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

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| **F.V., Appellant** | ) | |
| **and** | ) | **Docket No. 11-599** |
| | ) | **Issued: February 24, 2012** |
| **U.S. POSTAL SERVICE, CROSSROADS POST OFFICE, Seattle, WA, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

# DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

## *JURISDICTION*

On January 10, 2011 appellant filed a timely appeal from a July 26, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) that denied his emotional condition claim and a November 29, 2010 decision that denied his request for a hearing. 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.

## *ISSUES*

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition causally related to factors of his federal employment; and (2) whether OWCP properly denied his request for a review of the written record.

[1] 5 U.S.C. § 8101 *et seq.*

## *FACTUAL HISTORY*

On June 2, 2010 appellant, then a 45-year-old letter carrier, filed a traumatic injury claim alleging that he was constantly harassed at work and not given training on new routes which caused emotional stress and a panic anxiety disorder.[2] Harleynda Wilcox, customer service manager, advised that the employer controverted the claim. She noted that appellant contended that days missed at work were related to stress and she advised him to file a claim. Ms. Wilcox related that his allegations since November 2009 were not consistent with when he was at work. Further, appellant did not submit medical evidence supporting work-related disability due to stress at the time of prior leave usage and several reports addressed other medical conditions than that claimed. Ms. Wilcox forwarded medical reports and time and attendance records. Appellant also submitted a claim for compensation for the period June 10 to 14, 2010.

In a July 15, 2010 statement, appellant attributed his emotional condition to breach of contract, constant harassment at work and the general fear of being fired. He noted that, prior to an Equal Employment Opportunity (EEO) complaint, he worked as a T6, which meant different routes everyday and identified five routes on which he worked. Appellant asserted that Hortencia Beltran, a manager, repeatedly pestered, degraded, stared at and inappropriately counseled him about his commitment to work and treated him in a condescending manner.[3] On March 29, 2010 his first day on route 757, appellant told Ms. Beltran that he had to return to the employing establishment by 4:00 p.m. in order to pick up his son from daycare. Ms. Beltran allegedly told him "I do n[o]t care," which upset him. On June 5, 2010 appellant's first day on route 738, she told him that the route would take only eight hours to sort, case and deliver. Ms. Beltran repeated this on June 7 and 8, 2010 and, on June 9, 2010 appellant alleged that she singled him out. At about 7:44 a.m. on July 7, 2010, appellant told her that he had a physician's appointment but she told him to deliver the mail, no excuses. He called another supervisor at 2:50 p.m. and asked for 30 minutes help but the supervisor argued with him. Appellant continued to deliver the mail and about 10 minutes later, a third supervisor showed up and harassed him. On July 8, 2010 he, Mr. Pak, a new manager, and Jim Henderson, a union steward, had a discussion at work. Appellant believed that Mr. Henderson would file a grievance on his behalf but that was not the case. Rather, Mr. Henderson convinced appellant to try to work things out. Appellant contended that management was in breach of a settlement agreement, that he was harassed because he did not hold a college degree and was spoken to in a very degrading manner. He noted that he was fearful of being fired and had consulted an employee assistance program counselor.

In a disability slip dated November 11, 2009, Dr. Philip N. Buenvenida, a family practitioner, advised that appellant was seen that day and was unable to work from November 7

[2] Appellant initially identified the date of injury as November 7, 2009, but noted that he was harassed at work more than just one day. It is well established that a claim need not be filed on any particular form and letters and statements in amplification and expansion of a claim are as much a part of a claim as the claim form itself. *Jeral R. Gray*, 57 ECAB 611 (2006). Appellant attributed his emotional condition to incidents over a period of time longer than one workday or shift and the Board will adjudicate the claim as one of occupational disease. 20 C.F.R. § 10.5(q).

[3] Appellant listed seven witnesses to the "constant bombardment of harassment" by Ms. Beltran.

to 12, 2009 due to a headache and hypertension. In a January 6, 2010 disability slip, he advised that appellant could not work from January 2 to 9, 2010 due to back pain, hypertension and migraine headaches. From March 30 to April 30, 2010 Dr. Buenvenida advised that appellant could not work from March 29 to May 10, 2010 due to a stress disorder, anxiety, back pain and hypertension. In a May 25, 2010 report, he diagnosed a stress disorder, panic and anxiety and checked a form box "yes," noting that the treated condition was employment related. Dr. Buenvenida first saw appellant on March 30, 2010 and listed that he was totally disabled to May 10, 2010.

Appellant submitted an undated settlement agreement between Ms. Beltran and himself. It stated that the parties agreed that mutual respect, encouragement, consideration and communication were necessary and both parties would work on these issues; that there was a learning period of up to 60 days on a new route; and that management agreed to assist in obtaining OWCP forms. In an unsigned statement, appellant noted a telephone conversation with Ms. Beltran and maintained that she harassed him after the settlement agreement was entered and did not intend to honor it.

In a statement dated November 6, 2009, Mike Bruggeman, a coworker, advised that one day appellant walked by his case and stopped to say hello. Ms. Beltran came by and told him to keep moving. Appellant started moving and she walked beside him talking but Mr. Bruggeman could not hear what was said. In a statement describing an April 6 incident, Mr. Henderson was casing mail on a particular route when he heard loud voices which he recognized as those of appellant and Ms. Wilcox, a employing establishment manager. He went to investigate and saw appellant with Ms. Wilcox and Ms. Beltran. Mr. Henderson was told to return to his case.

By decision dated July 26, 2010, OWCP denied appellant's claim finding that he failed to establish a compensable factor of employment.

On October 1, 2010 appellant requested a review of the written record and submitted additional evidence.

By decision dated November 29, 2010, OWCP denied appellant's request for a review of the written record on the grounds that it was untimely filed.

## ***LEGAL PRECEDENT -- ISSUE 1***

To establish his claim that he sustained a stress-related condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his stress-related condition.[4] If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.[5] When

[4] *Leslie C. Moore*, 52 ECAB 132 (2000).

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

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.[6]

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*,[7] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.[8] 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.[9] Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[10] Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[11] Perceptions alone are insufficient to establish an employment-related emotional condition.[12]

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.[13] 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.[14]

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis

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[6] *Id.*

[7] 28 ECAB 125 (1976).

[8] *See Robert W. Johns*, 51 ECAB 137 (1999).

[9] *Lillian Cutler, supra* note 7.

[10] *J.F.*, 59 ECAB 331 (2008).

[11] *M.D.*, 59 ECAB 211 (2007).

[12] *Roger Williams*, 52 ECAB 468 (2001).

[13] *Charles D. Edwards*, 55 ECAB 258 (2004). *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[14] *Kim Nguyen*, 53 ECAB 127 (2001).

for his or her allegations that the harassment occurred with probative and reliable evidence.[15] With regard to emotional claims arising under FECA, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other agencies, such as the Equal Employment Opportunity Commission, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under FECA, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or workers. Mere perceptions and feelings of harassment will not support an award of compensation.[16]

## ***ANALYSIS -- ISSUE 1***

Appellant did not attribute his emotional condition to the performance of his regular or specially assigned duties as a letter carrier under *Cutler*. Rather, his allegations pertain to error or abuse in administrative matters by management officials and to constant harassment at work. Appellant provided some detail in a July 15, 2010 statement alleging breach of contract, together with pestering, degrading conduct and arguments over his commitment to work. Many of his allegations were very general in nature and he failed to specify the parties involved, dates of purported incidents or the topic of what was discussed.

With regard to the postal route incident of March 29, 2010, appellant stated that Ms. Beltran did not approve his commitment time for returning to the employing establishment at 4:00 p.m. in order that he could pick up his son at daycare. He noted that she related that she "did n[o]t care" if his son was in daycare, which made him upset. The Board has recognized the compensability of verbal abuse in the workplace under certain circumstances and will review the evidence of record to determine whether such allegations are substantiated by reliable and probative evidence.[17] This does not imply, however, that every statement uttered in the workplace will give rise to compensability under FECA.[18] In this case, neither Mr. Bruggeman nor Mr. Henderson was witness to the remark. Appellant identified a third coworker as a person who overheard the comment, but did not submit any statement from that individual. The brief statement of Mr. Bruggeman pertains to November 6, 2009, when appellant was asked by Ms. Beltran to keep moving; but Mr. Bruggeman noted that he could not hear what was said between appellant and the manager. Mr. Henderson addressed April 6, 2010, when he heard loud voices that he recognized as those of appellant and Ms. Wilcox. He went to investigate but was told to return to work. Mr. Henderson provided no further detail. Neither of these statements is sufficient to show a persistent disturbance, torment nor persecution, *i.e.*, mistreatment by Ms. Beltran nor other managers at work.[19] While the manner or tone of Ms. Beltran may have engendered offensive feelings that she "did n[o]t care," the Board finds

[15] *James E. Norris*, 52 ECAB 93 (2000).

[16] *Beverly R. Jones*, 55 ECAB 411 (2004).

[17] *J.F.*, 59 ECAB 331 (2008).

[18] *T.G.,* 58 ECAB 189 (2006). The Board held that being spoken to in a raised or harsh voice does not of itself establish verbal abuse.

[19] *Beverly R. Jones, supra* note 16.

that record does not establish verbal abuse or harassment.[20] The statements currently of record do not provide any substantiation for appellant's allegations of error or abuse by his manager or to give rise to a compensable factor of verbal abuse.

Following the EEO settlement agreement, appellant noted that, on several occasions, between June 5 to 9, 2010, he was told by Ms. Beltran that his route took only eight hours to sort, case and deliver. While he may have disagreed with his manager's estimation of the time necessary to complete his route, the evidence of record is not sufficient to establish that she was verbally abusive toward him on the dates in question or to establish error on her part. An employee's general dissatisfaction with perceived poor management is not compensable.[21] Mere disagreement or dislike of a supervisor or a managerial action will not be found compensable, absent evidence of error or abuse.[22] The evidence of record is not sufficient to establish error or abuse by Ms. Beltran in this regard.

Further, appellant did not establish that he sustained injury on November 7, 2009. He did not describe what occurred on that day at work that allegedly caused his emotional condition and submitted no evidence pertaining to any incident or event that date.[23]

Appellant generally claimed a lack of training for his duties on new routes. As noted, workers' compensation law does not cover an emotional reaction to an administrative or personnel action unless the evidence establishes error or abuse on the part of the supervisor.[24] The assignment of work is an administrative function of a supervisor. Frustration from not being permitted to work in a particular environment or to hold a particular position is not covered by workers' compensation.[25] In this regard, appellant did not adequately address the nature of his workshift or schedule on various postal routes. He noted only that, as a T6, he was assigned to work on different routes. Appellant did not specify or describe any past training provided at work or that he had made such a request to his supervisors concerning his work on the dates specified. He emphasized his disagreement with Ms. Beltran's estimation that his work required only eight hours to complete not that he lacked specific skills to perform casing, sorting or mail delivery.

For the reasons stated, the Board finds that appellant did not meet his burden of proof to establish his claim for an emotional condition due to the factors of his federal employment.

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8124(b)(1) of FECA, pertaining to a claimant's entitlement to a hearing before and Office hearing representative states that "[b]efore review under section 8128(a) of this title, a

[20] *See Robert Breeden*, 57 ECAB 622 (2006).

[21] *V.W.*, 58 ECAB 428 (2007).

[22] *C.S.*, 58 ECAB 137 (2006).

[23] *Id.*

[24] *Kim Nguyen, supra* note 14.

[25] *Cynthia R. Harrill*, 55 ECAB 522 (2004).

claimant for compensation not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[26]

The implementing federal regulations clarify that a claimant is entitled to a hearing or review of the written record as a matter of right only if his or her request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration under section 8128(a).[27] Although there is not right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretion grant or deny such request and must exercise its discretion.[28]

## ***ANALYSIS -- ISSUE 2***

Appellant requested a review of the written record on October 1, 2010. This was more than 30 days following issuance of the July 26, 2010 decision. As the request was untimely under section 8124(b), OWCP denied appellant's request finding that he was not entitled to a review of the written record as a matter of right.

OWCP further considered the matter under its discretionary authority and, as to the issue involved, found that additional argument and evidence could be submitted with a request for reconsideration. It's procedures which require it to exercise its discretion to grant or deny a hearing when a request is untimely or after reconsideration under section 8128(a) have been found a proper interpretation of FECA and Board case precedent.[29] There is no evidence that OWCP abused its discretion in this case in finding that appellant could further pursue this matter through the reconsideration process. The Board finds that OWCP properly denied his request for a hearing.

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[26] 5 U.S.C. § 8124(b)(1).

[27] 20 C.F.R. §§ 10.616 and 10.617. The Board has noted that section 8124(b)(1) is unequivocal in setting forth the time limitation in requests for a hearing. *See André Thyratron*, 54 ECAB 257 (2002); *Ella M. Garner*, 36 ECAB 238 (1984).

[28] *See Delmont L. Thompson*, 51 ECAB 155 (1999).

[29] *See Daniel J. Perea*, 42 ECAB 214 (1990).

## ***CONCLUSION***

The Board finds that appellant did not establish that he sustained an emotional condition due to factors of his federal employment. The Board also finds that OWCP did not abuse its discretion in denying his untimely request for review of the written record.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 29 and July 26, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 24, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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