United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 11-1569**
	)	**Issued: February 27, 2012**
DEPARTMENT OF THE NAVY, NAVAL FACILITIES ENGINEERING COMMAND, MID ATLANTIC, Norfolk, VA, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 21, 2011 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) decision dated April 21, 2011 which denied appellants claim for an emotional condition. 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 the case.

ISSUE

The issue is whether appellant has met his burden of proof in establishing that he developed an emotional condition in the performance of duty.

FACTUAL HISTORY

On February 28, 2011 appellant, then a 57-year old motor vehicle operator, filed a traumatic injury claim alleging that on February 24, 2011, he experienced work-related stress

[1] 5 U.S.C. § 8101 *et seq.*

after being given a letter of warning. He stopped work on February 25, 2011 and returned to regular duty on March 15, 2011.

On March 11, 2011 OWCP asked appellant and the employing establishment to provide additional evidence.

In an undated statement, appellant indicated that on February 24, 2011, he was called into his supervisor, Michael Sears's office, and was issued a proposed suspension. He signed the disciplinary document and requested a copy and alleged that Mr. Sears refused to provide a copy. Appellant indicated that Mr. Sears instructed another employee to read the disciplinary memorandum out loud to appellant which violated his privacy rights. He alleged that James Brown, a union representative, later accompanied him to obtain a copy of the proposed suspension from Mr. Sears and as appellant extended his hand to retrieve the document Mr. Sears pulled the document back and appellant took the copy out of his hand. Appellant asserted that he subsequently attended a union meeting and Mr. Sears arrived with four armed base policemen who interrogated him. He asserted that he felt terrified and traumatized after being interrogated by the police who told him that he could be thrown off base and not be permitted on any base on the east coast. Appellant asserted that he worked in a hostile work environment and Mr. Sears continued to harass him.

The employing establishment submitted a March 10, 2011 statement from Genie Doyle, an employing establishment human resource specialist, who challenged appellant's claim alleging that he had not implicated a compensable employment factor but rather an emotional reaction to discipline. The employing establishment submitted a copy of the proposed suspension for failure to complete a work assignment on July 30, 2010, specifically, that appellant failed to use the proper flatbed trailer to transport a fire tow tractor. The proposed suspension also noted that on November 1, 2010, appellant failed to report damage to a government vehicle, specifically, a cracked cargo door, when he drove from a pier to an annex. He signed the proposed suspension noting "I do not agree. For I have reason that it is a form of harassment." The employing establishment submitted an affidavit from Mr. Brown dated February 24, 2011, who attended a meeting with appellant to discuss a proposed three-day suspension when Mr. Sears arrived at the union office with four base police officers. Mr. Brown noted that the base police questioned appellant about his proposed suspension and then left. In an undated investigative statement, Mr. Sears noted that on February 24, 2011, he issued a notice of proposed suspension to appellant who was accompanied by his union representative. He noted that appellant appeared to be in an agitated state. Mr. Sears handed the notice to appellant and asserted that he roughly snatched the notice from his hand and rose up as though to physically attack him. Mr. Sears found appellant's manner to be physically threatening and Mr. Brown immediately came between them and physically removed appellant from the office. Mr. Sears noted that appellant was loud and disorderly. He contacted the police regarding an insubordinate employee. Four officers arrived and went to the union office and questioned appellant while the union representatives were present. The incident was characterized as a lack of communication and the police left without further action. Also submitted was a job description for a motor vehicle operator.

Appellant was treated by Dr. John Waitekus, a family practitioner, from February 25 to April 11, 2011 for stress and anxiety as a result of working in a hostile work environment. He

also submitted an April 8, 2011 report from Roberta Mohler, a social worker, who treated him for acute stress disorder after a work incident on February 24, 2011.

In an April 21, 2011 decision, OWCP denied appellant's claim. It found that no compensable employment factors were established and also that insufficient medical evidence was submitted.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[2]

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*,[3] 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.[4] 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.[5] Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[6] Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[7] Personal perceptions alone are insufficient to establish an employment-related emotional condition.[8] On the other hand the disability is not covered where

[2] *George H. Clark*, 56 ECAB 162 (2004).

[3] 28 ECAB 125 (1976).

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

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

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

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

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

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.[9]

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 the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.[10] 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 the matter establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.[11]

ANALYSIS

Appellant alleged an emotional condition as a result of improperly being given a proposed three-day suspension on January 24, 2011. He asserted that his supervisor, Mr. Sears, instituted a pattern of harassment which included having a coworker read the disciplinary document out loud violating his privacy rights and then calling the base police who interrogated him about the proposed suspension. The Board must thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA. Appellant has not attributed his emotional condition to the regular or specially assigned duties of his position as a motor vehicle operator. Therefore, he has not alleged a compensable factor under *Cutler*.[12]

Appellant makes allegations related to administrative and personnel actions. In *Thomas D. McEuen*,[13] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing

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

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

[11] *Id.*

[12] *See supra* note 3.

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

establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[14]

Appellant alleged an emotional condition as a result of being given a proposed three-day suspension on January 24, 2011. His allegations that the employing establishment engaged in improper disciplinary actions, relate to administrative or personnel matters, unrelated to his regular or specially assigned work duties.[15] Although the handling of disciplinary actions and evaluations are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.[16] The record, as noted, reveals that appellant was given a proposed suspension for failure to complete his work assignment on July 30, 2010, noting that he failed to use the proper flatbed trailer to transport a fire tow tractor and for failure to report damage to a government vehicle in 2010 after driving from a pier to an annex. Mr. Sears noted that on February 24, 2011, appellant was issued a notice of proposed suspension for failure to perform his work duties and noted that when the discipline was issued appellant was accompanied by his union representative. He noted that appellant appeared to be in an agitated state and roughly snatched the notice from his hand and rose up as though to physically attack him. The evidence does not support that the employing establishment acted unreasonably in response to appellant's failure to complete his work assignment on July 30, 2010 and failure to report the damage to the government vehicle on November 1, 2010. Appellant presented no corroborating evidence that the employing establishment acted unreasonably in this matter and his unsupported assertion that Mr. Sears was disciplining him as a way to harass is insufficient to meet appellant's burden of proof. Thus he has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under FECA.

Appellant asserted that Mr. Sears issued the proposed suspension as a method of harassment. He further asserted that Mr. Sears instructed a coworker to read the proposed suspension out loud as a way to harass him. Appellant advised that he felt terrified and traumatized when he was interrogated by the police who threatened him stating that he could be thrown off base and not be permitted on any base on the east coast. He asserted that this behavior constituted a hostile work environment and Mr. Sears continued to harass him. To the extent that incidents alleged as constituting harassment or a hostile environment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[17] However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under FECA.[18] The factual evidence fails to support appellant's claim for harassment. The record does not support his allegation that he was

[14] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[15] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[16] *Id.*

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

[18] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991). *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

harassed or worked in a hostile work environment. Mr. Sears noted that on January 24, 2011, when he issued the disciplinary notice to appellant, he roughly snatched the document from his hand and rose up as though to physically attack him. He found appellant's manner to be physically threatening and Mr. Brown immediately came between them and physically removed appellant from the office. Mr. Sears reported contacting the police who went to the union office and questioned appellant while the union representatives were present. A February 24, 2011 affidavit from Mr. Brown indicated that while attending a meeting with appellant to discuss the proposed three-day suspension Mr. Sears arrived at the union office with four base police officers. Mr. Brown noted that the base police questioned appellant about his proposed suspension and then left. The evidence is insufficient to show that appellant was singled out or treated disparately with regards to his claim of harassment. There is no corroborating evidence to support that the employing establishment acted unreasonably in light of appellant's behavior. Appellant has not established a compensable factor of employment in this regard.

To the extent that appellant alleged that the base police threatened him when they questioned him regarding his interaction with Mr. Sears after being issued the proposed suspension, the Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.[19] The Board finds that the facts of the case, noted above in the analysis of the allegation of harassment, does not support that appellant was threatened by the police. Appellant provided no corroborating evidence or witness statements to establish his allegations.[20] There is no corroborating evidence to support that the employing establishment acted unreasonably. Appellant has not otherwise shown how the base polices comments or actions rose to the level of verbal abuse or threats or otherwise fell within coverage of FECA.[21]

Consequently, appellant has not established his claim for an emotional condition as he has not attributed his claimed condition to any compensable employment factors.[22]

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 the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

[19] *Charles D. Edwards*, 55 ECAB 258 (2004).

[20] *See William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

[21] *See Judy L. Kahn*, 53 ECAB 321 (2002) (the fact that a supervisor was angry and raised her voice does not, by itself, support a finding of verbal abuse).

[22] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

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

Issued: February 27, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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