

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

F.M., Appellant)	
)	
and)	Docket No. 14-1009
)	Issued: October 28, 2014
U.S. POSTAL SERVICE, POST OFFICE,)	
Durham, NC, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Appellant, pro se</i>	
<i>Office of the Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 27, 2014 appellant filed a timely appeal from a November 25, 2013 merit decision of the Office of Workers' Compensation Programs. 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.

ISSUE

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

FACTUAL HISTORY

Under claim file number xxxxxx631, OWCP accepted that appellant, then a 46-year-old sales and service distribution clerk, experienced an anxiety state beginning November 26, 2004

¹ 5 U.S.C. § 8101 *et seq.*

after he was wrongfully terminated by the employing establishment. It did not accept that there was evidence of error or abuse with respect to his second termination in 2003 or with regard to disciplinary actions of being placed on a restrictive sick leave list, being issued absent without leave or pay issues. Appellant stopped work on April 2, 2005. Dr. Peter Smith, clinical psychologist, advised that appellant's disability was due to workplace harassment by, a supervisor, Ms. Wright. He stated that appellant could work if Ms. Wright did not supervise or work with appellant. On February 16, 2007 appellant accepted a modified duty job under protest.

On April 2, 2012 Dr. Smith took appellant off work, noting that he had been accused of being tardy to work. In an April 24, 2012 letter to Peggy A. Fountain, an occupational health nurse at the employing establishment, he released appellant to return to full-time work on April 26, 2012, provided he not work for or be supervised by Ms. Wright, whom appellant believed was directly involved in his firing on two separate occasions.²

In a May 17, 2012 letter, Dr. Smith stated that on March 26, 2012 appellant was approached by his supervisor who, by appellant's description, persistently verbally harassed and scolded him for what the supervisor believed was his tardiness to work. He stated that appellant showed the supervisor his time clock information and a copy of the policy on timeliness, but the supervisor persisted to harass appellant and threatened discipline. Dr. Smith opined that this type of alleged harassment by a supervisor was directly parallel to the harassment appellant experienced from his previous supervisor in 2005, which was the foundation for his accepted claim. Appellant suffered a great hardship due to two wrongful terminations when he filed his claim in 2005. Dr. Smith took appellant off work for two weeks to recover.

On June 14, 2012 appellant filed an occupational disease claim for an anxiety disorder. He referred Dr. Smith's April 24, 2012 letter to the employing establishment's occupational nurse. The employing establishment controverted the claim on the basis that appellant's limited-duty assignment had not been withdrawn. Appellant returned to modified duty on June 18, 2012. OWCP assigned case file number xxxxxx545 to the claim. Appellant submitted Dr. Smith's letters of April 24 and May 17, 2012 and an April 2, 2012 Form CA-17 duty status report noting he was accused of being tardy for work.

In a June 15, 2012 letter, counsel for the employing establishment advised that appellant had been waiting since April 24, 2012 for clearance to return to work due to his psychiatric condition and that he had not been contacted by the employing establishment to return to work were not accurate. The nurse spoke to appellant's doctor on April 24, 2012 and appellant was cleared to return to duty but did not do so. A summary of multiple communications in which the

² On May 1, 2012 appellant filed a Form CA-7 claiming compensation for the period April 2 to 30, 2012. By letter dated May 11, 2012, OWCP authorized payment for 2.12 hours on April 2, 2012 but advised him that medical evidence was needed to support the remainder of his claim. On June 14, 2012 appellant filed a recurrence claim alleging total disability from work beginning April 26, 2012. He alleged that the employing establishment withdrew his limited-duty employment and failed to notify him when he could return to his position after his physician removed him from work. The employing establishment advised that appellant's limited-duty assignment had not been withdrawn. By decision dated June 18, 2012, OWCP denied his claim for compensation from April 7 to 24, 2012. It noted that Dr. Smith described a new work event but failed to explain how appellant's current condition was due to the accepted work injury.

employing establishment instructed appellant to return to duty were described. A May 31, 2012 letter notified appellant of a predisciplinary interview on June 7, 2012, for which he failed to appeal. A June 4, 2012 telephone conversation with Sal Ricigilano, manager of human resources, instructed appellant to return to duty. A June 4, 2012 letter from the Department of Labor advised appellant to return to work. Appellant was advised to return to work immediately as his continued unauthorized absence and failure to comply with instructions to report to work or report for the predisciplinary interview could lead to disciplinary action.

In a June 19, 2012 statement, Mr. Ricigliano indicated that appellant was not required to be “cleared” by anyone to return to work. He stated that Nurse Fountain informed appellant’s treating physician that all that was needed to return appellant to work was a Form CA-17.

By letter dated June 29, 2012, OWCP advised appellant of the evidence needed to establish his claim. The evidence of record was insufficient to establish that he actually experienced the employment factors alleged to have caused injury or that he was injured while performing any duty of his employment.

In a July 22, 2012 response, appellant stated that he did not understand OWCP’s request that he describe in detail the employment-related conditions or incidents he believed contributed to his condition. He stated his physician’s letters of June 19 and July 9, 2012 explained what happened to aggravate his existing condition. Appellant had not filed any Equal Employment Opportunity complaints or other actions relative to this claim. He had no stress outside of work and his hobbies were unchanged. Appellant was originally diagnosed with his condition in January 2005, for which he remained on medication.

In a May 24, 2012 letter to a Ms. Harris, assistant manager customer service, appellant asserted that the employing establishment had to clear him to return to work through his doctor. He stated that the employing establishment was notified by fax transmission on April 24, 2012 in the Form CA-17 from his physician as to his duty status and on May 8, 2012 in an undated Form CA-17 as to his work availability. Appellant asserted that he was never contacted as to when he was cleared to return to work as required by various manuals, from which excerpts were provided regarding absences from work. He also submitted a July 8, 2012 complaint regarding the employing establishment’s senior litigation counsel.

In a June 19, 2012 report, Dr. Smith explained that appellant’s disability in April 2012 was due to the alleged harassment by management, which was complicated by the employing establishment’s nurse, who had been provided with appropriate documentation for appellant’s return to work. The employing establishment took no action which forced appellant to miss additional weeks of work. Dr. Smith found this behavior reprehensible and caused appellant financial hardship. In a July 9, 2012 report, he explained that appellant had not suffered a new injury, but missed work because his existing injury was aggravated by the alleged behavior of his managers.

By decision dated October 26, 2012, OWCP denied appellant’s claim. It found that he failed to submit sufficient evidence to establish a compensable factor of employment.

Appellant requested a telephonic hearing, which was held on February 19, 2013. He testified that he had been out of work for two months. Dr. Smith appeared and stated that the definitions of injury were technical rather than medical and, under OWCP's definitions, appellant perhaps had a new injury. He indicated that appellant's anxiety disorder was exacerbated in late March when he was verbally harassed while on the clock due to a discussion about whether he had been tardy for work. Based on the facts presented to him, the supervisor acted in a harassing manner and appellant's condition worsened. Dr. Smith stated that given the history and context of appellant's previous injury, he needed time off work to cool down to restore his medical condition. Appellant believed he was harassed and mistreated and that he was spoken to in a manner that worsened his existing injury and required him to miss work. Dr. Smith stated that he faxed a letter to the occupational nurse two business days prior to appellant's work release, but did not receive a reply. He opined that the employing establishment kept appellant out of work without pay for weeks and their nonresponse was unreasonable punishment and unprofessional behavior.

By decision dated April 8, 2013, an OWCP hearing representative affirmed the October 26, 2012 decision. She found appellant did not establish that his emotional condition was casually related to any compensable work factors. The hearing representative directed OWCP to combine case file number xxxxxx631 with the present claim so a complete medical history was available.

On September 3, 2013 appellant requested reconsideration. He found that the use of the word "alleged" in OWCP's hearing representative's decision offensive and misleading and established bias in the decision. Appellant argued there was no evidence to support that either he or his physician were notified prior to the June 15, 2012 letter from the employing establishment that he was cleared to return to work. He stated that the employing establishment's policies and past practices required notification when an employee was cleared to return to work as provided and alleged the employing establishment failed to follow such practices. Appellant argued that the employing establishment's claims or statements were untrustworthy. He also argued that the June 15, 2012 letter clearing him to return to work was the first time he was contacted by the employing establishment and it contained erroneous or false claims with regard to the statements of Mr. Ricigliano and Ms. Fountain. Appellant alleged the employing establishment got to cut 40 hours and not pay him from the budget each time it delayed returning him to work. He attributed his anxiety disorder flare-up to being verbally abused, belittled and berated, vehemently and at length. Appellant submitted copies of employing establishment's forms and correspondence, which he argued supported his position that the employing establishment was required to clear him to return to work and failed to notify him of a return to work in a reasonable time limit. He noted that no medical evidence was considered in the decision. Appellant argued that the employing establishment had a history of keeping him out of work with no income for long periods of time without cause and that such action was retaliatory. He alleged that the discussion about tardiness was harassment.

Appellant submitted a memorandum from the employing establishment regarding return to work protocol; an Employee and Labor Relations Manual 865, return to duty after absence for medical reasons and a sample letter of employee report to duty.

In a May 20, 2013 letter to Ms. Fountain, Dr. Smith noted that he had no record of her telephoning him or directing him to inform appellant to return to work after he released appellant to return to work. In a June 6, 2013 letter to Ms. Fountain, he noted that he did not receive a response to his May 20, 2013 letter.

In October 10, 2013 responses, Mr. Ricigliano and Beverly Torain, a manager, noted that the citations to the employee relations manual appellant referenced were outdated and the information referred to throughout appellant's argument was also outdated. Mr. Ricigliano stated that the presentation of a Form CA-17 was typically that was needed to return an employee to work due to an OWCP-related absence. A copy of Employee and Labor Relations Manual 865 -- return to work after absence for medical reasons and Employee and Labor Relations Manual 865.1 -- clearance required, etc, was provided. Mr. Ricigliano stated that the return to work protocol appellant provided had been long since superseded by the new Employee and Labor Relations Manual that was agreed upon by the union to which appellant belonged. The current Employee and Labor Relations Manual stated that management can require a clearance and that appellant did not receive a notice requiring any further clearance from his office or the medical unit. Mr. Ricigliano stated that in appellant's case, the employing establishment did not require any additional evidence for him to return to work due to the fact that his work restrictions did not change.

In a November 11, 2013 response, appellant argued that Mr. Ricigliano failed to address the core issue in his reconsideration request. He noted that the Employee and Labor Relations Manual was a tool provided to management to notify an employee when they violate a rule or policy and was not provided to regular employees like him. Appellant noted that Ms. Harris was no longer a manager and did not work at his office anymore and another manager had told him that Ms. Harris erred. He stated that the nurse administrator did not have the authority to clear him to return to work. Appellant also noted that Mr. Ricigliano provided a signed note from Ms. Torain, who was a new manager, who had only been there for 30 days and was not present when the incident occurred. He reiterated that there was nothing submitted from the nurse administrator which provided evidence to support the employing establishment's claim that Mr. Ricigliano had spoken with him on the telephone or in any other manner including fax, e-mail or letter. Appellant reiterated that he was never notified of a return to work prior to the employing establishment's October 10, 2013 letter to OWCP.

By decision dated November 25, 2013, OWCP denied modification of its April 8, 2013 decision. It found no evidence of any employing establishment error or abuse related to appellant's return to work. OWCP found that appellant alleged additional incidents which were either not factors of employment (the March 26, 2012 discussion regarding being tardy from work) or were unsubstantiated.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ When an employee experiences emotional

³ *Id.* at § 8102(a).

stress in carrying out his or her employment duties or has fear and anxiety regarding his or her ability to carry out his or her duties and the medical evidence establishes that the disability resulted from his or her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability resulted from his or her emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of her work. By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation because they are not found to have arisen out of employment, such as when disability results from an employee's fear of a reduction-in-force, job insecurity or frustration from not being permitted to work in a particular environment or to hold a particular position.⁴

Workers' compensation does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.⁵ The Board has held that actions of the employing establishment which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under FECA, but there must be some evidence that harassment or discrimination did in fact occur. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁶ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.⁷ The primary reason for requiring factual evidence from the claimant in support of his or her allegation of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by OWCP and the Board.⁸

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Thomas D. McEuen*, 41 ECAB 387 (1990), *referred on recon.*, 42 ECAB 566, 572-73 (1991).

⁶ See *Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

⁷ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

⁸ *Paul Trotman-Hall*, 45 ECAB 229 (1993) (Michael E. Groom, Alternate Member, concurring).

It is well settled that an employee's reaction to supervision is not a compensable factor of employment under *Cutler*.⁹ Complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by FECA. This principle recognizes that a supervisor or manager must be allowed to perform his or her duties and that employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action is not compensable, absent evidence of error or abuse.¹⁰

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.¹¹ 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.¹²

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that an emotional condition was caused or adversely affected by his or her employment.¹³ Neither the fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.¹⁴

ANALYSIS

Appellant has an accepted anxiety disorder under claim file number xxxxxx631. In the current case, he alleged an exacerbation of his anxiety disorder due to a March 26, 2012 incident

⁹ *Reco Roncaglione*, 52 ECAB 454 (2001) (disagreement with the associate warden held not compensable, whether viewed as a disagreement with supervisory instructions or as perceived poor management); *Robert Knoke*, 51 ECAB 319 (2000) (where the employee attributed his emotional injury to the manner in which his supervisor spoke to him about undelivered mail, the Board found that a reaction to the instruction itself was not compensable, as work assignments given by supervisors in the exercise of supervisory discretion are actions taken in an administrative capacity and as such, are outside the coverage of FECA); *Frank A. Catapano*, 46 ECAB 297 (1994) (supervisory instructions, with which the employee disagreed, held not compensable in the absence of evidence of managerial error or abuse); *Rudy Madril*, 45 ECAB 602 (1994) (where the employee questioned his supervisor's instructions to move from belt number five to belt number six and unload mail and became upset because he felt he was being pushed and picked on, the Board found that the incident was not a compensable factor of employment).

¹⁰ *T.G.*, 58 ECAB 189 (2006).

¹¹ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹² *Id.*

¹³ *See Charles D. Edwards*, 55 ECAB 258 (2004).

¹⁴ *See Ronald K. Jablanski*, 56 ECAB 616 (2005); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

when his supervisor allegedly verbally harassed and scolded him for being tardy and to inaction by management following his release to return to work. As appellant described a new event not related to the accepted incidents under claim file number xxxxxx631, OWCP properly assigned a new case number to the current claim.

The Board notes that appellant did not attribute his emotional condition to the performance of his regular or specially assigned duties as a sales and service distribution clerk under *Cutler*.¹⁵ Rather, appellant contends an exacerbation of his emotional condition related to the actions of his supervisor and management. As noted in *McEuen*, complaints about the manner in which a supervisor performs his duties or the manner in which a supervisor exercises his discretion falls outside the scope of coverage provided by FECA. A manager's style is not a compensable factor of employment. It must be established factually that the manager committed error or abuse to support a compensable factor pertaining to any administrative or personnel matter. Similarly, allegations pertaining to perceived instances of harassment or discrimination must be established by probative factual evidence.

Appellant alleged a March 26, 2012 discussion with his supervisor about being tardy from work. Dr. Smith supports that appellant had an emotional reaction to his supervisor discussing tardiness on March 26, 2012, which led to his work stoppage a week later. However there is only appellant's allegation that the discussion about tardiness constituted harassment. Appellant did not submit sufficient evidence to establish his allegations of error or abuse as factual. His general allegations do not provide sufficient information as to specific instances to support error or abuse on the part of the supervisor, who remained unidentified. Appellant did not describe what was stated during the March 26, 2012 incident other than generally allege he was verbally harassed and threatened with discipline. Further, there was no formal finding by an administrative body that appellant's supervisor violated a specific rule, regulation or policy in his interactions with appellant.¹⁶ While Dr. Smith alleged the employing establishment went over the line in other cases he was aware of, his opinion on causal relation largely relied on appellant's allegations of error and abuse. He referenced the March 26 event as a matter of perception. The employing establishment denied appellant's allegations. As appellant submitted insufficient evidence to support his allegations that his supervisor harassed him on March 26, 2012 his perception that a form of criticism or disagreement was unjustified, without evidence or error or abuse, was not a compensable factor of employment.¹⁷

Appellant alleged that there was error or abuse in the delay of his return to work following Dr. Smith's April 23, 2012 release. Again, he provided insufficient evidence to support any employing establishment error regarding the delay in his return to work after Dr. Smith's April 23, 2012 release. The employing establishment denied any error or abuse in the matter, noting that appellant did not need to be cleared by anyone at the employing establishment to return to work and only needed a Form CA-17 from his physician, which

¹⁵ See *supra* note 3.

¹⁶ E.g., *R.G.*, Docket No. 10-947 (issued April 25, 2011) (where an arbitrator's decision demonstrated that the employing establishment erred in prematurely suspending the claimant from work, the record established a compensable factor of employment).

¹⁷ See *Robert Breeden*, 57 ECAB 622 (2006).

Dr. Smith had provided. It noted that the Employee and Labor Relations Manual procedures cited by appellant were outdated and the current the Employee and Labor Relations Manual procedure states that management can require clearance. The employing establishment noted that appellant did not receive any further clearance from his office or the medical unit as his work restrictions did not change. It further denied his allegations that he was never notified of a return to work prior to receiving the June 15, 2012 letter. Ms. Fountain had advised Dr. Smith on April 24, 2012 that appellant was cleared for duty and could return to work. While appellant and Dr. Smith alleged they never heard from the employing establishment regarding a return to work instruction prior to receiving the June 15, 2012 letter, the Board notes that the June 15, 2012 letter describes in detail several communications in which appellant was instructed to return to work but failed to do so. Accordingly, appellant has not established any error or abuse in the delay of his return to work following Dr. Smith's April 23, 2012 work release.

Lastly, appellant described several incidents, for which he offered no collaborating evidence to support that the incidents occurred as alleged. He alleged that the employing establishment withdrew his modified-duty assignment; the employing establishment came up with the "he said" (Mr. Ricigliano), "she said" (Ms. Fountain) claim knowing that they did not have to provide any evidence to OWCP; it got to cut 40 hours and not pay him for the budget each time it delayed him from returning to work; his anxiety disorder can flare-up when he was being verbally abused, belittled and berated by someone who has a history of treating employees in this manner; the employing establishment retaliated against him in delaying his return to work; and there was no statement from the supervisor who berated him and caused his flare-up. Such allegations, unsupported by evidentiary proof of administrative error or abuse, are not sufficient to establish a compensable factor of employment. Absent probative factual evidence, his allegations are also not sufficient to establish harassment or discrimination on the part of his supervisor or management. Mere perceptions of harassment or discrimination are not compensable.¹⁸

For these reasons, appellant did not establish that his emotional condition in the present case arose in the performance of duty.¹⁹

On appeal, appellant reiterates arguments previously alleged before OWCP. For the above stated reasons, he did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

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

¹⁸ See *Dorthea M. Belnavis*, 57 ECAB 311 (2006).

¹⁹ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the November 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 28, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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