

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

C.O., Appellant)

and)

DEPARTMENT OF THE ARMY, MATERIEL)
COMMAND, Fort Rucker, AL, Employer)

**Docket No. 14-516
Issued: June 5, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 6, 2014 appellant filed a timely appeal from the October 1, 2013 merit 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 this case.

ISSUE

The issue is whether appellant established an emotional condition in the performance of duty.

FACTUAL HISTORY

On August 3, 2012 appellant, then a 55-year-old quality assurance specialist, filed an occupational disease claim (Form CA-2) alleging that he had sustained stress from hostile work conditions. He first became aware of his condition on July 1, 2009 and of its relationship to his

¹ 5 U.S.C. § 8101 *et seq.*

employment on August 1, 2009. Explaining the condition's relationship to appellant's employment and how he came to this realization, he wrote "Hostile work conditions." Under the heading of the nature of the disease or illness, appellant wrote, "Stress and work environment." He explained that he had not filed his claim within 30 days of August 1, 2009 by writing, "Condition worsened." Appellant did not submit any other factual or medical evidence in support of his claim. A supervisor stated that appellant had not made him aware of any complications before this date and that he could not verify any facts as alleged by appellant because he had not provided his supervisor with medical documentation or a personal statement.

On September 11, 2012 OWCP requested additional factual and medical evidence from appellant. It noted that he had not submitted any evidence apart from his claim form and afforded him 30 days to submit additional evidence. OWCP also requested from the employing establishment comments from a knowledgeable supervisor, a copy of appellant's position description and physical requirements and a response to his allegation of hostile work conditions.

In a sworn statement dated August 9, 2012, Kenneth Ashline, a supervisor, stated that he spoke to his own supervisor by telephone on August 3, 2012, for guidance in filling out his portion of appellant's CA-2 form. He noted that while speaking to his supervisor, appellant returned to his office approximately 15 to 20 minutes after initially completing the form and asked to change his symptoms from "nervousness and stressed" to "hostile work environment." Mr. Ashline changed the information as requested and finished his own portion of the claim. He noted that appellant had not complained of any work-related injury or sickness since Mr. Ashline began work at his current position on March 5, 2012 and that he had never complained of a hostile work environment since July 1, 2009. Mr. Ashline noted that he had worked in the same office as appellant as a quality assurance engineer since November 18, 2010 and that he had taken sick days but never gave a reason.

On August 9, 2012 Wade Pasquarella stated that he was speaking with Mr. Ashline by telephone on August 3, 2012 regarding questions that he had regarding completion of appellant's CA-2 form. During this conversation, appellant entered Mr. Ashline's office and asked him to change the answer to one of the questions on the form relating to the symptoms and causes of his condition, which he had answered previously, from "stress" to "hostile work environment."

In a sworn statement dated August 10, 2012, Kimberly Clark stated that she had also spoken by telephone with Mr. Ashline on August 3, 2012 regarding filling out the supervisor portion of appellant's CA-2 form, when appellant entered Mr. Ashline's office, interrupting their conversation and asked him to change one of the answers on the form regarding his illness from "stress" to "hostile work environment." Mr. Ashline made this change and Ms. Clark heard appellant leave the room.

The employing establishment submitted a position description for appellant's position as a quality assurance specialist (aircraft) on September 14, 2012.

By decision dated October 15, 2012, OWCP denied appellant's claim for compensation. It found that he had not established that he experienced the employment incident alleged to have occurred, because he had not submitted factual evidence regarding any claimed events. OWCP

further noted that appellant had not submitted medical evidence and thus failed to establish this aspect of his claim as well.

In a letter dated October 22, 2012, appellant stated that he had a great deal of stress, a lack of ability to remember things and that he was on an “emotional rollercoaster” due to a hostile work environment.

Appellant submitted a second Form CA-2 regarding his claim dated May 31, 2013, but included only the first page. On this form, he stated that he first became aware of the condition on January 8, 2007 and first realized its relationship to his employment on June 19, 2012. Appellant stated that his condition resulted from an increase in hostility and harassment from the chain of command and a significant increase in his level of depression and anxiety. He noted that he had asked for accommodations to relieve the stress. Under the heading of the nature of the disease or illness, appellant wrote, “Major depression, recurrent, generalized anxiety disorder.” He explained that he had not filed his claim within 30 days after June 19, 2012 because there was a progression of events since that date leading to his “leaving employment because of lack of accommodations, continued hostility and harassment, increased depression/anxiety, to the point I could no longer go to work.” Appellant explained his delay in submitting a factual statement because he had to “get my thoughts together in order to do so.”

In an undated statement, appellant noted that he had first been diagnosed with depression and anxiety-related issues on or around May 8, 2002. He recalled that his primary reason for visiting a physician at that time was work-related stress. Appellant stated that, from 2003 through 2006, he had normal supervisors and less stress. On May 1, 2007 he asserted that a supervisor, Millard, began harassing him, attempted to charge him with being absent without leave and denied him sick leave and annual leave. Appellant noted that he filed an Equal Employment Opportunity (EEO) Commission complaint on approximately August 1, 2007. He asserted that, after this complaint, there was further harassment from Millard and another supervisor, Hensley. On March 6, 2008 appellant noted that he had to take off time from work due to his work-related stress. He noted that he made his supervisor aware of his medical issues, including depression and anxiety and that job-related stress exacerbated these conditions. Appellant stated that the harassment may have changed after this date, but that it continued.

Appellant filed another EEO complaint on May 8, 2008 regarding the promotion of a junior employee to a superior position, which he stated was not resolved in his favor.² He alleged that this EEO complaint led to increased stress and harassment at work and that he moved to a different air field. Appellant noted that, near the end of 2008, he realized that if he could not try to get another job away from the employing establishment, his career dreams would be cut short; and that he had been visiting his physician more often. After 2008 and following a command restructuring, he asserted that his senior command increased their efforts to be vindictive and hostile towards him. In 2009, appellant moved back to his original air field and that he worked under a good supervisor. In September 2010, another supervisor took over, Mercer, who appellant asserted treated him negatively and who had worked with Millard. In 2011, Mercer took the place of a fired employee and Mr. Pasquarella was “also there.”

² No documents associated with the August 1, 2007 and May 8, 2008 EEO complaints referred to by appellant appear in the case record.

In a February 12, 2012 incident, Mercer complained about appellant parking in the “wrong place.” On March 12, 2012 another incident occurred with Mercer and another supervisor, Gassni, and Mr. Ashline “came on scene.” On April 3, 2012 appellant asked to be relocated and he found an opening at another location caused by the death of a person with the same job description. There was an incident on May 21, 2012 which he did not describe further. On June 17, 2012 appellant asked for full accommodations under various statutes. He stated that, on July 3, 2012, he e-mailed David Lewandowsky and revealed a meeting on this date with Colonel Aid, making him aware that he was suffering depression as a result of stressful work conditions and of a change of names on a rating chain. On July 20, 2012 appellant e-mailed Mr. Lewandowsky again, stating that he should be aware of his July 3, 2012 meeting with Colonel Aid and checking to see if any steps had been taken to resolve the situation. He stated that on August 3, 2012 he filed his CA-2 form for relief, not understanding what he was required to do. On October 12, 2012 appellant took sick leave “due to leadership continuing to ignore my request for accommodations.” He noted that he could not stand working anymore and had to leave work at this time, leaving him no option but to retire early.

Appellant stated that he would have liked to remain employed until age 65, but that he had to leave for medical reasons. He asserted that his “nerves were getting so bad because of the stress that I had to get out of there or, end up hurting myself and/or others.” Appellant stopped work officially on December 31, 2012. He listed conditions of employment that he believed to be responsible for his illness including bullying tactics, verbal harassment, micromanaging, watching him all the time, having soldiers follow him around, having soldiers take pictures of his car, watching him from a truck doing his job on top of a helicopter, not wanting soldiers to assist him, checking everything he did as if he were a new hire, questioning his every decision, overlooking him for promotion, racial profiling, questioning his integrity, belittling his ability in front of others and provocation. Appellant stated that the harassment worsened to the point that he could not take lunch with his coworkers. Without supplying a date, he recounted a specific event of harassment:

“They could not find my car while I was at work. Search the grounds to find out where I was. I had car pooled with son that day, did not have my car. I was there the hold time doing my job, they were unaware, looked for me every where except on the job where I was, was suppose to be. They were too concerned about my car not being where they could see it, assumed that I was AWOL, looking for something to write me up on. I was walking around with my clip board, doing my job-apparently they must have been late for work that day, because they should have seen me come in.”

Appellant noted that he had been exposed to these factors on air fields for eight hours a day and five days a week. He noted symptoms of difficulty sleeping and resting, tenseness, depression, anxiety, headaches, stomach aches and shortness of breath. Appellant stated that he had not suffered a similar condition prior to working for the Federal Government.

Appellant submitted a behavioral health evaluation from Dr. Theron M. Covin, a counselor, dated May 30, 2013.³ Dr. Covin diagnosed appellant with recurrent major depression without psychotic features and generalized anxiety disorder and stated his opinion that these conditions were aggravated by appellant's employment. He noted that appellant was currently disabled from all work and could not work with restrictions.

On June 24, 2013 appellant requested reconsideration of OWCP's October 15, 2012 decision.

By decision dated October 1, 2013, OWCP denied modification of its October 15, 2012 decision after reviewing the merits of appellant's case. It found that he had not substantiated any of the events alleged and thus failed to establish that the events occurred as alleged. OWCP also found that the medical report from Dr. Covin was irrelevant, because he had not substantiated the factual elements of his claim.

LEGAL PRECEDENT

To establish a claim that he sustained an emotional condition in the performance of duty, an employee must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.⁴

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.⁵ 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.⁶ 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.⁷ 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.⁸

³ The Board notes that Dr. Covin lists his credentials as a doctorate of education, licensure as a professional counselor, licensure as a marriage and family therapist and fellowship in the American Board of Medical Psychotherapists and Psychodiagnosticians.

⁴ *V.W.*, 58 ECAB 428, 431 (2007); *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

⁵ *L.D.*, 58 ECAB 344, 350 n.8 (2007); *Robert Breeden*, 57 ECAB 622, 625 (2006).

⁶ *A.K.*, 58 ECAB 119, 121 (2006); *David Apgar*, 57 ECAB 137, 140 (2005).

⁷ 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309, 314 (2001); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

⁸ *J.F.*, 59 ECAB 331, 338 (2008); *Gregorio E. Conde*, 52 ECAB 410, 411-12 (2001).

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.⁹ 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.¹⁰ 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.¹¹

The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of FECA. This principle 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.¹² Although the handling of leave requests and attendance matters are generally related to employment, they are administrative matters and not a duty of the employee.¹³

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.¹⁴ Mere perceptions of harassment or discrimination are not compensable under FECA.¹⁵ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹⁶ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁷ A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.¹⁸

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

⁹ See *Matilda R. Wyatt*, 52 ECAB 421, 423 (2001); *Thomas D. McEuen*, 41 ECAB 387, 391-92 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹⁰ See *William H. Fortner*, 49 ECAB 324, 325 (1998).

¹¹ *Ruth S. Johnson*, 46 ECAB 237, 241 (1994).

¹² *S.M.*, Docket No. 09-2290 (issued July 12, 2010); *Linda J. Edwards-Delgado*, 55 ECAB 401, 405 (2004).

¹³ *C.T.*, Docket No. 08-2160 (issued May 7, 2009); *Jeral R. Gray*, 57 ECAB 611, 615-16 (2006).

¹⁴ *K.W.*, 59 ECAB 271, 276 (2007); *Robert Breeden*, *supra* note 5.

¹⁵ *M.D.*, 59 ECAB 211, 216-17 (2007); *Robert G. Burns*, 57 ECAB 657, 661 n.14 (2006).

¹⁶ *J.F.*, 59 ECAB 331, 339 (2008); *Robert Breeden*, *supra* note 5.

¹⁷ *G.S.*, Docket No. 09-764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616, 620 (2005); *Penelope C. Owens*, 54 ECAB 684, 686 (2003).

¹⁸ *Robert Breeden*; *supra* note 5; *Beverly R. Jones*, 55 ECAB 411, 416 (2004).

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.¹⁹ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.²⁰ 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.²¹

ANALYSIS

Appellant has not alleged that his emotional condition is related to his regular duties as a quality assurance specialist under *Cutler*.²² Rather, he attributed his emotional condition to actions taken by his supervisors. The Board must review whether the alleged incidents are established as compensable employment factors under the terms of FECA.

Appellant made several allegations related to administrative and personnel matters. In *Thomas D. McEuen*,²³ the Board held that an employee's emotional reaction to most administrative or personnel matters is not covered under FECA because those matters pertain to procedures and requirements of the employer and do not bear a direct relation to the employee's work. The Board noted, however, that coverage under FECA would attach if the facts showed error or abuse by the employing establishment's supervisor in the administrative or personnel action dealing with the claimant. Absent such evidence of error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²⁴

Appellant has alleged that several administrative or personnel actions taken by his supervisors since 2007 led to his emotional condition. On May 1, 2007 he asserted that a supervisor, Millard, began harassing him, attempted to charge him with being absent without leave and denied him sick leave and annual leave. Appellant filed an EEO complaint on May 8, 2008 regarding the promotion of a junior employee to a superior position, which he stated was not resolved in his favor. These events are administrative matters, which are not compensable

¹⁹ *D.L.*, 58 ECAB 217, 220 (2006); *Jeral R. Gray*, *supra* note 13.

²⁰ *K.W.*, *supra* note 14; *David C. Lindsey, Jr.*, 56 ECAB 263, 269 (2005).

²¹ *Robert Breeden*, *supra* note 5.

²² *Supra* note 7

²³ *Supra* note 9.

²⁴ See *S.M.*, *supra* note 12; *David C. Lindsey, Jr.*, *supra* note 20; *Richard J. Dube*, 42 ECAB 916, 921 (1991); *Thomas D. McEuen*, *supra* note 9.

without a showing of error or abuse by the employing establishment.²⁵ While appellant contended that his supervisors undertook these actions and that they resulted in his emotional condition, he has not substantiated these allegations through documents or witness statements to demonstrate that the employing establishment acted unreasonably in undertaking these actions.

Appellant contended generally that his supervisors harassed him in various manners, which he listed in his undated statement. He asserted that, in a February 12, 2012 incident, a supervisor named Mercer complained about appellant parking in the “wrong place.” On March 12, 2012 another incident occurred with Mercer and a supervisor, Gassni, but appellant did not describe it. There was an incident on May 21, 2012, which appellant did not describe further. Finally, he contended that he had been harassed by supervisors who could not find his car and assumed he was absent on an unspecified date. Harassment by a supervisor may be a compensable factor of employment. However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did occur. Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.²⁶ An employee’s allegation that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.²⁷ To establish entitlement to benefits, a claimant must show a factual basis for his or her claim by supporting his or her allegations with probative and reliable evidence.²⁸ Appellant generally alleged types of harassment and specifically described several incidents. He did not describe the incidents in detail or submit witness statements in support of his claim and did not support his allegations with other probative and reliable evidence. The Board finds that appellant has failed to establish that he was harassed or otherwise subjected to abuse by the employing establishment.

Appellant contended that he filed several EEO complaints, but did not submit them to the record. EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.²⁹ Where an employee alleges harassment and cites specific incidents, OWCP or another appropriate fact-finder must determine the truth of the allegations. The issue is not whether the claimant has established harassment or discrimination under the EEO complaints standards. Rather, the issue is whether the claimant, under FECA, has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.³⁰ Appellant has failed to do so in this case.

²⁵ *Judy L. Kahn*, 53 ECAB 321 (2002) (matters involving the use of leave are generally not considered compensable factors of employment as they are administrative functions of the employer and not duties of the employee); see *Charles D. Edwards*, 55 ECAB 258 (2004) (matters involving disciplinary actions, evaluations, leave requests, the assignment of work duties and the monitoring of activity at work are generally not considered compensable factors of employment).

²⁶ *G.S.*, *supra* note 17; *Robert G. Burns*, *supra* note 15.

²⁷ See *C.T.*, *supra* note 13; *K.W.*, *supra* note 14; *Ronald K. Jablanski*, *supra* note 17.

²⁸ See *G.S.*, *supra* note 17; *C.S.*, 58 ECAB 137, 142 (2006); *Frankie McDowell*, 44 ECAB 522, 526 n.4 (1993); *Ruthie M. Evans*, 41 ECAB 416, 425 (1990).

²⁹ *J.C.*, 58 ECAB 594, 603 (2007).

³⁰ See *James E. Norris*, 52 ECAB 93 (2000). See also *Michael Ewanichak*, 48 ECAB 354 (1997).

Consequently, appellant has not established his claim for an emotional condition, as he has not attributed his claimed condition to any compensable employment factors.³¹ He 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 the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 1, 2013 is affirmed.

Issued: June 5, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

³¹ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *See L.K.*, Docket No. 08-849 (issued June 23, 2009); *V.W.*, 58 ECAB 428, 435 n.29 (2007); *Alberta Dukes*, 56 ECAB 247, 250 (2005); *Margaret S. Krzycki*, 43 ECAB 496, 503 (1992).