United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 15-28**
	)	**Issued: April 20, 2015**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Oakland, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 7, 2014 appellant filed a timely appeal from May 22, 2014 merit decisions of the Office of Workers' Compensation Programs. 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.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether he sustained an emotional condition on December 18, 2012 in the performance of duty.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY -- FILE NO. xxxxxx130

On December 19, 2012 appellant, then a 41-year-old claims examiner, filed an occupational disease claim alleging that he sustained migraine headaches, irritable bowel syndrome, gastroesophageal reflux disease (GERD), and aggravated psoriasis causally related to factors of his federal employment. He attributed his condition to stress from filing charges with the Federal Labor Relations Authority (FLRA) against the employing establishment and resulting retaliation by supervisors and the union. Appellant related that the stress "increased the severity of [his] service-connect[ed] disabilities." He stopped work on December 19, 2012. OWCP assigned the claim file number xxxxxx130.

In a letter dated December 6, 2012, appellant informed the FLRA that he had filed charges against the employing establishment and the union. He stated:

> "Yesterday, December 5, 2012, I was threatened by a union steward, Labrinia McDougle, stating that she read the paperwork I gave Sidney Byrd the union president regarding FLRA charges. She stated that I don't know who I am messing with and that I better watch my back coming to and from work because she is from Oakland and knows people who can take care of problems like me."

Appellant informed management of the incident and requested a transfer but it was deferred pending an investigation.

In an e-mail dated December 5, 2012 to William Vallejos, his supervisor, appellant related that Ms. McDougle threatened him after Mr. Byrd showed her documents. He related that he felt afraid at work and requested assistance. In a December 6, 2012 response, Mr. Vallejos informed appellant that the employing establishment was investigating the incident and asked that he not have contact with Ms. McDougle. He asked if there were any witnesses to the incident. Appellant replied that a couple of days ago the union representatives were behaving in a way that was not professional. He indicated that there were probably not witnesses to the incident with Ms. McDougle. Appellant stated, "I do not feel the environment is respectful or dignified based on my experiences." He questioned how Ms. McDougle could threaten people with union support.

In an e-mail to Mr. Vallejos dated December 18, 2012, appellant related that James England, a supervisor, followed him from the 14th floor to the 15th floor. On the 15th floor Mr. England informed appellant that his break time was 9:30 a.m. Appellant did not know that he had a break time. He asserted that Mr. England, who was not his supervisor, was disrespectful in discussing the matter in front of coworkers. Appellant stated, "I would also like to find out what is the status with the investigation for the threats on my life that took place at work on December 5, 2012." He advised that he did not feel safe at work.

In an e-mail dated December 19, 2012, appellant enclosed a statement from Scott Harlan, who witnessed the incident with Mr. England.[2] Mr. Harlan related that he and appellant were on

[2] In an e-mail dated December 19, 2012, appellant indicated that he was filing a traumatic injury claim form to obtain continuation of pay.

a break and talking about 7:30 a.m. on December 18, 2012. Mr. England walked by twice and then on the third time around "appeared to chastise [appellant] about interrupting and accused him of not being on an authorized break." Mr. Harlan indicated that it was not professional for Mr. England to criticize appellant in front of coworkers and noted that he was not appellant's supervisor. He stated, "I have witnessed on multiple occasions conversations being carried on with no interruption. It seems as though the perception is that the intention is to pick upon certain employees."

In a December 19, 2012 e-mail message to William Pennerman, a manager, appellant related that he had experienced three instances of retaliation after filing an FLRA complaint. On December 5, 2012 a union shop steward threatened to kill appellant. The employing establishment was investigating the incident and instructed him "to avoid contact with that person until the investigation is completed." On December 18, 2012 another incident occurred which appellant reported to his supervisor and other managers. He was sick with a migraine headache yesterday and Mr. Vallejos told him to fill out a form before going home. Appellant believed that this was another instance of retaliation because no one else had to fill out the form.

By decision dated January 10, 2014, OWCP denied appellant's occupational disease claim under file number xxxxxx130. It found that he had not established any compensable factors of employment.

On February 18, 2014 appellant requested reconsideration of the January 10, 2014 decision. He contended that his traumatic injury claim should be considered as part of his occupational disease claim.

In a decision dated May 22, 2014, OWCP denied modification of its January 10, 2014 decision in file number xxxxxx130.

On appeal, appellant argues that his emotional condition claims are really one claim. He asserts that he became disabled from employment due to the employing establishment engaging in "prohibited personnel practices."

FACTUAL HISTORY -- FILE NO. xxxxxx128

On December 19, 2012 appellant filed a traumatic injury claim alleging that on December 18, 2012 he sustained migraine headaches, GERD, irritable bowel syndrome, and psoriasis due to retaliation by a supervisor for filing FLRA charges for unfair labor practices. OWCP assigned the file number xxxxxx128.

By letter dated January 16, 2013, OWCP advised appellant that the evidence was insufficient to show that he experienced the alleged work incident. It noted that he had attributed his injury to retaliation from his supervisors and the union from filing FLRA charges and requested that he describe in detail the work factors that contributed to his illness. OWCP further asked that appellant submit any findings regarding the FLRA allegations.

In response to OWCP's request for additional information, appellant related that he had submitted all documentation to Mr. Pennerman. He indicated that he was additionally enclosing evidence showing that he experienced retaliation after filing his FLRA charge against the

employing establishment. Appellant submitted the December 2012 e-mail messages also contained in file number xxxxxx130.

In a memorandum dated February 1, 2013, Mr. Vallejos advised appellant that he had not properly requested leave for his absence beginning December 20, 2012. The supervisor informed him that he should submit a proper leave request upon his return to work.

In an e-mail dated February 5, 2013, appellant asked Mr. Vallejos the "status of the investigation regarding the threats posed by Labrina McDougal on December 4, 2012." He related that he felt uncomfortable at work. In a response dated February 11, 2013, Mr. Vallejos related, "After a review of the events you reported on December 5, 2012, it was determined that there was no evidence found indicating that a threat was made." He noted that appellant had indicated that there were no eyewitnesses and that "any investigation would prove inconclusive. In the light of the absence of any additional information and/or witness statements, this matter is considered closed." Mr. Vallejos noted that he had moved appellant on December 6, 2012 to another workstation.

On February 28, 2013 appellant advised that he should not have to fill out a Form SF-71, a request for leave for approved absences, as it violated the regulations of OWCP and employing establishment. He related that he was experiencing discrimination and harassment.

In response to OWCP's request that appellant complete a questionnaire explaining in detail the retaliatory actions to which he attributed his condition, on March 6, 2013 he advised that OWCP should refer to e-mails and his FLRA charges for information.

In an undated statement received March 15, 2013, appellant related that he experienced migraine headaches due to stress at work after filing charges with the FLRA. He stated, "I have been a victim of retaliation and the constant stress of working around people who have been allowed to threaten my life and well-being are becoming everyday problems." Appellant advised that stress from the hostile work environment and retaliation for filing FLRA charges also aggravated his psoriasis.

By decision dated April 11, 2013, OWCP denied appellant's claim that he sustained an emotional condition on December 18, 2012 in the performance of duty. It found that he had not established any compensable work factor related to the alleged December 18, 2012 incident.

On May 1, 2013 appellant requested an oral hearing. An OWCP hearing representative attempted to hold a hearing on August 30, 2013; however, she stopped the hearing as a result of conduct by appellant and his representative that she found inappropriate. On September 24, 2013 the Acting Chief of the Branch of Hearings & Review related that he had reassigned the case to another hearing representative and that appellant would receive a telephone hearing. On September 26, 2013 OWCP advised him that it had scheduled a telephone hearing for 12:00 p.m. on October 30, 2013.

By decision dated November 13, 2013, OWCP found that appellant had abandoned his request for a hearing. It determined that he had not called in for the scheduled hearing or contacted OWCP to explain his failure to call for his hearing.

On November 21, 2013 appellant questioned why OWCP separated his traumatic injury claim from his occupational disease claim.[3]

On February 19, 2014 appellant requested reconsideration. He questioned why OWCP had not considered the medical reports in denying his claim. Appellant contended that e-mails and FLRA documents showed that some incidents showing harassment and retaliation were witnessed by third parties. He listed the managers who had harassed him. Appellant asked that OWCP obtain information from the employing establishment regarding the incident between himself and Mr. England. He indicated that he had a "copy of the fact finding and it shows that Mr. England was acting on his own behalf and was not supposed to harass me or scold me in front of my fellow employees; rather he was to report any 'suspicious' behavior to my supervisor who knows my break time and my work projects." Appellant referred OWCP to his Equal Employment Opportunity (EEO) claim for additional information. He contended that the employing establishment's refusal to investigate the threat on his life was in retaliation. Appellant asserted that his traumatic injury claim and occupational disease claim should be considered together. He related that the employing establishment erred in requiring him to submit a SF-71 form and that it constituted "discrimination based on disability." Appellant argued that, according to Board case law, the employee did not have the burden to show harassment by his supervisor but that the injury occurred as a result of his supervisor's actions.[4]

Appellant submitted a February 19, 2013 report of fact finding. The employing establishment noted that on December 18, 2012 Mr. England, the early manager, "was instructed by his manger Rachel Pennington to walk around the floors to determine if everyone is working as they should be. [He] is to report anything found to the respective manager." Mr. England saw appellant talking at 6:15 a.m. on the 14th floor and again at 7:30 a.m. on the 15th floor. He asked appellant why he was not at his desk and appellant responded that he was on a break. Mr. England informed appellant that the other employees were "not on a break and that he should leave the area." The employing establishment discussed appellant's allegation that Mr. England followed him, did not know his break time, and acted in a disrespectful manner. It noted that witnesses indicated that Mr. England "may have singled [appellant] out because they do not recall [him] questioning other employees on any things." Another coworker questioned why appellant was on break just after arriving at work. The witnesses indicated that Mr. England "showed that he was upset with [appellant] and spoke to [him] in a very disrespectful manner." The employing establishment concluded that Mr. England was following the instructions of his supervisor and "conducting himself in accordance with those instructions." It further found that some employees did not understand the role of managers and the scope of taking breaks and recommended informing all employees of scheduled lunches and breaks.

By decision dated May 22, 2014, OWCP denied modification of its April 11, 2013 decision.

[3] Appellant also alleged that the hearing representative's conduct was not professional and argued that he should have more than two hours to present evidence.

[4] Appellant cited *Stanley Smith*, 29 ECAB 652 (1978) and *Lewis Leo Harms*, 33 ECAB 897 (1982). The Board has long held, however, that appellant must factually establish the occurrence of any alleged harassment. *See M.D.*, 59 ECAB 211 (2007); *James E. Norris*, 52 ECAB 93 (2000).

On appeal, appellant argues that his two claims should be considered together. He notes that in June 2014 the employing establishment removed him from employment. Appellant contends that he was disabled due to the employing establishment's prohibited practices.

LEGAL PRECEDENT -- FILE NOS. xxxxxx128 AND xxxxxx130

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 regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.[5] 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.[6]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[7] 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.[8] 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.[9]

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[10] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[11] The issue is whether the claimant has submitted sufficient evidence under FECA to establish a factual basis for the claim by supporting his or her allegations with

[5] *Supra* note 1; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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

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

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

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

[10] *See Michael Ewanichak*, 48 ECAB 364 (1997).

[11] *See Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

probative and reliable evidence.[12] The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by OWCP and the Board.[13]

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.[14] 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.[15]

ANALYSIS -- FILE NOS. xxxxxx128 AND xxxxxx130

Appellant filed an occupational disease claim alleging that he sustained migraines headaches, irritable bowel syndrome, GERD, and an aggravation of psoriasis due to stress in the performance of his federal employment. He also filed a traumatic injury claim for a stress-related condition occurring on December 18, 2012. Before OWCP and on appeal, appellant asserted that both claims should be considered together. He attributed his stress-related condition to a result of a number of employment incidents and conditions. OWCP denied appellant's emotional condition claims as he had not established any compensable employment factors. The Board must, therefore, review whether these alleged incidents and conditions of employment are compensable 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*.[16] Rather, he alleges error and abuse in administrative matters and harassment and discrimination by managers and coworkers.

In *Thomas D. McEuen*,[17] 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 employer 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 facts surrounding the administrative or personnel action established error or abuse by employing establishment superiors in dealing with the

[12] *See James E. Norris*, *supra* note 4.

[13] *Beverly R. Jones*, 55 ECAB 411 (2004).

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

[15] *Id.*

[16] *See Lillian Cutler*, *supra* note 5.

[17] *See Thomas D. McEuen*, *supra* note 7.

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.[18]

Appellant maintained that a supervisor, Mr. England, acted abusively in reprimanding him in front of coworkers on December 18, 2012 for talking instead of working. He maintained that Mr. England followed him from the 14th floor of the building to the 15th floor and told him that he was not on his break time. Appellant indicated that Mr. England was not his supervisor and that he acted disrespectfully. The Board notes that disciplinary actions are administrative functions of the employing establishment and not duties of the employee and, unless the evidence discloses error or abuse on the part of the employing establishment, not compensable employment factors.[19] Mr. Harlan related that Mr. England twice walked by while he and appellant talked, and on the third time told appellant that he was not on an authorized break. He believed that Mr. England should not have criticized appellant as he was not his supervisor and as in the past there had been conversations without interruptions. Mr. Harlan related that it appeared that he was selecting appellant for discipline.

In a February 19, 2013 fact finding report, the employing establishment found that Ms. Pennington had instructed Mr. England to walk around the floors, to make sure everyone was working, and to report problems to the relevant manager. Mr. England saw appellant talking at 6:15 a.m. on the 14th floor and at 7:30 a.m. on the 15th floor. The employing establishment determined that Ms. England was following the instructions of his supervisor and acting within the scope of the instructions. It further found that some employees did not understand the role of managers. Appellant has not provided sufficient evidence of error or abuse by Mr. England in telling him that he was not on break on December 18, 2012.

Appellant further alleged that the employing establishment erred in requiring him to fill out a written form before requesting leave. Matters involving the use of leave are generally not considered compensable factors of employment as they are administrative functions of the employing establishment and not duties of the employee.[20] Appellant has not submitted any evidence showing error or abuse by management in requiring him to complete a form when requesting leave and thus failed to establish a compensable employment factor.

Appellant further alleged that he experienced harassment and discrimination from managers and coworkers in retaliation for filing an FLRA complaint. He maintained that on December 5, 2012 Ms. McDougle told him to watch his back as she knew people who could take care of him. Appellant also generally alleged that he experienced a hostile work environment. If disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from the employee's performance of his

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

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

[20] *See V.W.*, 58 ECAB 428 (2007); *Judy L. Kahn*, 53 ECAB 321 (2002).

regular duties, these could constitute employment factors.[21] The evidence, however, must establish that the incidents of harassment or discrimination occurred as alleged to give rise to a compensable disability under FECA.[22] On February 11, 2013 Mr. Vallejos advised appellant that there was no evidence that anyone threatened him on December 4, 2012 and found that matter closed pending new evidence or witness statements. Appellant did not submit any factual evidence in support of his allegations and thus failed to establish the factual basis of this allegation.

Appellant also maintained that on December 12, 2012 Mr. England spoke to him in a disrespectful manner when telling him that he was not on break. Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute factors of employment. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.[23] In the February 19, 2013 report of fact finding, the employing establishment noted that some witnesses indicated that Mr. England acted upset and spoke disrespectfully. A raised voice in the course of employment does not, in and of itself, warrant a finding of verbal abuse.[24] Appellant has not described what Mr. England stated or explained why it would rise to the level of verbal abuse and thus has not established a compensable work factor.

The Board finds that appellant has not met his burden of proof to establish a compensable work factor in either his December 19, 2012 occupational disease claim or his claim for a traumatic injury occurring on December 18, 2012.[25]

On appeal, appellant contends that he was disabled due to the employing establishment's prohibited practices. He has the burden of proof, however, to submit evidence supporting that he sustained an emotional condition in the performance of duty.[26]

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established an emotional condition in the performance of duty and has not established an emotional condition on December 18, 2012 in the performance of duty.

[21] *Janice I. Moore*, 53 ECAB 777 (2002).

[22] *Id*.

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

[24] *P.D.*, Docket No. 13-1142 (issued August 16, 2013); *Karen K. Levene*, 54 ECAB 671 (2003).

[25] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Hasty P. Foreman*, 54 ECAB 427 (2003).

[26] *See Pamela D. Casey*, 57 ECAB 260 (2005).

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 20, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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