# United States Department of Labor
# Employees' Compensation Appeals Board

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| **W.B., Appellant** | ) | |
| **and** | ) | **Docket No. 12-1369** |
| | ) | **Issued: May 1, 2013** |
| **U.S. POSTAL SERVICE, POST OFFICE, White Plains, NY, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On June 11, 2012 appellant filed a timely appeal from the May 31, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

### ***ISSUE***

The issue is whether appellant met his burden of proof to establish an emotional condition while in the performance of duty.

### ***FACTUAL HISTORY***

On November 30, 2011 appellant, then an 80-year-old maintenance mechanic, filed an occupational disease claim, alleging that his coronary condition was aggravated by harassment

[1] 5 U.S.C. § 8101 *et seq.*

perpetrated by his employing establishment. He stated that Barbra Belton, his supervisor, was engaged in "continuing campaign of harassment and retaliation."

Ms. Belton controverted appellant's claim in a December 6, 2011 letter, stating that at no time was she hostile or created an atmosphere that resulted in intimidation and harassment toward him, and that he was not treated any differently from any other employee when asking a work-related question.

OWCP informed appellant in a January 4, 2012 letter that additional evidence was needed to establish his claim. It gave him 30 days to submit additional factual evidence to corroborate the occurrence of the alleged incidents and a medical report from a physician explaining how compensable factors of employment caused or contributed to an emotional condition.

In response to the letter, appellant submitted a statement dated January 26, 2012 when he asserted that, on October 5, 2011, Ms. Belton asked him in a loud voice whether he was on lunch, and whether he had "punched out." He argued that because there were three other coworkers in the room and she did not ask them the same questions, her action was designed to hold him up for public scrutiny and create a hostile atmosphere towards him. Appellant explained that he had previously been hospitalized on August 1, 2011 due to a heart condition, and that the condition was caused by a "long-standing program of harassment and retaliation" engaged by Ms. Belton with the knowledge and encouragement of upper management. He explained that these actions were in retaliation for his filing of grievances, Equal Employment Opportunity (EEO) Commission charges and a federal lawsuit. Appellant then described several separate incidents in which he believed he had been harassed and subjected to disparate treatment by the employing establishment. He alleged that on March 22, 2011 Jerry Barletta, a supervisor, had complained to Michael Anechino, the maintenance manager, that appellant was "intimidating" him. Appellant was told to refrain from entering the maintenance shop, when Mr. Barletta was present. He further alleged that on April 4, 2011 Ms. Belton falsely accused him and his coworker Peter Eller, a custodian, of doing union work on the employing establishment computers and issued Mr. Eller a letter of warning. Appellant also found her actions to be retaliation for his union activities and alleged that her complaints were racially and age motivated.

Appellant also alleged that on April 8, 2011 he was put on emergency placement without pay and he remained out of work until May 9, 2011, subsequently a mediation conducted through the EEO office resulted in a hearing at which he was awarded payment for the days he lost during his suspension, and the letter of warning issued against him was expunged from the record. He stated that the alleged action which led to his suspension was a fabrication by Ms. Belton and in retaliation against him. In addition, appellant noted a July 3, 2011 incident during which he entered the maintenance shop and she asked him to stay out of the maintenance shop and wait in the break area, while she did not similarly direct other workers to do so. He alleged that this was disparate treatment and a reprisal for having filed charges in the past against Ms. Belton.

Appellant also submitted various medical notes from his August 1, 2011 injury. An August 1, 2011 report from Dr. Ramin Malekan, a Board-certified cardiac surgeon, noted

appellant's previous history of coronary artery disease, chronic obstructive pulmonary disease, prostate cancer, congestive heart failure, chronic kidney disease, paroxysmal atrial fibrillation, cholecystectomy and hypertension and indicated that on August 1, 2011 appellant was admitted to the White Plains Hospital Center with vertigo, electrocardiogram changes showing premature ventricular contractions and trigeminy.

In a November 11, 2011 report, Dr. Martin Cohen, a Board-certified cardiologist, related that appellant had undergone coronary bypass surgery, with implantation of a defibrillator. He stated that he had no knowledge regarding the specifics of appellant's workers' compensation claim, but that stress could have potentially interacted with his ventricular tachycardia.

On May 31, 2012 OWCP denied appellant's emotional condition claim on the grounds that the evidence appellant submitted does not substantiate that he was harassed as claimed.

## ***LEGAL PRECEDENT***

To establish a claim that he or she sustained an emotional or stress-related condition in the performance of duty, an employee must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) medical evidence establishing that he or she has an emotional or stress-related disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the condition. If a claimant implicates a factor of employment, OWCP should determine whether the evidence of record substantiates that factor. Allegations alone are insufficient to establish a factual basis for an emotional condition claim and must be supported with probative and reliable evidence. If a compensable factor of employment is established, OWCP must then base its decision on an analysis of the medical evidence.[2]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to a claimant s employment. In the case of *Lillian Cutler*,[3] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition under FECA. When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that a disability resulted from this emotional reaction, the disability is generally regarded as due to an injury arising out of and in the course of employment. This holds true when the disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work. On the other hand, there are disabilities that have some causal connection with the claimant's employment but nonetheless fall outside FECA's coverage because they are found not to have arisen out of employment, such as when a disability results from a fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.[4]

[2] *G.S.*, Docket No. 09-764 (issued December 18, 2009).

[3] 28 ECAB 125 (1976).

[4] *William E. Seare*, 47 ECAB 663 (1996).

The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of FECA. This principal recognizes that a supervisor or manager must be allowed to perform their duties and that employee's will, at times, disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.[5]

## ***ANALYSIS***

Appellant attributed his August 1, 2012 coronary condition to actions by management of the employing establishment. He has not alleged that the actual performance of any of his work duties caused his emotional condition. Rather appellant alleges that he was treated improperly by Ms. Belton. The allegations of record relate to actions taken by his supervisor, which appellant alleges were taken in retaliation for his union activities and filing of grievances, EEO complaints and a federal law suit.

As the Board has previously stated, a supervisor or manager must be allowed to perform his or her duties and that employee's will, at times, disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.[6]

The Board finds that appellant has not established that his supervisor acted in error or abusively when he asked appellant on October 5, 2011 whether he had punched out to take lunch. Appellant has not cited any employing establishment policy or rule which would prevent Ms. Belton from asking this question. Likewise, while he may not have liked being instructed on March 22, 2011 to refrain from entering the maintenance shop, because an employee of the shop felt intimidated, he has not established that Ms. Belton in error or abusive when making this rule. Similarly, appellant has not established that being told on July 3, 2011 to wait in the break room, rather than the maintenance shop, was an erroneous instruction or abusive.

Appellant has also alleged that Ms. Belton wrongly accused him of doing union work on the employing establishment computers. OWCP recognizes that certain representational functions performed by employee representatives of exclusive bargaining units benefit both the employee and the employing establishment. Its stated policy is that employees performing representational functions entitling them to official time are in the performance of duty and entitled to all benefits of FECA if injured in the performance of those functions.[7] Appellant has not established that he was in fact performing representational functions, as an employee representative of a bargaining unit, such that his union activities would be considered in the performance of duty. Rather the evidence of record suggests that the supervision was concerned with the pursuit of personal matters while at work.

[5] *S.M.*, Docket No. 09-2290 (issued July 12, 2010); *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

[6] *Id.*

[7] *See S.C.*, Docket No. 11-1608 (September 13, 2012).

Regarding appellant's complaint that he was improperly suspended and placed on emergency leave on April 8, 2011, and that an EEO hearing resulted in expungement of this action, the Board has long held that grievances and EEO complaints by themselves do not establish that workplace harassment or unfair treatment occurred. The facts do not establish that there had been a finding of error by the employing establishment in the expungement action. No copies of these EEO decisions were in the record and thus the allegation of error and abuse regarding these findings are not substantiated. The grievance settlement provided no indication of a finding of error by the employing establishment.

Because appellant has not presented sufficient evidence that his supervisors acted unreasonably or committed error or abuse, he has failed to identify a compensable work factor.[8]

As appellant has not established a compensable factor of employment, it is not necessary to evaluate the medical evidence of record.[9]

Appellant may submit new evidence or argument as part of a formal 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 establish that he sustained an emotional condition while in the performance of duty.

[8] *H.C.*, Docket No. 12-457 (issued October 19, 2012).

[9] The Board notes that appellant requested an oral argument before the Board. By letter dated November 19, 2012, appellant was advised that oral arguments were only held in Washington, DC. He was asked to confirm by December 19, 2012 that he would attend an oral argument in Washington, DC. Appellant did not respond to this request. Accordingly, the Board in its discretion, has proceeded to adjudicate the appeal on the record.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 31, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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