

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

K.B., Appellant

and

**U.S. POSTAL SERVICE, ML SELLERS
FACILITY, San Diego, CA, Employer**

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**Docket No. 11-1249
Issued: March 12, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 27, 2011 appellant filed a timely appeal from a March 29, 2011 merit decision of the Office of Workers' Compensation Programs denying his emotional condition claim. Pursuant to the Federal Employees' Compensation Act¹ (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 in the performance of duty.

FACTUAL HISTORY

On May 6, 2010 appellant, then a 57-year-old physician (associated area medical director), filed an occupational disease claim alleging that his preexisting sleep apnea and insomnia were caused or aggravated by unusual work stress. He first became aware of these

¹ 5 U.S.C. § 8101 *et seq.*

conditions on January 4, 2009 but did not realize the relationship to his employment until September 15, 2009.

By correspondence dated June 28, 2010, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised as to the medical and factual evidence to submit and given 30 days to provide additional information.

The employing establishment controverted appellant's claim on the grounds that his sleep apnea was due to anatomic abnormalities and unrelated to his employment. It attached a copy of the responsibilities for an associate area medical director. The responsibilities relevant to appellant's allegations include fitness-for-duty examinations, ensuring confidentiality of medical records and serve as medical consultant for district management implementing USPS National.

Appellant submitted documents and correspondence concerning the issues of release of a classified fitness-for-duty report and a tuberculosis (TB) outbreak investigation and testing. He also submitted the employing establishment procedure for the release or access to restricted medical information and the security of medical information.

Appellant submitted e-mails in early November 2009 from Antoinette Simon, manager, Labor Relations, and Mr. Jurach, a representative for an unidentified employee, concerning the denial of a release of a fitness-for-duty report in an Equal Employment Opportunity (EEO) case. Ms. Simon informed Mr. Jurach that the fitness-for-duty form he requested would not be released to him due to the sensitive nature involved.

The record also contains e-mail correspondence from Deborah C. Winslow, an attorney for the employing establishment, and from Michael W. Thomas, a union Labor Relations manager, regarding the release of confidential medical information. In a December 23, 2009 letter, Ms. Winslow instructed appellant to release the requested medical documents to the employee's union representative immediately. Mr. Thomas informed Ms. Winslow in a follow-up e-mail that the union was not requesting a copy of the fitness-for-duty report, but that the employee wanted a copy for a treating psychologist. He related that an agreement was reached with the employee's union representative that the report would be released to the employee's treating physician as defined by the Privacy Act. Mr. Thomas related that appellant was correct in finding that a psychologist was not a physician for Privacy Act purposes.

In correspondence dated November 17, 2009 to Dr. Afrim Saba, appellant's supervisor, noted Dr. Saba's instruction directing him "to provide a FFD [fitness-for-duty] report to the union and EEO" as this was required by the Collective Bargaining Agreement. Appellant stated that he felt uncomfortable with this instruction as he has "always held the opinion that releasing such sensitive material to anyone other than a psychiatrist with a signed release was contraindicated." In concluding, he argued that "professional care for the individual preempts the bargaining agreement" and was "reluctant to release this confidential material to lay individuals."

Appellant, in a November 24, 2009 letter, denied an employee's request for access to a fitness-for-duty report. The rationale he gave was that in his professional opinion release of this information to anyone other than a practicing psychiatrist would reasonably endanger the

employee's psychological and physical health and there was a possibility the safety of other individuals may be impacted. Appellant related that he would release the information to a practicing psychiatrist.

In a December 28, 2009 letter of instruction, Dr. Saba found appellant's rationale for failing to release a fitness-for-duty report to an employee's psychologist was inadequate and unacceptable. He noted that, after consultation with the legal department, it was determined that a psychologist is considered a physician as defined by the Department of Labor (DOL) and the employing establishment. As the report was to be released to a physician as defined by regulations, Dr. Saba instructed appellant to immediately release the requested report to the employee's treating psychologist.

The record also contains an e-mail from Michael J. Marino, a nurse to Dr. Saba, stating that Mr. Marino would follow Dr. Saba's instructions to have appellant respond by e-mail to Dr. Saba's letter of construction.

A January 14, 2010 e-mail from Mr. Thomas related that he had discussed the release of sensitive psychiatric information with Dr. Saba. Mr. Thomas stated that he informed Dr. Saba that for Privacy Act purposes a psychologist is not considered a physician and that medical psychiatric information can only be released to a qualified physician. He noted that the definition of physician under the Privacy Act is different than the definition held under DOL or the Family Medical Leave Act (FMLA).

In an April 12, 2010 certification of health care provider form, Dr. Farhad Shadan, a treating Board-certified internist and sleep medicine specialist, diagnosed depression, insomnia, severe headaches and fatigue. He opined that appellant's work aggravated his preexisting condition, which resulted in his being disabled from working for six months.

In a June 30, 2010 report, Dr. Christopher P. Khoury, a treating Board-certified psychiatrist, attributed appellant's insomnia beginning about March 15, 2010 to significant work stresses. Appellant was subsequently incapacitated from working due to this condition, but would be able to return to work provided there was a different supervisor.

On July 3, 2010 Dr. Michael Bowersox, a treating Board-certified family medicine physician, who noted treating appellant for his sleep apnea. He related that appellant was seen on March 16, 2010 for significant work stress which began the prior year and peak with an alleged discriminatory firing of appellant's remaining nurse. Appellant attributed his sleep difficulty and insomnia to the stress from the firing of his nurse in addition to the stressful and hostile work environment due to an abusive supervisor. Dr. Bowersox related that the objective data showed a worsening of his sleep apnea in April 2010. Lastly, he noted that appellant had been terminated which resulted in an improvement in his condition.

On July 16, 2010 appellant submitted e-mail correspondence between himself and Dr. Saba regarding TB investigation and appellant's responsibilities. Dr. Saba stated that appellant and Mr. Marino "had taken on the role of the [p]ublic [h]ealth activities," which Dr. Saba described as unacceptable. Appellant was instructed to inform the local public health department in writing about the test results, send Dr. Saba copies of all correspondence and

communication with the public health department and to refrain in the future from any public health activities regarding TB testing.

By decision dated August 31, 2010, OWCP denied appellant's claim on the grounds that he failed to identify any compensable factors of employment. It found that he failed to identify any specific employment factors which allegedly caused or aggravated his sleep apnea or insomnia.

Subsequent to the August 31, 2010 decision, appellant submitted polysomnography test results from April 29, 2009, January 24 and April 12, 2010 to show the worsening of his sleep apnea due to excessive work stress.

On September 26 and 27, 2010 appellant requested an oral hearing before an OWCP hearing representative. In his request for an oral hearing, he related that he was initially diagnosed with obstructive sleep apnea in April 2009. At the time of his diagnosis, appellant's apnea-hypoxia index (AHI) was 17.2 or moderately severe and that by January 24, 2010 his AHI had reduced to 4.4 due to sleep apnea treatment. However, by April 29, 2010 his AHI score had risen to 22.1 as a result of the severe work stress induced by Dr. Saba.

A hearing was held on January 26, 2011 at which appellant testified that there was a TB outbreak which he was trying to contain by finding the individuals with TB and identify the original carrier. He related that Dr. Saba disagreed with this strategy and attempted to get him to abandon his containment efforts. Appellant believed it was his duty as a physician to find the original carrier and prevent further exposure or harm to nonexposed individuals. He noted that Dr. Saba's instructions to abandon this effort was very stressful. Specifically, Dr. Saba's order to appellant not to continue with the investigation and follow up was stressful. Appellant stated that he continued working on the TB case and was issued a disciplinary letter by Dr. Saba. He related that the public health department did not have the resources so he and his nurse investigated to ensure the TB outbreak was contained. Appellant alleged that Dr. Saba's threats that he would lose his job if he continued with the TB investigation was stressful. He contended that this was agency error as the public health department stated that it lacked the resources to handle the TB outbreak and it would be irresponsible for him to follow Dr. Saba's instructions that he stop his investigation into the TB outbreak. Appellant next related that he sustained stress as a result of the illegal firing of his last nurse, Mr. Marino, which resulted in him having to assume some nursing duties until another nurse was hired. He related that he had trouble keeping up with his own work duties in addition to the nursing duties he had to assume.

In a January 28, 2011 report, Dr. James R. Vevaina, a treating Board-certified internist, diagnosed insomnia due to sleep apnea, which had been aggravated by work stress. He related that appellant had been diagnosed with sleep apnea which had been abated with successful therapy. However, as a result of excessive work stress in early 2010, appellant lost control of his sleep apnea condition as shown by a March 12, 2010 polysomnogram which documented a rise in his AHI level to pre-treatment levels. According to Dr. Vevaina, the rise in appellant's AHI levels to pretreatment levels documents an exacerbation of appellant's sleep apnea due to work stress. One stressful work event involved evaluation of 60 individuals who had been exposed to TB by appellant. As these individuals had different shifts and days off, it made testing and follow-up challenging. Dr. Vevaina noted that appellant assumed responsibility for an internal

investigation as the public health TB office relied on larger companies to perform the investigation. Dr. Saba, appellant's supervisor, ordered appellant persistently to cease the TB investigation. Dr. Vevaina stated that "[a]s a result, [appellant] was in a serious professional and ethical dilemma." He opined that appellant correctly opted to complete the investigation and ignore Dr. Saba's orders to cease the investigation. In concluding, Dr. Vevaina opined that appellant's work-related stress caused by his supervisor aggravated his preexisting sleep apnea and was a direct cause of his insomnia resulting in appellant's incapacity to perform any work.

On February 23, 2011 OWCP received an undated e-mail from Dr. Saba and an undated statement from appellant. Dr. Saba's e-mail provided feedback to appellant regarding the TB exposure and interaction with the local public health department. He stated that appellant had exceeded his responsibility and the role of the employing establishment's health department by assuming duties which should be performed by the public health department.

In his statement, appellant reiterated his contention that his work stress had aggravated his sleep apnea and caused his insomnia. He attributed his work stress to Dr. Saba's obstruction of a TB exposure investigation and mitigation program and the demand from Dr. Saba and the employing establishment's legal department that a protected psychiatric report be released to a nonphysician.

By decision dated March 29, 2011, OWCP's hearing representative affirmed the denial of appellant's claim.

LEGAL PRECEDENT

To establish a claim that she sustained an emotional condition in the performance of duty, an employee must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric 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 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.³ 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.⁴ Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁵ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a

² *V.W.*, 58 ECAB 428 (2007); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁴ *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

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

reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.⁶

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.⁷ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.⁸ 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.⁹

ANALYSIS

Appellant has not attributed his condition to the performance of his regular duties or any special work requirement arising from his employment duties under *Lillian Cutler*, nor has he implicated his workload as having caused or contributed to his emotional condition. He contended that instructions and disciplinary actions given by Dr. Saba, his supervisor, regarding the release of confidential medical information and his activities regarding a TB outbreak at an employing establishment facility constituted error and abuse on the part of Dr. Saba and were thus compensable. However, the Board has held that 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 absent a showing of error or abuse.¹⁰ Thus, the Board must initially review whether the alleged incidents of employment are compensable factors under the terms of FECA.

Appellant alleged that Dr. Saba, his supervisor, acted abusively in issuing him a letter of instruction on December 28, 2009 and giving him verbal instructions on November 17, 2009 regarding the release of confidential medical information. He also alleged that Dr. Saba acted abusively in instructing him to cease his activities regarding TB testing and to refrain in the future from assuming the role of the public health department. Appellant's allegations relate to administrative actions. As noted above, disability is not covered from reactions to actions taken in an administrative capacity unless it is shown that the employing establishment erred or acted

⁶ *J.F.*, 59 ECAB 331 (2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁷ *D.L.*, 58 ECAB 217 (2006); *Jeral R. Gray*, 57 ECAB 611 (2006).

⁸ *K.W.*, 59 ECAB 271 (2007); *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

⁹ *Robert Breeden*, 57 ECAB 622 (2006).

¹⁰ See *C.T.*, Docket No. 08-2160 (issued May 7, 2009); *Jeral R. Gray*, *supra* note 7.

abusively in its administrative capacity.¹¹ On the other hand, 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.¹²

In the December 28, 2009 letter, Dr. Saba instructed appellant to release confidential medical evidence. He informed appellant that the rationale for failing to release fitness-for-duty reports to the employee's psychologist was inadequate and unacceptable. He instructed appellant to immediately release the requested report to the employee's treating psychologist. In a November 17, 2009 letter, appellant had noted his disagreement with releasing medical information to anyone other than a qualified medical or osteopathic physician. According to employing establishment regulations a psychologist was not defined as a physician for Privacy Act purposes. The record also contains December 23, 2009 e-mail correspondence from Ms. Winslow, an attorney for the employing establishment, instructing appellant to release the requested medical documents to the employee's union representative and a follow-up e-mail to Mr. Winslow's e-mail from Mr. Thomas. Mr. Thomas stated that the union did not want the requested medical report and noted that a psychologist was not a physician as defined for Privacy Act purposes. The Labor Relation managers, Mr. Thomas and Ms. Simon, supported appellant's decision not to release medical information to a nonphysician. As noted by the e-mail of Mr. Thomas, the employing establishment defined the term "physician" for psychiatric medical reports under the Privacy Act differently than is defined by DOL or FMLA. The Board finds that the evidence is sufficient to establish that appellant's supervisor erred by instructing him to release information to a nonphysician as defined by the employer's implementing regulations. Appellant has established a compensable factor with respect to this allegation.

As noted, appellant also attributed his condition to Dr. Saba's instructions that he and his staff cease any activities regarding TB testing as this was in the purview of the local health department. He did not allege stress from performing TB testing but to Dr. Saba's instructions that he cease such work. The evidence of record does not establish that containment of the TB outbreak or TB testing was part of appellant's job duties. Appellant has submitted insufficient evidence to establish that Dr. Saba acted unreasonably in instructing him to cease such activities. His dissatisfaction with perceived poor management by Dr. Saba on TB containment and testing is not compensable.¹³ Thus, appellant has not established a compensable factor of employment with respect to this allegation.

¹¹ See *L.S.*, 58 ECAB 249 (2006) (Frustration from not being allowed to work in a particular position or to hold a particular job, such as one that would allow an employee to take off a particular day, is not something that workers' compensation covers. Any emotional condition arising therefrom, is simply considered self-generated); *Robert Breeden*, *supra* note 9 (an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable); *Ronald K. Jablanski*, 56 ECAB 616 (2005) (An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable. Likewise, an employee's dissatisfaction with perceived poor management is not compensable).

¹² See *J.C.*, 58 ECAB 594 (2007); *Jeral R. Gray*, *supra* note 7; *C.T.*, *supra* note 10.

¹³ *V.W.*, *supra* note 2; *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004) (mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse).

As appellant has established a compensable employment factor, OWCP must base its decision on an analysis of the medical evidence. As OWCP found that there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to OWCP for this purpose.¹⁴ After such further development as deemed necessary, OWCP should issue an appropriate decision on this matter.

CONCLUSION

The Board finds that this case is in posture for decision. Appellant has substantiated a compensable factor of employment necessitating review of the medical evidence by OWCP. On remand, OWCP will consider the medical evidence and issue a *de novo* decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 29, 2011 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: March 12, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁴ See *D.L.*, 58 ECAB 217 (2006); *Lorraine E. Schroeder*, 44 ECAB 323 (1992).