

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

C.M., Appellant

and

**U.S. POSTAL SERVICE, DISTRIBUTION
CENTER, Memphis, TN, Employer**

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**Docket No. 13-1432
Issued: December 9, 2013**

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 June 3, 2013 appellant filed a timely¹ appeal from the February 25, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) and a November 27, 2012 merit decision. Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ The last merit decision in this case was issued on November 27, 2012. Appellant had 180 days to request an appeal from this decision pursuant to 20 C.F.R. § 501.3(e). The 180th day following November 27, 2012 was Sunday, May 26, 2013. While this appeal was received at the Board on June 3, 2013, the Board's *Rules of Procedure* also provide that if the notice of appeal is sent by United States mail and use of the date of delivery as the date of filing would result in a loss of appeal rights, the appeal will be considered to have been filed as of the date of postmark or other carriers' date markings. The appeal was postmarked on May 25, 2013 and was therefore timely filed for review of the merits of the claim.

² 5 U.S.C. § 8101 *et seq.*

³ By order dated October 21, 2013, the Board denied appellant's request for oral argument on the grounds that the Board did not have jurisdiction of merits of the case, the arguments on appeal could be adequately addressed based on a review of the case record and oral argument would further delay issue of a Board decision and would not serve a useful purpose. Upon further review, the Board finds that it does have jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty on July 3, 2012; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 29, 2012 appellant, then a 56-year-old maintenance manager, filed a traumatic injury claim (Form CA-1) alleging that, on September 10, 2012, he sustained work-related stress. He did not submit any other factual or medical evidence in support of his claim.

By letter dated October 9, 2012, the employing establishment explained that appellant's duties as maintenance manager included ensuring that the distribution facility is maintained and that processing equipment is functional. Appellant was given specific instructions to ensure that machine downtime was reported to another office, but failed to do so on two separate occasions. Due to this lapse, he was given a letter of warning for his level of performance. Mr. Jones stated that appellant's claim was in response to this corrective action.

On October 23, 2012 OWCP requested additional factual and medical evidence from appellant. It noted that he had not submitted any evidence apart from his claim form. OWCP afforded appellant 30 days to submit additional evidence.

On November 1, 2012 appellant stated that during a district-wide teleconference on July 3, 2012, he was screamed at, personally insulted, and humiliated, which caused severe depression which was later diagnosed as post-traumatic stress syndrome. Appellant asserted that he had no stress outside of his federal employment, but that he had constant recurring thoughts of the event, nightmares, and inability to sleep, and that he was being treated by a psychiatrist for his condition.

In an attending physician's form report dated October 2, 2012, Dr. Christine Malone, a psychiatrist, diagnosed post-traumatic stress disorder. She noted that appellant experienced the July 3, 2012 incident as traumatic in nature. Appellant felt that his integrity and career were threatened, and had recurrent distressing recollections, nightmares and anhedonia as a result of the event. Dr. Malone checked a box indicating that she believed appellant's condition was caused or aggravated by the employment activity. She also estimated that appellant could return to work on October 22, 2012.

In a note dated September 18, 2012, Dr. Audria K. Black, a Board-certified psychiatrist, diagnosed appellant with depression and prescribed medication.

In an unsigned note dated November 12, 2012, Dr. Malone stated that appellant exhibited symptoms of acute stress at his initial assessment and had post-traumatic stress disorder. She asserted that appellant's condition resulted from a traumatic event in which he felt threatened, and that he exhibited a persistent symptom of increased arousal.

By decision dated November 27, 2012, OWCP denied appellant's claim, finding that the factual evidence was not sufficient to support a compensable employment factor. There was a

discrepancy between the date of the incident reported on the claim form that of September 10, 2012, and the date listed in medical notes from Dr. Malone, that of July 3, 2012.

On January 20, 2013 appellant requested reconsideration. In a January 17, 2013 narrative statement, he explained that he inadvertently listed the date of his injury as September 10, 2012 when completing his claim form and that July 3, 2012 was the correct date of injury. Appellant noted that Mr. Jones controverted his claim on October 9, 2012 and was the same person who verbally abused him on July 3, 2012. He contended that his claim was unrelated to being given a letter of warning. Describing the alleged incident, appellant stated that the “personal attack on me on or about 3 July 2012, during the District Teleconference was a fact, and unlike any I have ever experienced,” and that “it was public ridicule, extremely humiliating, I was referred to by grade level, it was a personal attack on me with numerous management personnel in attendance.” He noted other work-related stress had combined with the incident of July 3, 2012 and resulted in his present condition. The other work-related stress included staffing deficiencies and a denial of employee training. Appellant responded to the employing establishment’s controversion of his claim, stating that the adverse personnel action against him was irrelevant and that he was told that it was of no consequence. He included a summary of his work history with his narrative statement.

In a certification of health care provider form of January 10, 2013, Dr. Malone stated that appellant’s condition commenced the first week of July 2012 and that he was unable to perform many of his job functions such as managing others, overseeing equipment and personnel operations. She listed appellant’s symptoms as hypersomnia, feelings of helplessness, anhedonia, lack of emotional responsiveness, avoidance of anything associated with the incident, irritability, isolation and feeling easily fatigued. Dr. Malone estimated that appellant could go back to work on February 25, 2013, but that it was medically necessary for him to be absent from work from three to five days a week due to flare-ups of his condition.

In a note dated November 12, 2012, Dr. Black diagnosed depression and prescribed medication.

By decision dated February 25, 2013, OWCP denied appellant’s request for reconsideration, on the grounds that the evidence submitted did not establish that it erroneously interpreted a point of law, did not provide a relevant legal argument not previously considered, and was substantially similar to evidence previously of record and considered. It noted that none of the evidence submitted supported that the mistreatment of July 3, 2012 occurred as alleged.

LEGAL PRECEDENT -- ISSUE 1

To establish a claim that he 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.⁴

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.⁵ 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.⁶ Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁷ 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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁸

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.⁹ However, 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.¹⁰ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹¹

The Board has held that the manner in which a supervisor exercises his or her discretion generally falls outside the coverage of FECA. This principal recognizes that a supervisor or manager must be allowed to perform their duties and that employee's will, at times, disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.¹² 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.¹³

⁴ V.W., 58 ECAB 428, 431 (2007); *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

⁵ L.D., 58 ECAB 344, 350 n.8 (2007); *Robert Breeden*, 57 ECAB 622, 625 (2006).

⁶ A.K., 58 ECAB 119, 121 (2006); *David Apgar*, 57 ECAB 137, 140 (2005).

⁷ 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309, 314 (2001); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

⁸ J.F., 59 ECAB 331, 338 (2008); *Gregorio E. Conde*, 52 ECAB 410, 411-12 (2001).

⁹ See *Matilda R. Wyatt*, 52 ECAB 421, 423 (2001); *Thomas D. McEuen*, 41 ECAB 387, 391-92 (1990).

¹⁰ See *William H. Fortner*, 49 ECAB 324, 325 (1998).

¹¹ *Ruth S. Johnson*, 46 ECAB 237, 241 (1994).

¹² S.M., Docket No. 09-2290 (issued July 12, 2010); *Linda J. Edwards-Delgado*, 55 ECAB 401, 405 (2004).

¹³ C.T., Docket No. 08-2160 (issued May 7, 2009); *Jeral R. Gray*, 57 ECAB 611, 615-16 (2006).

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an emotional condition as a result of a work-related incident on July 3, 2012. The Board notes that he did not attribute his emotional condition to his regular or specially assigned duties under *Cutler*. OWCP denied appellant's emotional condition claim finding that he had not established that the incident occurred as alleged. In a statement dated November 1, 2012, appellant asserted that during a teleconference on July 3, 2012, he was screamed at, personally insulted, and humiliated, which caused severe depression that was later diagnosed as post-traumatic stress syndrome. In a narrative statement dated January 17, 2013, he asserted that Mr. Jones was the person who harassed him, on July 3, 2012, during a district-wide teleconference. Appellant stated that "it was public ridicule, extremely humiliating, I was referred to by grade level, it was a personal attack on me with numerous management personnel in attendance." By letter dated October 9, 2012, Mr. Jones stated that appellant's claim was in response to a letter of warning given poor job performance. His letter did not address an incident on July 3, 2012.

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.¹⁴ Mere perceptions of harassment or discrimination are not compensable under FECA.¹⁵ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁶ A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.¹⁷

In the present case, appellant has not submitted sufficient evidence to establish that he was harassed by Mr. Jones, a manager, during a teleconference on July 3, 2012.¹⁸ He alleged in general terms that he was personally attacked during the teleconference. Appellant failed to provide a specific description of the statements made during the teleconference. The Board has recognized the compensability of verbal altercations or abuse when sufficiently detailed by the claimant and supported by the record. Appellant did not provide any detail as to the alleged statements, other than attributing them to Mr. Jones. The evidence of record does not establish error or abuse by his manager. As the Board has explained, not every statement uttered in the workplace will give rise to compensability.¹⁹ Appellant did not submit any statement from other employees party to the teleconference of July 3, 2012. The evidence of record does not establish

¹⁴ *K.W.*, 59 ECAB 271, 276 (2007); *Robert Breeden*, *supra* note 3.

¹⁵ *M.D.*, 59 ECAB 211, 217 (2007); *Robert G. Burns*, 57 ECAB 657, 661 n.14 (2006).

¹⁶ *G.S.*, Docket No. 09-764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616, 620 (2005); *Penelope C. Owens*, 54 ECAB 684, 686 (2003).

¹⁷ *Robert Breeden*, *supra* note 3; *Beverly R. Jones*, 55 ECAB 411, 416 (2004).

¹⁸ *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.)

¹⁹ *See Joe M. Hagewood*, 56 ECAB 479, 492 (2005); *David C. Lindsey*, 56 ECAB 263, 270 (2005) (finding that the mere fact that a supervisor or employee may raise his or her voice during the course of an argument does not warrant a finding of verbal abuse.)

verbal abuse or otherwise establish a compensable work factor.²⁰ Appellant alleged that Mr. Jones made statements that he believed constituted harassment or verbal abuse, but he did not detail what was stated or provide any corroborating evidence, such as witness statements, to establish that the statements actually were made.²¹ Therefore, he has not established a compensable employment factor under FECA with respect to the claimed harassment.

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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.²² Section 10.608(b) of OWCP's regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.²³ The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.²⁴

ANALYSIS -- ISSUE 2

On January 20, 2013 appellant requested reconsideration of OWCP's November 27, 2013 decision denying his claim for compensation on the grounds that he had not provided sufficient evidence to demonstrate that the traumatic incident occurred as alleged. With his request for reconsideration, appellant submitted a narrative statement, work history information, a certification of health provider for the Family and Medical Leave Act, an Employee Assistance Program self-referral waiver, a maintenance vacancy report, and a prescription from Dr. Black dated November 12, 2012. His request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Appellant did not advance a relevant legal argument not previously considered by OWCP. Thus, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

²⁰ See *J.J.*, Docket No. 07-2014 (issued January 24, 2008).

²¹ See *William P. George*, 43 ECAB 1159, 1167 (1992).

²² 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141, 146 (2007).

²³ *Id.* at § 10.608(b); *K.H.*, 59 ECAB 495, 499 (2008).

²⁴ See *Daniel Deparini*, 44 ECAB 657, 659 (1993).

The Board finds that appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP. In his January 17, 2013 statement, appellant listed trauma from other work-related factors, combined with the incident of July 3, 2012, that resulted in his present condition. He briefly mentioned staffing deficiencies and denial of employee training and noted the adverse personnel action was irrelevant to his claim.

The narrative statement of January 17, 2013 provided a duplicative account of the teleconference on July 3, 2012. Appellant provided no additional information. Submitting additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.²⁵ Therefore, this statement is insufficient to require further merit review of appellant's claim.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a compensable employment factor. Further, OWCP properly denied his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²⁵ See *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Daniel Deparini*, 44 ECAB at 659.

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2013 and November 27, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 9, 2013
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