

**United States Department of Labor
Employees' Compensation Appeals Board**

T.C., Appellant)

and)

**DEPARTMENT OF AGRICULTURE, FOOD
SAFETY & INSPECTION SERVICE,
Waltham, MA, Employer**)

**Docket No. 16-0755
Issued: December 13, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 7, 2016 appellant filed a timely appeal from a January 28, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish an emotional condition in the performance of duty.

On appeal appellant alleges that the evidence submitted establishes that his emotional condition was caused by compensable work factors.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 5, 2014 appellant, then a 55-year-old compliance investigator, filed an occupational disease claim (Form CA-2) alleging that on June 20, 2014 he first realized that his stress, inability to concentrate, short-term memory loss, and recurrence of severe depression were caused by his supervisor's harassment. He explained that he experienced retaliation for his Equal Employment Opportunity (EEO) activity and whistle blowing. Appellant did not stop work.

By letter dated September 8, 2014, OWCP requested that appellant provide factual and medical information to substantiate his claim. Appellant was afforded 30 days to provide the medical and factual evidence requested.

Appellant clarified his claim and submitted evidence regarding his specific allegations of harassment, retaliation, and error in handling of administrative matters. Appellant alleged wrongdoing on the part of the employing establishment by failing to offer him a permanent position with the civil rights office following a detail and improperly handling of his concerns over the transfer of nonworking or damaged equipment. He also alleged the employing establishment denied his request to attend an Infragard meeting, and to have a guest speaker at his presentation, for a contact list, for recognition for his suggestion, and denied him the opportunity to serve on an employing establishment safety committee by refusing to form the committee. Appellant also alleged abuse regarding leave issues, grievances, and requests for equipment.

In support of his claim appellant provided an undated affidavit from an EEO complaint. According to appellant, coworker M.B. had also filed an EEO complaint, and thereafter was detailed to an EEO office with a promise of permanent position. At the end of the detail, however, M.B. returned to his prior position where he had been subjected to harassment. Appellant alleged that this was similar to his experience because he had also been detailed to the EEO office, made a promise of a permanent job, but then returned to his prior position at the end of his detail.

Appellant submitted e-mail correspondence from V.R., an employing establishment employee relations specialist, from a period of February 5 to April 25, 2012 over a grievance, leave issues, and the denial of a government computer and blackberry.

A September 5, 2013 report reflected items that had been transferred to appellant, but appellant alleged were either inoperable, incorrect size, or damaged.

In a September 12, 2013 e-mail, J.B., a regional director of the employing establishment, advised appellant that he would not be held accountable for any dents or scratches on the motor vehicle assigned to him, but the motor vehicle was not to be repaired at this time.

In statements dated April 22 and 24, 2012, September 16 and November 12, 2013, January 15, 20, and July 24, 2014, appellant discussed work incidents he believed caused his emotional condition. Citing to the "No Fear Act," he alleged abuse of authority,

mismanagement, and failure to follow directives by J.B., D.D., a supervisor, and T.C., an investigator.

Appellant related that upon his return to work on September 11, 2013 T.C. requested that he sign a report to accept the transfer of a General Services Administration (GSA) vehicle to him. He stated he checked the automobile's condition prior to signing the report and discovered scratches of various depths and lengths. Appellant discussed the damages to the automobile with T.C. who informed appellant that he had not reported the damage to GSA. He documented the damage on the transfer of property form and added photos. Appellant gave the form to his supervisor, D.D. D.D. told appellant that she considered the damage to be normal wear and tear. Appellant informed D.D. that he nonetheless had notified GSA regarding the damage and was waiting for further instruction from GSA.

Appellant further alleged that in a September 12, 2013 telephone conversation with J.L., he was instructed to obtain a police report and SF91 form, and e-mail them to her. He contacted E.G. of the GSA Accident Management Center who provided instructions on completing the SF91 allegedly told appellant that he had followed the proper procedures in reporting the damages to the automobile. Appellant alleged that J.B. had prohibited him from continuing with instructions given by E.G. regarding the government automobile damage.

In a July 26, 2012 settlement agreement and August 8, 2012 addendum, the employing establishment agreed to detail appellant to the safety office effective September 2, 2012 for six months, and thereafter for six months to the Civil Rights Division. Appellant also received a lump-sum amount of \$5,000.00.

The employing establishment, in a letter dated September 12, 2013, responded that a term of the August 8, 2012 settlement agreement had not been met, regarding a close-out document dated December 23, 2010. The employing establishment was unable to respond to the remaining allegations because they were outside the four corners of the agreement.

Appellant alleged that on October 23, 2013 he filed an informal grievance with D.D. alleging harassment and ongoing retaliation by J.B. for having not been properly recognized for a suggestion of appellant's which had been implemented. He believed that he was entitled to an award or compensation for his suggestion.

Appellant filed a formal grievance on November 12, 2013 alleging that on October 29, 2013 he had been subjected to harassment and interference by D.D. for destroying his contact information while he was away on leave or detail and not providing him an updated contact list on his return to the office. He further alleged bullying, reprisal, and abuse of authority by D.D. and T.C. for micromanaging and excessively monitoring his work, and providing unwarranted criticism.

OWCP received a May 12, 2014 letter of caution from J.E., Director Compliance and Investigations, for failure to follow instructions provided by his supervisor, D.D., and for failing to perform his assigned duties as he had been instructed. The letter also alleged that appellant exhibited discourteous or unprofessional conduct toward his coworkers and supervisor, and that

he made disrespectful and irresponsible statements. The letter of caution provided examples and dates of each allegation.

Appellant submitted e-mail correspondence acknowledging that guest speaker B.L. did not accompany appellant to his diversity presentation as requested.

In a July 27, 2014 complaint affidavit, appellant reiterated allegations of harassment, discrimination, abuse, and reprisal. Next, he alleged harassment and discrimination due to the employing establishment's denial of his request to attend an Infragard meeting; the employing establishment instructing him not to report government vehicle damage, the failure of the employing establishment to recognize or award his idea, the employing establishment denying his opportunity to serve on a safety committee by refusing to form the committee; and the employing establishment's failure to offer him a permanent position with its civil rights staff after his detail ended. He related that he had previously filed an EEO complaint, which was settled. Appellant also explained that he was a witness for a complaint involving coworker, M.B.'s EEO complaint.

Appellant contended that Dr. Eliot's denial of his request to attend the Infrared meeting was reprisal for the EEO complaint he had filed, and he further alleged that the letter of caution he had received was abuse. Appellant alleged that the failure to form the safety committee was a violation of the settlement agreement as he claimed he had been verbally promised.

In correspondence dated July 1 and August 1, 2014, the employing establishment Division Chief of their Employment Complaints Division responded to appellant's request to amend his complaint and advised him which allegations had been accepted for investigation.

In a July 29, 2014 progress notes, Vicki E. Beggs, Ph.D., a clinical psychologist, diagnosed depression, work problems, and obesity.

In an August 14, 2014 report Stanley J. Alexander, Ph.D. and licensed psychologist, diagnosed depression, acute stress disorder, and anxiety. Appellant attributed his condition to unrelenting stress at work and an intolerable work situation since 2010. Dr. Alexander recommended a medical leave of absence for the period September 7 to November 21, 2014.

On August 29, 2014 appellant filed a grievance alleging that he had been subjected to a hostile work environment based on targeting by his supervisor due to being under psychiatric care.

By decision dated March 26, 2015, OWCP denied appellant's emotional condition claim as it found that appellant had not established any compensable work factors. It found that there was no evidence showing that appellant had been subjected to harassment or discrimination and there was no evidence of administrative error or abuse by the employing establishment.

Subsequent to the denial of his claim, OWCP received a September 23, 2014 letter of reprimand to appellant from V.R. for failure to follow instructions from his supervisors, and failure to comply with employing establishment regulations and rules.

It further received a September 30, 2014 letter to appellant from A.D., Attorney, Complaints Examining Unit of the U.S. Office of Special Counsel, which informed appellant that it had denied his allegations of harassment, reprisal, and whistleblowing involving D.D., J.B., and J.C. She informed him of her appeal rights.

Dr. Alexander, in letters dated December 10, 2014, February 17, January 19 and March 26, 2015, requested an extension of appellant's medical leave due to the intractability of his depressive disorder symptoms. In a January 5, 2015 letter, Dr. Alexander opined that appellant's intractable depression and stress were due to what appellant perceived was harassment by the employing establishment in not pursuing alternative dispute resolution or mediation to address his complaints. He also opined that being in a courtroom with an adversarial attorney would be too stressful for appellant and he would be unable to adequately represent himself.

In a form dated April 2, 2015, appellant requested a telephonic hearing before an OWCP hearing representative, which was held on November 23, 2015.

In an April 15, 2015 report, Dr. Alexander opined that appellant's depression had been aggravated by the EEO process and the employing establishment's delay in responding to appellant's request for alternative dispute resolution or mediation on his complaints.

On May 4, 2015 OWCP received an undated partial affidavit, which only included odd numbered pages, from M.B., attesting to having met appellant when they both had been detailed to the civil rights office and that he was aware that appellant had not been offered a permanent position following the completion of the detail with the civil rights office.

By decision dated January 28, 2016, an OWCP hearing representative affirmed OWCP's March 26, 2015 decision which had denied appellant's emotional condition claim as he had failed to establish any compensable work factors.

LEGAL PRECEDENT

To establish a claim that he sustained an emotional condition in the performance of duty, an employee must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric 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 emotional condition.²

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.³ There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the

² V.W., 58 ECAB 428 (2007); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ L.D., 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

concept or coverage of workers' compensation.⁴ Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁶

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.⁷ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.⁸ 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.⁹

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.¹⁰ 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.¹¹ 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.¹²

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact,

⁴ *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

⁵ 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *J.F.*, 59 ECAB 331 (2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁷ *D.L.*, 58 ECAB 217 (2006); *Jerald R. Gray*, 57 ECAB 611 (2006).

⁸ *K.W.*, 59 ECAB 271 (2007); *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

⁹ *Robert Breeden*, *supra* note 3.

¹⁰ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹¹ See *William H. Fortner*, 49 ECAB 324 (1998).

¹² *Ruth S. Johnson*, 46 ECAB 237 (1994).

occur.¹³ Mere perceptions of harassment or discrimination are not compensable under FECA.¹⁴ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹⁵ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁶ A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.¹⁷

ANALYSIS

Appellant alleged an emotional condition as the result of various employment incidents. OWCP denied his claim because he had failed to establish any compensable employment factors. The Board must initially review whether the alleged employment incidents are covered employment factors under FECA. The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Cutler*.¹⁸ Appellant's allegations pertain to alleged error and abuse in personnel or administrative matters and harassment and discrimination on the part of his supervisors and a coworker. The Board finds that appellant has not established any compensable factors of employment.

Appellant alleged error and abuse on the part of the employing establishment by failing to offer him a permanent position with the civil rights office following a detail, by improperly handling his concerns over the transfer of nonworking or damaged equipment, for denying his request to attend an Infragard meeting, to have a guest speaker B.L. at his presentation; and to be provided an updated contact list. He also claimed error when he had not been rewarded for the implementation of one of his suggestions and when he was denied an opportunity to serve on the safety committee.

A review of the settlement agreement and addendum do not support appellant's contention that he was promised a permanent position with the civil rights office. The agreement stated that appellant would be detailed six months to the safety office and then for six months with the civil rights office. Appellant submitted an affidavit from M.B., but it is incomplete and did not support appellant's allegation. The fact that both appellant and M.B. were detailed as

¹³ *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, *supra* note 3.

¹⁴ *M.D.*, 59 ECAB 211 (2007).

¹⁵ *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, *supra* note 3.

¹⁶ *G.S.*, Docket No. 09-764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

¹⁷ *Robert Breeden*; *supra* note 3; *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁸ *Lillian Cutler*, *supra* note 5.

part of their settlement agreements, and did not receive a permanent position at the end of their details, does not establish error and abuse.¹⁹

The allegations with respect to the handling of the transfer of a government vehicle and contradictory instructions regarding damage reports, the denial of appellant's request to attend an Infragard meeting, and to have a guest speaker at his presentation, and the denial of appellant's request to form a new committee all pertain to the assignment and management of work which is an administrative function of the employing establishment and not a duty of the employee.²⁰

Appellant submitted no other evidence corroborating his allegations of error in the employing establishment's handling of the vehicle damage reports, denial of his request to attend a meeting, denial of his request for a guest speaker, and denial of a contact list.²¹ He submitted e-mail correspondence from D.D. informing him that having a guest speaker at his diversity presentation was not approved. There is no evidence in the record supporting that these actions of the employing establishment were abusive or erroneous.²²

Appellant also alleged abuse by the employing establishment claiming that he had not been properly recognized for a suggestion, that D.D. micromanaged his work and gave him a poor midyear performance appraisal, that J.E. improperly issued him a letter of caution on May 12, 2014, and that V.R. improperly issued a September 23, 2014 letter of reprimand. The handling of disciplinary actions and leave requests, as well as monitoring performance are administrative functions of a supervisor.²³ The manner in which a supervisor exercises his or her discretion generally falls outside FECA's coverage. This principle recognizes that supervisors must be allowed to perform their duties and at times employees will disagree with their supervisor's actions. Mere dislike or disagreement with certain supervisory actions will not be compensable absent error or abuse on the part of the supervisor.²⁴ There is no credible evidence of any error or abuse on the part of the employing establishment. While appellant contended that he did nothing to warrant either the letter of reprimand or letter of warning, that the allegations were false, and the allegations were made to discredit him, he has provided no corroborating evidence to support his contentions.²⁵ Thus, appellant has not established any error and abuse by the employing establishment.

¹⁹ Cf. The Board has found that where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its personnel responsibilities, such action could be considered a compensable employment factor. See *J.B.*, Docket No. 15-0986 (issued September 23, 2016).

²⁰ See *G.S.*, *supra* note 16; *Lori A. Facey*, 55 ECAB 217 (2004).

²¹ See *S.D.*, Docket No. 14-0701 (issued October 2, 2015). To establish a compensable factor of employment, appellant must provide corroborating evidence to establish an allegation of error or abuse on the part of the employing establishment.

²² *Supra* note 11.

²³ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005); *Beverly R. Jones*, 55 ECAB 411 (2004); *Charles D. Edwards*, 55 ECAB 258 (2004).

²⁴ *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

²⁵ *Supra* note 21.

For the above reasons, appellant has not established any compensable work factors under FECA with respect to administrative or personnel matters.

Appellant also alleged harassment, discrimination, reprisal and bullying due to actions of his supervisors and a coworker. He reported being bullied, humiliated, and intimidated, by his coworker and supervisor in violation of the employing establishment's zero tolerance policy. However, appellant has again submitted no evidence to establish his claims. Mere perceptions of harassment alone are not compensable under FECA.²⁶ Appellant did not submit any witness statements in support of his claim. He submitted copies of grievances and EEO complaints, but the Board has held that EEO complaints and grievances, by themselves, do not establish workplace harassment or unfair treatment.²⁷

As appellant has failed to establish a compensable work factor, the Board will not review the medical evidence of record.²⁸

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 appellant has failed to meet his burden of proof to establish an emotional condition in the performance of duty.

²⁶ *G.S.*, *supra* note 16; *V.W.*, 58 ECAB 428 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

²⁷ *T.G.*, 58 ECAB 189 (2006).

²⁸ *See L.K.*, Docket No. 08-849 (issued June 23, 2009); *V.W.*, *supra* note 26; *Alberta Dukes*, 56 ECAB 247 (2005); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 28, 2016 is affirmed.

Issued: December 13, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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