United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 12-225**
	)	**Issued: June 22, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Oklahoma City, OK, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 22, 2011 appellant filed a timely appeal of a November 7, 2011 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 to consider the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he developed an emotional condition due to factors of his federal employment.

FACTUAL HISTORY

On May 13, 2011 appellant, then a 51-year-old clerk, filed an occupational disease claim alleging occupational stress and anxiety due to work-related conditions. He first became aware of his condition on August 2, 1991 and first related his stress condition to his employment on

[1] 5 U.S.C. § 8101 *et seq.*

May 12, 2011. On the reverse of the form, appellant's supervisor stated that he refused to work Tour I and was using sick leave.

In a report dated August 2, 1991, R.A. Cougher, Ph.D., a clinical psychologist, diagnosed anxiety due to conflict on the job. He noted that appellant's preferred shift was 5:00 a.m. to 1:30 p.m.

Appellant attributed his emotional condition to harassment and retaliation by his supervisors due to Equal Employment Opportunity (EEO) complaints and grievances that he filed. He stated that his employer refused to pay him for higher level work that he performed. Appellant alleged that he was unjustly disciplined for wearing jeans to work, including a letter of warning and a seven-day suspension. He alleged retaliation due to whistle-blowing. Appellant stated that managers improperly denied vacation periods and ignored his restricted work hours. He filed several EEO complaints because managers refused to help him and because his seniority ranking was wrong. Appellant was improperly denied preferential days off and a change in his work shift to 1:00 a.m. through 9:30 a.m., which he alleged was against his restrictions of no work prior to 9:30 a.m.

On May 2, 2011 Dr. Dean Ross, a family practitioner, diagnosed insomnia, sleep apnea and anxiety. He stated that appellant's anxiety would be worsened if he tried to change from his day shift working hours. Appellant could work for any eight-hour period between 4:30 a.m. and 5:00 p.m., with two consecutive days off. Dr. Ross found that appellant could not work after 5:00 p.m. or before 4:30 a.m. and could not work overtime. He stated that the restrictions were necessary for appellant to maintain a normal sleep pattern in order to control his sleep apnea and hypertension. Appellant submitted a note from a professional counselor and a sleep study diagnosing severe obstructive sleep apnea.

In a June 2, 2011 letter, OWCP requested additional factual and medical evidence in support of appellant's claim. Appellant responded that he was medically restricted from working overtime and to work hours between 4:30 a.m. and 5:00 p.m. with no overtime and two consecutive days off. He reiterated that he was subjected to harassment and retaliation from his supervisors and managers. Appellant was not paid for performing higher level duties and disciplined for wearing jeans to work even though he was allowed to do so as a clerk. He alleged that he was accused of shorting funds. Appellant noted that he bid on a job but the position was awarded to another employee who was ranked higher on the seniority roster. He discovered that his coworker did not have a Veteran's preference and when he and the union reviewed the seniority roster, errors were found. Appellant filed an EEO complaint to have this roster corrected.

Appellant received settlements in 2010 for complaints filed in 2008 and 2009. He noted that in June 2010 a supervisor had a discussion with him regarding a conversation he had with a female coworker. Appellant alleged that the employing establishment deliberately allowed Express Mail to fail and which caused him stress and anxiety. He stated that a manager harassed him on May 13 and 14, 2011. Since 2006 appellant filed yearly complaints with the EEO Commission or other outside agencies. All the managers at the employing establishment had been named in his complaints and none would aid him.

Appellant attributed his condition to the proposal to change his work schedule from a 4:30 a.m. to 1:00 p.m. schedule to a 1:00 a.m. to 9:30 a.m. schedule. As this schedule did not comply with his work restrictions, he used sick leave from 1:00 a.m. to 4:30 a.m. Appellant alleged that a supervisor confronted him about his leave usage and dismissed his physician's recommendations. He alleged that his position was to be abolished. Appellant experienced daily stress of not knowing what he was going to do.

Appellant submitted a grievance dated May 27, 2009 regarding a letter of warning he received for wearing blue jeans at the employing establishment. The grievance also addressed the second charge of his neglect to close a case. Appellant alleged that he was aiding a customer and that his position was undermanned. On December 12, 2009 he filed an EEO investigation report alleging discrimination based on race, color, age, retaliation and mental disability through the employing establishment's actions in not providing him with enough time to complete work tasks, in singling him out regarding work dress and the May 14, 2009 letter of warning.[2]

On April 12, 2010 appellant alleged that he was performing higher level duties and not being fairly compensated. He submitted a March 10, 2008 EEO dispute resolution specialist inquiry report regarding the issue.

Appellant submitted a statement to the Merit Systems Protection Board (MSPB) alleging that his employer violated his Veteran's preference rights in September 2009 when a job that he bid on was awarded to another employee with the same hire date, but no Veteran's preference. In a letter dated November 12, 2010, the union president alleged that the employing establishment should have given appellant credit for his military service correcting his standing on the seniority roster. On October 21, 2010 the EEO counselor provided appellant with a notice of right to file a claim regarding this issue. On September 29, 2010 the employing establishment informed appellant that an arbitration decision established his seniority as a clerk as of December 24, 1983 and that his position on the seniority roster was correct.

Appellant submitted a National Labor Relations Board complaint alleging that the employing establishment made unilateral changes in work schedules without notice to the union. On April 30, 2011 he requested to change his vacation leave from period 30 to period 44, Christmas. On April 29, 2011 appellant requested precomplaint counseling regarding his employer's failure to change his vacation leave periods from periods 13 and 30 to 15 and 44 as requested on April 22, 24 and 28, 2011. On April 25, 2011 he criticized the handling of express mail. Appellant submitted notes dated May 17 to June 2011 from Kelly Bender, a licensed professional counselor.

In a letter dated June 24, 2011, the employing establishment responded to appellant's allegations. It noted that his hours were changed due to the needs of the service. The employing establishment also noted that appellant's medical condition requiring specific hours was due to sleep apnea, not an accepted work-related condition. In a statement dated June 23, 2011, appellant's supervisor for Tour 2 stated that appellant submitted medical documentation with his work hours' restrictions, but she advised him that as the condition of sleep apnea was not work

[2] This investigation was listed as agency case number 4G-730-0045-09.

related, he should apply for light duty. This supervisor noted that she did not receive any light-duty request from appellant.

In a letter dated June 17, 2010, the employing establishment provided a settlement agreement from two of appellant's EEO claims. Appellant received $2,250.00 in nonwage compensatory damages and the employing establishment removed the letter of warning of May 14, 2009. The settlement agreement noted that it did not constitute any admission of violation of any statute, rule, regulation or legal obligation.

OWCP referred appellant for a second opinion evaluation on August 25, 2011. The statement of accepted facts includes an age discrimination EEO complaint. In a report dated September 23, 2011, Dr. Amar Bhandary, a Board-certified psychiatrist, noted appellant's allegations of harassment and work difficulties at the employing establishment. He reviewed the statement of accepted facts and medical records and diagnosed depression and generalized anxiety disorder. Dr. Bhandary stated that appellant had significant interpersonal conflicts with his supervisors and had a tendency to repeatedly file complaints. He concluded, "In my opinion, this is not a cause of workplace harassment. The veteran has personality deficits that cause his interpersonal relationship with his supervisor. They might respond to him negatively which he then tends to misconstrue as harassment." Dr. Bhandary attributed appellant's depression and anxiety to appellant's personality disorder "that tends to cause interpersonal conflicts which may result in negative response towards him about which he then feels emotionally stressed." He also stated that appellant's emotional condition was not affecting his sleep, but rather that his sleep problem was more related to obstructive sleep apnea syndrome and chronic pain syndrome. Dr. Bhandary opined that appellant could return to work, but recommended that he work at a different branch of the employing establishment with new managers.

By decision dated November 7, 2011, OWCP denied appellant's claim on the grounds that the medical evidence did not establish a causal relationship between his diagnosed condition and accepted employment factors. It accepted that the employing establishment settled an age discrimination EEO complaint. However, OWCP found that appellant had not established compensable factors in regard to his desire to work a specific shift, that his lack of sleep affected his service-connected disabilities.

LEGAL PRECEDENT

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.[4] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.[5] When an employee experiences emotional stress in carrying out his or

[3] 28 ECAB 125 (1976).

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Robert W. Johns*, 51 ECAB 136 (1999).

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.[6] In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is 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, nor is disability covered when it results from such factors as an employee's frustration in not being permitted to work in a particular environment or to hold a particular position.[7]

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.[8] 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.[9] A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.[10]

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under FECA. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[11]

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of incidents and conditions at work. OWCP denied his emotional condition on the grounds that the medical evidence did not establish a causal relationship between his diagnosed condition and the accepted factor of employment. The Board must determine whether appellant has established an employment factor under the terms of FECA. In conducting a *de novo* review of the evidence, the Board finds that he has not substantiated a compensable factor of employment. Appellant did not attribute his emotional condition to difficulties in performing the functions of his position.

[6] *Cutler, supra* note 3.

[7] *Id.*

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

[9] *Kim Nguyen*, 53 ECAB 127 (2001). *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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

[11] *Alice M. Washington*, 46 ECAB 382 (1994).

He instead attributed his emotional condition to error or abuse in the administrative functions of his employer including improper changes in his work schedules, a denial of a change in his vacation schedules, disciplinary actions, seniority determination and pay rates. Appellant also alleged harassment through these actions of the employing establishment.

Appellant alleged that he improperly received a letter of warning and seven-day suspension for wearing blue jeans to work and for not completing a task in a timely manner. He filed a grievance, EEO complaint and MSPB complaint and received a settlement from the employing establishment including removal of the letter of warning and compensatory damages. The settlement agreement stated that the agreement did not constitute an admission of violation of any statute, rule, regulation or legal obligation. The Board has held that the mere fact that an employing establishment lessens a disciplinary action taken towards the employee does not substantiate that the employing establishment acted in an abusive manner.[12] The record does not contain any further evidence that the employing establishment erred in the disciplinary and other actions covered by the settlement agreement. The Board finds that appellant has not established a compensable factor of employment in regard to the actions implicated by this settlement agreement.

Appellant alleged that the employing establishment improperly changed his work schedule from a report time at 4:30 a.m. to a report time at 1:30 a.m. He has stated and his supervisor confirmed that appellant did not report to work at 1:30 a.m. and instead used sick leave until 4:30 a.m. The Board has held that a change in an employee's duty shift can be a factor of employment.[13] However, a change in duty shift does not arise as a compensable factor *per se*. The factual circumstances surrounding the employee's claim must be carefully examined to discern whether the alleged injury is being attributed to the inability to work his or her regular or specially assigned job duties due to a change in the duty shift, *i.e.,* a compensable factor arising out of and in the course of employment or whether it is based on a claim which is premised on the employee's frustration over not being permitted to work a particular shift or to hold a particular position.[14] The employing establishment stated that appellant's hours were changed due to the needs of the service and also noted that appellant's medical condition requiring specific hours was due to sleep apnea, not an accepted work-related condition. In a statement dated June 23, 2011, appellant's supervisor for Tour 2 stated that appellant did submit medical documentation with his work hours' restrictions, but that she advised him that as the medical condition of sleep apnea was not work related he should apply for light duty.

The Board finds the fact that appellant did not attempt to perform the reassigned duties is distinguishable from situations where an employee actually attempts to perform the reassigned duties and becomes upset over an inability to satisfactorily perform such duties. Appellant's apprehension that he would not be able to perform his new work duties, due to a

[12] *See Michael Thomas Plante*, 44 ECAB 510, 516 (1993) (finding that even though appellant won grievances, the record did not contain evidence which established error by the employing establishment).

[13] *Dodge Osborne*, 44 ECAB 849 (1993).

[14] *Helen P. Allen*, 47 ECAB 141 (1995).

nonemployment-related condition, without any actual attempt to perform these duties, was self-generated and compensable.[15]

Appellant did not submit any additional evidence corroborating or substantiating the additional employment events and incidents alleged. Without evidence of error or abuse he has not established compensable factors of employment in regard to the allegations made.

Appellant also alleged a general pattern of harassment, discrimination and retaliation against him by the supervisors at the employing establishment for the filing of EEO and merit system complaints. The Board has held that a claimant must establish a factual basis for his allegations with probative and reliable evidence.[16] Appellant has submitted insufficient evidence to establish his allegations. He submitted copies of several complaints and grievances filed. Appellant also submitted a settlement agreement which did not establish any wrongdoing on the part of the employing establishment. He did not provide any evidence to support his allegations. As noted, in order to establish harassment there must be evidence that the acts alleged or implicated by the employee did in fact occur.[17] Appellant submitted numerous documents relating to various EEO claims. The Board notes that the record does not contain a final decision relating to any of his claims explaining the basis for a finding of fault. The evidence of record is not sufficient to establish a compensable factor of employment regarding appellant's allegations of harassment and discrimination.

Where a claimant has not established any compensable employment factors, the Board need not consider the medical evidence of record.[18]

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 substantiated a compensable factor of employment and has not met his burden of proof to establish his emotional condition claim.

[15] *See Mary Margaret Grant*, 48 ECAB 696 (1997).

[16] *T.G.*, 58 ECAB 189 (2006).

[17] *Paul Trotman-Hall*¸ 45 ECAB 229 (1993).

[18] *A.K.*, 58 ECAB 119 (2006).

ORDER

IT IS HEREBY ORDERED THAT the November 7, 2011 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: June 22, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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