

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

M.B., Appellant)	
)	
and)	Docket No. 12-371
)	Issued: September 12, 2012
DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, San Diego, CA,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Thomas Martin, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 13, 2011 appellant, through his attorney, filed a timely appeal from the July 19, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employee' 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 has met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On October 27, 2010 appellant, then a 52-year-old material handler, filed an occupational disease claim alleging that on September 20, 2010 he sustained an emotional condition due to discrimination and retaliation by supervisors Julie Bertrand and Percy Riley. He also alleged

¹ 5 U.S.C. § 8101 *et seq.*

harassment and a hostile work environment. Appellant stated that he first realized his condition was work related on October 12, 2010. He stopped work on October 12, 2010.

In an October 24, 2010 statement, appellant stated that he returned from leave on June 1, 2010 and his work schedule had been changed. He indicated that he was assigned to work both sides of general stores and automated ground vehicles (AGV) on the same day. Appellant noted that they were short-handed and three extra personnel were hired but things got “worse.” He also exclaimed that he did not understand why they moved another individual to AGV instead of him. Appellant also indicated that on September 20, 2010 he was assigned by his work leader, John Dolley, to work in general stores area for inventory and the nursing tower, the busiest area. He indicated that he questioned Mr. Dolley as to why he was being “singled out” but he did not receive an answer. The following day, September 21, 2010, appellant was advised that Mr. Riley, “the boss,” wanted to see him and they discussed issues pertaining to his work schedule. During the discussion, Mr. Riley stated that there were no more general stores and AGV issues as they both fell under one job description as a material handler. Appellant stated that Mr. Riley told him to “shut up” and listen to him while he was in his office. He noted that he was “embarrassed and humiliated” in front of his supervisor and was “shaking, nervous and mad” but he controlled himself. Appellant stated that Mr. Riley advised him that Ms. Bertrand would take care of the problem, but nothing changed. He noted that the schedule was supposed to be posted but his was hidden so that “you don’t know your work schedule unless you ask your work leader.” On October 12, 2010 appellant checked his e-mail and discovered that Ms. Bertrand sent him an e-mail about “abusing” his sick leave. He noted that he went to her office and she informed him that there was a “pattern of calling in sick before and after days off.” Appellant noted that he was on sick leave on that date and went to his physician for a gout problem. He denied abusing his sick leave. Ms. Bertrand escorted him to Mr. Riley’s office where appellant was advised that he would be in trouble if he brought the matter to human resources. Appellant indicated that he was stressed and depressed and shaking to control himself. He stated that he went to an emergency room. Appellant further alleged that he was being subjected to discrimination and retaliation for complaining about his work schedule. He further alleged that another individual was promoted instead of him and that he was working in a hostile work environment.

In an October 26, 2010 statement, Ms. Bertrand noted that appellant misled her about how he obtained his occupational disease claim. She stated that he had a couple of “outbursts at work previous to all of this” that led to her contacting human resources and submitting a proposed suspension and corrective action that had not been presented to him due to his absence. Ms. Bertrand also noted that appellant received a reprimand letter in 2009.

In a letter dated October 29, 2010, Gloria Cuthbertson, a human resource specialist, controverted the claim. She noted that he was reacting to administrative matters. Ms. Cuthbertson advised that on August 26, 2009 appellant received a letter of reprimand for failure to follow attendance procedures and advised that further misconduct within a two-year period would result in more severe discipline and possible removal from his employment.

OWCP received several medical reports from October 7 to 26, 2010, which placed appellant off work for major depression. In an October 20, 2010 report, Dr. Leonid Parker, a

psychiatrist, diagnosed severe depression and adjustment disorder with anxiety and indicated that appellant was hospitalized on October 18, 2010 due to his job.

OWCP also received the August 26, 2009 letter of reprimand pertaining to appellant's absence without leave and his failure to follow established time and attendance procedures, an October 12, 2010 leave request and e-mail correspondence of the same date from Ms. Bertrand regarding a potential pattern of abuse of sick leave.

By letters dated November 3, 2010, OWCP requested additional factual and medical evidence from appellant and the employing establishment.

In a November 22, 2010 statement, Ms. Bertrand indicated that Mr. Riley did not "yell" at appellant to "shut up and listen" during a meeting on September 21, 2010. She noted that they were "in fact listening to [appellant's] concerns about his schedule." Ms. Bertrand denied advising him that on October 12, 2010 that sick leave matters were none of his business. She indicated that appellant came to her office and questioned her as to why she accused him of abusing sick leave. Ms. Bertrand denied that she accused him of abusing sick leave but noted advising him that "a pattern [of] calling in sick either before or after his regular scheduled days off" could be "considered sick leave abuse." Appellant became very agitated and asked her "why are you picking on us?" Ms. Bertrand indicated that she asked him to whom he was referring and he indicated that he was sick and that she could call his physician. She noted that she never indicated that appellant was not sick but only noted that his pattern of leave use "could be considered sick leave abuse." Additionally, Ms. Bertrand denied that Mr. Riley yelled at appellant and told him to "shut up" during a meeting on October 12, 2010. She also denied that Mr. Riley threatened appellant but instead tried to explain that he was doing his job as supervisor but that appellant would not listen and made "sounds of disgust and shook his head." Ms. Bertrand indicated that Mr. Riley remained calm and sought to explain that it could be construed as a pattern and someone at "HR" might consider it a pattern at which point appellant told him that he was "being unprofessional" and left Mr. Riley's office. She denied that she discriminated and or retaliated against appellant.

In a separate statement, Mr. Dolley indicated that, during the course of his meetings with appellant, he did not recall "Mr. Riley ever yelling at [appellant] to 'Shut up and listen.' I did not hear those words said by Mr. Riley." He also indicated that he "never discriminated against [appellant] in any way, shape or form for his complaining about his work schedule." Mr. Dolley also denied any knowledge of Ms. Bertrand or Mr. Riley discriminating against appellant about his work schedule complaints.

By decision dated December 16, 2010, OWCP denied the claim finding that he failed to establish a compensable employment factor.

On January 5, 2011 appellant submitted a January 5, 2011 report from Dr. Eugene Richard Dorsey, a Board-certified psychiatrist, who diagnosed several conditions to include major depression and opined that appellant was totally disabled.

On February 1, 2011 appellant's representative requested a hearing, which was held on June 8, 2011. At the hearing, appellant argued that the employing establishment changed his

working hours and shift, which caused him to be overworked, confused and depressed. He indicated that the new supervisor, Ms. Bertrand, took him off his regular schedule and put him any place she wanted. Appellant believed that, as the senior person, he should have a permanent position. He indicated that Ms. Bertrand assigned him too much work and it was an impossible task. Appellant also indicated that he was the only one that was given a mixed job. He further indicated that he told Mr. Riley that he could not do both jobs and was advised that Ms. Bertrand would take care of the problem. However, Mr. Riley yelled at appellant who believed that it was because he was complaining about his schedule. Appellant advised that he was terminated on March 25, 2011 and that, before this, there was a confrontation in which Mr. Riley and Ms. Bertrand yelled at him. He indicated that she was the reason for his depression. Regarding overwork, appellant indicated that he was placed “anywhere they wanted me to work” and he worked in two different locations. When asked what he meant by overwork, he explained that they kept putting him in AGV, which was not an easy job and the general stores, which was the work of “two persons.” Appellant indicated that he was not able to do all the work. He further indicated that it was very hard for him to do it by himself. Appellant testified that he worked up to eight hours per day.

After the hearing, appellant submitted a June 8, 2011 statement from, Fortunato Panlaqui, a coworker, who explained that the ward to which appellant was assigned was one of the busiest and most difficult assignments for a materials handler during their shift. Mr. Panlaqui indicated that the reason appellant was reassigned was because their shift needed someone else to operate the AGV’s used to take linens and medical supplies to the wards. He stated that appellant was the “most reliable and hard working employee they need to assign for that job to run the operation smoothly.” Mr. Panlaqui noted that appellant was also rotated as necessary to help pull materials where they were stocked and to do inventory and replenishment of medical supplies various areas that they serviced. He noted that this did not happen to anyone else, including himself and believed that this “practice is really unfair for him being the most senior material handler in our shift.”

By decision dated July 19, 2011, an OWCP hearing representative affirmed the December 16, 2010 decision. Regarding appellant’s allegation of overwork, she noted that he was unable to articulate how he was overworked.

LEGAL PRECEDENT

Workers’ compensation law does not apply to each and every illness that is somehow related to an employee’s employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers’ compensation. Where the disability results from an employee’s emotional reaction to his regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA. On the other hand the disability is not covered where 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.²

² See *Lillian Cutler*, 28 ECAB 126 (1976).

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition, for which he claims compensation was caused or adversely affected by employment factors.³ This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions, for which compensation is claimed.⁴

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.⁵ 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.⁶

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.⁷ 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.⁸ 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.⁹

ANALYSIS

Appellant alleged that his work factors caused an emotional condition. OWCP denied his claim on the basis that no compensable factors had been established. The Board must review whether the allegations are sufficient to establish compensable factors under FECA. The Board finds that appellant has not established a compensable factor of employment.

³ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁴ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁵ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁶ *Id.*

⁷ *Charles D. Edwards*, 55 ECAB 258 (2004).

⁸ *Kim Nguyen*, 53 ECAB 127 (2001). *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

⁹ *Roger Williams*, 52 ECAB 468 (2001).

Appellant attributes in part his emotional condition to the stress of carrying out his workload, because he was assigned to work both the general store and the AGV on the same day. He alleged that these were the busiest areas and it was impossible for him to do all the work. The Board has held that conditions related to stress resulting from situations in which a claimant is trying to meet his or her position requirements are compensable.¹⁰ During his hearing, appellant indicated that it was impossible to work both areas. However, he did not sufficiently explain how he was overworked. In support of this aspect of his claim, appellant submitted a statement from another employee, Mr. Panlaqui, who indicated that appellant was the only person assigned to work both the AGV and inventory. The Board notes that the record does not contain any other indication of overwork, other than appellant's displeasure with having to work both areas. Appellant also noted that the employing establishment advised him that the areas fell under one job description. During his hearing, he testified that he worked up to eight hours per day. Appellant did not provide any details other than to exclaim that it was impossible to work both areas. However, other than exclaiming that he was doing the work of two persons and being placed in AGV and the general stores, despite proclaiming that it was hard, he has not submitted substantial evidence of a heavy workload and as such has not established a compensable work factor under *Cutler*.¹¹

Appellant also made several allegations related to administrative and personnel actions. In *Thomas D. McEuen*,¹² 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 establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹³

Regarding appellant's allegations pertaining to leave matters, the Board has held that, although the handling of leave requests and attendance matters are generally related to employment, they are administrative matters and not a duty of the employee.¹⁴ The Board notes that appellant is alleging that his supervisors suggested that he abused his sick leave by suggesting a pattern of leave use before and after scheduled days off. However, the employing establishment denied acting abusively. For example, Ms. Bertrand denied accusing appellant of abusing his sick leave, but rather sought to caution him by explaining that his pattern of leave use could be construed as a pattern of abuse by human resources. Appellant has not submitted any

¹⁰ *Richard H. Ruth*, 49 ECAB 503 (1998).

¹¹ *See supra* note 2.

¹² *See supra* note 8.

¹³ *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁴ *See Joe M. Hagewood*, 56 ECAB 479 (2005).

witness statements or other evidence to support his allegation that the employing establishment acted abusively in relation to questions pertaining to his leave or by requesting medical documentation to support his requests.

Appellant also made allegations about the assignment of work. For example, as noted above, he alleged that he was made to work both the general store and AGV. The assignment of work is an administrative function of the employer and not a duty of the employee.¹⁵ The Board notes that the employing establishment has generally denied appellant's allegations and he has not submitted sufficient evidence to support that the employing establishment acted unreasonably in assigning work. The Board has held that 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 under FECA.¹⁶

Appellant also asserted that he was passed over for a promotion. Denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment absent a showing of error or abuse as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.¹⁷ However, there is no evidence to support his allegation that the actions of the employing establishment were erroneous or abusive. Appellant did not provide evidence showing unreasonable action by the employer in this regard.

Although appellant alleged a hostile work environment, he did not clearly detail what aspect of his employment not already addressed constituted a hostile work environment. The Board has reviewed his allegations and finds that he has not submitted sufficient evidence to establish a hostile work environment. For an allegation of a hostile work environment and harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did, in fact, occur. Mere perceptions of harassment alone are not compensable under FECA.¹⁸ Additionally, both Ms. Bertrand and Mr. Dolley denied any type of harassment or retaliation. Appellant has not submitted sufficient evidence to establish harassment or a hostile work environment by the employing establishment.

Likewise, appellant asserted discrimination due to the fact that he was required to work multiple areas, such as the AGV and the general store, whereas no other employee was required to do so. As noted above, he submitted a statement from Mr. Panloui who indicated that appellant was the only person assigned to work both the AGV and inventory. As noted, 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. The Board finds that appellant has not established that being assigned to both areas to include AGV and the inventory was discriminatory. Additionally, both Ms. Bertrand and Mr. Dolley denied any type of harassment or retaliation. The evidence did not establish discriminatory intent with regard to the assignment

¹⁵ See *Lori A. Facey*, 55 ECAB 217 (2004).

¹⁶ See *Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

¹⁷ *Hasty P. Foreman*, 54 ECAB 427 (2003).

¹⁸ *Ruthie M. Evans*, 41 ECAB 416 (1990).

of duties. Although Mr. Panlaqui indicated that no one else was required to perform duties performed by appellant, this general allegation is insufficient to establish unreasonable disparate treatment. Appellant has not established a compensable work factor in this regard.

Appellant also alleged that on September 21 and October 12, 2010 Mr. Riley yelled at him and told him to “shut up.” The Board has recognized the compensability of 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 Appellant provided no evidence to corroborate the alleged statements or actions. Furthermore, Ms. Bertrand noted being present at both meetings and denied that any improper comments were made by Mr. Riley. Mr. Dolley also denied that Mr. Riley improperly addressed appellant. The Board finds that there is insufficient evidence to establish that any statements uttered by Mr. Riley rose to the level of compensable verbal abuse.

Consequently, the Board finds that appellant has not established a compensable employment factor with respect to these allegations of harassment. As appellant has not established a compensable employment factor, it is not necessary to address the medical evidence.²⁰ On appeal, he reiterates assertions made before OWCP, particularly that he was overworked. Regarding overwork, appellant did not submit any detailed statement explaining how his specific duties for a particular time period represented overwork. As explained, he has not established a compensable factor of employment.

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

Appellant did not meet his burden of proof in establishing that he sustained an emotional condition in the performance of duty.

¹⁹ See *Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783 (1991).

²⁰ *Garry M. Carlo*, 47 ECAB 299 (1996). See *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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