United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 15-66**
	)	**Issued: March 24, 2015**
DEPARTMENT OF DEFENSE, FORT BELVOIR, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 14, 2014 appellant, filed a timely appeal of a May 19, 2014 merit decision and a July 18, 2014 nonmerit 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 to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment; and (2) whether the Branch of Hearings and Review properly denied his request for an oral hearing as untimely.

FACTUAL HISTORY

On November 20, 2013 appellant, then a 64-year-old materials examiner and identifier, filed an occupational disease clean alleging that he developed chronic post-traumatic stress

[1] 5 U.S.C. § 8101 *et seq.*

disorder (PTSD) due to factors of his federal employment. He stated that he first became aware of his condition on October 18, 2013 and first attributed this condition to his employment on October 19, 2013. Dr. Cynthia Teeple, a clinical psychologist, completed a report on November 5, 2013 and diagnosed history of PTSD. She indicated that appellant was totally disabled.

Appellant completed a narrative statement and alleged that he was subjected to harassment from his supervisors and coworkers. He stated that his supervisor refused to allow him to attend training, refused to allow him to perform tasks outside of his current position, and refused to grant him a recognition award. Appellant alleged that his supervisor did not allow him to perform duties at the related depot, did not pay him for overtime and charged him with absence without leave. He stated that he filed Equal Employment Opportunity (EEO) complaints and that he was subjected to retaliation from his supervisor. Appellant alleged that his supervisor discussed his private information with coworkers and that this resulted in retaliation from coworkers. He stated that his car was keyed and that a coworker telephoned his wife with his cell phone to allege that appellant was conducting sexual affairs with coworkers. Appellant stated that his union representative informed him that he was accused of spreading rumors that his supervisor was molesting her children. This allegation caused him to have flashbacks of his military duty in Vietnam. Appellant believed that, for the safety of himself and others, it was best for him to remove himself from his work environment.

In a note dated November 19, 2013, Dr. Teeple stated that she first examined appellant on October 22, 2013 at which time he reported "years of repressing his feelings (especially about his Vietnam experiences)…." She noted that work appeared to trigger his anger and rage and possible symptoms of untreated chronic PTSD. Dr. Teeple diagnosed PTSD. She stated, "It is quite likely the employment situation exacerbated his untreated PTSD condition and, therefore, additional treatment is necessary." Dr. Teeple indicated that appellant could return to full duty on November 25, 2013.

On December 5, 2013 Dr. Mariana Markella, a Board-certified psychiatrist, examined appellant and noted his history of conflicts at work and worsening PTSD symptoms. She noted that he was a Vietnam veteran with a history of drug use and incarceration. Dr. Markella reported appellant's employment history of poor relationships with coworkers and supervisors and his sense of gossip behind his back. She stated that he had experienced thoughts of wanting to shoot coworkers as well as intense anger. Appellant reported difficulty with falling asleep and difficulty staying asleep as well as recurrent memories or thoughts of his traumatic experience in Vietnam, flashbacks, avoidance, exaggerated startle response and psychic numbing.

The employing establishment responded to appellant's allegations on December 18, 2013 and stated that he attended training on January 23, 2009, May 13, 2010, and June 6, 2013. Appellant's supervisor, Daniel E. Long, completed a statement on December 16, 2013 and denied any retaliation against appellant. He stated that appellant received training on three occasions. Mr. Long stated that appellant's issues with overtime pay and absence without leave (AWOL) were resolved through an informal mediation and that appellant's pay was restored. He denied discussing appellant's information or actions with other employees. Mr. Long stated that he held a discussion with the employee who was checking appellant's work and informed him to "worry about himself and that work was the concerns of leads and supervisor." He noted that he

directed appellant to make a report with police services after his wife was contacted with his cell phone which was left on his desk and informed of appellant's alleged sexual affairs with female coworkers. Mr. Long stated that the union held a meeting with appellant and that it was appellant's perception that he was being accused of spreading rumors or of having knowledge of the call that was being investigated. He noted that there was a second meeting that appellant was told that "he was not being accused of anything and that the name James was mentioned and he was the only James known."

OWCP requested additional factual and medical information regarding appellant's claim by a letter dated December 19, 2013. Appellant completed a narrative statement and responded to OWCP's questions and request for documentation. He stated that the denied training was needed for his employment. Appellant was found AWOL after he called in sick, but did not continue to report his illness after the first date in accordance with the employing establishment's policy as he understood it, that he filed an EEO complaint regarding his rheumatoid arthritis and reached an agreement with management on this issue, that in 2007 black employees faced discrimination and that management acknowledged this with temporary job assignments and permanent positions, that he was denied the position of distribution facilities specialist and it was awarded to an unqualified person, and that his deployment for Kuwait was cancelled on the scheduled date of departure. He stated that on October 17, 2013 a union representative accused him of giving someone information about a sargent molesting her children. He alleged that his car was keyed in the employee parking lot.

Appellant submitted an e-mail dated July 22, 2010 documenting his deployment to Kuwait. This e-mail stated that he was contingency support and that dates may change. On September 23, 2010 appellant was directed to receive predeployment training from October 3 through 9, 2010. In an e-mail dated October 13, 2010, he and many others were informed that all predeployment training had been cancelled and that there was no longer a need for the 30 employees in Kuwait. Dr. Hui Pan, an internist with a subspecialty in rheumatology, diagnosed rheumatoid arthritis and recommended restrictions on lifting, bending, and cold.

Appellant filed an EEO complaint on October 19, 2007 alleging that he was discriminated against due to his race when management removed his permissions to make changes and restored permissions to employees who were white in February 2007. The employing establishment responded on November 5, 2007 and stated that all revision and cancellation access was taken from all employees. Appellant reached a resolution agreement on January 15, 2008 in which the employing establishment would counsel respect for fellow employees, provide refresher training for appellant, and modify access to cancel and revise receipts. He agreed to withdraw his EEO complaint and the parties agreed that this resolution agreement was not an admission by either party. Appellant filed a second complaint alleging discrimination when he did not receive a merit promotion on September 10, 2007.

Appellant submitted a complaint to the commander's hotline alleging that a coworker was checking his work and that this was not his duty. He stated that his supervisor had not taken action and that the coworker did not like blacks.

Appellant provided that a mediation agreement regarding his rheumatoid arthritis accommodations dated June 29, 2005. This agreement indicated that he would be provided with a heater, plastic door curtain, and a conveyor system.

By decision dated May 19, 2014, OWCP denied appellant's emotional condition claim finding that he had not met his burden to prove a compensable factor of employment. Appellant requested a telephone hearing from OWCP's Branch of Hearings and Review in a form dated June 14, 2014 and postmarked June 20, 2014.

By decision dated July 18, 2014, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that it was untimely filed. It found that the issue in the case could equally well be addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

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*,[2] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.[3] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.[4] 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.[5] In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of FECA. Thus, disability is not covered when it results from an employee's fear of a reduction-in-force, nor is disability covered when it results from such factors as an employee's frustration in 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] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a

[2] 28 ECAB 125 (1976).

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Robert W. Johns*, 51 ECAB 136 (1999).

[5] *Supra* note 2.

[6] *Id.*

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

compensable employment factor.[8] A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.[9]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an aggravation of his military-service related PTSD syndrome due to several incidents and activities that occurred while he worked at the employing establishment. As a preliminary matter, the Board must review whether the alleged incidents are covered employment factors under FECA.[10] The performance of regular or specially assigned duties is a compensable work factor. In this case, however, appellant does not allege that the actual performance of his job duties caused an emotional condition.

Appellant alleged that he did not receive proper training. The employing establishment disputed this allegation and stated that he attended training on three occasions. An allegation of inadequate training is considered an administrative or personnel matter.[11] It, therefore, is not considered a compensable work factor, unless there is factual evidence establishing error by the employing establishment in failing to provide adequate training. Appellant reached a resolution agreement with the employing establishment on January 15, 2008 in which the employing establishment stated that it would provide refresher training for him. He agreed to withdraw his EEO complaint and the parties agreed that this agreement was not an admission by either party. Appellant has provided no other evidence corroborating his allegation that his supervisor did not allow him to attend training and the employing establishment has denied that he did not receive proper training. There is no admission of wrong doing by the employing establishment and no evidence of error or abuse by the employing establishment with respect to his training.[12]

Appellant alleged that his supervisor refused to allow him to perform tasks outside his current position, did not allow him to work at another location, and refused to grant him a recognition award. He also stated that his deployment for Kuwait was improperly cancelled on the scheduled date of departure. The assignment of work and granting of awards are administrative functions.[13] While appellant has submitted e-mails regarding his scheduled deployment to Kuwait and notice on October 13, 2010 to him and 29 other employees that, the deployment was cancelled, he did not submit any evidence suggesting that there was error or abuse in this action. The employing establishment indicated that it was based on the needs of the service and there is no conflicting evidence in the record. Appellant has also failed to submit any

[8] *Kim Nguyen*, 53 ECAB 127 (2001). *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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

[10] *C.L.*, Docket No. 14-983 (issued January 23, 2015).

[11] *L.R.*, Docket No. 14-1990 (issued January 27, 2015).

[12] *Supra* note 10.

[13] *L.P.*, Docket No. 14-1224 (issued November 7, 2014); *Deborah J. Blanchard*, Docket No. 03-1888 (issued December 9, 2003).

evidence substantiating error or abuse by the employing establishment in denying specific work assignments or in denying a recognition award. He has not established a compensable employment factor with respect to these events.

Appellant alleged that he did not receive pay for overtime. He also stated that he was charged with being AWOL and denied a promotion. In his December 16, 2013 statement, Mr. Long stated that appellant's issues with overtime pay and AWOL were resolved through an informal mediation and that appellant's pay was restored. Although the handling of leave requests is generally related to employment, they are administrative functions of the employing establishment and not duties of the employee.[14] Likewise, the denial of a promotion is an administrative or personnel matter and will be considered to be an employment factor only where the evidence discloses error or abuse on the part of the employing establishment. Appellant has not submitted evidence of error or abuse on the part of the employing establishment in these actions.

Appellant has also alleged harassment and discrimination by his supervisor and coworkers. For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under FECA. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[15] Harassment is defined as a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or workers.[16] Appellant filed an EEO complaint on October 19, 2007 alleging that he was discriminated against due to his race when management removed his permissions to make changes and restored permissions to employees who were white in February 2007. This complaint was resolved on January 15, 2008 and the parties agreed that there was no admission of wrong doing by either party. This settlement agreement does not establish discrimination by the employing establishment.

Appellant also alleged that he was subjected to harassment and retaliation through actions of his supervisor and coworkers. He alleged that his supervisor discussed his private information with coworkers and that this resulted in retaliation from coworkers. Appellant stated that a coworker checked his work, that his car was keyed, and that a coworker cell phoned his wife with appellant's cell phone to allege that appellant was engaging in sexual affairs. He stated that his union representative informed him that he was accused of spreading rumors that his supervisor was molesting her children. Mr. Long denied discussing appellant's information or actions with other employees. He stated that he held a discussion with the employee who was checking appellant's work and informed him to "worry about himself and that work was the concerns of leads and supervisor." Mr. Long noted that he directed appellant to make a report with police services after his wife was contacted with his cell phone which was left on his desk

[14] *C.S.*, 58 ECAB 137 (2006).

[15] *Alice M. Washington*, 46 ECAB 382 (1994).

[16] *D.G.*, Docket No. 14-1796 (issued January 16, 2015); *Beverly R. Jones*, 55 ECAB 411 (2004).

and informed of appellant's alleged sexual affairs with female coworkers. He stated that the union held a meeting with appellant and that it was appellant's perception that he was being accused of spreading rumors or of having knowledge of a supervisor's illegal actions. Mr. Long noted that there was a second meeting that appellant was told that he was not being accused of anything. While he has provide some corroboration that a coworker was improperly checking appellant's work, that the union held meetings with appellant and that he reported that his wife received a call from appellant's cell phone while he was at work, Mr. Long denied that he was responsible for discussing appellant's private or professional actions with his coworkers and denied that the union accused appellant of any knowledge or gossip. Mr. Long also did not corroborate that appellant's car was keyed.

Appellant has submitted no other factual evidence addressing these allegations of harassment. He did not provide specific times or dates that the events occurred or witness statements regarding the incidents alleged and has not otherwise submitted sufficient evidence to establish that the matters alleged constituted harassment.[17] The Board finds that appellant has not established that these incidents were compensable factors of employment.

Where a claimant has not established any compensable employment factors, the Board need not consider the medical evidence of record.[18] 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

Section 8124(b) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.[19] Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[20] The request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[21] A claimant is entitled to a hearing or review of the written record as a matter of right if the request is filed within 30 days.[22]

[17] *J.S.*, Docket No. 14-1233 (issued December 22, 2014); *K.A.*, Docket No. 14-17 (issued August 4, 2014).

[18] *A.K.*, 58 ECAB 119 (2006).

[19] 5 U.S.C. § 8124(b)(1).

[20] 20 C.F.R. § 10.615.

[21] *Id.* at § 10.616(a).

[22] *See Leona B. Jacobs*, 55 ECAB 753 (2004).

While a claimant may not be entitled to a hearing or review of the written record as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.[23]

ANALYSIS -- ISSUE 2

In the instant case, OWCP properly determined that appellant's request for a hearing was not timely filed as it was made more than 30 days after the issuance of OWCP's May 19, 2014 decision. That is, the June 14, 2014 form, on which he requested the hearing, was postmarked on June 20, 2014. The time limitation to request an oral hearing from OWCP's Branch of Hearings and Review expired on June 18, 2014, 30 days after OWCP's May 19, 2014 decision. OWCP, therefore, properly denied appellant's hearing as a matter of right.

OWCP then proceeded to exercise its discretion to determine whether to grant a hearing in this case. It determined that a hearing was not necessary as the issue in the case could be resolved through the submission of additional evidence in the reconsideration process. Therefore, OWCP properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny his request for a hearing as he had other review options available.

CONCLUSION

The Board finds that appellant has not established a compensable factor of employment and, therefore, has not met his burden of proof in establishing a claim for an emotional condition. The Board further finds that OWCP's Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely.

[23] 20 C.F.R. § 10.616(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

ORDER

IT IS HEREBY ORDERED THAT the July 18 and May 19, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 24, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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