

FACTUAL HISTORY

On July 12, 2010 appellant, then a 41-year-old housekeeping aid leader, filed an occupational disease claim for stress due to harassment by his supervisor and other managers for the past three years. He alleged that the harassment became progressively worse.

In an August 30, 2010 statement, appellant further discussed the incidents and conditions at work which he believed caused or contributed to his emotional condition. He alleged his supervisor, Larry Clayton, communicated with belligerent tirades laced with profanity to intimidate him and that both Mr. Clayton and his direct supervisor criticized appellant's decisions and performance. Appellant was required to work every holiday, the employing establishment did not implement his plan to assist with completion of tasks and he was made a scapegoat for deficiencies which were the responsibility of other employees. He asserted that management was dedicated to terminating him, that he was not allowed to communicate with Mr. Clayton in writing and that his lead supervisory responsibilities were removed. Appellant claimed that in January 2009 his duties were unfairly increased and he was required to work alone while others worked in groups. On one occasion, he was required to complete his duties in the dark when the power went out. Appellant claimed that his supervisor looked for reasons to reprimand him, that he was required to attend morning meetings with the supervisor, and that he did not receive an "outstanding" performance rating. He alleged that his new supervisor, Mr. McDonald, became increasingly hostile, that he was improperly removed from participating in decisions regarding the third shift and that meetings were scheduled on his days off.

Appellant claimed that staff members were instructed not to take his advice or else they would be written up, that various work-related forms necessary to perform his duties were removed which resulted in him searching for these forms on a daily basis, and that he was held responsible for issues that arose on the supervisor's day off but had no authority to take corrective action. He asserted that, because no light duty was available on the third shift, he was improperly moved to the day shift where he was asked to create run sheets. Upon returning to the night shift appellant was expected to assist in implementation of the new run sheets and he was moved to another building where no one was working the night shift. He alleged that he was improperly held accountable for occurrences in both buildings, but that he was only allotted four hours of assistance each week to complete his tasks. Appellant alleged that he was required to collect keys and pagers from other coworkers which required him to wait 40 minutes each day without being compensated. He asserted that leave was unfairly denied and that he was improperly required to work weekends and holidays. Appellant claimed that he was wrongly directed to disclose a conversation with another employee which occurred in his capacity as a union representative. He was unfairly issued a proposed removal regarding the union matter and Mr. Clayton was hostile and uncooperative about his actions related to this matter. Appellant also submitted a July 16, 2010 response from the union to a proposed removal of appellant, a list of leave approved or denied and several medical reports.

In a September 13, 2010 decision, OWCP denied appellant's emotional condition claim finding that he did not establish any compensable work factors. It determined that many of appellant's allegations related to administrative matters and that the evidence did not establish error or abuse by his supervisors.

Following this denial, OWCP received additional factual evidence including e-mail communications which concerned such matters as appellant's work duties, allegations of unsafe working conditions, counseling statements from supervisors to appellant and other matters mentioned by appellant in his statement.

In a September 16, 2010 decision, OWCP reissued its denial of the claim and discussed the additional information submitted for consideration. It concluded that appellant had not submitted sufficient information to support his emotional condition was due to compensable work factors.

Appellant disagreed with OWCP's decision and requested a hearing before an OWCP hearing representative. In a December 27, 2010 decision, an OWCP hearing representative found that OWCP had not submitted appellant's statement to the employing establishment for review or comment before making a finding of fact on the information received. The file was remanded for further development.

OWCP submitted appellant's statement to the employing establishment for review and comment. The employing establishment responded on February 9, 2011 discussing its leave policy and reasons for denial of appellant's leave. OWCP also received an e-mail dated February 1, 2011 from Mr. Clayton who noted that he was never belligerent or profane in communicating with his staff. He rarely saw appellant who worked the third shift and was off work before he arrived at work. Mr. Clayton noted that appellant did work alone and in areas where the lights were off, but indicated that there was a light switch located in the corridors he had access to. He advised that appellant did good work and if there was a deficiency it would have been addressed by the supervisor. Mr. Clayton stated that appellant was only required to attend morning meetings a handful of times in four years when he was filling in for the supervisor. He noted that, when the employing establishment reorganized, appellant volunteered to stay on the third shift electing to perform the duties of this shift. Mr. Clayton denied that appellant was required to work without getting paid.

In a February 18, 2011 decision, OWCP again denied appellant's claim finding that he had not submitted sufficient evidence to support his emotional condition was due to compensable work factors.

Appellant disagreed with this decision and requested an oral hearing with an OWCP hearing representative. His attorney requested that four managers and three coworkers as well as various documents be subpoenaed, but this request was denied by the hearing representative. Appellant was represented by his attorney during a telephone hearing held on July 6, 2011. He stated that Mr. Clayton was the chief of Emergency Management Services, clarifying that he was his supervisor's supervisor. Appellant alleged that Mr. Clayton used profanity during meetings in the early 2007 which he found offensive. He alleged that Mr. Clayton was disrespectful and rude. Appellant stated that he thought if he could provide a service for Mr. Clayton their relationship would improve, so he did some yard work on his property on August 28, 2009. He alleged that Mr. Clayton felt that the amount he charged for this off-duty work was too high, and following this, he began to ignore appellant's work-related requests and would not speak to him. Appellant discussed other allegations which he believed caused or contributed to his condition, noting he was required to work in buildings that did not have the heat/air conditioning running

during his night shift and alleged he was required to stay after the end of his tour uncompensated for staff meetings beginning in July 2009 and continuing for several months.

In a September 21, 2011 decision, an OWCP hearing representative affirmed OWCP's February 18, 2011 decision finding that appellant had not established any compensable work factors.²

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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.³ 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.⁴

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.⁵ 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.⁶ 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.⁷

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.⁸ However, for harassment or discrimination to give rise to a compensable disability under FECA,

² The hearing representative denied appellant's request to subpoena witnesses as the need for the subpoena was not adequately explained.

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

⁴ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁵ *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

⁶ *William H. Fortner*, 49 ECAB 324 (1998).

⁷ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁸ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under FECA.⁹

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.¹⁰ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected a condition for which compensation is claimed and a rationalized medical opinion relating the claimed condition to compensable employment factors.¹¹

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.¹² 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.¹³

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. OWCP denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA. The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Cutler*.¹⁴ Rather, he has alleged error and abuse in administrative matters and harassment and discrimination on the part of his managers and coworkers.

The majority of appellant's allegations fall into the category of administrative or personnel actions. These include being removed from the lead supervisor responsibility, his proposed removal, his disagreement with his performance evaluation, being required to return keys and forms to a central location, a change in his work location and days off, working holidays, denial of leave, assignment of management responsibilities, turning the heat/air

⁹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁰ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

¹¹ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

¹² *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹³ *Id.*

¹⁴ *See Cutler*, *supra* note 3.

conditioning off during the third shift which he worked, and a change in the equipment he was allowed to use to perform his work duties.¹⁵

While appellant alleged that the above actions caused or contributed to his emotional condition, he has submitted no evidence to substantiate that they occurred and, even if they were established as occurring as alleged, that the employing establishment was in error or abusive in these actions. The mere fact that appellant disagrees with an administrative action of the employing establishment does not establish error or abuse. Appellant's allegations were mostly very general in nature with no specific details of when or where these events allegedly occurred. He provided no supporting evidence, such as witness statements, to establish that his supervisors erred or were abusive with respect to these incidents. Therefore, the Board finds that appellant has not established compensable work factors with respect to these administrative issues.

Appellant also discussed his disagreement with numerous actions of his supervisor. He opined that the supervisor inappropriately criticized his decisions and performance, did not implement his suggestions, held him responsible for other employees mistakes, did not allow him to communicate in writing, required him to work alone, required him to work in the dark, did not allow him to participate in the decision making process, instructed other staff members not to take his advise and changed his work duties. Many of these allegations were general in nature and no probative evidence was submitted supporting that they occurred as alleged. The employing establishment provided a statement from appellant's manager which disputed the allegations and provided reasonable explanation for several of the actions which appellant disliked. Therefore, appellant has not established compensable work factors with respect to these administrative matters.

Appellant alleged that he was required to attend morning staff meetings at the end of his shift which resulted in him working without pay. He made general allegations that his work load increased, that he had to stay after his work shift ended to collect other coworkers' keys and pagers and that he was required to disclose a private conversation in his capacity as a union representative. Appellant has not submitted any probative factual evidence to support any of these allegations. His supervisor acknowledged that on occasion appellant stayed for management meetings while he was acting supervisor, but there has been no evidence submitted to support that appellant was not paid for the meetings or the employing establishment erred or was abusive in requiring him to attend. As such, these administrative matters also are not established as compensable factors of employment.

Appellant alleged that he was harassed by several supervisors and managers at the employing establishment. He alleged that one manager was belligerent and profane during meetings, that he was critical of his work and that he looked for reasons to remove him from

¹⁵ See, e.g., *T.G.*, 58 ECAB 189 (2006) (complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by FECA; the handling of evaluations and leave requests are administrative functions of the employer); *D.L.*, 58 ECAB 217 (2006) (allegations involving work assignments, transfer requests and demotions involve administrative matters that generally do not fall within coverage of FECA); *V.W.*, 58 ECAB 428 (2007) (the handling of disciplinary actions and the monitoring of work activities are administrative functions of the employer and not duties of the employee).

employment. Appellant claimed that this manager was hostile, disrespectful and rude towards him. He provided very few details of these allegations and no probative evidence to substantiate that the allegations occurred as alleged. The employing establishment and the supervisors have disputed these allegations. Therefore, the Board finds that appellant has not submitted sufficient probative evidence to support these general allegations regarding the claimed harassment.

For the foregoing reasons, appellant has not established any compensable employment factors under FECA and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹⁶

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 meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

¹⁶ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992). The Board finds that OWCP's hearing representative properly denied appellant's request to subpoena witnesses. Under the applicable regulations at 20 C.F.R. § 10.619, a subpoena may be issued for the attendance and testimony of witnesses, and for the production of relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts. A person requesting a subpoena must submit the request in writing no later than 60 days after the date of the original hearing request and explain why the testimony or evidence is directly relevant to the issues at hand, and a subpoena is the best method or opportunity to obtain such evidence because there are no other means by which the documents or testimony could have been obtained. The hearing representative properly denied this request as counsel did not explain why a subpoena was the best method or opportunity to obtain such evidence because there was no other means by which the testimony could be obtained.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 7, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board