

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

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M.M., Appellant	)	
	)	
and	)	<b>Docket No. 11-820</b>
	)	<b>Issued: October 14, 2011</b>
<b>DEPARTMENT OF LABOR, MINE SAFETY &amp; HEALTH ADMINISTRATION, Morgantown, WV, Employer</b>	)	
	)	
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*Appearances:* *Case Submitted on the Record*  
Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 15, 2011 appellant filed a timely appeal from a January 21, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying his emotional condition claim. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3(d), 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, counsel contends that OWCP's January 21, 2011 decision is "contrary to fact and law."

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

## **FACTUAL HISTORY**

On May 19, 2010 appellant, then a 38-year-old coal mine health and safety inspector, filed a traumatic injury claim (Form CA-1) claiming that he sustained post-traumatic stress disorder on April 5, 2010 when he was informed of an explosion at the Upper Big Branch coal mine in West Virginia. He had just returned to his duty station after inspecting a different coal mine. In associated statements, appellant described the onset of dizziness and a feeling of pressure in his head when he saw a television report of the explosion while at work. Coworkers discussed the report in his presence. Appellant later learned that 29 miners were killed in the blast.

In a May 20, 2010 statement, appellant's supervisor described him as an exemplary and conscientious employee. After the April 5, 2010 incident, appellant worked on April 16, 2010 in an above-ground office, performed underground mine inspections on April 19 and 20, 2010, and performed surface work on April 22, 2010. He then stopped work and had not yet returned to duty.

In a May 28, 2010 letter, OWCP requested that appellant submit additional information regarding whether seeing coverage of the explosion on April 5, 2010 occurred in the performance of duty. Appellant responded by June 22, 2010 statement, noting that his attending physician diagnosed post-traumatic stress disorder and prescribed anti-anxiety medications. He noted a history of inner ear disturbance with dizziness in 2008. Appellant submitted work diaries from 2009 mine inspections and a job description listing the duties of a coal mine inspector.

Appellant also submitted medical evidence. January 30, 2008 acute care reports describe the onset of dizziness possibly due to hypertension. April 5, 2010 vestibular testing was negative. In an April 10, 2010 report, Dr. Ronald Wilkinson, an attending Board-certified otolaryngologist, diagnosed vestibular neuritis. On May 10, 2010 Dr. Joseph Annibali, an attending Board-certified psychiatrist, diagnosed post-traumatic stress disorder due to the April 5, 2010 incident. In a May 28, 2010 report, Dr. Glenn Paul Carress, an attending licensed clinical psychologist, diagnosed post-traumatic stress disorder due to the April 5, 2010 incident. He found appellant totally disabled for work from April 8, 2010 onward.

By decision dated July 8, 2010, OWCP denied appellant's claim on the grounds that he failed to establish any compensable employment factors. It accepted the April 5, 2010 incident as factual but found that it did not occur in the performance of duty. Appellant did not submit evidence that he inspected the Upper Big Branch mine, that he was at or near the mine at the time of the explosion, or that he had close relatives at the mine. As appellant had no occupational or personal connection to Upper Big Branch, OWCP found that his reaction to the April 5, 2010 explosion was self-generated and noncompensable.

In a July 19, 2010 letter, appellant requested a telephonic hearing, held November 4, 2010. At the hearing, he noted that he worked as a mine inspector for four years and as a coal miner before that. Appellant had never been to the Upper Big Branch mine and had no assigned duties regarding the mine. On April 5, 2010 while sitting in his office filling out forms after returning from a mine inspection, he heard news of the explosion on television. Appellant became stressed and dizzy. The following day, he sought medical treatment and was diagnosed with hypertension. Appellant noted that one of his assigned duties as a coal mine

inspector was checking for gas buildup that can lead to mine explosions. He stated that he did not have any family members involved with the Upper Big Branch explosion.

Following the hearing, appellant submitted June 30 and August 25, 2010 reports from Dr. Carey McMonagle, an attending Board-certified internist, diagnosing post-traumatic stress disorder due to the April 5, 2010 incident. Dr. McMonagle found appellant permanently disabled from working in a mine. In an October 1, 2010 report, Dr. Neal L. Presant, a Board-certified family practitioner, opined that the post-traumatic stress disorder stemmed from the April 5, 2010 incident and permanently disabled appellant from working as a mine inspector.

In a January 21, 2010 decision, OWCP's hearing representative affirmed the July 8, 2010 decision.

### **LEGAL PRECEDENT**

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. 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. 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. 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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

### **ANALYSIS**

Appellant alleged that he sustained post-traumatic stress disorder as a result of an incident which OWCP found to be noncompensable. Therefore, the Board must review whether the alleged incident is a covered employment factor under FECA.

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<sup>2</sup> See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>3</sup> See *Norma L. Blank*, 43 ECAB 384 (1992).

<sup>4</sup> *Id.*

Appellant claimed that he sustained post-traumatic stress disorder on April 5, 2010 when he saw television news coverage of the Upper Big Branch mine explosion while he was on duty. He also heard coworkers discussing the explosion. However, appellant had no official duties connected to Upper Big Branch. At the hearing, he stated that he had never been to the mine and performed no work connected to the mine. As appellant did not establish that the Upper Big Branch mine explosion was in any way connected to his regularly or specially assigned duties, he did not establish a compensable employment factor under *Cutler*.<sup>5</sup> His reaction to the tragedy did not arise from his employment and is considered self-generated.<sup>6</sup>

The Board has found that an employee's physical presence at a disaster site while in the performance of duty can be a compensable employment factor. In *C.F.*,<sup>7</sup> the employee was on duty in a courthouse adjacent to the Murrah Federal Building in Oklahoma City at the time of the April 19, 1995 bombing. OWCP accepted the claim for an emotional condition resulting from being present at the explosion while in the performance of duty. In *Sedi L. Graham*,<sup>8</sup> the Board found it compensable that the employee witnessed the September 11, 2001 attack on the Pentagon while she was in the performance of duty. In *A.B.*,<sup>9</sup> the Board found a compensable employment factor where the employee witnessed a plane crashing into the World Trade Center while she was in the performance of duty on September 11, 2011. However, the present case is distinguishable from this line of cases as appellant was not physically present at or near the Upper Big Branch mine at the time of the April 5, 2010 explosion. Therefore, appellant did not establish a compensable employment factor in this regard.

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty as he failed to establish any compensable factors of employment. As appellant has not established any compensable work factors, the medical record need not be addressed.<sup>10</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.

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<sup>5</sup> *Lillian Cutler*, *supra* note 3.

<sup>6</sup> *See David S. Lee*, 56 ECAB 602 (2005) (where the Board held that the employee's perceptions that he was threatened, in the absence of evidence proving that he was in any danger, was a self-generated reaction not arising in the performance of duty); *Tina L. Elliot*, Docket No. 05-1191 (issued October 5, 2005) (where the Board held that the employee's fear of anthrax exposure, in the absence of any evidence she was exposed to anthrax in the performance of her postal duties, was self-generated and noncompensable).

<sup>7</sup> *C.F.*, Docket No. 06-1233 (issued November 6, 2006).

<sup>8</sup> 57 ECAB 494 (2006).

<sup>9</sup> *A.B.*, Docket No. 06-2107 (issued January 26, 2007). *Cf. Gisele Harris*, Docket No. 04-884 (issued January 6, 2005) (where the Board found that an employee witnessing the collapse of the World Trade Center while commuting home from work was not compensable as the employee was not in the performance of duty at the time of the incident).

<sup>10</sup> *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

On appeal, counsel contends that OWCP's January 21, 2011 decision is "contrary to fact and law." As stated, the April 5, 2010 incident did not occur in the performance of duty. As appellant did not establish any compensable factors of employment, OWCP properly denied his emotional condition claim.

**CONCLUSION**

The Board finds that appellant did not 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 January 21, 2011 is affirmed.

Issued: October 14, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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