

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

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R.A., Appellant )

and )

DEPARTMENT OF JUSTICE, FEDERAL )  
BUREAU OF PRISONS, FEDERAL )  
CORRECTIONS INSTITUTE, Miami, FL, )  
Employer )

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**Docket No. 15-0553  
Issued: October 7, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 12, 2015 appellant filed a timely appeal from a November 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 that he sustained an emotional condition in the performance of duty.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On August 21, 2014 appellant, then a 36-year-old correctional officer, filed an occupational disease claim (Form CA-2) alleging that, while he was on workers' compensation due to an employment-related injury, he was harassed and racist comments were made to him by his human resources director. He noted that he filed an Equal Employment Opportunity (EEO) complaint with regard to his human resources director and mentioned his supervisor in the letter. Appellant alleged that his supervisor later cornered him, verbally assaulted him, and tried to start a fight. The employing establishment noted that appellant stopped work on July 1, 2014.

In an attached statement, appellant related that on October 1, 2013 he was hospitalized due to an on-the-job back injury and that on March 3, 2014 he underwent back surgery. He stated that on February 19, 2014, 10 days prior to his surgery, he received a "Fit for Duty Letter" from his immediate supervisor, Mr. P. Appellant stated that, when he called Mr. P. regarding this letter, he referred him to Ms. F., the human resources manager. He stated that when he called her to ask for clarification of the letter and explained that he was due to have surgery, Ms. F. made several discriminatory comments, including "Why are you so loud?" and "You are Cuban, aren't you? Yeah, you have to be because you look and act like a Cuban." He noted that in another conversation she stated, "Why are Cubans so loud? Please lower your voice." Appellant noted that, following these encounters, he filed an EEO complaint against Ms. F. for discrimination due to race. He noted that he explained to Mr. P. on April 15, 2014 that the only reason he was mentioned in the EEO case was because he signed the fit for duty letter, but appellant contended that his relationship with Mr. P. began to change on that date.

Appellant alleged that on May 15, 2014 due to an incident at work, Mr. P. called him over to the cooler and as he entered, Mr. P. balled his hands into a fist and began yelling at him. He immediately notified management and amended his EEO complaint to include Mr. P. for verbal assault and intimidation. Appellant remained with Mr. P. as his supervisor until June 13, 2014, when he was advised that his new supervisor was Mr. E. He noted that, during mediation, the employing establishment chose Mr. E. and the assistant warden to represent them, which placed him in a difficult position. Appellant noted that he requested protection from the Office of Special Counsel under the Whistleblower Protection Act, but was referred back to the EEO process. He also attached a chart he made with regard to the history of his condition. Appellant noted that on July 2 and 5, 2014 he went to the emergency room to be evaluated for chest pain, that on July 10, 2014 he began to experience major depression, anxiety, nervousness, fear, confusion, amnesia, shortness of breath, chest pain, and sleeplessness. Starting July 10, 2014, he began to experience occasional headaches, aggressive behavior, slurred speech, nightmares, blurred vision, and heard voices. Appellant discussed his subsequent medical treatment and medications.

Appellant submitted multiple treatment notes and reports from Dr. Noel E. Delgadillo, a Board-certified psychiatrist. In an August 8, 2014 report, Dr. Delgadillo discussed appellant's history, and noted that the first episode of depression occurred three years prior to his visit. He described appellant's EEO complaint as well as his back injury of October 2013, and noted that appellant had at least one depressive episode. Appellant noted that both of his parents are known to have unspecified emotional disorders. Dr. Delgadillo diagnosed a major depressive disorder, recurrent episode, moderate. In a September 1, 2014 report, he discussed appellant's treatment,

and stated that, due to fragility of appellant's state of mind, he was given "Off Work" until September 22, 2014, and that his medications were adjusted in order to try to reduce depressive symptomatology, anxiety, and suicidal ideations.

By letter dated September 30, 2014, OWCP informed appellant of information that was necessary to support his claim.

In a September 21, 2014 report, Dr. Elena Coello-Jemmell, a psychologist, noted that appellant was referred to the South Miami Substance Abuse Program for psychological evaluation and treatment. She described his work history and medical treatment. Dr. Coello-Jemmell diagnosed alcohol dependence; major depressive disorder, single episode, unspecified; general anxiety disorder; and post-traumatic stress disorder. She noted that her opinion was based on the information provided by appellant and that on this basis his symptomatology is considered to be directly caused by his employment incident, *i.e.*, the alleged incidents with the human resource manager, his supervisor, and the process related to his EEO complaint.

By decision dated November 5, 2014, OWCP denied appellant's claim as he had not substantiated any compensable factors of employment in the performance of duty as required by FECA.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>2</sup> has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including the fact that the individual is an employee of the United States within the meaning of FECA and that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>3</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

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

An occupational disease or illness means a condition produced by the work environment over a period longer than a single workday or shift.<sup>5</sup> Workers' compensation law does not apply

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<sup>2</sup> *Id.*

<sup>3</sup> *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

<sup>4</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>5</sup> 20 C.F.R. § 10.5(q).

to each and every injury or illness that is somehow related to an employee's employment.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the facts alleged or implicated by the employee did, in fact, occur.<sup>12</sup> Mere perceptions of harassment or discrimination are not compensable under FECA.<sup>13</sup> A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.<sup>14</sup> Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.<sup>15</sup> Perceptions and feelings alone are not compensable. To establish entitlement for benefits, a claimant must establish a basis in fact for the claim by supporting his or her allegations with probative and reliable evidence.<sup>16</sup>

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<sup>6</sup> *Lillian Cutler*, 28 ECAB 125 (1976); *see also L.D.*, 58 ECAB 344 (2007).

<sup>7</sup> *A.K.*, 58 ECAB 119 (2006).

<sup>8</sup> 5 U.S.C. §§ 8101-8193. *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, *supra* note 6.

<sup>9</sup> *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

<sup>10</sup> *See William H. Fortner*, 49 ECAB 324 (1998).

<sup>11</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>12</sup> *K.W.*, 59 ECAB 271 (2007).

<sup>13</sup> *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>14</sup> *J.F.*, 59 ECAB 331 (2008).

<sup>15</sup> *G.S.*, Docket No. 09-764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005).

<sup>16</sup> *L.M.*, Docket No. 13-267 (issued November 15, 2013).

If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.<sup>17</sup> 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.<sup>18</sup>

### ANALYSIS

In the present case, appellant filed a claim for an emotional condition related to his federal employment. Initially, the Board notes that he did not specifically attribute his claimed emotional condition to his regular or specifically assigned work duties or a requirement imposed by the employment. Thus, appellant has not established a compensable employment factor under *Cutler*.<sup>19</sup>

Appellant contests the handling of his EEO claim. He alleges that when management appointed appellant's supervisor and the assistant warden to represent them in the EEO claim, this put him in a very awkward position. The Board finds that appellant's filing of an EEO claim is an administrative process which is not a regular or specially assigned duty. Administrative and personnel matters are not compensable unless the employing establishment erred or acted abusively.<sup>20</sup> There is no evidence in the record establishing that the employing establishment acted unreasonably or abusively in its response to appellant's EEO claim.

Appellant claimed that he sustained an emotional condition due to other peripheral factors and provided allegations of harassment and discrimination based on Cuban ancestry, physical threats from his supervisor, and improper handling of his EEO complaint. The initial question presented is whether there are compensable work factors established by the evidence.

The Board finds that appellant's allegations of harassment are not supported by the record. Appellant alleged that the human resources manager made various inappropriate comments to him, including: "Why are you so loud?" and "You are Cuban, aren't you? Yeah, you have to be because you look and act like a Cuban." He noted that in another conversation she stated: "Why are Cubans so loud? Please lower your voice." However, there is no evidence to substantiate that these incidents occurred. If proven by the evidence, the actions of the human resources manager may constitute a compensable factor of employment. However, for harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that the harassment or discrimination did occur. Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.<sup>21</sup> An employee's allegations that he was harassed or discriminated against is not determinative of whether or not harassment

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<sup>17</sup> *K.W.*, *supra* note 12; *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

<sup>18</sup> *Robert Breeden*, 57 ECAB 622 (2006).

<sup>19</sup> *Supra* note 6.

<sup>20</sup> *A.C.*, Docket No. 15-297 (issued May 12, 2015).

<sup>21</sup> *Supra* note 15; *Penelope C. Owens*, 54 ECAB 684 (2003).

or discrimination occurred.<sup>22</sup> Appellant did not submit any witness statement corroborating this alleged incident. There were no incident reports concerning this alleged matter. Accordingly, appellant has not established his allegations that the human resource manager made offensive statements concerning Cubans to appellant.

The Board also finds that the filing of an EEO complaint regarding these allegations of inappropriate comments does not establish harassment or discrimination.<sup>23</sup> To establish entitlement to benefits, a claimant must establish a factual basis for his or her claim by supporting his or her allegations with probative and reliable evidence.<sup>24</sup> There is no final EEO decision supporting appellant's allegations.<sup>25</sup>

Furthermore, there are no supporting witness statements, internal report or EEO decision to substantiate that his supervisor, Mr. P., treated him in a threatening manner. The Board notes that verbal altercations and difficult relationships with supervisors/managers, when sufficiently detailed and supported by the record, may constitute compensable factors of employment.<sup>26</sup> However, appellant did not support his allegations with probative and reliable evidence.<sup>27</sup>

Accordingly, the Board finds that appellant failed to establish a compensable factor of employment. It is unnecessary to address the medical evidence of record as he failed to establish a compensable factor of employment.<sup>28</sup>

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 establish that he sustained an emotional condition in the performance of duty.

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<sup>22</sup> See *C.T.*, Docket No. 08-216 (issued May 7, 2009); *supra* note 12; *Ronald K. Jablanski*, *supra* note 15.

<sup>23</sup> See *C.O.*, Docket No. 12-1435 (issued January 15, 2013).

<sup>24</sup> See *G.S.*, *supra* note 15; *C.S.*, 58 ECAB 137 (2006); *Frankie McDowell*, 44 ECA B 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

<sup>25</sup> See *M.T.*, Docket No. 12-98 (July 20, 2012).

<sup>26</sup> *Marguerite J. Toland*, 52 ECAB 107, 109 (2000).

<sup>27</sup> See *Kathleen D. Walker*, 42 ECAB 603,608 (1991).

<sup>28</sup> See *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 5, 2014 is affirmed.

Issued: October 7, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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