United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 12-1300**
	)	**Issued: December 7, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 30, 2012 appellant, through his attorney, filed a timely appeal from a March 19, 2012 Office of Workers' Compensation Programs' (OWCP) merit decision denying his emotional condition claim. 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 established that he sustained an emotional condition on June 30, 2010 while in the performance of duty.

On appeal, counsel contends that the evidence of record establishes that appellant's emotional condition was caused by compensable factors of his federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 14, 2010 appellant, a 33-year-old letter carrier, filed a traumatic injury claim Form CA-1 alleging that on June 30, 2010 he sustained chest pains, severe headaches, stiffness, sore body and stomach trouble as a result of a dispute with management. He stopped work that day.

The employing establishment submitted a time and attendance sheet recording that appellant arrived at work on June 29, 2010 at 8:18 a.m. The entry was marked as nonscheduled begin tour.

In a June 30, 2010 incident report, Silvia Glover, appellant's manager, stated that at 8:25 a.m. Pam Elkins, a supervisor, informed appellant that he came in late the previous day and made up the time at the end of his tour, which was not allowed. Appellant became very upset and started yelling, stating that he completed a change of schedule due to his father's illness. Ms. Glover reminded him that he could not come in anytime he felt like. If appellant had requested a change of tour to arrive at 8:30 a.m. that had to be done daily until the change of schedule expired. He could not come to work at 8:18 a.m. and think the change of schedule covered his tardiness. Appellant's scheduled begin time was 8:00 a.m. He became very agitated and started breathing heavily. Appellant asked to be alone, noted that he had anxiety attacks when he became upset and needed to calm down.

In a July 14, 2010 witness statement, Ms. Elkins indicated that on June 30, 2010 she had approached appellant regarding his begin tour. Appellant had a change of schedule on file for 8:30 a.m. to begin his tour of duty. He arrived at 8:18 a.m. on June 29, 2010. Ms. Elkins explained to begin his tour either at 8:00 a.m. or at 8:30 a.m. Appellant became agitated and Ms. Glover told him to go into her office. Ms. Elkins stated that Ms. Glover did not raise her voice to appellant and he asked to be left alone to calm down. When she went to check on appellant, he was having trouble breathing so she called 9-1-1. Appellant stated that he was having chest pains when the ambulance took him to the hospital.

In a July 28, 2010 letter, the employing establishment controverted appellant's claim.

By letter dated July 30, 2010, OWCP requested additional evidence from appellant in support of his claim and allotted 30 days for submission.

Appellant submitted an August 30, 2010 report by Barry Silverman, a social worker, who indicated that appellant had experienced symptoms of severe anxiety, depression and agitation as a result of a series of encounters with Ms. Glover at work. Ms. Glover reportedly verbally abused and bullied him. Mr. Silverman diagnosed post-traumatic stress disorder (PTSD) and opined that appellant was unable to return to work.

In a July 8, 2010 report, Dr. Alan B. Perel, a Board-certified neurologist, stated that on June 30, 2010 appellant had a verbal argument with his supervisor and then noted chest pain. Appellant had clinical evidence of lightheadedness, headaches and neck pain, which might be indicative of a cervical radiculopathy. On July 14, 2010 Dr. Perel found evidence of a mild left facial weakness with a left hemisensory loss and patchy decreased sensation in the right arm.

By decision dated August 30, 2010, OWCP denied appellant's claim finding that the evidence was not sufficient to establish a compensable factor of employment.

On September 24, 2010 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative. In a February 3, 2011 report, Mr. Silverman reiterated his diagnosis and opinion.

At a February 14, 2011 oral hearing appellant testified that his father had a heart attack. Instead of taking family medical leave or staying at home, he went to work. Appellant previously had a different manager with whom he had an "agreement" that appellant could be late to work. He testified that there was a written change of schedule that sometimes he would come in late or come in at 8:30 a.m. On those days, appellant would call his supervisor to notify that he was going to be late. It would be put in as a change of schedule and he would stay later to make up the time. Appellant reported that there was no discipline for being late until June 30, 2010. He could have put in for family medical leave for the 15 minutes he was late, but no one said anything until the next day.

In a March 8, 2011 statement, Ms. Elkins noted that appellant was informed that a change of schedule was not to be used to cover tardiness.

In an undated statement, Ms. Glover noted that she had not received a telephone call from appellant and Ms. Elkins did not recall receiving a telephone call from him that day. She was not otherwise aware that he had arrived late prior to his arrival at the station at 8:18 a.m. Ms. Glover initially placed appellant on leave under the Family and Medical Leave Act (FMLA) but he did not complete the forms sent to him and it was denied. She noted that the previous manager condoned his tardiness but after he retired she became the new manager and stopped the practice. Ms. Glover indicated that appellant and all other employees were informed of the time requirements. Appellant attempted to make-up his time at the end of his tour on a previous day but she informed him of the requirement to be regular in his attendance.

In a March 18, 2011 report, Dr. Joel Breving, a psychiatrist, noted that he had treated appellant since October 2010. He diagnosed panic disorder without agoraphobia and stated that his diagnosis was believed to be work related.

By decision dated April 27, 2011, OWCP's hearing representative affirmed the August 30, 2010 decision finding that the evidence submitted did not establish any compensable factors of employment.

On December 30, 2011 appellant, through counsel, requested reconsideration and submitted a November 21, 2011 report by Dr. Breving, who indicated that he first saw appellant on October 27, 2010 when he was experiencing severe symptomatology of anxiety and panic attacks that occurred after an incident at work with a supervisor. He diagnosed panic disorder with agoraphobia, ruling out PTSD. Dr. Breving opined that appellant was unable to work and was fully disabled.

In statements dated February 8, 2012, Ms. Elkins and Ms. Glover indicated that appellant came to work late several times due to visiting his father and was given 30 days to make other arrangements. After 30 days had passed, appellant was required to report to work as scheduled.

By decision dated March 19, 2012, OWCP denied modification of its April 27, 2011 decision.

LEGAL PRECEDENT

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] The phrase while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of arising out of and in the course of employment.

In *Lillian Cutler*,[3] the Board noted that workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are situations when an injury or illness has some connection with the employment but nonetheless does not come within the coverage of workers' compensation as they are found not to have arisen out of the employment. When an employee experiences emotional stress in carrying out her employment duties or has fear and anxiety regarding her ability to carry out her duties, and the medical evidence establishes that the disability resulted from her 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 her emotional reaction to her day-to-day duties. The same result is reached when the emotional disability resulted from the employee's emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of the work.[4]

In contrast, a disabling condition resulting from an employee's feelings of job insecurity are not sufficient to constitute a personal 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, unhappiness with doing inside work, desire for a different job, brooding over the failure to be given work she desires, or the employee's frustration in not being permitted to work in a particular environment or to hold a particular position.[5] Board case precedent demonstrates that the only requirements of employment which will bring a claim within the scope of coverage under FECA are those that relate to the duties the employee is hired to perform.[6]

[2] *See id*. at § 8102(a).

[3] 28 ECAB 125 (1976).

[4] *Id.* at 130.

[5] *See Lillian Cutler*, *supra* note 3.

[6] *See Anthony A. Zarcone*, 44 ECAB 751 (1993).

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 work 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 compensable factors of employment and may not be considered.[7] If a claimant does implicate a factor of employment, OWCP should then consider whether the evidence of record substantiates that factor. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim, the claim must be supported by probative evidence.[8] Where the matter asserted is a compensable factor of employment and the evidence of record established the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.[9]

ANALYSIS

Appellant has not attributed his emotional condition is related to his regular duties as a letter carrier under *Cutler*. His allegations do not relate to such potential compensable factors as overwork or any claim of his inability to perform the duties required in his position.[10] Rather, appellant attributed his emotional reaction to actions taken by his supervisors on June 30, 2010, including a disciplinary discussion regarding his tardiness to work. The Board must review whether the alleged incidents and conditions of employment are compensable factors of employment under the terms of FECA.

For harassment to give rise to compensability under FECA, there must be evidence that harassment did, in fact, occur. Mere perceptions of harassment are not compensable under FECA.[11] In the present case, OWCP found that appellant was not subjected to any harassment and did not submit any evidence substantiating his allegations.

There is no evidence to substantiate any derogatory remark by Ms. Elkins or Ms. Glover to appellant upon his arrival at work on June 30, 2010 or during the discussions pertaining to his tardiness on June 29, 2010. There is no evidence of record from any witness to substantiate

[7] *See Dennis J. Balogh*, 52 ECAB 232 (2001).

[8] *See Charles E. McAndrews*, 55 ECAB 711 (2004).

[9] *See Jeral R. Gray*, 57 ECAB 611 (2006).

[10] *See Reco Roncaglione*, 52 ECAB 454 (2001) (disagreement with the associate warden held not compensable, whether viewed as a disagreement with supervisory instructions or as perceived poor management); *Robert Knoke*, 51 ECAB 319 (2000) (where the employee attributed his emotional injury to the manner in which his supervisor spoke to him about undelivered mail, the Board found that a reaction to the instruction itself was not compensable, as work assignments given by supervisors in the exercise of supervisory discretion are actions taken in an administrative capacity and, as such, are outside the coverage of FECA); *Frank A. Catapano*, 46 ECAB 297 (1994) (supervisory instructions, with which the employee disagreed, held not compensable in the absence of evidence of managerial error or abuse); *Rudy Madril*, 45 ECAB 602 (1994) (where the employee questioned his supervisor's instructions to move from belt number five to belt number six and unload mail and became upset because he felt he was being pushed and picked on, the Board found that the incident was not a compensable factor of employment).

[11] *See Michael Thomas Plante*, 44 ECAB 510 (1993); *William P. George*, 43 ECAB 1159 (1992).

appellant's allegation that he was harassed by Ms. Glover or Ms. Elkins. Rather, the evidence of record establishes that, following his late arrival at work, he was allowed to stay in Ms. Glover's office alone to calm down. There is no evidence from appellant in support of his allegations that he was harassed by his supervisors on June 30, 2010.

Appellant's allegations pertaining to the morning of June 30, 2010 relate to administrative and personnel matters of the employing establishment involving a disciplinary discussion held concerning his late arrivals to work. Generally, an employee's emotional reaction to administrative or personnel matters is not covered under FECA. However, when the evidence of record demonstrates that the employing establishment erred or acted unreasonably in a personnel matter, coverage may be afforded.[12] The Board finds that the evidence of record does not establish that Ms. Glover or Ms. Elkins acted unreasonably or erred in the administrative and personnel matters they raised with appellant in counseling him with regards to his tardiness.[13] Therefore, appellant's allegations do not constitute compensable factors of employment.

The evidence of record does not establish appellant's allegations of harassment or that the June 30, 2010 incident to which he attributes his emotional condition arose from the performance of his regular or specially assigned work duties. Rather appellant's emotional reaction to the personnel and administrative matters can be described as self-generated and not arising in the performance of duty but due to his personal frustration in not being permitted to work in a particular work environment. Thus, he has not met his burden of proof to establish a claim.[14]

On appeal, counsel contends that the evidence of record establish that appellant's emotional conditions were caused by compensable factors of his federal employment and that OWCP failed to develop the evidence to see that justice was done. For the reasons stated above, the Board finds counsel arguments are not substantiated.

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 not established that he sustained an emotional condition on June 30, 2010 while in the performance of duty.

[12] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Norman A. Harris*, 42 ECAB 923 (1991).

[13] *See Kathi A. Scarnato*, 43 ECAB 220 (1991) (the Board noted that the employing establishment retains the right to preserve an environment in which the performance of work is an essential goal). *See also Anthony A. Zarcone*, *supra* note 6; *Drew A. Weissmuller*, 43 ECAB 745 (1992).

[14] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 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