had not established any compensable factors of employment.

OWCP procedures provide:

“If an employing [establishment] fails to respond to a request for comments on the claimant's allegations, the [claims examiner] may usually accept the claimant's statements as factual. However, acceptance of the claimant's statements as factual is not automatic in the absence of a reply from the [employing establishment], especially in instances where performance of duty is questionable. The Board has consistently held that allegations unsupported by probative evidence are not established. *James E. Norris*, 52 ECAB 93 (1999); *Michael Ewanichak*, 48 ECAB 364 (1997). The [claims examiner] should consider the totality of the evidence and evaluate any inconsistencies prior to making a determination.”³⁰

Given the facts and circumstances of this case, the Board finds that it is unable to make an informed decision in this case regarding appellant's allegations of error or abuse of administrative

²⁷ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991). See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

²⁸ *Alice M. Washington*, 46 ECAB 382 (1994); *N.D.*, Docket No. 16-0823 (issued August 18, 2017); *E.C.*, Docket No. 15-1743 (issued September 8, 2016).

²⁹ Appellant also filed informal and formal EEO complaints, results which are pending.

³⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5(d)(1) (June 2011).

actions and a hostile work environment as the employing establishment did not respond to the request for comment made by OWCP in the September 7, 2017 development letter.³¹

Although it is a claimant's burden of proof to establish his or her claim, OWCP is not a disinterested arbiter, but rather shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.³² Since appellant's allegations indicate that the employing establishment would have in its possession evidence relevant to appellant's administrative and harassment allegations, OWCP should obtain a response from the employing establishment to the allegations of harassment and administrative error or abuse and any relevant evidence or argument.³³

This case will accordingly be remanded to OWCP for further development of the evidence regarding appellant's allegations of harassment.³⁴ It shall request that the employing establishment provide a detailed statement and relevant evidence and/or argument regarding appellant's allegations. Following this and any necessary further development, OWCP shall issue a *de novo* decision regarding whether appellant has established an emotional condition in the performance of duty.

CONCLUSION

The Board finds that the case is not posture of decision.

³¹ See *R.A.*, Docket No. 17-1030 (issued April 16, 2018).

³² See *K.W.*, Docket No 15-1535 (issued September 23, 2016) (remanding the case for further development by OWCP when the employing establishment did not provide an investigative memorandum in an emotional condition claim based on sexual harassment).

³³ *Id.*; see 20 C.F.R. § 10.117(a), which provides that an employing establishment that has reason to disagree with any aspect of the claimant's report shall submit a statement to OWCP that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position. The employing establishment may include supporting documents such as witness statements, medical reports or records, or any other relevant information.

³⁴ See *R.A.*, Docket No. 17-1030 (issued April 16, 2018).

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further development consistent with this decision of the Board.

Issued: October 17, 2018
Washington, DC

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

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

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