United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	**Docket No. 13-1199**
	)	**Issued: January 2, 2014**
U.S. POSTAL SERVICE, POST OFFICE, San Juan, PR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 18, 2013 appellant filed a timely appeal from a February 20, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his emotional condition claim. 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 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.

On appeal, appellant contends that OWCP's decision was improper.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 4, 2012 appellant, then a 60-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging an emotional condition in the performance of duty. On November 23, 2011 Jose L. Sepulveda, a fellow employee, intimidated him with words and gestures and acted like a supervisor by giving him instructions. Mr. Sepulveda was not appellant's supervisor. Appellant submitted hospital reports and a December 8, 2011 note from a social worker.

By letter dated April 24, 2012, OWCP informed appellant that the evidence of record was insufficient to support his claim. It requested that he provide additional factual and medical evidence, including a report from an attending psychiatrist or clinical psychologist within 30 days.

Appellant submitted a narrative statement alleging that he worked in a hostile environment since May 31, 2011. Mr. Sepulveda stated in a high tone of voice, "This old son of a b***h bastard don't do what he is supposed to do and I end up f***ing myself doing it." Appellant stated that he was subjected to yelling and cursing by Mr. Sepulveda, in English and Spanish, on several different occasions. Mr. Sepulveda was suspended several times but would return to work and continue his behavior after each suspension. Appellant was previously treated for anxiety due to active service. He submitted a June 2, 2011 narrative statement reiterating the May 31, 2011 incident.

In a November 28, 2011 statement, appellant alleged that on November 23, 2011 Mr. Sepulveda complained about the manner in which he performed assigned duties. He stated that Mr. Sepulveda was always giving instructions and calling people on the telephone to show up for work as if he were a supervisor.

Appellant submitted a copy of the employing establishment's zero tolerance policy of violence in the workplace and documentation dated January 30 through February 10, 2012 regarding an Occupational Safety and Health Administration (OSHA) complaint. On January 30, 2012 he submitted a report of alleged hazardous working conditions, including: "separate two incidents, May and November 2011, [when] a coworker showed hostilities and aggression towards supervisors and coworkers by yelling and cursing during regular working hours. Employees are concerned about their safety and information and training not provided to them related to agency's procedures related to violence in the workplace incidents." OSHA advised that it would not conduct an inspection; however, it instructed the employing establishment to perform an investigation since allegations had been made.

By letter dated February 9, 2012, the employing establishment stated that appellant's safety violation allegations were investigated on December 19, 2011. The alleged harasser, Mr. Sepulveda, was informed of the seriousness of inappropriate conduct on the premises and offered a referral to the Employee Assistance Program (EAP). As a preventative measure he would report to another position that was not located at the platform area where appellant worked. Visual aids were made available on the workroom floor at the employee bulletin boards as to violence in the workplace.

In a February 10, 2012 letter, OSHA noted that the employing establishment had investigated appellant's complaint and taken steps to achieve compliance and avoid possible future violations. OSHA closed the case on the grounds that the hazardous conditions had been corrected. It notified appellant that if he did not agree that the hazards had been satisfactorily abated, he must contact OSHA by February 17, 2012.

On February 15, 2012 appellant contended that Mr. Sepulveda was at his work site on February 11, 2012 even though he was instructed not to be at the platform. He went to the platform crew break area during the whole working shift. Appellant stated that he did not feel safe around Mr. Sepulveda as he disturbed the peace with his loud talking and harassment.

On May 5, 2012 Dr. Sylvia Berrios, a Board-certified psychiatrist, advised that appellant was hospitalized from December 5 to 20, 2011 and received psychiatric treatment for symptoms including: severe anxiety, irritability, poor impulse control, lack of sleep and frequent nightmares. She stated that his symptoms arose in association with problems concerning another coworker. Dr. Berrios diagnosed hypertension, gastroesophageal reflux disease and problems in work environment.

By decision dated October 11, 2012, OWCP denied appellant's claim. It found that he did not establish a compensable factor of employment.

On November 26, 2012 appellant requested reconsideration. He submitted a narrative statement and an August 28, 2012 report from Dr. Luis Escabi, a psychiatrist, who diagnosed major depressive disorder. Dr. Escabi indicated that appellant had no previous history of emotional conditions and that his depressive disorder was severe, had remained severe and was not expected to improve significantly. A mental status examination revealed depression, anhedonia, insomnia, isolation, crying spells, anxiety, loss of memory, irritability and suicidal ideas. Dr. Escabi opined that appellant was totally disabled and restricted from going to work due to the severity of his emotional condition.

By decision dated February 20, 2013, OWCP denied modification of its October 11, 2012 decision.

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.[2] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-

[2] *Id.*; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.[3]

To the extent that disputes and incidents alleged as constituting harassment by coworkers are established as occurring and arising from a claimant's performance of his or her regular duties, these could constitute employment factors.[4] 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.[5]

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.[6] 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.[7] 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.[8]

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by employment factors.[9] This burden includes the submission of a detailed description of the employment factors or conditions, which 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.[10]

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.[11] If a claimant does implicate a factor of

[3] *See Gregorio E. Conde*, 52 ECAB 410 (2001).

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

[5] *See Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[6] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff d on recon.*, 42 ECAB 556 (1991).

[7] *See William H. Fortner*, 49 ECAB 324 (1998).

[8] *See Ruth S. Johnson*, 46 ECAB 237 (1994).

[9] *See Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[10] *See Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[11] *See Dennis J. Balogh*, 52 ECAB 232 (2001).

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.[12]

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of employment incidents and conditions in his employment as a mail handler. OWCP denied his emotional condition claim on the grounds that he did not establish a compensable employment factor. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA. The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Cutler*.[13] Rather, appellant has alleged harassment on the part of a coworker.

For harassment to give rise to compensability under FECA there must be evidence that harassment did, in fact, occur. Mere perceptions of harassment are not compensable under FECA.[14] The Board has recognized the compensability of verbal altercations or abuse when sufficiently detailed by the claimant and supported by the record. This does not imply, however, that every statement uttered in the workplace will give rise to compensability.[15] In the present case, OWCP found that the evidence did not substantiate his allegations. Specifically, there is no evidence substantiating any derogatory remarks made by Mr. Sepulveda to appellant. The record contains no witness statement corroborating appellant's description of the alleged incidents. The evidence of record does not establish that any of the incidents rose to the level of verbal abuse or otherwise constituted a compensable work factor.[16] The Board finds no evidence substantiating appellant's contention that he was harassed by Mr. Sepulveda.

The record contains appellant's OSHA complaint regarding harassment by Mr. Sepulveda and the results of an investigation by the employing establishment. Appellant submitted a January 30, 2012 OSHA report of alleged hazardous working conditions and of the employing establishment's zero tolerance policy of violence in the workplace. OSHA did not conduct any inspection. In a February 9, 2012 letter, the employing establishment noted that appellant's allegations were investigated on December 19, 2011. It stated that Mr. Sepulveda was spoken to and informed of the seriousness of inappropriate conduct on the premises and offered EAP. The employing establishment noted that, as a preventative measure, Mr. Sepulveda would report to another position that was not located at the platform area where

[12] *Id.*

[13] *See Lillian Cutler*, *supra* note 2.

[14] *See supra* note 5.

[15] *See David C. Lindsey*, 56 ECAB 263 (2005). 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. *Joe M. Hagewood*, 56 ECAB 479 (2005).

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

appellant worked. Subsequently, appellant alleged that Mr. Sepulveda was at his work site on February 11, 2012, but he failed to submit sufficient evidence to establish this allegation as factual.

The Board has long held that grievances and Equal Employment Opportunity complaints by themselves do not establish that workplace harassment or unfair treatment occurred.[17] The Board finds that the employing establishment's report of investigation and its recommendation that Mr. Sepulveda be relocated as a preventative measure is not a finding of harassment nor is the fact that Mr. Sepulveda was spoken to and informed of the seriousness of possible inappropriate conduct on the premises a finding of harassment. The evidence of record on appeal is insufficient to substantiate appellant's allegations of harassment by the coworker.

Because appellant has not presented sufficient evidence that he was harassed by his coworker, Mr. Sepulveda, he has failed to establish a compensable work factor.[18] Appellant has not met his burden of proof to establish a claim.[19]

On appeal, appellant contends that OWCP's decision was improper. For the reasons stated above, the Board finds his argument is not substantiated.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

[17] *See Parley A. Clement*, 48 ECAB 302 (1997).

[18] *See H.C.*, Docket No. 12-457 (issued October 19, 2012).

[19] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2013 Office of Workers' Compensation Programs decision is affirmed.

Issued: January 2, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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