United States Department of Labor
Employees' Compensation Appeals Board

T.F., Appellant	)	
and	)	**Docket No. 12-439**
	)	**Issued: August 20, 2012**
U.S. POSTAL SERVICE, POST OFFICE, St. Petersburg, FL, Employer	)	

Appearances:
Victor A. Walker, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 27, 2011 appellant, through his representative, filed a timely appeal from the November 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On February 27, 2011 appellant, a 58-year-old electronic technician, filed an occupational disease claim alleging that his stress, anxiety and depression were the result of his federal employment. He explained that he suffered an anxiety attack on February 13, 2001 due

[1] 5 U.S.C. § 8101 *et seq.*

to continuous harassment by a coworker. Appellant also explained that the employing establishment's refusal to stop the sexual harassment aggravated his illness. The most recent incident, he noted, happened on February 17, 2011.

Appellant stated that he was sitting at the workbench in the maintenance shop doing paperwork along with another employee, Mark. The coworker who had been harassing him for over 10 years entered the shop, walked toward appellant and stood directly behind him. When appellant turned his head to see what the coworker was doing, the coworker shuffled one step over so that he stood directly behind Mark. "At this point he begins to slap Mark on the back several times, saying 'Mark, you have dirt on your back.'" The coworker then left the room.

Appellant explained that those actions closely mimicked the coworker's behavior when he accosted appellant in the past. He further recounted that it was no secret that he was going fishing that week with the union steward and friends and the coworker's intentions "were clear as to send me a message similar to his past sexual harassment based on this situation." Appellant added that to his knowledge the coworker and Mark were not close friends and appellant saw no dirt on Mark's back. "How would Dwayne know Mark had dirt on him until he stood behind us?" Appellant felt threatened by the coworker's actions: "At the moment Dwayne … began slapping Mark … on the back, [he] looked directly at me with a smirk on his face. This is when I became convinced that this was a way of Dwayne showing me that he could just as easily have been doing this to me."

Appellant left work on February 17, 2011 at the end of his scheduled workday and did not return.

Appellant alleged three separate incidents of sexual harassment by this coworker over more than 10 years. He submitted documents relating to Equal Employment Opportunity (EEO) complaints dating to 2001 and 2003, documents relating to an investigative interview in 2001 and an undated statement in support of a grievance.[2]

More recently, appellant alleged that this coworker physically and verbally accosted him at work on May 18, 2010, when he made references to his sexuality "and put his hands on me." He alleged that on May 20, 2010 the coworker again put his hands on him at work, this time in the presence of another employee. Appellant informed management and told one of the maintenance managers that the coworker had sexually harassed him in February 2001 and was put on notice at that time.

Management offered appellant a change of schedule to avoid any contact with the coworker, but appellant saw the coworker again on May 25, 2010. The maintenance manager told appellant just to avoid him. Appellant saw the coworker again on June 9, 2010. The coworker asked appellant about a problem with a delivery bar code sorter: "I gave him a pass …

[2] The record indicates that in OWCP File No. xxxxxx315, appellant filed an emotional condition claim with an onset date of February 13, 2001. On October 9, 2002 the Branch of Hearings and Review affirmed OWCP's September 26, 2001 denial of the stress claim. The decisions found that appellant was not in the performance of duty.

and left the area." Appellant stated that this series of events clearly showed that managers did not take his complaint seriously and had done little or nothing to protect him as the law required.

A labor relations specialist and a customer service manager conducted interviews on the 2010 matter. One manager acknowledged a history of animus between appellant and the coworker in question. The coworker stated that he and appellant had difficulty working together since 1992. He felt appellant was excitable, paranoid and difficult to work with. The coworker explained that the expression "Broke Back Lake" referred to the weekend fishing trip that certain employees took; it was a running joke, just shop talk and did not refer to appellant personally. He admitted touching appellant, explaining that he did not try to avoid appellant and that appellant never asked him not to touch him. The coworker stated that the manager told him to try to avoid appellant and on May 21, 2010 the manager instructed him not to touch appellant. He explained that the current problem was due to his seeking the position of union steward, which appellant was trying to block. The coworker denied calling appellant a homosexual. He stated that appellant had approached him in the past to talk about his new car for 20 minutes or about his wife losing her job. The whole situation was appellant's attempt to gain disability retirement.

The union steward viewed the coworker as an intimidator and appellant as nonconfrontational, which made him the target of the coworker's actions because it upset appellant. He felt the coworker enjoyed manipulation and tried to intimidate others but did not realize that his behavior was malicious. Two other employees indicated that the problems between appellant and the coworker were ongoing with random spikes. Both felt that appellant was intimidated by the coworker's personality. One stated that he saw the coworker touch appellant by patting him on the back sometime in May 2010. Appellant was upset and stated: "I don't know why he's touching me, he's not to be touching me."

After the interviews, the labor relations specialist and customer service manager found that "a concern exists," that prior incidents between appellant and the coworker were not handled impartially and effectively and had escalated to the point where the employees required separation. They recommended that the matter be officially submitted to the plant manager "for immediate action as he deems appropriate under the Suncoast District's Zero Tolerance Policy."

In a May 31, 2011 decision, OWCP denied appellant's claim. It found that the evidence failed to establish a compensable factor of employment. OWCP found that the coworker entering his work area on February 17, 2011 was not a factor of employment and that the allegation that management failed to accommodate appellant was not established. As there were no compensable employment factors established, it did not address the medical evidence.

Appellant requested reconsideration. He submitted a copy of the employer's Zero Tolerance Policy on threats, assault and violence, as therein defined. Also, appellant resubmitted the investigative report by the labor relations specialist and customer service manager.

On November 16, 2011 OWCP reviewed the merits of appellant's case and denied modification of its prior decision. It found no compensable employment factors and therefore found the medical evidence irrelevant. OWCP explained that the "Broke Back Lake" conversations were imported from outside work. It was established that the coworker touched

appellant by putting his hands on appellant's back or shoulders in May 2010, but management warned him not to do it again, appellant's schedule was changed and management advised both to stay away from each other. OWCP found no evidence that management acted erroneously. It further found that, while the evidence gave the impression that appellant was not on friendly terms with the coworker, there was no evidence of a hostile work environment. The evidence did not establish harassment. Therefore, any emotional reaction to the incidents that occurred was considered self-generated and not in the performance of duty.

On appeal, appellant's representative argues that the evidence shows harassment took place. He notes, indeed, that the employing establishment acknowledged it. The investigation indicated that a concern existed, that prior incidents were not handled properly and that action should be taken under the district's Zero Tolerance Policy.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.[3] When an employee experiences emotional stress in carrying out his employment duties or has fear and anxiety regarding his ability to carry out his duties and the medical evidence establishes that the disability resulted from his 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 emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of his 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 or frustration from not being permitted to work in a particular environment or to hold a particular position.[4]

Workers' compensation does not cover each and every injury or illness that is somehow related to employment.[5] An employee's emotional reaction to an administrative or personnel matter is generally not covered. Nonetheless, the Board has held that error or abuse by the employing establishment in an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in an administrative or personnel matter, may afford coverage.[6]

As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[7] Mere perceptions and feelings of harassment or discrimination

[3] 5 U.S.C. § 8102(a).

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

[5] *Id.*

[6] *Thomas D. McEuen*, 42 ECAB 566 (1991).

[7] *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).

will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[8] The primary reason for requiring factual evidence from the claimant in support of his 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.[9]

ANALYSIS

Appellant attributes his emotional condition primarily to three instances of alleged harassment by a coworker: the first in 2001, the second in 2010 and the third in 2011. The record indicates that appellant filed a compensation claim for the first, the denial of which OWCP's Branch of Hearings and Review affirmed in 2002. The Board has no jurisdiction to review that case.[10]

The second instance occurred on May 18, 2010, when the coworker made references to appellant's sexuality "and put his hands on me." Appellant alleged that on May 20, 2010 the coworker again put his hands on him at work, this time in the presence of another employee. The evidence does not establish that the coworker verbally accosted appellant or made references to his sexuality. It does, however, establish that the coworker patted appellant on the back in May 2010. The coworker admitted touching appellant and another employee witnessed him patting appellant on the back sometime in May 2010.

The Board has held that physical contact is a compensable factor of employment.[11] In this case, the evidence corroborates that the coworker patted appellant on the back. The Board therefore finds that appellant has established a compensable factor of employment. The Board does not find that this one instance of physical contact rose to the level of harassment, only that the evidence is sufficient to substantiate both that physical contact occurred sometime in May 2010 and the nature of that contact.

The third instance of alleged harassment occurred on February 17, 2011, when the coworker entered the maintenance shop, stood directly behind appellant, then stepped over

[8] *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).

[9] *Paul Trotman-Hall*, 45 ECAB 229 (1993) (Groom, M., concurring).

[10] For final adverse decisions of OWCP issued prior to November 19, 2008 a claimant had up to one year to file a Board appeal. *See* 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP issued on and after November 19, 2008 a claimant has 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e).

[11] *Ruth Borden*, 43 ECAB 146 (1991) (claimant failed to submit evidence or witness statements to support her claims that she was involved in physical altercations with two different supervisors); *Alton L. White*, 42 ECAB 666 (1991) (physical contact by supervisor may support a claim for an emotional condition if substantiated by factual evidence of record and medical evidence establishes that the condition was thereby caused or aggravated); *Constance G. Patterson*, 41 ECAB 206 (1989) (finding that claimant sustained an injury in the performance of duty when she was poked by a coworker).

behind another employee and slapped that employee's back several times while stating, "Mark, you have dirt on your back." The evidence does not corroborate that this incident occurred as alleged, nor does the evidence support appellant's assertion that the coworker accosted him or was "sending a message." That remains a matter of appellant's perception, and any emotional injury he might have sustained as a result of that perception must be considered self-generated and not compensable under FECA.

Appellant also alleges that the employing establishment's refusal to stop the sexual harassment aggravated his illness. He has not established sexual harassment -- the allegation is one of error by management in the handling of matter. The record indicates that management took actions in response to appellant's complaints. It attempted to accommodate him by instructing the coworker on May 21, 2010 not to touch appellant. There is no evidence that he did thereafter. Management told the coworker to try to avoid appellant. It offered appellant the opportunity to change his schedule so as to avoid further contact with the coworker. The fact that avoidance was not absolute, that circumstances later allowed appellant to see the coworker twice, is not evidence of error or unreasonable conduct by management.

Appellant emphasizes the investigative report by the labor relations specialist and customer service manager. To the extent that the referenced "concern" and handling of the matter predated the May 2010 allegations and separation, it has no bearing on appellant's current claim for compensation. Moreover, the report's recommendation that the matter officially be submitted to the plant manager "for immediate action as he deems appropriate under the Suncoast District's Zero Tolerance Policy" is not a finding of harassment. It is simply a recommendation that the plant manager consider what action might be deemed appropriate under the policy. It is not for OWCP or the Board to prejudge. The plant manager may decide that no action is warranted. Should appellant obtain a formal final decision that the coworker's actions toward him did, in fact, violate the district's zero tolerance policy on threats, assault and violence, such evidence would be probative in his claim for compensation benefits. In the absence of such a decision, the evidence as it currently stands is insufficient to discharge appellant's burden of proof to substantiate his allegations of harassment by the coworker and error by management.

The only compensable employment factor that appellant has established is that the coworker patted him on the back sometime in May 2010. The question for determination, therefore, is whether this incident of physical contact caused or aggravated appellant's diagnosed emotional condition. As this is a medical question, and as OWCP has not yet reviewed the medical opinion evidence on the issue of causal relationship, the Board will set aside OWCP's November 16, 2011 decision and remand the case for further action. After such further development as may become necessary, OWCP shall issue a *de novo* final decision on appellant's claim for compensation.

CONCLUSION

The Board finds that this case is not in posture for decision. Further action is warranted.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: August 20, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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