

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

S.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pontiac, MI, Employer**

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**Docket No. 13-1484
Issued: December 6, 2013**

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 10, 2013 appellant filed a timely appeal from a February 4, 2013 merit decision and an April 15, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish an emotional condition in the performance of duty on April 1, 2012; and (2) whether OWCP properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 27, 2012 appellant, then a 39-year-old mail handler, filed a claim for traumatic injury, alleging that he sustained psychological/emotional reaction on April 1, 2012 when he was

¹ 5 U.S.C. § 8101 *et seq.*

verbally assaulted and threatened by three African American “EAS” employees. On the claim form, the employing establishment noted that appellant would not specify the nature of injury or include a statement.

Evidence submitted in support of appellant’s claim included restricted pay information, page 5 of employee rights and responsibilities for traumatic injury/Form CA-1 dated May 9, 2012, a May 1, 2012 accident report from the employing establishment which noted an April 1, 2012 accident/injury/illness and undated Family Medical Leave Act (FMLA) paperwork.

By letter dated May 22, 2012, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the factual and medical evidence necessary to establish his claim. He was asked to describe in detail the conditions or incidents of employment which he believed caused his condition. Appellant was advised that the record would be kept open for 30 days for submission of additional evidence.

In response to OWCP’s request, appellant submitted a May 30, 2012 statement in which he advised that he was resending a signed and dated Department of Labor, Wage and Hour decision Form WH-380-E from his counselor. He stated that he tried to simplify the process and include a CA-20 form. Appellant noted that the CA-20 form does not provide an “on or about” date of injury and that his injury and not some phantom disease have been exact.

Also submitted was a May 29, 2012 Family Medical Leave Act Form WH-382, which approved appellant’s leave request from April 1, 2012 up to 12 weeks; and a June 2, 2012 statement from Kevin S. Bialecki, supervisor, distribution operations, which indicated that appellant would not provide any information regarding his injury of April 1, 2012 during initial questioning as well as at the predisciplinary interview.

In a May 30, 2012 CA-20 form, Carol Murray, a licensed social worker, diagnosed generalized anxiety disorder stemming from an April 1, 2012 incident at the employing establishment. She indicated that there was a “blow-up” about his driving which resulted in a heated argument and threats made to client. Ms. Murray opined that appellant should be able to return to work in October and would benefit from ongoing counseling.

By decision dated July 2, 2012, OWCP denied appellant’s claim on the grounds that fact of injury had not been established. It found that appellant failed to provide a factual basis to support his claim and there was no medical evidence which contained a medical diagnosis in connection with the claimed incident.

On August 31, 2012 OWCP received appellant’s August 28, 2012 request for reconsideration. In a six-page statement, appellant advised that he would attempt to answer all of the deficiencies noted in the denial of his claim. With regard to the fact that his claim lacked detail regarding the claimed incident, he stated that he completed the Form CA-1 online and that there was insufficient space for the requested narrative or documentary of which he is now being asked. With regard to the fact that he did not provide any medical evidence to support a diagnosed condition, appellant stated that it was his understanding that this was due to Department of Labor’s failure as he had provided this information on Form WH-380-E and in block number 7 of a CA-20, but OWCP found that his counselor did not qualify as a physician.

He stated that he does not have an illness and that he did not know how to file for a work-related condition. Appellant denied stress outside of his federal employment and stated that his condition was traumatic. He stated that he did not know how to narrate the development of the injury. Appellant listed his symptoms he experienced and indicated that he had been under psychological counseling but was never hospitalized. He stated that it was not his fault that his statements are vague and general as the CA-1 form requests only vague and general information. Appellant referred back to the WH-380 form for a full description as to what occurred. He indicated that it was not possible to obtain a witness statement as he was incapacitated and unable to return to work. Appellant referred to the accident report provided by the employer as proof of occurrence and that the incident happened during his tour of duty. He indicated that the time block was omitted as he did not look at his watch to see exactly what time the incident occurred. With regard to who was involved in the incident, appellant stated that he did not know the identity of the three African American "EAS" employees. He indicated that, when he was told that he almost hit one of them, his reaction was that of fright, panic, anxiety, self-defense, disbelief, embarrassment, singled out, discriminated, threatened, belittled and surprised.

Appellant submitted an August 9, 2012 Form CA-20 and a July 30, 2012 medical report from Laurie A. LaMonde, Ph.D, a licensed psychologist, diagnosing adjustment disorder with mixed anxiety and depressed mood as a result of an April 1, 2012 employment incident. In the July 30, 2012 medical report, Dr. LaMonde described that on April 1, 2012 the following incident occurred as reported by appellant: "[Appellant] stated that around 4:30 in the evening on April 1, 2012, he was operating a "tug" or "jitney." Appellant was operating this "2" A foot wide industrial vehicle in an eight foot wide aisle: when he passed two people who were reportedly stationary in the middle of the aisle. After he passed these individuals, the stationary man yelled, "You almost hit her." Appellant told him "I went around" and "I don't even know who the hell you are." The other gentleman reportedly told him "you need to slow down" and then appellant stated that they had a "heated verbal discussion." Per appellant, the woman that had been in the center of the aisle also become confrontational and stated, "I can't afford to be off work, it's my livelihood." He reportedly tried to minimize things and stated, "Don't worry about it," inferring that there were no injuries and to move past the incident. At that time, the other man reportedly threatened to take appellant's license. Appellant decided to leave the situation and return to his duties. When he went to pick up another piece of equipment, he was reportedly approached by his supervisor." Appellant stated that the situation "was dealt with." His supervisor instructed appellant to talk with him. Appellant stated that "you only heard one side of the story" and he went back to work. Following that interaction, he stated that he was approached by a "higher up." Appellant was told that "they may pull (my) license." The supervisor reportedly tried to help; however, appellant perceives that "they kept bringing in people higher up: and he perceived he was getting the guillotine. Although he denied any physical aggression, he acknowledged that he felt "surrounded like a flash mob" and that others "made threatening gestures." After reportedly enduring three hours of such intense interactions, appellant "blew up and left," frustrated because no one had been hurt in the incident and he felt unnecessarily targeted. He was already scheduled to be off the next few days and stated that he was only able to work a half day when he returned on his next scheduled day, April 5, 2012, secondary to escalating symptoms of anxiety. Appellant stated that he had difficulty "dealing with stupid people, stressing again that no one was hurt and that he felt persecuted."

By decision dated February 4, 2013, OWCP denied modification of the July 2, 2012 decision. It found that while appellant's treating physician provided a very detailed description in the medical report, that there was no corroborating information as to how the injury occurred at the time, place and in the manner alleged.

On March 22, 2013 OWCP received appellant's March 18, 2013 request for reconsideration. In support of the request, appellant submitted a 21-page undated statement and an 8-page statement dated March 18, 2013 in which he disagreed with the grounds of denial set forth in OWCP's prior decisions. No new evidence or factual statement describing what actually occurred on April 1, 2012 was described in appellant's statements.

By decision dated April 15, 2013, OWCP denied appellant's March 18, 2013 request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

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.² 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.³

Appellant 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.⁴ 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.⁵

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.⁶ If a claimant does implicate a factor of

² See *Lori A. Facey*, 55 ECAB 217 (2004);

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470 (1993).

⁶ See *Norma L. Blank*, 43 ECAB 384 (1992).

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.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that he sustained an emotional condition due to a compensable April 1, 2012 work incident.

As noted above, to establish a compensable emotional condition claim, appellant must first submit a detailed description of the employment factors which he believes caused or adversely affected his condition. On the CA-1 form dated April 27, 2012 he alleged that his emotional condition occurred due to being verbally assaulted and threatened by three African American "EAS" employees of the employing establishment on April 1, 2012. On May 22, 2012 OWCP asked that appellant provide a more detailed description of the alleged incident. While the record contains numerous responses and statements from appellant, he never offered any description of what occurred or happened on April 1, 2012. Ms. Murray and Dr. LaMonde refer to an April 1, 2012 incident concerning appellant's driving, and Dr. LaMonde provided a detailed description in her narrative report. However, there is no corroborating information as to how the injury occurred in the matter, place and time alleged. It is noted that Dr. LaMonde states that appellant's supervisor had been instructed to talk with him, which infers the supervisor was aware of the incident. However, in his June 2, 2012 statement, appellant's supervisor, Mr. Bialecki, appeared unaware of any incident on April 1, 2012 and stated that appellant would not provide any information regarding his injury of April 1, 2012 during initial questioning or at the predisciplinary interview. This reduces the reliability of Dr. LaMonde's statement as to how the incident occurred. While appellant states that a narrative as to how the incident occurred is contained in the WH-380 form, no copy of such form is in the record. The record is devoid of evidence to support that the incident occurred in the manner alleged. As such, appellant's allegation lacks probative detail to establish a specific incident in the manner alleged. The Board also finds that, as alleged, the incident does not constitute a compensable factor of employment.

Appellant has not established any compensable employment 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.⁸

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.

⁷ *Id.*

⁸ If appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Kryzcki*, 43 ECAB 496 (1992).

LEGAL PRECEDENT -- ISSUE 2

OWCP has the discretion to reopen a case for review on the merits.⁹ An application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁰ When an application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹¹

ANALYSIS -- ISSUE 2

Appellant's March 18, 2013 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. In his 21-page undated statement and March 18, 2013 statement, he expressed his disagreement with the grounds upon which his claim was denied and reiterated numerous allegations previously made. Appellant did not advance a relevant legal argument not previously considered by OWCP. Therefore, he is not entitled to a review of the merits based on the first and second above-noted requirements under section 10.606(b)(2).¹²

The Board finds that appellant also failed to submit any relevant and pertinent new evidence with his March 18, 2013 request for reconsideration. In his statements, appellant did not present any new evidence or provide a factual statement addressing in detail exactly what occurred on April 1, 2012 which he believed caused or contributed to the reported psychological condition. Because he did not provide any new evidence that might arguably impact the prior decision, he is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).¹³

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 April 1, 2012. The Board also finds that OWCP properly denied his request for reconsideration.

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.606(b)(2).

¹¹ *Id.* at § 10.608(b).

¹² *Id.* at § 10.606(b)(2)(i) and (ii).

¹³ *Id.* at § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the April 15 and February 4, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 6, 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