

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

T.P., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
STATION OCEANA, Virginia Beach, VA,
Employer**

**Docket No. 13-392
Issued: November 4, 2013**

Appearances:

Laura A. O'Reilly, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 10, 2012 appellant, through his attorney, filed a timely appeal from the June 12, 2012 merit decision of the Office of Workers' Compensation Programs¹ (OWCP). 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.

ISSUE

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

¹ Appellant's appeal was received on Monday, December 10, 2012, which was 181 days after the issuance of OWCP's June 12, 2012 decision. The appeal is timely as the 180th day after the June 12, 2012 decision fell on a Sunday. *See* 20 U.S.C. § 501.3(e),(f)(2).

² 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 1, 2011 appellant, then a 48-year-old lead firefighter, filed a traumatic injury claim (Form CA-1) alleging that he sustained an emotional condition at work due to an incident that occurred at 12:55 p.m. on October 1, 2011.³ Regarding the cause of the injury, he stated, “Chief Cosentino used a box type flashlight to hit me in the left side of the chin. This was due to a union issue dealing with the crash bunk room living conditions.” In the witness statement portion of the Form CA-1, Brett Smith, a coworker, indicated in an October 1, 2011 entry, “I witnessed a flashlight placed in [appellant’s] face during a heated debate. The flashlight appeared to be very close if not touching his face. Both persons standing face to face where the flashlight was pushed into his face.” Captain John Lahart, appellant’s immediate supervisor, completed his portion of the CA-1 form on October 1, 2011 and stated, “Employee was on duty at time of incident. Based on witness statement I am unable to determine [sic]. It is under investigation.” Captain Lahart checked a “yes” box indicating that his knowledge of the facts about the claimed injury agreed with “statements of [appellant] and/or witnesses.”⁴

In a “mishap report” dated October 1, 2011, it was noted that appellant reported that he was assaulted by a supervisor noting, “[Appellant] alleges that the supervisor placed a box[-]type flashlight in his face in the chin and cheek area and the object made contact with [him].” The report indicates that he was given medical care on site and later had a friend take him to receive medical treatment off the premises.

In an October 17, 2011 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim.

In an October 1, 2011 form report, Mark A. Fusco, an attending physician’s assistant, indicated that appellant reported being stressed as a result of an alleged assault to his chin or cheek.⁵ In the clinical findings portion of the report, he stated, “No obvious sign of trauma.” Mr. Fusco diagnosed facial pain/contusion and situational stress related to alleged assault. In October 20, 2011 reports, he variously indicated that appellant suffered facial pain/contusion, situational stress/anxiety and a mild form of post-traumatic stress due to the reported October 1, 2011 incident, *i.e.*, having the flashlight pushed into his mandible with force. In an October 25, 2011 report, Dr. Robert T. Light, an attending psychiatrist, indicated that appellant reported being assaulted by a supervisor on October 1, 2011. He diagnosed acute stress disorder and checked a “yes” box indicating that this condition was caused or aggravated by the reported work incident.

In an October 15, 2011 letter, Mr. Lahart stated that appellant told him at work on that date that he was “having dreams about what happened.” In an October 17, 2011 letter, he stated that the employing establishment conducted an investigation of the October 1, 2011 incident but

³ Regarding the nature of the injury, appellant indicated, “Emotionally shaken up after assault.”

⁴ Appellant stopped work on October 1, 2011 but returned to work shortly thereafter. He stopped work again on October 15, 2011 and returned to light-duty work in mid-November 2011.

⁵ The report indicates that appellant reported that on October 1, 2011 his supervisor placed the flashlight up against his chin.

he was “unaware of the status” and was “not in possession of a final report.”⁶ In a November 7, 2011 letter, a human resources official at the employing establishment indicated that appellant’s claim was being controverted and noted that the medical evidence showed no signs of trauma from the alleged incident on October 1, 2011.

In a November 22, 2011 decision, OWCP denied appellant’s claim on the grounds that he did not establish any compensable work factors. Regarding the reason for the denial, it further explained:

“[T]he evidence does not support that the injury or event(s) occurred as [appellant] described. However, [appellant] also did not submit any medical evidence to establish that a diagnosed medical condition of acute stress disorder is causally related to the work injury or event. Therefore, even if you establish the factual portion of your claim, you must also establish the remaining medical portion described in this paragraph.

“Based on these findings, [appellant’s] claim is denied on the factual component of ... fact of injury, because the evidence does not support that the injury and/or event(s) occurred. The requirements have not been met for establishing that [he] sustained an injury as defined by [FECA].”

Appellant submitted an October 15, 2011 report, in which Dr. Scott Fowler, an attending family practitioner, diagnosed possible post-traumatic stress disorder “following alleged assault at work.”

Appellant requested a telephone hearing with an OWCP hearing representative regarding his claim. During the April 2, 2012 hearing, he testified at length about his claim that on October 1, 2011 Chief Cosentino struck him on his chin with a flashlight while they were discussing the living conditions of the crash bunk room. Appellant asserted that Chief Cosentino struck him because he was angry about their discussion of this matter. He and his counsel testified that the circumstances of the October 1, 2011 incident were addressed in a case heard before a U.S. District Judge in Norfolk, VA.⁷ Counsel indicated that the employing establishment temporarily moved Chief Cosentino to another workstation but that he later returned to his regular workstation.

⁶ In another October 17, 2011 statement, Mr. Lahart indicated that he did not witness the October 1, 2011 incident.

⁷ Appellant stated, “[W]e went to court and the judge’s finding was that basically he thought that there was my side of the story, Chief Cosentino’s side of the story and somewhere in between lies the truth, so the charges were dismissed.” He indicated that he was not given a copy of the judge’s decision,

In a June 12, 2012 decision, the hearing representative affirmed OWCP's November 22, 2011 decision denying appellant's claim. He cited the Board precedent regarding the establishment of the "fact of injury"⁸ and stated:

"The record does not establish that an injury occurred in the time, place or manner claimed. [Physician assistant Mr.] Fusco found upon initial examination no sign of trauma. Dr. Fowler subsequently made reference to only an alleged assault at work. As a result the medical reports of record were insufficient to confirm that a physical injury occurred. In turn, as reported by [appellant], the U.S. District Judge in Norfolk dismissed the charges filed against Fire Chief Cosentino related to the claimed work incident. Moreover, the Navy Department did not discipline Chief Cosentino with regard to the claimed incident. The lack of medical evidence confirming a physical injury as well as the decision by the U.S. District Judge constitutes strong and persuasive evidence refuting the claimant's allegation of an assault at work. Consequently, the evidence of record is insufficient to establish that an injury occurred as claimed."

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. 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. 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.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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.¹⁰

To the extent that disputes and incidents alleged as constituting harassment by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹¹ However, 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.¹² The Board has recognized the compensability of physical assaults or verbal abuse in certain circumstances.¹³

⁸ The hearing representative did not recite any Board precedent specific to the establishment of emotional condition claims.

⁹ *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁰ *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹¹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹² *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹³ *See Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

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.¹⁴ This burden includes the submission of a detailed description of the employment factors or conditions, which he believes caused or adversely affected a condition for which compensation is claimed and a rationalized medical opinion relating the claimed condition to compensable employment factors.¹⁵

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.¹⁶ 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 record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.¹⁷

Under FECA, although it is the burden of an employee to establish his claim, OWCP also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹⁸

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of an alleged incident on October 1, 2011 when a supervisor, Chief Cosentino, struck him on his chin with a flashlight while they were discussing the living conditions of the crash bunk room. OWCP denied his emotional condition claim on the grounds that he had not established the fact of injury. The Board must, thus, initially review whether the alleged incident is a covered employment factor under FECA. The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Cutler*.¹⁹ Rather, appellant has alleged a work factor in the form of harassment and physical/verbal abuse by a supervisor.

The Board finds that OWCP has not made adequate findings regarding appellant's claim that he sustained an emotional condition on October 1, 2011 due to the alleged actions of Chief Cosentino. As noted above, when working conditions are alleged as factors in causing a

¹⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

¹⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

¹⁶ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁷ *Id.*

¹⁸ *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

¹⁹ *See Cutler* note 9.

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.²⁰

OWCP did not adequately consider all the relevant evidence in determining that appellant did not establish a compensable work incident on October 1, 2011. Importantly, it did not make any mention in its decisions of a witness statement of Mr. Smith, a coworker, that was made on appellant's original Form CA-1 regarding the events of October 1, 2011. Mr. Smith indicated, "I witnessed a flashlight placed in [appellant's] face during a heated debate. The flashlight appeared to be very close if not touching his face. Both persons standing face to face where the flashlight was pushed into his face."

In addition, the record indicates that the employing establishment investigated the October 1, 2011 incident, but the record does not contain a copy of an agency investigation and the outcome of the investigation remains unclear. In an October 17, 2011 letter, Mr. Lahart, appellant's immediate supervisor, stated that the employing establishment conducted an investigation of the October 1, 2011 incident but he was "unaware of the status" and was "not in possession of a final report." At an April 2, 2012 hearing, appellant and counsel mentioned that the employing establishment was a party to an action in federal court regarding the events of October 1, 2011.²¹ The record does not contain a copy of any such action. With respect to any investigation carried out by the employing establishment, OWCP has a responsibility in the development of the factual evidence, especially when such evidence is of the character normally obtained from the employing establishment or other government source.²² However, it does not appear that OWCP made an adequate attempt to obtain all the relevant evidence regarding appellant's claim. In particular, it remains unclear whether the employing establishment attempted to obtain witness statements from Chief Cosentino or others who might have witnessed the events of October 1, 2011.

For these reasons, the case must be remanded to OWCP for further development of the factual aspect of appellant's emotional condition claim. It should attempt to obtain any relevant investigative reports, court decisions and witness statements. After such development as it deems necessary, OWCP shall issue an appropriate decision on the matter which adequately considers all relevant evidence.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty. The case is remanded to OWCP for further development.

²⁰ See *supra* note 16.

²¹ Appellant indicated that the case was "dismissed," but the findings and determinations of any federal suit remain unclear.

²² See *supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: November 4, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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