

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

R.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Woodburn, OR, Employer**

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**Docket No. 10-2221
Issued: August 19, 2011**

Appearances:
Rocky L. Smith, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 1, 2010 appellant, through his representative, filed a timely appeal from an April 29, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying his emotional condition claim. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 has established that he sustained an emotional condition in the performance of duty. On appeal appellant's representative contends that appellant has established his entitlement to compensation benefits.

FACTUAL HISTORY

On April 2, 2008 appellant, then a 56-year-old distribution clerk, filed an occupational disease claim alleging that on February 9, 1999 he first realized that debilitating stress was

¹ 5 U.S.C. § 8101 *et seq.*

employment related.² He alleged that his stress was due to being discriminated against by his supervisor. Specifically appellant alleged that coworkers with less seniority were given training as a window clerk and window clerk assignments. He submitted a statement listing dates of alleged discrimination by his supervisor. One incident involved requesting to be made a regular rather than part-time flexible carrier because appellant required two consecutive days off and to not be on the overtime list. Appellant alleged that Postmaster Kevin McGrory threatened him on April 20, 2001 at the end of his shift, which was the same day he requested to be made a regular carrier. On June 16, 2001 he alleged that Mr. McGrory was upset with him and told appellant that he should not have been made a regular carrier. Appellant also alleged that it became common practice among management and coworkers to blame him when a mistake occurred. On September 12, 2006 he alleged that Mr. McGrory began urging him to work overtime and became upset and questioned the limitations set by his physician for a shoulder condition. Next, appellant alleged that Mr. McGrory requested he submit medical documentation and that Mr. McGrory was greatly upset because the original medical documentation regarding his restrictions had been sent to the medical unit. On November 2, 2007 he alleged that he informed Mr. McGrory that he was legally not entitled to his medical documentation as it was to be sent to the employing establishment's medical unit. Appellant alleged that Mr. McGrory required appellant to get his medical provided to complete a document he prepared, which appellant described as redundant and ridiculous. He also alleged that on various days in November 2007 he discussed window clerk training with Mr. McGrory and that a part-time flexible clerk with lesser seniority was signed up for window training. Appellant stated that he felt intimidated on December 1, 2007 when Mr. McGrory showed up at the employing establishment and did not speak to him. On January 8, 2008 he alleged intimidation by management when he was the only person in the back and he had 19 minutes left in his shift.

In a December 7, 2007 report, Harry O. Stevens, a nurse practitioner diagnosed depression due to work and home stressors and noted appellant could not work overtime.

The record contains a copy of a December 21, 2007 Equal Employment Opportunity (EEO) Dispute Resolution Specialist's (DRS) Inquiry Report in which appellant alleged discrimination based on disability when he failed to receive a positive response regarding his request for window training on November 7, 2007, harassment for the past seven or eight years, and not being allowed to work on the window.

In an April 9, 2009 response, Mr. McGrory denied appellant's allegations of harassment and discrimination. He contended appellant's perceptions were not supported by the facts and that he treated appellant equitably.

In a statement Rocky Smith, appellant's brother, provided an overview of appellant's medical problems and disability history. He stated that in 1999/2000 appellant began seeing a psychologist for treatment of depression and anxiety due to appellant's work stress. Mr. Smith stated that appellant was subjected to harassment, subtle pressure by management regarding his work restrictions, and denied a transfer to vacant window clerk's position. He alleged that

² Appellant also alleged that he sustained a left shoulder condition in the performance of duty. On October 13, 2009 the Office denied his claim for a left shoulder condition. Appellant requested an oral hearing before an Office hearing representative. However, the Office has not issued a decision on this issue.

appellant began in early 2000 unsuccessful and frustrating attempts to transfer into a window clerk position. Mr. Smith stated that he observed appellant's frustration at being denied the opportunity to become a window clerk and observed signs of growing paranoia in appellant. He stated that Mr. McGrory appeared upset on June 16, 2001 at the change in work status in appellant to a full-time distribution clerk. Mr. Smith noted that appellant became a union representative in 2002 and that Mr. McGrory became more adversarial towards appellant due to the numerous grievances filed and other postal issues. On December 10, 2007 Mr. Smith alleged that appellant felt pressured by the employing establishment to provide medical documentation regarding restrictions on his working overtime. He noted that an EEO complaint was filed on March 10, 2008 by appellant alleging discrimination and harassment. Mr. Smith noted that appellant felt frustrated and helpless with the lack of help provided by the union in providing any legal guidance or assistance regarding his work problems. On March 3, 2009 he related appellant's allegation that Mr. McGrory interrupted a telephone conversation appellant was having on a work issue. Appellant alleged that Mr. McGrory began screaming at him in front of coworkers.

On February 22, 2008 the EEO dispute specialist indicated the employing establishment denied appellant's allegations that he was harassed and that he was not given the window clerk position because of his bid position as an opening clerk. Appellant was informed that he could file a formal complaint as there was no resolution to his counseling complaint.

On March 10, 2008 appellant filed a formal EEO complaint alleging discrimination based on disability due to his left shoulder condition. The EEO Commission accepted appellant's claim for investigation on March 10, 2008.

The record contains affidavits and statements from Jacalyn K. Sanks, postmaster; Jose Dorado, supervisor customer services; Tim Richey, Postmaster, Sandy; and Stephanie Williams; supervisor customer services, denying appellant's allegations of harassment by Mr. McGrory or a hostile work environment. Mr. Richey stated that from his observations Mr. McGrory treated appellant cordially. Ms. Sanks stated she never witnessed any verbal or physical threats by Mr. McGrory towards appellant, but that she had called Mr. McGrory to discuss her concerns about appellant's demeanor during a detail and her concerns for the safety of both her workers and herself.

In an April 24, 2009 report, Dr. Kristen Snyder, a treating Board-certified psychiatrist, diagnosed major depressive disorder and possibly a pain disorder. She related that appellant had a history of severe depression dating back to 1979 when he was hospitalized for severe depression. Dr. Snyder related that appellant's symptoms had been exacerbated by his perception of harassment and threatening behavior by his supervisor, which appellant attributed to work restrictions for a shoulder injury. She related that appellant's treatment response was slow which she attributed as "likely due to severity of depression, the presence of co-morbid pain issues and the fear of returning to a work environment he perceives as hostile." In concluding, Dr. Snyder stated that appellant was totally disabled from working, that his depression was a life-long condition which would have relapses as well as remitting symptoms.

By letter dated May 19, 2009, OWCP informed appellant that the evidence of record was insufficient to support his claim and advised as to the factual and medical evidence he should submit.

By decision dated October 13, 2009, OWCP denied appellant's emotional condition claim on the grounds that he failed to establish any compensable factors of employment.

On October 26, 2009 appellant's counsel requested an oral hearing before OWCP's hearing representative.

By decision dated April 29, 2010, OWCP's hearing representative affirmed the denial of appellant's emotional condition claim.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.³ 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.⁴ Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁵ 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 frustration from not being permitted to work in a particular environment or to hold a particular position.⁶

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.⁷ 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.⁸ 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.⁹

³ *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁴ *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

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

⁶ *J.F.*, 59 ECAB 331 (2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁷ *See K.W.*, 59 ECAB 271 (2007); *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

⁸ *See M.D.*, 59 ECAB 211 (2007); *William H. Fortner*, 49 ECAB 324 (1998).

⁹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

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.¹⁰ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.¹¹ 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

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. In an October 13, 2009 decision, OWCP denied his emotional condition claim on the grounds that he did not establish any compensable employment factors, which was affirmed by OWCP's hearing representative in an April 29, 2010 decision. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

Appellant generally alleged that his stress was due to harassment and discrimination by his supervisor. Actions of a claimant's supervisor or coworker which the claimant characterizes as harassment may constitute 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, in fact, occur. Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.¹³ An employee's charges that he or she was harassed or discriminated against, is not determinative of whether or not harassment or discrimination occurred.¹⁴ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹⁵

The Board finds that the factual evidence does not support appellant's claim of harassment. The record contains evidence that appellant filed an EEO claim for harassment and discrimination but the Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.¹⁶ None of the information

¹⁰ *D.L.*, 58 ECAB 217 (2006).

¹¹ *K.W.*, *supra* note 7; *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

¹² *Robert Breeden*, *supra* note 3.

¹³ *G.S.*, Docket No. 09-764 (issued December 18, 2009); *David C. Lindsey, Jr.*, *supra* note 11; *Lorraine E. Schroeder*, 44 ECAB 323 (1992).

¹⁴ *V.W.*, 58 ECAB 428 (2007); *Ronald K. Jablanski*, 56 ECAB 616 (2005).

¹⁵ *Robert Breeden*, *supra* note 3; *David S. Gilreath*, 56 ECAB 241 (2005); *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹⁶ *T.G.*, 58 ECAB 189 (2006); *David C. Lindsey, Jr.*, *supra* note 13.

submitted by appellant regarding EEO matters showed that the employing establishment acted improperly. Appellant submitted his statements in support of his contentions, but provided no corroborating witness statements supporting his contentions of harassment and discrimination. The statements from Ms. Sanks, postmaster; Mr. Dorado, supervisor customer services; Mr. Richey, postmaster, Sandy; and Ms. Williams; supervisor customer services, all denied appellant's allegations of harassment by Mr. McGrory or a hostile work environment. Mr. McGrory denied harassing or discriminating against appellant. He also denied telling appellant that he should not have been made a permanent employee. The record also contains no evidence supporting appellant's allegation that he was blamed by both management and coworkers when a mistake occurred. The Board finds that appellant has failed to establish that he was harassed and discriminated against by the employing establishment.

Appellant made several allegations regarding window clerk training, window clerk assignments and request for medical documentation. He also contended that coworkers with less seniority were given window clerk training and assignments. These allegations are unrelated to his regular or specially assigned work duties and do not generally fall within the coverage of FECA.¹⁷ The Board has held, however, that an administrative or personnel action may be considered an employment factor where the evidence discloses error or abuse. In determining whether the employing establishment erred or acted abusively, the Board has examined whether management acted reasonably.¹⁸ Appellant presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to these allegations. There is no evidence substantiating that the employing establishment acted unreasonably in these matters. Therefore, appellant has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under FECA.¹⁹

On appeal appellant's representative contends that appellant's claim should be accepted as both the Department of Veterans Affairs and the Social Security Administration have awarded him disability benefits. However, these decisions are not dispositive of appellant's entitlement to benefits under FECA. The Board has long held that entitlement to benefits under statutes administered by other federal agencies does not establish entitlement to benefits under FECA.²⁰ Decisions made by such federal agencies are pursuant to different statutes which have varying standards for establishing disability and eligibility for benefits. The finding by both the Social Security Administration and the Department of Veterans Affairs are not dispositive of his rights under FECA.

¹⁷ An employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. *M.D.*, 59 ECAB 211 (2007); *Sandra Davis*, 50 ECAB 450 (1999).

¹⁸ See *J.F.*, 59 ECAB 331 (2008); *Richard J. Dube*, 42 ECAB 916, 920 (1991). *Thomas D. McEuen*, *supra* note 7.

¹⁹ As appellant has not substantiated a compensable factor of employment as the cause of his emotional condition, the medical evidence regarding his emotional condition need not be addressed. *Karen K. Levene*, 54 ECAB 671 (2003); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

²⁰ *Andrew Fullman*, 57 ECAB 574 (2006).

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 has failed to establish that he 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 April 29, 2010 is affirmed.

Issued: August 19, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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