



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On January 9, 2013 appellant, then a 45-year-old lead police officer, filed an occupational disease claim (Form CA-2) alleging that he sustained high blood pressure due to the “anxiety and stress of the job.” He stopped work on January 2, 2013.

In a January 24, 2013 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim, including a detailed description of the implicated work factors and medical evidence describing his medical condition with an explanation of the cause of any such condition.

Appellant submitted a January 2, 2013 emergency room report in which an attending physician assistant reported blood pressure of 156/100 when he first arrived, and noted that it was 136/88 after he had settled down for a while. The physician assistant diagnosed mild anemia and headache. In other notes from that visit, a registered nurse noted that appellant had a history of hypertension.

By decision dated May 29, 2013, OWCP denied appellant’s emotional condition claim because he failed to establish any compensable work factors and, therefore, did not establish an injury as defined under FECA. It noted that he only provided a vague and general statement that job-related stress caused his claimed medical condition.

By letter dated October 30, 2013 and received on November 7, 2013, appellant requested reconsideration of his claim and described the incidents and conditions at work which he believed caused a stress-related condition. He alleged that in late 2010, while suffering from bladder cancer caused by his military service, the employing establishment mishandled his request for a transfer to another position. Appellant asserted that he received his requested transfer to Canadaigua, NY, in August 2011, but was immediately transferred again to Rochester, NY, based on a false assertion by management that he did not have enough seniority to remain in the Canadaigua position. He alleged that this action was part of retaliatory and discriminatory actions that lasted for five months and that he was brought before an interview panel whose members attempted to discredit his character. In a written report, management officials allegedly called appellant unprofessional and accused him of being a liar. Appellant indicated that, in early December 2011, during his yearly psychological evaluation he lost confidence in the ability and character of the civilian contractor carrying out the evaluation. During an early March 2012 evaluation, the civilian contractor misinterpreted a comment that appellant had made about a former supervisor’s propensity for violence and reacted as though appellant had made an “emotionally unstable remark.” Appellant indicated that the civilian contractor became visibly irate and requested that he leave the room so that he could speak to the police chief. He stated that he was wrongly removed from service the day after this evaluation, but that the civilian contractor denied that he was

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<sup>3</sup> Docket No. 15-0297 (issued May 12, 2015).

responsible for removing him from service. Appellant was placed on administrative leave until March 14, 2012 when he was recommended for discontinued service.

In his October 30, 2013 letter, appellant further alleged that between March and October 2012 he witnessed numerous criminal actions by employees and patients, but that management did not take steps to prevent such actions. He filed complaints with the Office of the Inspector General for the employing establishment concerning fraud, waste, and abuse, but the response of the factfinders was that the employing establishment was “not responsible for the actions of others.” Appellant’s promotion to the lieutenant rank in October 2012 had been improperly delayed by a human resources official who made remarks that made him feel uncomfortable. He alleged that after his promotion he was exposed to additional acts of retaliation by management and placed in hostile environments. In early January 2013, appellant experienced an emotional incident when he was abandoned at work after other officers called in sick and a police officer assigned to the union office was hostile toward him. Beginning January 23, 2013, he was wrongly placed on administrative leave for eight months, a situation which exacerbated his prostate and bone cancers. Appellant alleged that he was placed in a hostile work environment when he returned to work in August 2013, and that human resource officials stole his military health records from the mail. Also, a union member stated that appellant belonged in a secured unit for the mentally unstable. Appellant alleged that a number of employees who had harassed him had been removed from their jobs or were being investigated.<sup>4</sup>

Appellant submitted an October 15, 2012 letter to the chief of his workplace in which he asserted that management officials made misleading statements about his military-connected health issues, mental health, and fitness for duty. He was subjected to harassment and discrimination by these officials and the human resources office failed to notify him about opportunities for advancement. In a November 25, 2012 e-mail, appellant discussed a tort claim he filed with the Office of General Counsel of the employing establishment alleging that he received improper medical care for his bladder cancer from a physician who worked for the employing establishment.

In January 24 and May 6, 2013 e-mails to the then Secretary of the employing establishment, appellant asserted that a human resources manager at the employing establishment subjected him to sexual advances and that management illegally removed him from active service. He generally alleged that he was subjected to harassment after he began working at the employing establishment.

In a May 24, 2013 statement, a coworker described a meeting on that date with a supervisor, a union official, and several others. He asserted that a supervisor called appellant “crazy” and “nuts” and stated that he “could easily be a patient [in 3 Building].” The supervisor also stated that appellant was “certifiable” and that coworkers felt unsafe around him. In a June 19, 2013 e-mail to the director of the employing establishment, appellant alleged that an unspecified person used vulgar language to tell him to shut up when he was contacted regarding his return to duty. He indicated that management officials subjected him to harassment, retaliation,

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<sup>4</sup> In a separate undated statement, appellant generally alleged that he had suffered numerous acts of discrimination, harassment, hostility, false accusations and “administrative/managerial harassing actions.”

discrimination, sexual harassment, privacy violations, civil rights violations, and unfounded accusations.

Appellant submitted several medical reports of Dr. Aurelian Niculescu, an attending Board-certified psychiatrist, including an October 8, 2013 report in which he diagnosed major depressive disorder, generalized anxiety disorder, and anxiety disorder with mixed features of panic disorder and agoraphobia. Dr. Niculescu posited that these conditions were aggravated by appellant's being placed on administrative leave at work.

By decision dated June 9, 2014, OWCP denied appellant's emotional condition claim because he failed to establish any compensable employment factors. It found that he had not submitted sufficient corroborative documentation, such as witness statements or grievance findings that documented his claims of harassment, discrimination, and other acts of wrongdoing by the employing establishment.

Appellant appealed his case to the Board and, by decision dated May 12, 2015,<sup>5</sup> it affirmed OWCP's June 9, 2014 decision. The Board found that appellant failed to meet his burden of proof to establish an emotional condition in the performance of duty because he failed to establish any compensable employment factors.

On May 10, 2016 appellant requested reconsideration of his emotional condition claim.

Appellant submitted a November 20, 2014 letter from the chief of police in Canandaigua who indicated that appellant advised him on January 13, 2013 that he was required to work a tour of duty and that he found out upon arriving for the tour of duty that no other officers had arrived for duty.

In a May 18, 2015 statement, a coworker advised that on many occasions he had witnessed "the misconduct the employing establishment has done to [appellant]." He indicated that on one occasion he witnessed appellant in a panic after coming out of meeting where the director of the employing establishment threatened his career and livelihood.

In a May 19, 2015 statement, a former coworker indicated that appellant suffered from investigations into his complaints which caused him stress and prevented him from performing his assigned duties at work.

Appellant submitted an undated statement in which he provided additional details about incidents and conditions at work between mid-2010 and late-2013 that he believed caused his claimed emotional conditions. He also submitted new reports of Dr. Niculescu from periodic treatment sessions in 2015.

By decision dated August 4, 2016, OWCP denied appellant's claim for an employment-related emotional condition. It found that appellant failed to establish a compensable employment

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<sup>5</sup> See *supra* note 3.

factor, noting that the witness statements he submitted lacked sufficient detail to establish a compensable employment factor.

On May 31, 2017 appellant requested reconsideration of OWCP's August 4, 2016 decision.

Appellant submitted a May 17, 2016 statement in which an employee of the employing establishment indicated that on May 14, 2016 another employee advised him that appellant was suspected of making a bomb threat *via* telephone against the employing establishment premises. In a statement from August 2016, another employee of the employing establishment discussed May 2016 bomb threats *via* telephone against the employing establishment premises, but he did not mention appellant's name. Appellant also submitted an August 14, 2015 report from an attending physician, a January 26, 2017 report from an attending social worker, and a May 23, 2017 report from an attending nurse practitioner.

By decision dated August 29, 2017, OWCP denied modification of its August 4, 2016 decision, noting that appellant failed to establish a compensable employment factor.

### **LEGAL PRECEDENT**

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.<sup>6</sup> 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.<sup>7</sup>

A claimant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by employment factors.<sup>8</sup> This burden includes the submission of a detailed description of the employment factors or conditions which he or she believes caused or adversely affected a condition for which compensation is claimed, and a rationalized medical opinion relating the claimed condition to compensable employment factors.<sup>9</sup>

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

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<sup>6</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>7</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>8</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

<sup>9</sup> *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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.<sup>10</sup> If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.<sup>11</sup>

### ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. OWCP denied his emotional condition claim because he had failed to establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are compensable employment factors under the terms of FECA. The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Cutler*.<sup>12</sup> Rather, appellant has alleged error and abuse in administrative matters and harassment and discrimination on the part of his supervisors.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's June 19, 2014 decision because the Board has already considered this evidence in its May 12, 2015 decision and found that it failed to establish a compensable employment factor. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>13</sup>

Appellant has alleged that the employing establishment committed wrongdoing with respect to administrative/personnel matters, including its investigation into suspicions that he made a bomb threat to the employing establishment premises. 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.<sup>14</sup> 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.<sup>15</sup> In determining whether the employing establishment has erred

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<sup>10</sup> See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

<sup>11</sup> *Id.*

<sup>12</sup> See *supra* note 6.

<sup>13</sup> See *B.R.*, Docket No. 17-0294 (issued May 11, 2018).

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

<sup>15</sup> *William H. Former*, 49 ECAB 324 (1998).

or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>16</sup>

The Board finds that appellant did not substantiate any error or abuse committed by the employing establishment and therefore he did not establish a compensable employment factor with respect to administrative or personnel matters. Appellant submitted a May 17, 2016 statement in which an employee of the employing establishment indicated that on May 14, 2016 another employee advised him that appellant was suspected of making a bomb threat *via* telephone against the employing establishment premises. However, this statement does not provide any indication that the employing establishment committed error or abuse in connection with its investigation of appellant. The record does not contain the findings of a complaint or grievance showing that management committed error or abuse with respect to any administrative or personnel matter.<sup>17</sup>

Appellant has alleged that supervisors 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.<sup>18</sup> The Board has held that unfounded perceptions of harassment do not constitute an employment factor.<sup>19</sup> 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.<sup>20</sup>

The Board finds that appellant has not established a compensable employment factor with respect to the claimed harassment and discrimination.<sup>21</sup> Appellant has not submitted probative evidence establishing such harassment or discrimination. In a May 18, 2015 statement, a coworker advised that on many occasions he had witnessed "the misconduct the employing establishment has done to [appellant]." He indicated that on one occasion he witnessed appellant in a panic after coming out of a meeting where the director of the employing establishment threatened his career and livelihood. The Board notes that these statements do not establish harassment or discrimination by management given its lack of specific details. For example, the coworker did not describe the nature of the "misconduct" to which appellant was subjected or the specific threats made to appellant's career and livelihood. In fact, it is unclear from the statement whether the

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<sup>16</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>17</sup> Appellant submitted a November 20, 2014 letter from the chief of police in Canandaigua who indicated that appellant advised him on January 13, 2013 that he was required to work a tour of duty and that he found out upon arriving for the tour of duty that no other officers had arrived for duty. In a May 19, 2015 statement, a former coworker indicated that appellant suffered from unspecified investigations into his complaints which caused him stress and prevented him from performing his assigned duties at work. However, these statements lack sufficient detail to establish any wrongdoing by management with respect to administrative matters.

<sup>18</sup> *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

<sup>19</sup> *See F.K.*, Docket No. 17-0179 (issued July 11, 2017).

<sup>20</sup> *See id.*

<sup>21</sup> *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).

coworker actually witnessed the comments ostensibly made by the director of the employing establishment or whether he heard them on a secondhand basis from appellant.<sup>22</sup>

For these reasons, appellant did not establish any compensable employment factors. Given the Board's finding on the factual aspect of her case, it is unnecessary to consider the medical evidence of record.<sup>23</sup>

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

### **CONCLUSION**

The Board finds that appellant has failed to meet his burden of proof to establish an emotional condition in the performance of duty.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 29, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 7, 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

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<sup>22</sup> See *S.B.*, Docket No. 09-1654 (issued July 14, 2010).

<sup>23</sup> See *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992) (finding that it is not necessary to consider the medical evidence of record if a claimant has not established any compensable employment factors).