United States Department of Labor
Employees' Compensation Appeals Board

M.J., Appellant	)	
and	)	**Docket No. 12-1412**
	)	**Issued: March 1, 2013**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Independence, MO, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 18, 2012 appellant, through his attorney, filed a timely appeal of a May 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition while in the performance of duty.

FACTUAL HISTORY

On August 15, 2011 appellant, then a 51-year-old maintenance and pest control worker at the Harry S. Truman National Historic Site, filed a Form CA-2 alleging that he was exposed to a

[1] 5 U.S.C. § 8101 *et seq.*

hazardous and hostile work environment from 2007 to 2011. As a result, he sustained stress, anxiety, depression and gastrointestinal symptoms. Appellant did not stop work.

Appellant alleged various incidents involving his superiors. In March 2007, Gary A. Dinehart, a former supervisor,[2] instructed him to reuse cloth while cleaning restrooms. In October 2007, he gave appellant a substandard job performance rating on the grounds that his collateral work as coordinator for training, supplies and emergency first responder services interfered with his primary duties. Near the end of 2007, Mr. Dinehart required him to attend one-on-one counseling sessions three to four times per week. In 2008 he failed to provide appellant with protective equipment and a decontamination shower during a project to remove lead-based paint from the exterior of the Truman Home; ordered him to remove the roll bar safety feature of a zero-turn riding mower; advised him that hearing protection was unnecessary because he was not exposed to loud noise for prolonged periods; and intentionally shook the ladder or scaffolding on which he stood while washing or repairing storm windows. In addition, Mr. Dinehart denied a request for work time dedicated to drafting a new Integrated Pest Management Plan (hereinafter "IPM"), assigned work at the Truman Farm, and required appellant to transport his personal all-terrain vehicle and care for his dogs while he was out of town.

In the middle of 2008, appellant was placed in charge of the environmental management systems audit by Larry Villalva, the superintendent. During the audit, he came across a 30-gallon container filled with an unknown chemical. Appellant advised Mr. Villalva to safely dispose of the container, but later found it emptying into a storm drain near the bottom of a driveway. Despite this and other violations, Mr. Villalva remarked that he would report a clean audit. Sometime in 2008, appellant was asked by a coworker to attest to a grievance, but was warned by Mr. Villalva that he was not entitled to whistleblower protection. At a separate meeting, he was reminded that he was an at-will employee. In early 2009, appellant informed Mr. Villalva that asbestos was discovered during installation of an air, heating, and fire suppression system at the Truman Home and that the contractors on site worked in confined spaces. He was later ordered to paint over the asbestos and "stay away." Since 2009 Mr. Villalva frequently chided appellant for raising job-related concerns. He also attempted to cast blame on appellant for June 2009 and June 2011 IPM violations committed by staff members who utilized unapproved pesticides and pest control equipment.[3] Near the end of the 2010 fiscal year, appellant was assigned the task of preparing a disaster shelter. He exceeded the allotted $500.00 budget by $40.00 and was scolded by Mr. Villalva. On May 17, 2011 appellant was involved in a motor vehicle collision while driving an employer-issued vehicle at the Truman Farm. He was berated by Mr. Villalva for admitting fault and incurring significant costs at the expense of the employing establishment.

[2] The case record indicates that Mr. Dinehart left the employing establishment sometime in June 2009.

[3] In a June 12, 2009 letter, Carol Dage, the employing establishment's supervisory museum curator, accepted responsibility for not informing her staff about changes related to chemical use for aphid control. In an October 27, 2011 letter, she noted that silverfish traps used to prevent infestation in storage were provided by management and a subsequent conference call involving the regional IPM coordinator clarified the appropriate protocol.

On August 11, 2011 appellant attempted to submit a Form CA-2 to Mr. Villalva, but was told to leave paperwork with Greg Wolcott, a supervisor, and "[not to] expect any kind of turn around on this." When he tried to leave the office after giving the form to Mr. Wolcott, Mr. Villalva blocked his exit, forcing him to squeeze his way through. Appellant was followed closely by Mr. Villalva until he was off the premises. His keys, cellular phone and purchasing authority were subsequently revoked.

In an August 19, 2011 statement, Mr. Wolcott advised that he began working at the employing establishment on February 1, 2010 and lacked knowledge of any events occurring prior to that date. Following the May 17, 2011 motor vehicle collision, he recalled that Mr. Villalva warned appellant that accidents depleted the employing establishment's finances and hindered its ability to complete projects. Regarding the August 11, 2011 altercation, Mr. Wolcott stated that appellant entered Mr. Villalva's office, demanded a meeting and stormed out when Mr. Villalva did not agree. Mr. Villalva then followed appellant after he submitted the Form CA-2 to ensure that he was not harassing other employees.[4]

In an August 19, 2011 statement, Mr. Villalva acknowledged that he once cited whistleblower provisions to explain their scope of coverage, criticized appellant for overspending the funds allocated for the disaster shelter, discussed the negative impact of the automobile accident on the employing establishment's operations, escorted him out of the building on August 11, 2011 and collected his work keys. Mr. Villalva commented that he had no knowledge of appellant's problems with Mr. Dinehart and denied all other allegations.[5]

OWCP informed appellant in an October 20, 2011 letter that additional evidence was needed to establish his claim. It gave him 30 days to submit additional factual evidence to corroborate the occurrence of the alleged incidents and a medical report from a physician explaining how compensable factors of employment caused or contributed to an emotional condition.

An April 8, 2011 note from Dr. Russell J. Thornton, an osteopath and general practitioner, stated that appellant was treated for depression, anxiety and irritable bowel syndrome. In a Form WH-380 Certification of Health Care Provider dated June 21, 2011, Christopher Moon, a licensed professional counselor, diagnosed ongoing episodes of generalized anxiety disorder and mood disorder necessitating weekly psychotherapy.

In a November 2, 2011 statement, Mr. Dinehart remarked that he told appellant that he did not need to wear hearing protection because he was only exposed to low-decibel noise. He was assigned sporadic work at the Truman Farm during the summer, such as mowing and repairs. Mr. Dinehart denied all other allegations.

By decision dated December 22, 2011, OWCP denied appellant's claim, finding the evidence insufficient to establish compensable factors of employment.

[4] Mr. Wolcott also provided a November 4, 2011 statement, which essentially reiterated his earlier assertions.

[5] Mr. Villalva also provided a November 4, 2011 statement, which essentially reiterated his earlier assertions.

Counsel requested a telephonic hearing, which was held on March 21, 2012. Appellant testified that he still worked at the Harry S. Truman National Historic Site and that the work environment improved with the arrival of a new supervisor.

In a March 19, 2009 report, Dr. John Anthony Woltjen, a Board-certified gastroenterologist, related that appellant complained of nausea and diarrhea. In medical records dated February 12, 2008 to August 5, 2011, Dr. Thornton noted that he experienced stress at work and diagnosed generalized anxiety disorder, major depressive affective disorder, irritable bowel syndrome, esophageal reflux, hyperlipidemia and elevated blood pressure, *inter alia*.

On May 11, 2012 an OWCP hearing representative affirmed the December 22, 2011 decision.

LEGAL PRECEDENT

To establish a claim that he or she sustained an emotional or stress-related condition in the performance of duty, an employee must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) medical evidence establishing that he or she has an emotional or stress-related disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the condition. If a claimant implicates a factor of employment, OWCP should determine whether the evidence of record substantiates that factor. Allegations alone are insufficient to establish a factual basis for an emotional condition claim and must be supported with probative and reliable evidence. If a compensable factor of employment is established, OWCP must then base its decision on an analysis of the medical evidence.[6]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to a claimant's employment. In the case of *Lillian Cutler*,[7] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition under FECA. When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that a disability resulted from this emotional reaction, the disability is generally regarded as due to an injury arising out of and in the course of employment. This holds true when the disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work. On the other hand, there are disabilities that have some causal connection with the claimant's employment but nonetheless fall outside FECA's coverage because they are found not to have arisen out of employment, such as when a disability results from a fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.[8]

[6] *G.S.*, Docket No. 09-764 (issued December 18, 2009).

[7] 28 ECAB 125 (1976).

[8] *William E. Seare*, 47 ECAB 663 (1996).

Administrative and personnel matters, although generally related to the claimant's employment, are administrative functions of the employer rather than the regular or specially-assigned work duties of the claimant and are not covered under FECA.[9] However, the Board has held that an administrative or personnel matter will be considered an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[10]

ANALYSIS

Appellant attributed stress, anxiety, depression, and gastrointestinal symptoms to actions by Mr. Dinehart and Mr. Villalva rather than the performance of his own regular or specially-assigned work duties.[11] He has not alleged a factor under *Cutler*. The Board shall determine whether the acts constitute compensable factors of employment.

Ordinarily, an employee's complaints about the manner in which a supervisor performs his duties or the manner in which he exercises his discretion fall outside the scope of coverage provided by FECA. This principle recognizes that a supervisor or manager must generally be allowed to perform his duties and employees will sometimes dislike the actions taken. However, absent evidence of error or abuse, mere disagreement or dislike of a supervisory or managerial action will not be compensable.[12]

Appellant alleged that Mr. Dinehart gave him a substandard job performance rating and required him to attend counseling sessions three to four times per week. He also alleged that Mr. Villalva reproached him for exceeding the budget allotted for the disaster shelter in 2010, for his involvement in a May 17, 2011 motor vehicle collision while driving an employer-issued vehicle, for IPM violations committed by coworkers, and for raising job-related concerns as well as revoked his work keys, cellular phone and purchasing authority. The Board has held that performance appraisals,[13] counseling sessions,[14] criticism and reprimands,[15] and monitoring of work by a supervisor[16] are administrative functions of the employer rather than duties of the employee. Mr. Villalva did not dispute that he collected appellant's work keys or admonished him for overspending and for subjecting the employing establishment to legal liability for the automobile accident. The evidence, however, does not establish that either supervisor acted in

[9] *M.C.*, Docket No. 10-1628 (issued June 8, 2011); *Matilda R. Wyatt*, 52 ECAB 421 (2001).

[10] *M.D.*, 59 ECAB 211 (2007); *Ruth S. Johnson*, 46 ECAB 237 (1994). *See also Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[11] *See Cutler*, *supra* note 7.

[12] *T.G.*, 58 ECAB 189 (2006); *Marguerite J. Toland*, 52 ECAB 294 (2001).

[13] *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

[14] *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

[15] *Roger W. Robinson*, 54 ECAB 846 (2003).

[16] *Janet I. Jones*, 47 ECAB 345 (1996).

an erroneous or abusive manner. Appellant did not present probative and reliable factual evidence to corroborate that the alleged incidents, which were denied by Mr. Dinehart and Mr. Villalva, occurred as described.

Appellant asserted that Mr. Dinehart instructed him to reuse cloth while cleaning the restrooms, failed to provide protective equipment and a decontamination shower during a project to remove lead-based paint from the exterior of the Truman Home, ordered him to remove the roll bar safety feature of a zero-turn riding mower and advised him that hearing protection was unnecessary because he was not exposed to loud noise for prolonged periods. He added that Mr. Villalva failed to properly dispose of a 30-gallon container of chemical waste, falsely reported a clean environmental management systems audit and discounted concerns regarding contractors' exposure to asbestos. The Board has held that matters of hygiene[17] and safety[18] in the workplace, including supervisors' failure to take appropriate actions to correct potentially hazardous situations,[19] are administrative functions. Although Mr. Dinehart stated that he did not require appellant to wear hearing protection, the evidence of record does not sufficiently establish that this was error in an administrative matter. Again, appellant did not present probative and reliable factual evidence to corroborate that the other incidents, which were denied by Mr. Dinehart and Mr. Villalva, occurred as alleged.

Appellant claimed that Mr. Dinehart denied his request to draft a new IPM during work hours and assigned job duties at the Truman Farm. The Board has held that granting or denying employees' requests pertaining to work,[20] assignment of work duties,[21] and supervisory instructions regarding work[22] are administrative functions. With respect to the first allegation, which Mr. Dinehart denied, appellant did not submit probative and reliable factual evidence to support that this declined request occurred as alleged. With respect to the second allegation, Mr. Dinehart acknowledged that he occasionally sent appellant to Truman Farm for mowing or repairs. However, the evidence does not support that he acted in an erroneous or abusive manner in assigning such duties.

An act of a supervisor that is characterized by the employee as harassment may constitute a compensable factor of employment giving rise to coverage under FECA. However, probative and reliable evidence must establish that the act alleged did, in fact, occur. An employee's unsubstantiated charge of harassment or discrimination is not determinative. Mere perceptions of harassment and discrimination are not compensable.[23]

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[17] *Steven M. Schwartz*, Docket No. 04-1102 (issued August 9, 2004).

[18] *Ronald C. Hand*, 49 ECAB 113 (1997).

[19] *Kim A. Baranosky*, Docket No. 03-678 (issued July 9, 2004).

[20] *See T.S.*, Docket No. 09-593 (issued September 14, 2009) (allegation that manager denied requests for additional staff and training implicates administrative and personnel matter).

[21] *James W. Griffin*, 45 ECAB 774 (1994).

[22] *P.B.*, Docket No. 08-158 (issued April 25, 2008).

[23] *H.C.*, Docket No. 12-457 (issued October 19, 2012); *Sylvester Blaze*, 42 ECAB 654 (1991).

Appellant accused Mr. Dinehart of intentionally shaking the ladder or scaffolding on which he stood while washing or repairing storm windows. He also indicated that Mr. Villalva threatened to fire him for attesting to a coworker's grievance and intimidated him when he attempted to submit a Form CA-2 by blocking his exit and directly escorting him out of the building. Appellant, however, did not substantiate these allegations with probative and reliable factual evidence. There are no statements by any coworkers or others who may have witnessed such actions. Instead, the case record contains statements from Mr. Villalva, who acknowledged that he cited whistleblower provisions to explain their scope of coverage and that he escorted appellant off the premises on August 11, 2011, and Mr. Wolcott, who specified that Mr. Villalva followed appellant to ensure that he would not harass other employees.

Appellant briefly mentioned that he transported Mr. Dinehart's all-terrain vehicle and watched over his dogs. While using a subordinate to assist with personal errands may constitute a compensable factor of employment,[24] he did not furnish probative and reliable factual evidence to establish particular occasions when this occurred or otherwise corroborate that this activity occurred at specific times. Since appellant had not established a compensable factor of employment, a review of the medical evidence is unnecessary.[25]

Counsel contends on appeal that the May 11, 2012 decision was contrary to fact and law. The Board has already addressed the deficiencies of appellant's claim.

Appellant may submit new evidence or argument as part of a formal 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 did not establish that he sustained an emotional condition while in the performance of duty.

[24] *See Debbie J. Hobbs*, 43 ECAB 135 (1991).

[25] *See Lori A. Facey*, 55 ECAB 217 (2004).

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: March 1, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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