United States Department of Labor
Employees' Compensation Appeals Board

R.E., Appellant	)	
and	)	**Docket No. 13-553**
	)	**Issued: July 25, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 9, 2013 appellant filed a timely appeal from the August 10, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied his emotional condition claim. He also appealed a December 27, 2012 decision finding that he abandoned his request for a hearing. 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.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether OWCP properly determined that he abandoned his request for a hearing.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 11, 2012 appellant, then a 56-year-old clerk, filed an occupational disease claim alleging stress, bipolar disorder and sleep apnea as a result of his work environment. He became aware of his condition and realized that it was causally related to his employment on March 30, 2012. Appellant stopped work on March 30, 2012 and did not return.[2]

In an undated statement, appellant noted reporting to work late on March 30, 2012. His postmaster, Sandra Neely, was present and she stated repeatedly that he was late and that he was supposed to be at the customer service window by 9:00 a.m. Appellant informed her that he was not late and that he had five minutes to get to his workstation. Ms. Neely continued to assert that he was late and that she was going to have Anthony Jones, his supervisor, meet with him to discuss his start time. Appellant requested that a union steward be present at the meeting. At this time, his head started to hurt and he felt sick and weak. Appellant assisted two customers at the window but felt very stressed and requested permission to leave work from Mr. Jones, who alleged that Ms. Neely informed him that she was initiating an investigation interview with appellant for possible insubordination for the manner in which he spoke to her on the work room floor. He asserted that Ms. Neely spoke to him in an inappropriate manner and instructed him to get off the clock and go home. Appellant told her that she could not continue to bully people and indicated that his voice was elevated due to his stress level.

Appellant submitted an attending physician's report from Dr. Nancy Rubio, a Board-certified psychiatrist, who diagnosed bipolar disorder and possible sleep apnea. Dr. Rubio checked a box "yes" that his condition was caused or aggravated by work activity and noted that he had a confrontation with the postmaster which caused distress. Also submitted was a Family Medical Leave Act health care provider certification which noted that appellant was being treated for bipolar disorder and stress. A certificate of visit from Darrell D. Turner, Ph.D, a clinical psychologist, dated March 30, 2012, noted appellant was treated for mental health reasons and was disabled until April 3, 2012.

On April 24, 2012 OWCP asked appellant and the employing establishment to provide additional evidence.

Appellant submitted medical records from the Veterans Administration Medical Center dated March 30 to April 16, 2012. He was treated by Dr. Rubio for an onset of depression, worsening with headaches, which may have been precipitated by a negative encounter with his supervisor on March 30, 2012. Dr. Rubio diagnosed anxiety disorder, osteoarthritis, dyslipidemia, obesity, erectile dysfunction and radiculopathy.

The employing establishment submitted a May 7, 2012 letter controverting appellant's claim. It submitted statements from Ms. Neely dated May 7 and 22, 2012. On March 30, 2012 Ms. Neely was assisting a customer at a window at 9:00 a.m. and noticed that there was only one clerk at the window when there should be three. She walked into the back and saw Nicole Robinson, appellant's coworker, and appellant and inquired as to their scheduled reporting time. Ms. Neely noted that both employees were to clock in at 9:00 a.m. and report directly to the

[2] The claim form listed appellant's tour of duty as 9:00 a.m. to 6:00 p.m. Monday through Friday.

window. Appellant stated that he had until 9:05 a.m. to clock in. Ms. Neely advised him that he was to clock in at 9:00 a.m. and had five minutes for congestion at the time clock. Appellant became agitated and told her that he would not argue and that she should take it up with his union steward. Ms. Neely spoke to Mr. Jones, appellant's supervisor, and proposed a meeting with appellant and his union steward, to clarify that his reporting time was 9:00 a.m., not 9:05 a.m., and that his attitude would not be tolerated. Prior to the meeting, appellant walked into her office and stated that he was going home sick because he was stressed. Ms. Neely stated that, if he needed to leave, he should do so and advised him to submit medical documentation. Appellant became very agitated and was opening and closing his fists and stated that "you can't bully and intimidate me." Ms. Neely repeatedly told him to go home. She noted that appellant had various medical and personal issues in the past year and missed work. Ms. Neely stated that her post office was not understaffed and there were many times when he would be standing against the wall because there were no customers. Appellant did not have extra demands placed on him and was generally able to perform his work duties in accordance with expectations. Ms. Neely advised that his attendance was less than satisfactory due to his medical appointments.

In an undated statement, Ms. Robinson, appellant's coworker, noted that on March 30, 2012 she arrived at work and clocked in. Appellant had clocked in at 9:07 a.m. Ms. Neely approached them and began to "fuss at both of us that we were late." Appellant stated that he was not late and that he still had time to clock in and Ms. Neely continued to state that he was late. Ms. Robinson retrieved her training materials from the training office when she heard a commotion by the time clock. She turned to see Ms. Neely and appellant discussing whether he reported to work late. A statement from Karen Brewer, a supervisor, noted that appellant was animated and boisterous during his time at work and that he was not under duress from his job.

In a decision dated August 10, 2012, OWCP denied appellant's claim finding that the claimed emotional condition did not occur in the performance of duty. It found that he did not establish any compensable work factors.

On August 16, 2012 appellant requested an oral hearing. He submitted an undated letter from Dr. Turner. On October 24, 2012 OWCP advised appellant that a telephone hearing would be held on December 5, 2012 at 9:30 a.m., eastern time. It instructed him to call the provided toll-free number a few minutes before the hearing time and enter the pass code to gain access to the conference call. OWCP mailed the October 24, 2012 letter to appellant's address of record.

By decision dated December 27, 2012, OWCP found that appellant had abandoned his request for a hearing. It found that he received a written notice of the hearing 30 days before the scheduled hearing but did not appear or explain his absence either before or after the scheduled hearing.

LEGAL PRECEDENT -- ISSUE 1

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.[3]

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*,[4] 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.[5] 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.[6] Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[7] Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[8] Personal perceptions alone are insufficient to establish an employment-related emotional condition.[9] 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.[10]

ANALYSIS -- ISSUE 1

Appellant alleged that on March 30, 2012 he reported to work at 9:05 a.m. and was clocking in when Ms. Neely, spoke to him in an inappropriate tone and harassed him. Ms. Neely stated repeatedly that he was late and that he was supposed to be at the customer service window by 9:00 a.m. Appellant alleged that she bullied and tried to intimidate him and stated that she was going to have his supervisor speak with him about his start time which caused stress. He asserted that Ms. Neely improperly threatened to discipline him and start an investigation for possible insubordination for the manner in which he spoke to her on March 30, 2012 after she confronted him for being late. The Board must review whether the alleged incidents and conditions of employment are established as compensable factors under the terms of FECA.

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

[4] 28 ECAB 125 (1976).

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

[6] *Supra* note 4.

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

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

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

[10] *Supra* note 4.

Appellant has not attributed his emotional condition to the regular or specially assigned duties of his position as clerk. Therefore, he has not alleged a compensable factor under *Cutler*.[11]

Appellant 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 employing establishment 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 management 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]

Appellant asserted that on March 30, 2012 Ms. Neely improperly threatened to discipline him and initiate an investigation interview for possible insubordination concerning the manner in which he spoke to her on March 30, 2012. His allegation that she improperly threatened to discipline him and initiate an investigation interview for possible insubordination relates to an administrative or personnel matters unrelated to his regular or specially assigned duties and does not fall within the coverage of FECA.[14] Although the handling of disciplinary actions and evaluations are generally related to the employment, they are administrative functions of the employing establishment and not duties of the employee.[15] While Ms. Neely may have mentioned possible discipline or an investigation, the record fails to establish that appellant was disciplined or the subject of an investigative interview. To the extent that appellant is complaining about the manner in which Ms. Neely performed her duties as a supervisor or the manner in which she exercised her supervisory discretion, this is outside the scope of coverage provided by FECA. This principle recognizes that a supervisor or manager in general must be allowed to perform her duties that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.[16] Absent evidence of error or abuse, appellant's mere disagreement or dislike of a managerial action is not compensable.[17] The Board finds that he did not submit sufficient evidence to establish error or abuse. The evidence does not establish that Ms. Neely

[11] *Supra* note 4.

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

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

[14] *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). Furthermore, time and attendance matters are administrative in nature. *See James P. Guinan*, 51 ECAB 604 (2000).

[15] *Id.*

[16] *See Marguerite J. Toland*, 52 ECAB 294 (2001).

[17] *See supra* note 13.

acted unreasonably. Appellant has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under FECA.

Appellant alleged that on March 30, 2012 he was running late and reported to work at 9:05 a.m. when Ms. Neely harassed him by stating repeatedly that he was late and that he was supposed to be at the customer service window by 9:00 a.m. He alleged that she bullied and intimidated him and stated that she was going to have his supervisor meet with 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.[18] 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.[19] The factual evidence fails to support appellant's claim for harassment. The record does not support his allegation that he was harassed or threatened or worked in a hostile environment. Ms. Neely stated that on March 30, 2012 she questioned appellant and Ms. Robinson as to their scheduled reporting time as both employees were late and were supposed to clock in at 9:00 a.m. and report directly to the window. She advised appellant that he was scheduled to clock in at 9:00 a.m. and had five minutes for congestion at the time clock. Appellant became agitated and was opening and closing his fists. His statement confirms that he was running late on March 30, 2012. This was corroborated by Ms. Robinson, appellant's coworker, who noted that on March 30, 2012 she arrived at work and noted that he clocked in at 9:07 a.m., when his reporting time was 9:00 a.m. Ms. Robinson also noted that Ms. Neely approached them and began to "fuss at both of us that we were late." Appellant noted that, after his confrontation with Ms. Neely, his voice was elevated. Ms. Neely denied any misconduct and the evidence supports that appellant's work shift commenced at 9:00 a.m. and he clocked in after that time. There is no corroborating evidence to support that she treated appellant improperly. Appellant has not established a compensable factor of employment in this regard.

To the extent that appellant alleged that Ms. Neely made improper comments to him, the Board has recognized the compensability of verbal abuse and threats in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.[20] The Board finds that the evidence does not support any specific incidents of verbal abuse. Although appellant asserted that Ms. Neely spoke to him inappropriately, appellant provided no corroborating evidence to establish his allegations.[21] He also acknowledged that his voice was raised during this interaction. Ms. Robinson's statement indicated that Ms. Neely began to "fuss" at her and appellant because they were late and that she later heard a "commotion" when appellant and Ms. Neely were addressing whether he was late,

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

[19] *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).

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

[21] *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).

she provided no support that Ms. Neely's comments rose to the level of verbal abuse.[22] There is insufficient corroborating evidence to support that any verbal interaction with appellant by Ms. Neely or others rose to the level of a compensable employment factor.

Consequently, appellant has not established his claim for an emotional condition as he has not attributed his claimed condition to any compensable employment factors.[23]

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

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.[24] Unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.[25]

A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference. The failure of the claimant to request another hearing within 10 days or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing. Where good cause is shown for failure to appear at the second scheduled hearing, review of the matter will proceed as a review of the written record.[26] Where it has been determined that a claimant has abandoned his or her request for a hearing, OWCP's Branch of Hearings and Review will issue a formal decision.[27]

ANALYSIS -- ISSUE 2

On August 10, 2012 OWCP denied appellant's claim. Appellant timely requested an oral hearing. In an October 24, 2012 letter sent to his address of record, OWCP notified him that a

[22] *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).

[23] 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).

[24] 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

[25] 20 C.F.R. § 10.617(b).

[26] *Id.* at § 10.622(f).

[27] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011).

telephone hearing was scheduled for December 5, 2012 at 9:30 a.m., eastern time. It instructed appellant to telephone a toll-free number and enter a pass code to connect with the hearing representative. Appellant did not telephone at the appointed time. He did not request a postponement of the hearing or explain his failure to appear at the hearing within 10 days of the scheduled hearing date of December 5, 2012. The Board therefore finds that he abandoned his request for a hearing.

On appeal, appellant asserted that he did not abandon his hearing or understand OWCP's letter sent in October 2012. After he received the December 27, 2012 decision he called OWCP on December 27, 2012 and was informed that the hearing date was on the letter sent in October. Appellant contended that he would not have missed the hearing and he had not returned to work. The October 24, 2012 letter clearly set forth the time and date of the hearing as well as the necessary information for joining the telephone hearing. The record reflects that it was properly mailed to his address of record.[28] Appellant did not request a postponement of the scheduled hearing; failed to appear at a scheduled hearing; and failed to provide any notification for such failure within 10 days of the scheduled date. The Board finds that he abandoned his request for an oral hearing.

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty. The Board further finds that he abandoned his request for an oral hearing.

[28] Absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. *See Nelson R. Hubbard*, 54 ECAB 156 (2002).

ORDER

IT IS HEREBY ORDERED THAT the December 27 and August 10, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 25, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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