

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

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A.S., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS ADMINISTRATION MEDICAL )  
CENTER, Oakland, CA, Employer )

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**Docket No. 16-1100**  
**Issued: November 14, 2016**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 29, 2016 appellant filed a timely appeal from a December 16, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant sustained an emotional condition on December 18, 2012 in the performance of duty.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as set forth in the prior decision are incorporated herein by reference. The facts relevant to the instant appeal are set forth.

On December 19, 2012 appellant, then a 41-year-old claims examiner, filed a traumatic injury claim (Form CA-1) alleging that on December 18, 2012 he sustained migraines, gastroesophageal reflux disease (GERD), irritable bowel syndrome, and psoriasis due to retaliation by a supervisor after he filed charges with the Federal Labor Relations Authority (FLRA) for unfair labor practices. OWCP assigned the claim file number xxxxxx128.

On December 19, 2012 appellant also filed an occupational disease claim (Form CA-2) alleging that he sustained migraines, GERD, irritable bowel syndrome, and an aggravation of psoriasis due to factors of his federal employment. OWCP assigned the claim file number xxxxxx130.

In a December 18, 2012 e-mail to W.V., his supervisor, appellant related that J.E., a supervisor, followed him from the 14<sup>th</sup> floor to the 15<sup>th</sup> floor. On the 15<sup>th</sup> floor the supervisor told him that he should not be talking to coworkers because he was not on his break. Appellant was unaware that he had a specific break time. He maintained that the supervisor acted disrespectfully when he discussed the matter in front of his coworkers.<sup>3</sup>

Appellant, in an e-mail dated December 19, 2012, enclosed a statement from S.H., a coworker.<sup>4</sup> S.H. advised that around 7:30 a.m. on December 18, 2012 he was talking with appellant while on a break. J.E. walked by two times and on the third time “appeared to chastise [appellant] about interrupting and accused him of not being on an authorized break.” S.H. asserted that it was unprofessional of J.E. to criticize him in front of coworkers and as he was not appellant’s supervisor. He noted that other conversations were not interrupted and it seemed that “the intention is to pick upon certain employees.”

OWCP, in a decision dated April 11, 2013, denied appellant’s claim that he sustained an emotional condition on December 18, 2012 in the performance of duty. It found that he had not established the occurrence of a compensable work factor on December 18, 2012.

On May 1, 2013 appellant requested an oral hearing before an OWCP hearing representative. The hearing representative attempted to hold a hearing on August 30, 2013 but had to stop the hearing due to inappropriate conduct. On September 24, 2013 the Acting Chief of the Branch of Hearings and Review reassigned the case to another hearing representative for a

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<sup>2</sup> Docket No. 15-0028 (issued April 20, 2015).

<sup>3</sup> Appellant also questioned the status of an alleged threat that occurred on December 5, 2012.

<sup>4</sup> In an e-mail dated December 19, 2012, appellant indicated that he was filing a traumatic injury claim form to obtain continuation of pay. In an e-mail message dated December 19, 2012 to a manager, he described various instances of harassment and retaliation he experienced after filing an FLRA complaint.

telephone hearing. On September 26, 2013 OWCP advised appellant that it had scheduled a telephone hearing for 12:00 p.m. on October 30, 2013.

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

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

Appellant on February 25, 2014 requested reconsideration. He asked that OWCP obtain information from the employing establishment regarding the incident with his supervisor.<sup>5</sup> Appellant indicated that he had a "copy of the fact finding and it shows that [the supervisor] was acting on his own behalf and was not supposed to harass me or scold me in front of my fellow employees, [but] rather report any 'suspicious' behavior to my supervisor who knows my break time and my work projects." He referred OWCP to his Equal Employment Opportunity (EEO) claim for additional information. Appellant asserted that his traumatic injury claim and occupational disease claim should be considered together.

In a February 19, 2013 fact finding report, the employing establishment noted that on December 18, 2012 the supervisor, who was also the early manager, received instructions from his supervisor to walk around the floors and make sure everyone was working. The supervisor witnessed appellant talking at 6:15 a.m. on the 14<sup>th</sup> floor and again at 7:30 a.m. on the 15<sup>th</sup> floor. The supervisor asked him why he was not at his desk and he responded that he was on a break. The supervisor informed appellant that the other employees were "not on a break and that he should leave the area." The employing establishment discussed appellant's allegation that the supervisor followed him even though he was not his manager and acted disrespectfully. It indicated that witnesses did not remember the supervisor speaking to other employees. The witnesses related that he was upset with appellant and spoke in a manner that was not respectful. The employing establishment determined that the supervisor was appropriately following the instructions of his supervisor and conducted himself "in accordance with those instructions." It indicated that certain employees did not understand the role of management and the scope of taking breaks.

By decision dated May 22, 2014, OWCP denied modification of its April 11, 2013 decision. It found that appellant had not demonstrated either harassment or error or abuse by the supervisor on December 18, 2012.

Appellant appealed to the Board. In a decision dated April 20, 2015, the Board affirmed the May 22, 2014 decision.<sup>6</sup> It found that he had not established that the supervisor committed error or abuse in reprimanding him on December 18, 2012 for talking when he was not on a break. In its April 20, 2015 decision, the Board also considered appellant's appeal from an OWCP decision denying the occupational disease claim under file number xxxxxx130 and found

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<sup>5</sup> Appellant also raised arguments relevant to his occupational disease claim.

<sup>6</sup> Docket No. 15-0028 (issued April 20, 2015).

that appellant had not established a compensable work factor. Therefore, appellant did not establish an emotional condition in the performance of duty.

On September 28, 2015 appellant requested reconsideration. He maintained that the medical evidence established that he sustained an emotional condition, an aggravation of a traumatic brain injury, GERD, migraines, and psoriasis due to a hostile work environment. Appellant advised that his congressman read a letter on the floor of the House of Representatives in an attempt to get the Office of the Inspector General (OIG) to investigate his complaints of retaliation and removal for whistleblowing. He submitted a copy of the letter to his congressman and the OIG's report which he maintained showed fraud. Appellant asserted that the employing establishment and union harassed him and engaged in erroneous personnel practices.

Appellant submitted a copy of a July 30, 2015 letter challenging the Board's April 20, 2015 decision.<sup>7</sup> Regarding his traumatic injury claim, he related that the employing establishment's fact finding on the December 18, 2012 incident with the supervisor was inaccurate and that it found that managers should report irregularities to the appropriate supervisor and "not harass us in front of the other employees." Appellant reiterated that the supervisor at issue was not his supervisor. He also raised numerous arguments about events occurring on dates other than the date in question, December 18, 2012. Appellant argued that the national media covered his allegations against the employing establishment and that his physician found that he was disabled due to management's actions. He questioned why the Board did not review the medical evidence. Appellant indicated that he was fired from his position when he was totally disabled and that management created a hostile work environment because he missed work. He noted that he had pending claims with the Equal Employment Opportunity Commission.

Appellant submitted medical evidence from a series of providers with his reconsideration request. In a letter dated November 16, 2015, he advised that the medical evidence established that he had a psychological condition as a result of his employment.

By decision dated December 16, 2015, OWCP denied modification of its prior merit decision issued under file number xxxxxx128 finding that appellant had not established an emotional condition on December 18, 2012 in the performance of duty. It determined that he had not established either harassment or error or abuse by the supervisor in telling him he was not on a scheduled break on December 18, 2012. OWCP indicated that it would not address appellant's allegations relevant to his occupational disease claim under OWCP file number xxxxxx130.

On appeal appellant questions why OWCP considered only his traumatic injury claim on reconsideration. He relates that he provided medical reports that were not considered. Appellant argues that Board case law indicates that a claimant does not have to prove harassment but rather that he had an emotional reaction to actions by a supervisor. He asserts that the fact finding by the employing establishment found that the supervisor was not supposed to harass employees but instead report their actions to their own supervisors. Appellant reiterates that the supervisor at

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<sup>7</sup> The correspondence indicated that it was a petition for reconsideration of the Board's April 20, 2015 decision. A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

issue was not his supervisor and did not know his break time. He argues that he is entitled to a medical examination.

### **LEGAL PRECEDENT**

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

### **ANALYSIS**

On prior appeal, the Board found that appellant had not established as a compensable work factor that J.E., a supervisor with the employing establishment, erred or acted abusively when he reprimanded him on December 18, 2012 for talking at a time that he was not on a break. With his request for reconsideration and before the Board on appeal, he asserted that the fact finding determination by the employing establishment indicated that the supervisor should not have reprimanded him in front of coworkers, but should have instead spoken with his own supervisor. Appellant also maintained that he sustained an emotional reaction to actions of his supervisor and thus a compensable work factor. The Board, however, previously reviewed appellant's contentions and the employing establishment's February 19, 2013 fact finding determination in determining that he had not established error or abuse by the supervisor on

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<sup>8</sup> 5 U.S.C. § 8101 *et seq*; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>9</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

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

<sup>11</sup> *See William H. Fortner*, 49 ECAB 324 (1998).

<sup>12</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

December 18, 2012. The Board's review of the previous evidence of record on this issue is *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>13</sup>

Appellant also contended that the employing establishment retaliated against him and removed him from employment for filing a whistleblower complaint. He maintained that the union and management harassed him and acted erroneously in personnel matters. These allegations, however, are not pertinent to the issue of whether the supervisor committed error or abuse in reprimanding him on December 18, 2012.

On appeal appellant asserts that OWCP did not consider the supporting medical evidence and that it should send him for a medical examination. It is well established, however, that in an emotional condition claim a claimant must first establish a compensable work factor before the medical evidence is considered.<sup>14</sup> Additionally, the determination of the need for the examination is a matter within the province and discretion of OWCP.<sup>15</sup>

Appellant also questions why OWCP considered only his traumatic injury claim following his request for reconsideration. As noted, his contentions in his September 28, 2015 request for reconsideration are relevant to his occupational disease claim as well as the traumatic injury claim. OWCP, however, adjudicated it only under his traumatic injury claim, assigned file number xxxxxx128. As such, the Board's jurisdiction is limited to this aspect of appellant's claim.<sup>16</sup> Upon return of the case record, it should consider appellant's request for reconsideration of the denial of his emotional condition claim filed as an occupational disease under OWCP file number xxxxxx130.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

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

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<sup>13</sup> See *A.T.*, Docket No. 16-0738 (issued May 19, 2016).

<sup>14</sup> See *Richard Yadron*, 57 ECAB 207 (2005).

<sup>15</sup> See 5 U.S.C. § 8123; *Dana D. Hudson*, 57 ECAB 298 (2006).

<sup>16</sup> The Board has jurisdiction to review final adverse decisions of OWCP issued under FECA. See 5 U.S.C. § 8149; 20 C.F.R. §§ 501.2(c) and 501.3(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 16, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 2016  
Washington, DC

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

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

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