

File Number:
HR10-D-H

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U.S. DEPARTMENT OF LABOR

OWCP/DFEC, PO Box 8311
LONDON, KY 40742-8311
Phone: (202) 693-0045

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Date of Injury _____
Employee: _____

Dear _____

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on _____. As a result of such hearing, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Your case file has been returned to the San Francisco District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OWCP/DFEC, PO Box 8311
LONDON, KY 40742-8311

Sincerely,

Division of Federal Employees' Compensation

PAUL H FELSER
ESQ
FELSER LAW FIRM, P.C.
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, September 01, 2020

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

*In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of
Claimant; Employed by the Case No.*

The issue for determination is whether fact of injury is established.

The claimant is employed as a US Customs and Border Protection Officer by the Department of Homeland Security. On _____ the claimant filed a timely claim of occupational disease, claiming an emotional condition due to her employment. She asserted a hostile work environment led to her condition. Her claim form indicated she stopped work on _____. No evidence was received with her claim.

By letter dated _____ the office advised the claimant that more evidence was needed in her claim. She was asked for a comprehensive medical report to include a full history of the injury, diagnoses and a physician's reasoned opinion as to whether and how the claimed work activity had caused or contributed to a diagnosed condition. She was also asked to describe in detail the work incidents she claimed and to provide evidence, such a witness statements or results of formal fact findings, to support her claim.

Medical evidence dated on or about _____ indicated the claimant reported she was the victim of ongoing, systemic discrimination and retaliation at work. No detailed description of any specific work events was provided. The report indicated the claimant was totally disabled beginning on _____

Medical evidence dated _____ indicated the claimant said she had applied for an intelligence position at her agency but was overlooked. She reportedly filed an EEOC complaint. She indicated she thought her management had been supportive but then she was removed from trainings and pulled from a conference that was to help her get the intelligence position. She reported she was given a cease and desist order and told she was a threat to national security. She said a task force she was supposed to be involved with was cancelled. She asserted she was again passed over for a male counterpart with less experience. She reported she believed she was the victim of retaliation. She indicated she was trying to move but wasn't being allowed to do so. She reported she had filed two grievances and two EEOC complaints. She said that no formal investigation had taken

Washington DC, September 01, 2020

place. She reported depression and PTSD due to her employer's actions. She was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood. An additional report indicated the claimant reported she had been working at the _____ site and had successfully worked on a big project regarding "sex trafficking, human trafficking" that was recognized by the CBP commissioner and highly acclaimed. However, she said that although the project was approved by her management, "because she did it on her own", she was actually reprimanded. She said she was served a cease and desist order and considered a threat. She advised she was fighting back because she believed she was being discriminated against because of her sex. She said she had representation and had filed a law suit. The report indicated she worked from 10pm to 6am and then had school from 9am to 2pm on Monday and Wednesday.

Ongoing medical evidence indicated the claimant was distraught after an unfavorable EEO decision and had applied for time off through FMLA but was asked by her employer for her diagnosis which she believed was illegal.

An EEOC decision dated _____ indicated the case was dismissed as the claimant and her employer had reached a written settlement agreement. A copy of the settlement agreement was provided. No discussion of specific work incidents or issues was provided in the document.

A document indicating an EEO timeline from _____ through _____ was provided by the claimant. It indicates she applied for a position but didn't get it and then wanted answers from management as to how she could improve to get the position. It indicates she eventually filed EEO and grievance complaints believing she was being discriminated against and then was passed over for another position. The notes indicated that of the five people who applied for the latter position, four were women but the sole male applicant was selected. Much of the document is written in agency specific vernacular. She indicates she was eventually given a cease and desist order regarding the project mentioned above and indicated it was then shared with other agencies through management. She indicated she was falsely accused of wrong doing by management but had yet to be interviewed by any "fact finder".

A _____ document from an EEO Investigator indicated the claimant had filed an EEO complaint claiming reprisal when:

1) On _____, _____, she learned that she was not selected for an assignment to the Intelligence and Targeting Unit (ITU).

2) Beginning on _____ and continuing, she was subjected to harassment when the following incidents occurred: (Amendment filed on _____)

a. Since _____ management has ignored her emails and requests, and has failed to provide her with assistance relating to her requests to utilize Leave Without _____

Pay (LWOP), enact her rights under the Family and Medical Leave Act (FMLA), and file a claim with the Office of Workers' Compensation Program (OWCP).

b. On _____, Complainant was bullied and threatened to provide confidential information when Mission Support Specialist (MSS) _____ instructed her to provide a doctor's note which contained a medical diagnosis.

c. On _____ Complainant was advised that she was required to submit medical documentation to _____ Fitness Branch.

A separate EEO document of the same date and from the same EEO Investigator noted a complaint regarding the following:

Whether U.S. Customs and Border Protection (CBP) discriminated against Complainant, _____ Officer, _____ assigned to the _____ Port of Entry, _____ based on her sex (female) and reprisal (participation), when:

1. On _____ Complainant learned she was not allowed to participate in a detail with the Regional Coordinating Mechanism Intelligence Group.

2. Beginning on _____ and continuing, Complainant was subjected to harassment when the following incidents occurred:

a. On _____, Complainant was not allowed to present or participate in a CBP teleconference with the intelligence community, for which she was previously authorized to participate to discuss her work.

b. Or _____ Port Director (PD) _____ berated and belittled Complainant during a meeting, made reference to Complainant's prior EEO complaints, and issued Complainant a cease and desist order for alleged gathering and unauthorized disclosure of sensitive law enforcement information.

c. On _____, Complainant requested and was denied a copy of her local personal file, which was being maintained by PD _____

d. On _____, Complainant learned that management shared information to other agencies, pertaining to her being served with a cease and desist order; and the other agencies were advised not to speak to Complainant.

e. On _____, Complainant learned that her reports which were referenced in the cease and desist order were posted on the _____ LEAD website for wide distribution.

f. On _____, Supervisory CBP Officer (SCBPO) repeatedly stated "You need to follow the letter" to Complainant, in reference to the cease and desist order.

g. On _____, SCBPO _____ approached Complainant in front of the public, berated her, and made derogatory comments to include: "You're not trying to do intel work are you? You know you're not supposed to be doing that."

h. On _____ Complainant learned that CBP Officer _____ was utilizing Complainant's targeting and intelligence work, which was referenced in her cease and desist order, while working in the IBIG position.

3) On or around _____, Complainant learned she was not selected for a position with the Integrated Border Intelligence Group (IBIG).

The claimant provided a response to the office's questions indicating she had been harassed and discriminated against at a prior duty station and then transferred to _____. She indicated the most significant event precipitating the move was that she was told to shoot herself by a manager in front of witnesses. She indicated she reported the incident and was retaliated against. She said that manager was subsequently arrested and pled guilty to unrelated Federal charges when he strangled a member of the traveling public while performing his duties. She indicated she settled her EEO complaint on that issue in _____.

She advised that after transferring she was denied a promotion and believed she was discriminated against because she was the senior officer out of the others who applied. She said she filed a grievance and EEO complaint and while that was going on she began an operation to target and build intelligence on the influx of illegal high-risk nationals. She reiterated assertions noted above. She indicated that eventually her operation was given to and credited to other people. She indicated she still hadn't been interviewed by any fact finders on what occurred. She listed prior EEO complaints from _____ that were settled. She indicated a union complaint from _____ regarding her non-selection was still ongoing. She indicated other EEO and union complaints were ongoing. She advised this included one from _____ regarding her agency's administrative failures in handling her OWCP claim. She provided a similar second statement labeled CA35G. Multiple duplicate statements were received.

Ongoing medical evidence was received.

By letter date _____, the office requested a response from the employing agency regarding the claimant's allegations.

A letter dated _____ from the employer to the claimant indicated she had not provided the necessary paper work or medical documentation to support her absence from

work beginning on or about [redacted]. She was advised she would be charged AWOL if she didn't submit requested documentation.

Ongoing medical evidence was received.

By decision dated [redacted], the office denied the claim on the factual basis of fact of injury. In so doing they listed the claimant's allegations but advised the incidents were not established as having occurred as alleged.

The claimant disagreed with the decision and requested an oral hearing before an OWCP representative.

A letter dated [redacted] from the employer to the claimant advised that it had come to management's attention that she may have engaged in the gathering and unauthorized disclosure of sensitive law enforcement information. She was advised that the matter was still under investigation and the letter was not disciplinary in nature. However she was advised to cease and desist from any unauthorized conduct.

Hearing was held on [redacted]. The claimant was represented Paul Felser. The claimant was not present.

At hearing, Mr. Felser cited a new recent statement from the claimant and argued that they believed the claimant had met her factual burden. He indicated they would be submitting additional evidence post hearing.

A copy of the transcript was provided to the employer and claimant. Both were afforded 20 days to respond.

In addition the case record was held open for 30 days for the submission of any additional evidence.

A statement dated [redacted] from the claimant was received in which the claimant expanded her allegations. These included an allegation that her units were often understaffed requiring that she work overtime. She provided leave and earnings statements.

A letter dated [redacted] from the Office of Personal Management (OPM) to the claimant advised that upon reconsideration of her disability application they had found her disabled due to Adjustment Disorder and Post Traumatic Stress Disorder.

Multiple citations of public law were received.

No formal findings from EEO or union grievance decisions were provided to establish the employer erred or abused their discretion in any of the administrative issues alleged.

Based upon a thorough review of the evidence of record, I find that the decision of the district office dated [redacted] should be set aside and the claim remanded for additional factual development.

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components that must be considered in connection with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place and in the manner alleged. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.

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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.¹ 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.²

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 the Act.³ 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.⁴ 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.⁵

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁶

In the present case I find that the evidence of record is not sufficient to make a formal finding of fact. I note the claimant has provided several statements including one from However, the employer has not been provided the most recent statement, nor is there indication that they previously responded to the claimant's allegations. I note that for the most part, the claimant's allegations are administrative in nature. As above, administrative

¹ 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

² *Gregorio E. Conde*, 52 ECAB 410 (2001).

³ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

⁴ See *William H. Fortner*, 49 ECAB 324 (1998).

⁵ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁶ *James E. Norris*, 52 ECAB 93 (2000).

issues are generally considered to be at the discretion of the employer and the claimant has provided no formal fact finding that the employer was determined to have erred or abused their discretion in the alleged administrative issues. However she has made some allegations that if found true could be considered to have occurred within the performance of duty. I find the most appropriate action at this time is to set aside the office's decision so that the office may provide the employer with all of the claimant's written statements for review and comment. The employer should be asked for any formal findings they have from fact finders regarding the incidents or issues cited by the claimant. The claimant should be asked to provide any formal EEO or union grievance decisions she has that establish her employer was found to be in error in any of the incidents or issues alleged. Upon completion of that development, along with any other the office deems necessary the office should issue a de novo decision.

Consistent with the above findings, the decision of the District office dated is set aside and the case remanded for the action described above.

ISSUED
WASHINGTON, D.C.

Hearing Representative
For
Director, Office of Workers'
Compensation Programs