

FACTUAL HISTORY

On December 16, 2013 appellant, then a 49-year-old social worker, filed an occupational disease claim (Form CA-2) alleging that he sustained emotional stress “related to discrimination and [Equal Employment Opportunity (EEO)] claim/process.” By letter dated December 17, 2013, OWCP requested that he submit additional evidence to support his claim for compensation.

Appellant submitted a statement dated January 24, 2014. He indicated that he had filed an initial EEO claim in 2011, and his psychiatric condition was related to “multiple cases of workplace secondary trauma stress, workplace stress, discrimination, stress associated with the EEO claim, and retaliation related to the EEO claim.” According to appellant, the EEO process was by its own nature stressful. Appellant discussed his work on an Indian Reservation prior to his employment with the employing establishment. He alleged that he began work at the employing establishment in 2003 and worked long hours during a two-week deployment with evacuees after Hurricane Katrina in 2005. According to appellant, he was the only full-time therapist in 2006, rarely took lunch breaks, and it was stressful seeing veterans that needed more care than the clinic could provide. He alleged there was little or no administrative support, and he received only a fully satisfactory on performance appraisal despite his work efforts. As to the time following 2006, appellant alleged that he was subject to discrimination and repression. According to appellant, the employees at the work site were primarily female and he was subject to discrimination as a male, and never once during the EEO process did he perceive any genuine concern for his well-being. He referred to evidence from the 2011 EEO claim that included his closing statement and appeal.

With respect to appellant’s EEO claim, the record contains a decision dated July 5, 2013 from an administrative judge. The decision indicated that appellant had alleged he was discriminated against on the basis of sex (male) and was subject to a hostile work environment. The allegations included actions by supervisors from 2007 to 2011. Appellant alleged that supervisor J.T. had accused appellant on two occasions of losing travel allowances for employees, failed to solicit his input on projects, criticized appellant in 2009 for failing to tell patients he had been selected to the position of consult screener, did not offer appellant the opportunity to volunteer for team leader, and denied appellant an opportunity to attend leadership training. In addition, appellant alleged that another supervisor gave him a negative reference in 2009 when he applied for another position. The judge addressed each allegation and found appellant had not established a hostile work environment or discrimination. The decision found: “Complainant has presented no evidence that any of the incidents were because of his sex. Complainant failed to prove that he was subjected to conduct sufficiently severe or pervasive to create a hostile work environment or that any of the [employing establishment’s] actions were motivated by discrimination.”

As noted by appellant, he submitted his “closing statement” dated January 13, 2013 presenting his arguments in the EEO claim. Appellant indicated that he found the EEO process to be intimidating. In a September 13, 2013 “appeal” of the EEO decision appellant reviewed his disagreement with the administrative judge’s decision. Appellant again indicated that the EEO process was unfair and intimidating. In addition, the record also contains a transcript of an October 27, 2011 interview with an EEO investigator.

In an e-mail from appellant dated December 27, 2013, appellant indicated that he had filed a second EEO claim in 2013 alleging retaliation for filing the 2011 EEO claim. The employing establishment submitted a February 12, 2014 letter from a workers' compensation specialist arguing appellant had not established compensable work factors.

Appellant submitted a January 23, 2014 statement asserting that his work-related condition started prior to filing an EEO claim. According to appellant, his condition was due to accumulated "secondary trauma stress" and workplace stress including discrimination. By letter dated March 9, 2014, appellant reported that his stress was not solely due to the EEO process, but "workplace dynamics and work-related stress" led him to filing an EEO claim. He also submitted a May 9, 2014 letter arguing that employees have difficulty submitting supplemental evidence because coworkers will respond to employing establishment requests, but not to his requests for information. Appellant referred to "excessive hours, staffing shortages, toxic work environment which was exasperated [sic] and compounded by years of ill treatment by supervision (disparity of treatment, isolating and critical)."

By decision dated June 30, 2014, OWCP denied the claim for compensation. It found appellant had not established a compensable work factor.

On July 11, 2014 appellant requested an oral hearing before an OWCP hearing representative, which was held on February 18, 2015. By letter received on August 25, 2014, he requested that subpoenas be issued for witnesses, including a former supervisor, physicians, and his spouse. Appellant also referred to EEO hearing transcripts and reports. He also submitted a letter dated January 22, 2015 again requesting the witnesses be subpoenaed. The hearing representative advised appellant on January 26, 2015 that the subpoena request was denied. The hearing representative found appellant had not provided sufficient explanation as to why subpoenas were necessary with respect to the issue presented. She noted that, if an adverse decision was issued on the merits, she may appeal all issues of the case, including the subpoena issue.

At the hearing, appellant alleged that in 2006 he had "879 encounters and 347 unique veterans." He alleged that he was treated differently after he filed an EEO claim, and that the employing establishment would destroy an employee rather than admit making a mistake. Appellant also reported that in September 2014 he was reprimanded for nodding off in a meeting.

By decision dated June 1, 2015, the hearing representative affirmed the June 30, 2014 OWCP decision. The hearing representative found that appellant had not established any compensable work factors with respect to his claim. Regarding the request for subpoenas she found that appellant failed to provide adequate rationale explaining why the information could not be obtained by other means or why it was relevant.

LEGAL PRECEDENT -- ISSUE 1

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 factors of his federal employment.² This burden includes the submission of detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.³

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it, but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment, or to hold a particular position, or to secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties, or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁴

A reaction to an administrative or personnel matter is generally not covered as it is not related to the performance of regular or specially assigned duties.⁵ Nevertheless, if the evidence demonstrates that the employing establishment erred, acted abusively or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.⁶

ANALYSIS -- ISSUE 1

In the present case, appellant has alleged that he sustained an emotional condition as a result of his federal employment. The Board finds that while appellant refers to his work in 2005 and 2006, he does not discuss in detail his work duties or allege a reaction to the performance of his regular or specially assigned duties. Appellant does refer to "excessive hours" in his May 9, 2014 letter, notes a two-week deployment after Hurricane Katrina, and he has alleged that he was the only therapist for a period of time at the employing establishment.

To the extent that he is alleging a reaction to overwork, he has not established a compensable work factor. A claimant must provide a detailed allegation and supporting evidence to establish a compensable work factor based on overwork.⁷ There is no probative evidence of record in this regard.

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *Roger Williams*, 52 ECAB 468 (2001); *Anna C. Leanza*, 48 ECAB 115 (1996).

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *See Brian H. Derrick*, 51 ECAB 417, 421 (2000).

⁶ *Margreate Lublin*, 44 ECAB 945, 956 (1993).

⁷ *See Sherry L. McFall*, 51 ECAB 436 (2000).

With respect to a claim for an emotional reaction resulting from discrimination or a hostile work environment, the record does not support such a claim. The record indicated that appellant filed an EEO claim for discrimination and a hostile work environment in 2011. Appellant has expressed his frustration with the EEO “process” of establishing a claim. Stress resulting from a reaction to the procedures and requirements of an EEO claim, or frustration at a lack of success with respect to an EEO claim, is not compensable under FECA.⁸

In the July 5, 2013 EEO decision, the administrative judge makes detailed findings with respect to appellant’s allegations and finds no basis for finding discrimination by the employing establishment. The record does not contain probative evidence sufficient to establish discrimination or a hostile work environment. In the absence of probative evidence, the allegation of discrimination or hostile work environment is merely a perception of dissatisfaction with supervisors that does not constitute a compensable work factor.⁹ The record indicated that appellant filed another EEO claim alleging retaliation for filing the 2011 EEO claim. The filing of a claim for retaliation does not establish that the alleged retaliation occurred.¹⁰ There must be probative, supporting evidence to establish harassment in retaliation of filing an EEO claim.¹¹ Again a mere perception of harassment is not a compensable work factor. There is no probative evidence of record with respect to an allegation of retaliation in this case.

Appellant has alleged error and abuse by the employing establishment with respect to performance appraisals and reprimands, which are considered administrative or personnel matters.¹² As noted above, unless there is evidence of error or abuse, an administrative or personnel matter is not a compensable work factor. No evidence of error or abuse on an administrative or personnel matter was presented. In addition, the alleged incidents of being criticized by supervisors do not constitute compensable work factors. While the Board has recognized that a compensable factor may be established based on verbal abuse,¹³ not every statement that is uttered in the workplace is sufficient to give rise to a compensable work factor.¹⁴ Even if a raised voice is used, this does not in itself establish verbal abuse.¹⁵ No evidence sufficient to establish a compensable factor based on verbal abuse was presented in this case.

⁸ *Christine C. Bodenheimer*, Docket No. 04-1230 (issued September 10, 2004); *Derrick A. Lee*, Docket No. 03-0881 (issued August 11, 2003); *Eileen P. Corigliano*, 45 ECAB 581 (1994).

⁹ *See M.G.*, Docket No. 14-1538 (issued April 16, 2015).

¹⁰ *See C.S.*, 58 ECAB 137 (2006).

¹¹ *D.J.*, Docket No. 15-0060 (issued April 10, 2015).

¹² *See P.M.*, Docket No. 14-1625 (issued February 23, 2015) (performance reviews are personnel or administrative matters); *G.C.*, Docket No. 13-0704 (issued April 4, 2014) (disciplinary actions are administrative or personnel matters).

¹³ *David W. Shirey*, 42 ECAB 783 (1991).

¹⁴ *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

¹⁵ *Beverly R. Jones*, 55 ECAB 411 (2005); *Karen K. Levene*, 54 ECAB 671 (2003).

On appeal, appellant asserts that OWCP did not carefully consider the evidence in his case. He reiterates his belief that he has an employment-related emotional condition. The Board has considered the evidence of record and finds, for the reasons discussed, that appellant did not meet his burden of proof to establish an emotional condition casually related to compensable work factors.

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 8126 of FECA provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.¹⁶ The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers, or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.¹⁷ In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.¹⁸ Section 10.619(a) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process.

The OWCP hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.¹⁹ Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.²⁰

ANALYSIS -- ISSUE 2

On appeal, appellant noted that he had been unable to subpoena witnesses that could have validated and confirmed his reports. The Board finds that the hearing representative properly denied appellant's subpoena requests. Appellant did not explain why a subpoena was the best

¹⁶ 5 U.S.C. § 8126(1).

¹⁷ 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹⁸ *Id.*

¹⁹ *See Gregorio E. Conde*, *supra* note 17.

²⁰ *Claudio Vazquez*, 52 ECAB 496 (2001).

method to obtain the evidence in question and why oral testimony was the best way to ascertain the facts in this case. The hearing representative noted that appellant had not explained the necessity for subpoena of witnesses in this case. As to documents, appellant had access to and submitted relevant evidence regarding his EEO claims.

A hearing representative has, as noted above, discretion with respect to a subpoena request. There is no evidence that the hearing representative abused her discretion in denying appellant's request for subpoenas. The Board therefore finds that the hearing representative properly denied appellant's subpoena requests.

CONCLUSION

The Board finds appellant did not meet his burden of proof to establish an emotional condition causally related to compensable work factors. The Board further finds that the OWCP hearing representative properly denied the subpoena requests.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 1, 2015 is affirmed.

Issued: November 23, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board