

¹ 5 U.S.C. §§ 8101-8193.

duty on October 15, 2009.² He claimed that he was pushed by Steve Swartz, the officer-in-charge for the postmaster at his workplace.

Appellant submitted several statements in which he described the claimed events of October 15, 2009. He asserted that Mr. Swartz instructed him to enter his office on October 15, 2009 and proceeded to crowd him. Appellant asserted that Mr. Swartz instructed him to go back to his work unit and “pushed his stomach against mine and pushed me with his hand.” In another October 15, 2009 statement, he claimed that Mr. Swartz asked him numerous questions on October 15, 2009 but did not allow him to answer the questions in an effort to bully him. Mr. Swartz unfairly blamed appellant for the fact that a mail carrier did not leave the work unit on time and would not listen to his explanation that the carrier was late due to the large volume of mail he had to deliver. Appellant claimed that Mr. Swartz then shouted “go!!, go!!” at him and that he followed this command. He alleged that Mr. Swartz crowded into him and “pushed his stomach against mine and then pushed me with his hand.”

Appellant submitted medical reports from Dr. Dwight L. McKenna, an attending Board-certified internist, who diagnosed depression, anxiety and post-traumatic stress disorder.

In an October 15, 2009 statement, Mr. Swartz noted that he spoke with appellant that day and asked him to focus on getting his mail carriers out of the work unit on time. When he walked away to speak to another employee, appellant followed and began to argue about his work performance. Mr. Swartz told appellant to stop arguing and when he did not stop told him to go back to his work unit and focus on getting his mail carriers out on time. He stated that appellant got down on his hands and knees started barking like a dog, and then walked away. A few minutes later Mr. Swartz told appellant not to act in a disrespectful manner; but appellant responded that Mr. Swartz was treating him like a dog. He asserted that appellant then taunted him, stating in part, “I’m not afraid of you,” “I want you to hit me” and “I’ll give it to you.” Mr. Swartz told appellant to go back to his work unit or go home. Appellant then left Mr. Swartz’ office.

Appellant submitted several statements of coworkers. In an October 17, 2009 statement, Troy Joseph, a coworker, noted that on October 15, 2009 he heard appellant and Mr. Swartz discussing something on the work floor in Zone 19. He stated that Mr. Swartz “[stated] something rude” to appellant and that appellant “crawled away somewhat to [Z]one 22.” Mr. Joseph stated that appellant later returned and told Mr. Swartz that he should not “[t]alk [t]hat way to [h]im [b]ecause [h]e [was not] [a] [d]og.” A short while later, appellant came back to Zone 19 and asserted that Mr. Swartz hit him while using the telephone.

In an undated statement, Marc Plummer, a coworker, noted that on October 15, 2009, he heard Mr. Swartz tell appellant something like “go, go” and noted that, when Mr. Swartz mentioned putting appellant off the clock, appellant responded, “I’m not afraid of being put off the clock.” Appellant later came out of Mr. Swartz’ office and claimed that Mr. Swartz hit him.

Alisa Leonard, a coworker, stated that on October 15, 2009 Mr. Swartz told appellant that he had to focus on getting the mail carriers out on time. Appellant then started to defend his

² Appellant indicated that he could not swallow and had shortness of breath.

actions in a loud manner and Mr. Swartz told appellant to “just stop.” Mr. Swartz told him to go back to his work unit but he continued to argue. Ms. Leonard stated that appellant got down on the floor and began crawling and barking like a dog. Mr. Swartz told appellant not to disrespect him and appellant shouted in response that he was being disrespected. Ms. Leonard asked appellant to not talk so loudly. After spending a few minutes in Mr. Swartz’ office, appellant stormed out of the office, slammed a door after entering another office and asserted that Mr. Swartz assaulted him by bumping into him.³

In a January 6, 2010 decision, OWCP denied appellant’s claims on the grounds that he did not establish any compensable work factors. It was found that he did not establish that Mr. Swartz hit him or committed any error or abuse in the claimed administrative matters.

Appellant requested a telephone hearing before an OWCP hearing representative. During the hearing held on April 6, 2010, he asserted that on October 15, 2009 Mr. Swartz approached him and repeatedly inquired why a particular carrier earned \$95,000.00 in the prior year. Mr. Swartz expressed his displeasure with this circumstance and appellant sensed that he was displaying hostility. Appellant indicated that Mr. Swartz began discussing the various mail routes, the number of parties working the routes and the splitting of routes, without giving him an opportunity to answer. In response, he fell to the floor and crawled away. Mr. Swartz later yelled at appellant and ordered him not to disrespect him. Appellant responded to Mr. Swartz that he was the person who had been disrespected. He asserted that Mr. Swartz screamed at him and told him to go to the manager’s office. Appellant claimed that Mr. Swartz followed him into the office, walked into his face, and began pointing, yelling and screaming at him. He asserted that when Mr. Swartz told him to go back to running his unit, he “walked into me and grabbed the door handle while he bumped his stomach into me and he manipulated me out of the door....”

Subsequent to the April 6, 2010 hearing, OWCP received copies of an April 26, 2010 e-mail correspondence from Mr. Swartz to a health and human services specialist at the employing establishment, copies of papers pertaining to appellant’s legal action against Mr. Swartz in municipal court, copies of numerous medical reports and a May 6, 2010 letter from counsel with numerous exhibits.⁴ In the April 26, 2010 e-mail, Mr. Swartz indicated that he did not raise his voice to appellant on October 15, 2009 but rather he asked him basic questions about his work operation. Appellant acted in a confrontational manner and had crawled on the floor and barked like a dog. As he became combative, he was instructed to go to his work unit or go home. Mr. Swartz asserted that no physical contact ever took place and indicated that appellant lost a court case against him.

³ The record also contains an October 21, 2009 e-mail in which Ms. Leonard provide a similar description of the events of October 15, 2009. Ms. Leonard indicated that Mr. Swartz told her on October 15, 2009 that appellant told him that he wanted to hit him. In an October 19, 2009 statement, Alvin Every, a coworker, related appellant’s account of the events of October 15, 2009, including his admission that he got down on his hands and knees and walked and barked like a dog. However, it does not appear that Mr. Every directly observed appellant’s actions on October 15, 2009.

⁴ There is no indication that appellant won a legal judgment against Mr. Swartz for the claimed assault on October 15, 2009.

Appellant submitted several additional witness statements. In a March 4, 2010 statement, Mr. Joseph stated with respect to the events of October 15, 2009, “I do remember [Mr. Swartz] yelling at [appellant] in an abusive manner telling him to go back to his [work] unit....” In response to several questions posed to him by an unknown party, Mr. Plummer stated that on October 15, 2009 Mr. Swartz was not behaving in a professional manner and indicated that appellant did not “get out of line.” On March 4, 2010 Raymond Bookman, a coworker, indicated that on October 15, 2009 he heard Mr. Swartz say “go, go” to appellant in a loud, rude and abusive tone. Mr. Swartz then pointed his finger at appellant and told him to go for a third time. Mr. Bookman noted that he did not hear appellant say anything.

In a June 22, 2010 decision, OWCP’s hearing representative affirmed OWCP’s January 6, 2010 decision finding that appellant had not established any compensable work factors.⁵

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 regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA. 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 frustration from not being permitted to work in a particular environment or to hold a particular position.⁶

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.⁷ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁸

⁵ OWCP’s hearing representative did not find any compensable work factors, but he did state,

“In the case at hand, it is accepted as factual that a discussion occurred between [appellant] and [Mr. Swartz] regarding a particular carrier’s salary the year before, personnel working routes, number and splitting of routes and timeliness of completion. It is accepted that the claimant in the midst of correction dropped to the floor and barked, simulating a dog and crawled off toward his work area. The claimant then returned and indicated that he should not be talked to ‘that way,’ because he was not a dog. It is accepted that [Mr. Swartz] indicated that the claimant not to disrespect him like that again, to which the claimant responded that it was he (claimant) that was disrespected. The claimant was then brought to the manager’s office where a discussion occurred and the claimant was directed back to his work area.”

⁶ *Lillian Cutler*, 28 ECAB 125 (1976).

⁷ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁸ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.⁹ 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.¹⁰

ANALYSIS

Appellant alleged that he sustained an emotional condition on October 15, 2009 due to the actions of Mr. Swartz, his supervisor. By decisions dated January 6 and June 22, 2010, OWCP denied his emotional condition claim on the grounds that he did not establish any compensable work factors. The Board must initially review whether the alleged incidents and conditions of employment are covered work factors under FECA. The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Culter*.¹¹ Rather, appellant has alleged error and abuse with respect to administrative matters by a supervisor and harassment by Mr. Swartz.

Regarding appellant's allegations that Mr. Swartz engaged in improper disciplinary actions and unreasonably scrutinized his activities at work on October 15, 2009,¹² the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of FECA.¹³ Although the handling of such matters are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.¹⁴ However, the Board has also found that an administrative or personnel matter will be considered to be a work factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁵

⁹ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁰ *Id.*

¹¹ See *Cutler supra* note 6.

¹² For example, appellant alleged that Mr. Swartz unfairly blamed him for the fact that a mail carrier did not leave the work unit on time and would not listen to his explanation that the carrier was late due to the large volume of mail he had to deliver.

¹³ 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).

¹⁴ *Id.*

¹⁵ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

The Board finds that appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. Appellant did not submit evidence, such as a successful result of a grievance, showing that Mr. Swartz committed error or abuse when discussing or scrutinizing his work performance on October 15, 2009. Thus, he has not established a compensable employment factor under FECA with respect to administrative matters.

Appellant has also alleged that harassment by Mr. Swartz on October 15, 2009 contributed to his claimed stress-related condition. He claimed that Mr. Swartz pushed his stomach against his body and then pushed him with his hand. Appellant also alleged that Mr. Swartz attempted to bully him by yelling at him in an abusive manner and not listening to his answers to questions. To the extent that disputes and incidents alleged as constituting harassment by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹⁶ 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.¹⁷

With respect to the claim that Mr. Swartz made physical contact with appellant, there is no probative evidence in the record that such physical contact actually occurred. Several coworkers indicated in witness statements that appellant told them on October 15, 2009 that Mr. Swartz hit him, but none of these coworkers were in a position to observe whether such an action actually occurred.¹⁸ Therefore, appellant has not established his claim in this regard.

With respect to the claims of loud and abusive behavior, Mr. Swartz denied that appellant was subjected to harassment and appellant has not submitted sufficient evidence to establish that he was harassed by Mr. Swartz.¹⁹ There is some indication in the evidence of record that Mr. Swartz told appellant to go back to his work unit, perhaps in a raised or insistent voice, and that he told appellant not to act in a disrespectful manner. The Board has recognized the compensability of verbal altercations or abuse in certain circumstances, but this does not imply that every statement uttered in the workplace will give rise to coverage under FECA.²⁰ Appellant has not established that Mr. Swartz' actions rose to the level of harassment. It appears from the record that appellant was in an agitated state on October 15, 2009 and Mr. Swartz was responding to his argumentative and unusual behavior, including crawling on the floor and barking like a dog. While some coworkers described Mr. Swartz' behavior as loud, rude or abusive, they provided limited description of why they felt that Mr. Swartz' actions could be characterized in such a manner. Appellant did not submit sufficient witness statements, or other

¹⁶ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁷ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁸ It appears that appellant filed a court case regarding the claimed assault but the record does not contain any legal decision finding in his favor on this matter.

¹⁹ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment with probative and reliable evidence).

²⁰ See *Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994).

corroborating evidence, to show that Mr. Swartz committed harassment.²¹ Thus, he has not established a compensable employment factor under FECA with respect to the claimed harassment.

For the foregoing reasons, appellant has not established any compensable work factors under FECA and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty on October 15, 2009.²²

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 that he sustained an emotional condition in the performance of duty on October 15, 2009.

²¹ See *William P. George*, 43 ECAB 1159, 1167 (1992).

²² As appellant has not established any compensable work factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2010 decision of the Office Workers' Compensation Programs is affirmed.

Issued: September 19, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board