United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 15-1590**
	)	**Issued: October 19, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Hampton, GA, 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
JAMES A. HAYNES, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 1, 2015 appellant filed a timely appeal from an April 1, 2015 merit 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 over the merits of this case.

ISSUES

The issues are: (1) whether OWCP abused its discretion in denying appellant's request for subpoenas; and (2) whether appellant met his burden of proof to establish an emotional condition in the performance of duty causally related to factors of his federal employment.

FACTUAL HISTORY

On November 5, 2013 appellant, then a 57-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that events at work from September 24 to October 29, 2013

[1] 5 U.S.C. §§ 8101-8193.

caused an anxiety disorder. He stated that he was first aware of the condition on April 3, 2004 and its relationship to employment on September 24, 2013. Appellant stopped work on October 28, 2013.

In an attached statement, appellant described a history beginning in 2004 when OWCP accepted a claim for anxiety disorder.[2] He related that on May 3, 2013 he was relieved of duty at the employing establishment's McDonough, Georgia location and he initially filed a recurrence claim under the 2004 injury. Appellant was advised to file a new claim for the incident on May 3, 2013.[3]

Appellant stated that his anxiety started to heighten when he returned to work following May 3, 2013 when he was relieved of duty at the McDonough, Georgia location. He related that when he returned to work at the employing establishment's Hampton location on September 24, 2013 he found that his money box was missing about $25.00 in cash and stamps. Appellant indicated that he left the box there in July 2012 when he was detailed to the McDonough location. He stated that a supervisor refunded $12.00 and he had received some money and stamps from others, but that he was not made whole regarding the missing cash and stamps. Appellant indicated that he believed the postmaster, R.S., and his supervisor, S.C., were attempting to aggravate his illness by not refunding the total amount. He related that he had an anxiety attack at work on October 21, 2013 because he had not been fully compensated for the missing stamps and money. Appellant further alleged that stress was caused on October 23, 2013 when he found out his schedule had been changed so that he would not work on Saturday, October 26, 2013, and that R.S. told him to take the matter up with S.C. He asserted that this was the second time the postmaster ignored his issues, and this strengthened his belief that she was retaliating against him. Appellant continued that he was told the schedule would be changed by a supervisor M.B., but that on October 24, 2013 S.C. indicated that appellant would remain off the schedule on October 26, 2013. He stated that he then asked for a grievance form and was forced to take more medication for anxiety. Appellant reported that he stopped work on October 28, 2013 and, based on his doctor's recommendation, did not return. He asserted that management failed to accommodate him, stating that he could work five days, but not in a row.

On September 23, 2013 David W. Aycock, Ph.D., a licensed psychologist, advised that appellant could return to work, beginning three or four days a week and should be given ample time to relearn job skills in a low stress environment. On October 29, 2013 Dr. Aycock advised that appellant had a serious relapse due to reported mistreatment at work on October 23 and 24, 2013 such that he could not return to work. He submitted psychotherapy notes dated May 7 to November 5, 2013 describing appellant's symptoms.

[2] The 2004 claim, accepted for anxiety disorder, was adjudicated by OWCP under file number xxxxx966. In that case OWCP found one compensable factor of employment, that an employing establishment supervisor did not adhere to proper grievance procedures.

[3] In a decision dated September 14, 2015, the Board affirmed a March 27, 2015 OWCP decision that denied appellant's claim that he established an emotional condition of May 3, 2013. Docket No. 15-1221 (issued September 14, 2015). The May 3, 2013 claim was adjudicated by OWCP under file number xxxxxx842. The instant claim was adjudicated under file number xxxxxx079.

In a November 5, 2013 report, Dr. Aycock advised that he began treating appellant in 2004. He explained that appellant had minor relapses over the years and a major relapse on May 3, 2013, as serious as his initial injury. Dr. Aycock stated that, after five months of weekly therapy sessions, appellant was fit to return to a limited workweek, and instructed that he was not to work more than three or four days a week. He noted appellant's report of issues concerning missing money and stamps and maintained that management made little attempt to make appellant whole, noting this had a serious effect on his ability to improve. Dr. Aycock also related that management asked appellant to adjust his schedule which allowed him to work five days a week, but no more than four days in a row and he preferred working Monday through Thursday, Friday off, working Saturday, and Sunday off.[4] He reported that when management changed appellant's schedule and would not let him work on Saturday, October 26, 2013 the postmaster also refused to discuss the matter with him. Dr. Aycock stated that this upset appellant because carriers junior to him were accommodated. He advised that these factors demonstrated a clear pattern of mistreatment that caused a recurrence of the 2004 employment injury. Dr. Aycock noted that appellant's symptoms were virtually identical to those he experienced nine years before. His diagnoses of appellant included serious anxiety disorder and depression. Dr. Aycock concluded that appellant was currently totally disabled due to the anxiety disorder that he sustained at work.

On October 28, 2013 appellant filed a grievance, stating that he was entitled to work on October 26, 2013. He requested a telephone step 1 meeting. In a hand-written annotation, he indicated that, as of November 2013, he had no response from management regarding the grievance. Appellant also submitted evidence regarding the two prior claims.

In letters dated December 18, 2013, OWCP informed appellant of the additional evidence needed to support his claim. The employing establishment was asked to respond to his allegations, to provide information regarding the cash box, and to state whether it made accommodations to reduce his stress.

In a January 7, 2014 report, Dr. Aycock again described appellant's report regarding the cash box, his work schedule, and not being provided requested pay information. He opined that these matters showed a pattern of the same retaliatory treatment by management that caused appellant's disability in 2004. Dr. Aycock diagnosed a severe anxiety disorder that debilitated appellant to the degree that he could no longer work without fear of retaliation by management. He noted that the diagnosed anxiety disorder was initially caused by actions at the employing establishment in 2004 and that appellant was only able to return to work in 2006, after several years of psychotherapy. Dr. Aycock continued that negative actions by management triggered a relapse of his entire symptom complex and again disabled him from all work. He also submitted treatment notes dated November 14, 2013 through January 14, 2014 in which he described appellant's symptoms and concerns.

On January 9, 2014 the postmaster, R.S. responded that appellant was responsible for his cash box. She maintained that when he left on detail he should have taken it with him, that it was not a part of office accountability, and that there were no guidelines for handling it.

[4] It appears from the record that appellant followed this schedule for less than two weeks.

R.S. stated that she was on a detail when appellant left and, upon her return, she found the box in the supervisor's office and was told that appellant left it there and gave permission for supervisors to use it. She related that, when appellant returned to the Hampton location, he told her that stamps and money were missing from the box, and she told all employees involved that the money and stamps had to be returned to him. R.S. stated that she verified that the box was returned to where he stated it should be. She explained that, when appellant first returned to work in September 2013, he was a lobby helper for three to four days a week, and after doing this for several weeks, he felt he could case his route. After about two weeks of casing and window work, appellant indicated that he could run his route, and he did this for a few days, then stopped work, and did not return. R.S. stated that, when he wanted to work a particular Saturday, it would cause issues with other carriers' schedules.

In a January 15, 2014 statement, appellant advised that he had filed an Equal Employment Opportunity (EEO) complaint on December 28, 2014 regarding the handling of his stamp box and his schedule change. He maintained that the change in schedule was against postal policy. Appellant related that, when he left on a detail in July 2012, he forgot his stamp box, and that, when he returned a month later, he left it in S.C.'s care with the provision that it could be used, but that he would be totally reimbursed when he returned. He indicated that he had only been reimbursed $22.00 and six stamps. Appellant also related that he attempted to get pay information from R.S. upon his return to work on September 23, 2013 but she denied his request. He described his symptoms and indicated that he continued to be disabled.[5]

By decision dated May 16, 2014, OWCP found that appellant established no compensable factors of employment and denied his claim.

Appellant timely requested an oral hearing before an OWCP hearing representative. The appeal request form informed him that "depending on your geographical location, the issue involved in your case, the number of hearing requests in your area, and at the discretion of the hearing representative, we may expedite your appeal by providing you a telephone hearing or videoconference." Appellant was asked to indicate if he preferred a telephone hearing. He did not note a preference for a telephone hearing.

In an informational letter dated June 12, 2014, OWCP informed appellant of the procedures for a hearing. The letter stated that, should he wish to subpoena witnesses, he must file his request within 60 days, specify the witnesses and documents to be produced, provide addresses for the witnesses, along with the location of the documents to be produced. The correspondence continued that the subpoena request should also "clearly explain why the testimony or evidence is directly relevant to the issues to be addressed at the hearing and why the subpoena is the best and only method to obtain such evidence." On July 28, 2014 appellant requested subpoenas for three postal workers, whose addresses were at the Hampton, Georgia, employing establishment. He did not provide an explanation as to why the subpoenas were needed.[6]

[5] Appellant also submitted additional correspondence regarding the May 3, 2013 claim. *Supra* note 3.

[6] In a separate letter appellant requested a copy of his OWCP record, which was provided to him on August 28, 2014.

On December 3, 2014 OWCP informed appellant that an informal hearing would be held on January 13, 2015. The notice stated that, pursuant to section 10.615 of OWCP regulations, "Given [appellant's] geographical location, the issue involved in your case, and the number of hearing requests in your area, it has been determined that your oral hearing will be conducted by telephone." The notice listed a hearing date and time, a toll free telephone number to call, and a pass code to enter. It continued, "if you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications." The letter stated that, once a hearing was scheduled, it could not be postponed unless the hearing representative could reschedule the hearing on the same docket, except if the claimant was hospitalized for a reason that was not elective, or if a death of the claimant's spouse, parent, or child prevented his attendance at the hearing. The correspondence concluded that if one of the conditions described above was not met, no further opportunity for a telephone hearing would be provided, and the hearing would take the form of a review of the written record.

In a letter dated December 9, 2014, appellant responded that he declined the "informal interview" and requested an oral interview, as he had previously requested. He reiterated his request for subpoenas for three postal employees. Appellant again did not provide an explanation of why the subpoenas were needed.

On January 6, 2015 an OWCP hearing representative cited section 10.619 of OWCP regulations and denied appellant's request for subpoenas because he had not explained why the testimony of those he cited was necessary. The hearing representative found that their testimony could be obtained through written affidavits or statements. She advised that appellant could not appeal this decision prior to the formal decision following the hearing.

In a January 13, 2015 hearing transcript, an OWCP hearing representative noted that appellant's hearing was being held by telephone and that he was accompanied by Dr. Aycock. The hearing representative declined a request to continue the hearing. She stated that appellant wanted a face-to-face hearing, and it was explained that this could not be done, and he could only be offered a telephone hearing. The hearing representative also explained why he was denied his subpoena requests. She concluded that Dr. Aycock felt that appellant was unable to continue with a telephone hearing, and it was discontinued. The hearing representative stated that she would contact her branch chief to ascertain alternatives. Appellant was provided a copy of the hearing transcript on January 23, 2015 and was asked to submit comments.

On January 28, 2015 OWCP informed appellant that his hearing could not be rescheduled because there was no legal basis for a postponement and, instead, a review of the written record would be conducted. Appellant was allotted 15 days to submit additional evidence.

In a February 19, 2015 response, appellant asserted that he had properly requested an oral hearing, not a telephone hearing, and that he had properly requested subpoenas. He maintained that he was not told that he must provide a reason for requesting subpoenas. Appellant stated that he thought the January 13, 2015 informal hearing was to discuss issues regarding his official oral hearing, to be held later. He enclosed several pages of a November 1, 2005 OWCP decision, in which a hearing representative found one compensable factor of employment. That

decision remanded the case to OWCP for referral of appellant for a medical evaluation.[7] He also attached e-mails concerning an October 28, 2013 grievance as well as employing establishment policies.

In a February 17, 2015 report, Dr. Aycock noted that when appellant was told at the hearing that he would not be allowed to participate in a face-to-face hearing in which he could produce witnesses, his entire anxiety complex became more apparent, and he was unable to participate in the telephone hearing. He noted that, after the hearing, it took appellant several days to return to normal functioning.

By decision dated April 1, 2015, an OWCP hearing representative detailed the law regarding hearing and subpoena requests noting why subpoenas were denied and why the format of the hearing was changed. She affirmed the May 16, 2014 decision, finding that appellant failed to establish a compensable factor of employment.

LEGAL PRECEDENT -- ISSUE 1

Section 8126 of FECA provides that the Secretary of Labor, on any matter within his jurisdiction under the subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[8] 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 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.[9] 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 and show that there is no other means by which the testimony could have been obtained.[10]

ANALYSIS -- ISSUE 1

The Board finds that the hearing representative did not abuse her discretion in denying appellant's subpoena requests. Contrary to appellant's assertions, the June 12, 2014 informational letter from OWCP clearly notified him that he must "clearly explain why the testimony or evidence is directly relevant to the issues to be addressed at the hearing and why the subpoena is the best and only method to obtain such evidence." In his response to OWCP letter, appellant merely provided the names and addresses of the employees he wished to subpoena. He did not explain why a subpoena was the best and only method to obtain evidence. On December 9, 2014 appellant repeated his request for subpoenas, but he again provided no reasons for the request.

[7] The decision was regarding file number xxxxxx966, accepted for anxiety disorder. *Supra* note 2.

[8] 5 U.S.C. § 8126(1).

[9] 20 C.F.R. § 10.619; *see R.H.*, Docket No. 15-0137 (issued July 17, 2015).

[10] *Id*.

Thus, appellant did not establish why a subpoena was the best method to obtain the evidence in question and why there was no other means by which the testimony could be obtained. As noted above, the decision to grant or deny such a request is within the discretion of the hearing representative.[11]

An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[12] The Board finds that the hearing representative did not abuse her discretion in denying appellant's request for subpoenas.

Regarding OWCP's January 28, 2015 letter informing appellant that his hearing could not be rescheduled, section 10.616(b) of OWCP regulations provide that the decision to grant or deny a change of format from a hearing to a review of the written record is not reviewable.[13] Therefore, this issue is not properly before the Board and is not considered.

LEGAL PRECEDENT -- ISSUE 2

To establish his claim that he sustained a stress-related condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his stress-related condition.[14] If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.[15] 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.[16]

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*,[17] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under FECA.[18] When an employee experiences emotional stress in carrying out his or

[11] *Id.*

[12] *L.S., (G.S.)*, Docket No. 14-1046 (issued September 23, 2014); *see Claudio Vazquez*, 52 ECAB 496 (2001).

[13] 20 C.F.R. § 10.616(b).

[14] *Leslie C. Moore*, 52 ECAB 132 (2000).

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

[16] *Id.*

[17] 28 ECAB 125 (1976).

[18] *See Robert W. Johns*, 51 ECAB 137 (1999).

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.[19] Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[20] Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[21] Personal perceptions alone are insufficient to establish an employment-related emotional condition.[22]

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.[23] 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 compensable employment factor.[24]

ANALYSIS -- ISSUE 2

The Board finds that appellant did not establish an employment-related emotional condition in the performance of duty because he did not establish a compensable factor of employment.

Appellant alleged that when he returned to work at the Hampton location of the employing establishment in September 2013, $25.00 and a book and a half of stamps were missing from a cash box that he left there when he was detailed to the McDonough location in July 2012. He maintained that he was not fully reimbursed upon his return. The Board notes that it has not been shown that maintaining a cash box was a regular job duty under *Cutler*.[25] RS., the postmaster, indicated that there were no postal guidelines for handling a cash box, and it was not a part of office accountability. She maintained that appellant should have taken it when he went on detail. R.S. also indicated that she had informed postal employees to reimburse appellant. Moreover, the record does not support that the absence of cash or stamps would be compensable. By his own admission, appellant left the cash box at the Hampton location in July 2012. Even though he related that he returned to the Hampton location a month after his detail at McDonough began and left the box in S.C.'s care, there is nothing in the record to

[19] *Supra* note 17.

[20] *J.F.*, 59 ECAB 331 (2008).

[21] *M.D.*, 59 ECAB 211 (2007).

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

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

[24] *Kim Nguyen*, 53 ECAB 127 (2001).

[25] *Supra* note 17.

substantiate what was in the box when he left. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.[26] Appellant admitted that he had been reimbursed at least $22.00 and six stamps. He also submitted nothing to support his contention that by not reimbursing him fully, R.S. and S.C. were attempting to aggravate his condition.[27] This incident, therefore, is not a compensable factor of employment.

Appellant also alleged that his schedule was improperly changed such that he was off the work schedule on Saturday, October 26, 2013. He related that M.B. told him that this schedule would be changed, but that S.C. indicated that it would not. Although appellant alleged that he could only work four days in a row, Dr. Aycock merely noted on September 23, 2013 that appellant could return to work and begin three or four days a week. Dr. Aycock also related on November 5, 2013 that management asked him to adjust his schedule which allowed him to work five days a week, but no more than four days in a row, and he preferred working Monday through Thursday, Friday off, work Saturday and Sunday off. There is no evidence to support this contention. R.S. explained on January 9, 2014 that, when appellant first returned to work, he was a lobby helper for three to four days a week, and after doing this for several weeks, he felt he could case his route to help him learn it again. After about two weeks of casing and window work appellant indicated that he could run his route, and he did this for a few days, then stopped work and did not return. R.S. advised that, when appellant wanted to work a particular Saturday, it would cause issues on the floor and with other carrier's schedules.

The assignment of a work schedule or tour of duty is an administrative function of the employing establishment and, absent any error or abuse, does not constitute a compensable factor of employment.[28] Here, appellant submitted insufficient evidence to demonstrate error and abuse in this matter.

Regarding appellant's assertion that R.S. denied his request for pay information, again there is no evidence of error or abuse. Appellant did not delineate the specific evidence requested. Generally, complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by FECA. This principle recognizes that a supervisor or manager in general must be allowed to perform his or her duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error or abuse.[29] Here again, as the record contains no evidence that R.S., S.C., or any employing establishment supervisor or manager committed error or abuse in discharging management duties, this allegation is not compensable.[30]

[26] *Id.*

[27] *See* discussion *infra*.

[28] *Peggy R. Lee*, 46 ECAB 527 (1995).

[29] *Id*.

[30] *See David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

Regarding appellant's general contention that he was subjected to harassment, particularly by R.S. and S.C., mere perceptions of harassment or discrimination are not compensable under FECA,[31] and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his allegations with probative and reliable evidence.[32] Although appellant indicated that he filed a grievance and EEO complaint regarding his cash box and schedule change, the record does not contain a final decision regarding these matters. He submitted nothing to show a persistent disturbance, torment, or persecution, *i.e.*, mistreatment by employing establishment management.[33] Appellant, therefore, did not establish a factual basis for his claim of harassment relying upon probative and reliable evidence.[34]

Lastly, as appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record.[35]

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.

CONCLUSION

The Board finds that OWCP did not abuse its discretion in denying appellant's request for subpoenas. The Board further finds that he did not meet his burden of proof to establish that he sustained an employment-related emotional condition in the performance of duty causally related to factors of his federal employment.

[31] *James E. Norris*, 52 ECAB 93 (2000).

[32] *Id.*

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

[34] *See Robert Breeden*, 57 ECAB 622 (2006).

[35] *Katherine A. Berg*, 54 ECAB 262 (2002).

ORDER

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

Issued: October 19, 2015
Washington, DC

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

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

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