



## **FACTUAL HISTORY**

On May 5, 2009 appellant then a 42-year-old custodian, filed an occupational disease claim alleging that he developed an aggravation of severe depression, anxiety and post-traumatic stress disorder due to his improper termination on June 20, 2007. He submitted a note from his physician, Dr. Kevin W. George, a psychiatrist, diagnosing depressive disorder, anxiety disorder and post-traumatic stress disorder. Dr. George stated that appellant had difficulty dealing with being fired from the employing establishment.

Appellant submitted an opinion and award of arbitrator dated June 8, 2007 addressing the issue of whether the employing establishment had just cause to issue discipline including the suspension from June 19 through October 3, 2006. The employing establishment issued a notice of removal to him on May 18, 2006 based on the charges of unacceptable conduct, failure to work in a safe manner, unauthorized usage of postal equipment, failure to follow instructions and failure to work for a fair days pay.

On April 9, 2006 appellant's supervisor found him in a locked room, sitting in a chair with his shoes off defragmenting his computer and watching a DVD on a postal computer. Appellant was not authorized to be in the room and was not on break. He then left the employing establishment on nine different occasions after being advised to remain in his work area. The employing establishment reduced the notice of removal to a time-served suspension or 105 days. The union alleged: that appellant was newly hired on February 2, 2006; that he was not on the workroom floor without his shoes; that he had no prior discipline; and that he was never told that the locked room was off limits.

The arbitrator found that appellant's grievance must be sustained. He found that the employing establishment had failed to establish two of the charges in the notice of removal, but had established unacceptable conduct, failure to follow instruction and failure to provide a fair days work for a fair days pay. The arbitrator noted that the employing establishment reduced the notice of removal as appellant had no prior discipline. He further found that the length of the suspension was excessive and that the action was therefore punitive and not corrective. The arbitrator reduced the suspension from 105 days without pay to 7 days. He stated that the employing establishment failed to establish by the preponderance of the credible evidence that it had just cause to issue the suspension from June 19 to October 3, 2006.

In a letter dated September 29, 2006, the employing establishment unilaterally reduced his removal action to a time served suspension and directed appellant to report to work on October 3, 2006. On December 27, 2007 it proposed to separate him on the grounds that he could not meet the requirements of his position. The employing establishment issued a disability separation decision on January 18, 2009.

OWCP referred appellant for a second opinion evaluation on August 12, 2009. It asked that the physician answer whether appellant developed an emotional condition as a result of the notice of removal that was changed to a time service suspension, whether he developed an emotional condition was a result of the termination of his employment and whether he was disabled for any period due to emotional condition. In a report dated September 3, 2009, a Dr. Melvin J. Steidhart, noted the history of injury and diagnosed adjustment disorder with

depression and anxiety due to his termination from his job with the employing establishment. He stated that appellant had been disabled for two years but was not currently disabled. Dr. Steidhart completed a work capacity evaluation and indicated that appellant could work eight hours a day, but stated that the job was the source of his stress and that it would be ill-advised for him to return to his job. He stated that appellant could work anywhere other than the employing establishment.

By decision dated October 14, 2009, OWCP denied appellant's claim. It accepted as a compensable factor of employment that the letter of removal was reduced to a time served suspension. However, OWCP found that the termination of appellant's employment was not in the performance of duty. It relied on Dr. Steidhart's report noting that appellant's diagnosed conditions were due to his termination from the employing establishment.

Appellant requested an oral hearing on November 6, 2009. Counsel argued that OWCP incorrectly interpreted the medical evidence and incorrectly found that the final termination from the employing establishment was not compensable.

In a decision dated February 18, 2010, the Branch of Hearings and Review remanded the case to OWCP for additional factual and medical development.

In a letter dated March 8, 2010, OWCP requested additional factual evidence from appellant regarding the factors to which he attributed his emotional condition. Appellant did not respond. By decision dated May 7, 2010, OWCP denied his claim stating that he did not respond to the requests for additional factual evidence that is necessary to determine if he had any compensable factors of employment. Appellant requested a review of the written record on June 4, 2010. Counsel argued that she had responded in a letter dated April 30, 2010 and stated that the claims examiner failed to properly consider the arbitrator's finding of the excessive and punitive discipline by the employing establishment which established error and abuse by the employing establishment.

The employing establishment submitted a letter dated September 16, 2010 relating facts in the case including appellant's notice of removal in 2006, the unilateral reduction to a time served suspension, the reduction by the arbitrator of the 105-day suspension to 7 days. It argued that there was no error or abuse in the issuance of the notice of removal or the 105-day suspension as the employing establishment had done a good faith analysis. Counsel responded on September 21, 2010 and stated that, although some discipline was warranted, the employing establishment erred in issuing the notice of removal and the 105-day suspension time served. She alleged that the seven-day suspension issued by the arbitrator was appropriate and that if the employing establishment had issued appropriate discipline appellant would not have developed his emotional condition. Counsel argued that his psychological injury was the direct result of the employing establishment's error in issuing excessive and punitive discipline.

By decision dated October 22, 2010, the hearing representative found that appellant's reaction to the disciplinary action was not a compensable factor and that the arbitrator's decision did not establish error or abuse on the part of the employing establishment.

## LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,<sup>2</sup> the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.<sup>3</sup> There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.<sup>4</sup> When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an 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 results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.<sup>5</sup> In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is not sufficient to constitute a person injury sustained in the performance of duty within the meaning of FECA. Thus disability is not covered when it results from an employee's fear of a reduction-in-force, nor is disability covered when it results from such factors as an employee's frustration in not being permitted to work in a particular environment or to hold a particular position.<sup>6</sup>

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.<sup>7</sup> Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.<sup>8</sup> A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.<sup>9</sup>

## ANALYSIS

The Board finds that this case is not in posture for decision. Appellant filed an emotional condition claim alleging that he developed depression, anxiety and post-traumatic stress disorder

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<sup>2</sup> 28 ECAB 125 (1976).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> See *Robert W. Johns*, 51 ECAB 136 (1999).

<sup>5</sup> *Cutler*, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Charles D. Edwards*, 55 ECAB 258 (2004).

<sup>8</sup> *Kim Nguyen*, 53 ECAB 127 (2001). See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

<sup>9</sup> *Roger Williams*, 52 ECAB 468 (2001).

as a result of his notice of removal and 105-day suspension without pay. In support of his claim he submitted medical evidence diagnosing emotional conditions and an arbitrator's decision finding that his grievance should be upheld as the employing establishment improperly issued the letter of removal and improperly unilaterally changed the letter of removal to a 105-day suspension of pay.

In *Thomas D. McEuen*, the Board held that 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. The Board noted, however, that coverage under FECA would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment's superiors in dealing with the claimant. Absent evidence of such 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.<sup>10</sup>

The Board finds that the employing establishment committed error in the administrative actions of issuing the letter of removal. The record establishes that appellant's actions were worthy of discipline, however, the arbitrator found that the notice of removal was inappropriate as appellant had no prior disciplinary actions on his record and as the employing establishment did not establish two of the charges. The Board finds that he has established compensable factors of employment in regard to the initial notice of removal which apparently required a history of prior discipline. The employing establishment knew or should have known that its notice of removal was not justified in the facts of appellant's employment.

As appellant has alleged and substantiated error or abuse on the part of the employing establishment in its notice of record, he has established a compensable factors of employment and OWCP must now consider the medical evidence.<sup>11</sup> The case is remanded to OWCP for this purpose. After such further development as deemed necessary, OWCP should issue an appropriate decision on this claim.<sup>12</sup>

The Board finds that appellant has established compensable factors of employment as argued by counsel on appeal.

### **CONCLUSION**

Appellant has established a compensable factor of employment and the case must be remanded for development of the medical evidence.

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<sup>10</sup> See *M.D.* 59 ECAB 211 (2007); *Richard J. Dube*, 42 ECAB 916, 920 (1991).

<sup>11</sup> The Board notes that OWCP initially referred appellant to a second opinion physician, but that Dr. Steidhart did not address the questions posed.

<sup>12</sup> *Tina E. Francis*, 56 ECAB 180 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 22, 2010 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development.

Issued: December 22, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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