United States Department of Labor
Employees' Compensation Appeals Board

A.G., Appellant	)	
and	)	**Docket No. 16-1261**
	)	**Issued: November 17, 2016**
OFFICE OF PERSONNEL MANAGEMENT, Washington, DC, Employer	)	

Appearances:
Stephen J. Dunn, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 6, 2016 appellant, through counsel, filed a timely appeal from a January 7, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has established an emotional condition causally related to compensable work factors on or after April 2011; and (2) whether appellant established a recurrence of disability as of October 5, 2012.

FACTUAL HISTORY

Appellant initially filed an occupational disease claim (Form CA-2) on September 24, 2010, alleging that he sustained an emotional condition as a result of his federal employment as a security specialist. That claim was assigned File No. xxxxxx798. On the claim form appellant alleged that he had been under administrative investigation for sexual harassment in June and July 2010, and was subject to a hostile work environment during that time. OWCP accepted the claim for major depression, recurrent episode, on April 14, 2011. The record indicates that appellant received wage-loss compensation from November 30 to December 18, 2010.

On February 26, 2013 appellant filed a recurrence of disability claim (Form CA-2a). The date of the recurrence was reported as November 9, 2011, with work stoppage on October 5, 2012. He indicated that he had returned to work in December 2010, and his condition had worsened as he was exposed to harassment and hostility. Appellant asserted that weeks after his return to work he was in regular contact with individuals that he was medically ordered to stay away from.

By decision dated May 15, 2013, OWCP found that the allegations were not a recurrence of disability, but a new claim for injury. It indicated that a new claim would be created with a new OWCP file number.

In a June 23, 2013 letter, appellant asserted that despite a negative finding on sexual harassment, a supervisor, R.E. continued to refer to appellant as a sexual harasser and there were a series of events which led appellant to be "ostracized, harassed, and retaliated against." He asserted that he was forced to work around individuals who resumed active harassment and hostility. According to appellant in late December 2010 he was provided a temporary assignment where he did not have to work with two specific supervisors. Then he was told after a few weeks that his office would be moved back to the first floor, in the vicinity of these supervisors. Appellant alleged that he complained, but a supervisor indicated that he would do his best to keep appellant's work space away from R.E. and another supervisor, K.M., and he accepted the new position in April 2011. He did have to work near the two supervisors and he was subject to relentless harassment and hostility. Appellant indicated that he had filled an Equal Employment Opportunity Commission complaint for discrimination, but not related to the alleged working conditions in this claim.

An employing establishment human resources specialist submitted a July 18, 2013 letter indicating that the employing establishment did not concur with appellant's allegations. The employing establishment asserted that appellant was accommodated with a temporary position on December 9, 2010 as a management analyst, and they worked with him to identify a permanent accommodation. The specialist reported that appellant was offered and accepted a permanent reassignment on April 5, 2011 as safety occupational health manager, and from that

point forward he never requested additional accommodation or expressed any problems. Appellant continued to work until he received a proposed suspension on April 11, 2012. The suspension was based on conduct and evidence that he had committed a crime. Appellant was suspended on June 3, 2012 and he filed a Merit Systems Protection Board complaint. A settlement agreement was reached on January 24, 2013 with the suspension replaced with resignation for medical reasons.

The record contains a September 24, 2010 request for accommodation from appellant, who requested a temporary reassignment and change of supervision to ensure limited contact with R.E. and K.M. In a report dated September 30, 2010, Dr. Patrick Sheehan, a Board-certified psychiatrist, reported that appellant was being treated for major depressive disorder and anxiety disorder, and he was unable to work as a program manager in his office. Dr. Sheehan indicated that he was not certain how long it would take for appellant to respond to treatment. In a brief report dated December 2, 2010, he reported that appellant should not be under the same supervisors and environment that brought about his illness.

In an e-mail dated December 9, 2010, a supervisor wrote that, in accord with appellant's request for reasonable accommodation, appellant was being given a temporary detail assignment as a management analyst with M.N., D.A., and D.H. as supervisors. With respect to the suspension, an undated letter from the employing establishment indicated that appellant had pleaded guilty to perjury in April 2012, and this would compromise his ability to hold a public trust position as safety and occupational health manager. The settlement agreement is dated January 24, 2013 and states that nothing in the agreement shall be considered as an admission by either party.

The record contains a July 26, 2011 report from Dr. Sheehan, who provided in his history that appellant now had a permanent reassignment as an occupational health program manager. He indicated that appellant was concerned about an Office of the Inspector General investigation. In a report dated August 22, 2012, Dr. Sheehan recommended appellant retire due to "hostile, harassing work environment."

By decision dated November 27, 2013, OWCP denied the claim for compensation. It found no compensable work factors were established. OWCP found the employing establishment accommodated appellant with work restrictions in December 2010, and he was offered and accepted a permanent reassignment in April 2011. In addition, it found the evidence did not establish that appellant continued to be harassed by coworkers.

On December 19, 2013 appellant, through counsel, request a telephonic hearing with an OWCP hearing representative. A hearing was held on March 21, 2014. Counsel argued that appellant had suffered a recurrence of disability on October 5, 2012. Appellant indicated that he did accept a position in April 2011 with the understanding that medical restrictions would be accommodated. He asserted that he was moved to an office space in the vicinity of R.E. and K.M., in violation of work restrictions.

Appellant submitted a March 6, 2014 report from Dr. Sheehan, who reported that after appellant began working on the same floor as former supervisors R.E. and K.M., appellant's

condition worsened due to a hostile work environment. Dr. Sheehan wrote that appellant was temporarily disabled "due to the revocation of his psychiatric restrictions on October 5, 2012."

By decision dated June 10, 2014, the hearing representative affirmed the November 27, 2013 decision. He found that the employing establishment had provided a temporary position in December 2010 in accordance with instructions from Dr. Sheehan, and that there was no evidence that job was withdrawn or restrictions violated. The hearing representative noted that counsel argued that the case should adjudicated as a recurrence, but as a recurrence appellant would have to show that the job was withdrawn or he was forced to work outside restrictions, and the evidence did not support such a finding.

Appellant, through counsel, requested reconsideration on July 18, 2014. Counsel argued that OWCP had improperly denied appellant's claim. He submitted a statement from a coworker, T.B., who confirmed that appellant had been moved to an office space on the first floor in April 2011. The coworker indicated that one month later she had worked with appellant on an e-mail to a supervisor regarding the need to be away from R.E. and K.M.

In a letter dated September 30, 2014, the employing establishment human relations specialist again indicated that he disagreed with appellant's allegations. The employing establishment asserted that medical restrictions were followed, that appellant had been provided with a complete job description of the safety occupational health manager position that included some personal contact with individuals that may include managers and professionals from other employing establishments. Appellant voluntarily accepted the position, completed the job duties and never requested any additional accommodation. The employing establishment indicated that he was placed on administrative leave in January 2012 due to misconduct and that there was no hostile work environment.

By decision dated October 20, 2014, OWCP reviewed the case on its merits and denied modification. It found that there was no evidence to establish a compensable work factor, and appellant had voluntarily accepted a reassignment.

Appellant, through counsel, again requested reconsideration by letter dated August 26, 2015. Counsel argued that there was a recurrence of disability as the light-duty job was withdrawn. Appellant submitted a witness statement from coworker, M.R., who reported that appellant was not happy about having to work on the same floor as R.E. and K.M. There is also a statement from another coworker, D.B., who reported that appellant did have to attend some meetings at which R.E. and K.M. were present.

By decision dated January 7, 2016, OWCP again reviewed the merits and denied modification. It found that the witness statements did not establish a compensable work factor or that the employing establishment violated work restrictions.

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.[3] This burden includes the submission of detailed description of the employment factors or conditions, which he believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

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 secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.[5]

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.[6] 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.[7]

With respect to a claim based on harassment or discrimination, the Board has held that actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under FECA. A claimant must, however, establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[8] An employee's allegation that he or she was harassed or discriminated against is not determinative of whether or not harassment occurred.[9]

ANALYSIS -- ISSUE 1

In the present case, appellant initially filed a recurrence of disability commencing October 5, 2012 with respect to his accepted major depression, recurrent episode. OWCP determined that a new claim should be developed, as appellant's claim involved allegations that

[3] *Pamela R. Rice*, 38 ECAB 838 (1987).

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

[5] *Lillian Cutler*, 28 ECAB 125 (1976).

[6] *See Brian H. Derrick*, 51 ECAB 417, 421 (2000).

[7] *Margreate Lublin*, 44 ECAB 945, 956 (1993).

[8] *Gregory N. Waite*, 46 ECAB 662 (1995); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

[9] *Helen P. Allen*, 47 ECAB 141 (1995).

he continued to suffer harassment after his return to work in December 2010. The development of a new claim is in accord with OWCP procedures when new incidents are alleged.[10]

Initially, the Board finds that there are no *Cutler* allegations.[11] Appellant did not specifically attribute his claimed emotional condition to any regular or specially assigned work duties.[12] He attributed his emotional condition following his return to work in December 2010 to continued harassment and hostility by the individuals involved in his accepted occupational disease claim. Following appellant's return to work after his accepted September 2010 claim, the record establishes that he was accommodated with a temporary assignment in December 2010 as a management analyst. He then accepted a permanent assignment in April 2011 as a safety health manager. Based on appellant's own description of the events and the evidence of record, his alleged emotional condition following his return to work clearly did not involve his regular or specially assigned work duties.

Rather, appellant alleged that he continued to experience continued harassment and a hostile work environment. The Board finds that he did not establish a compensable work factor. Appellant has made general allegations of harassment and hostility after December 2010, without providing any relevant detail.[13] It is not clear what specific incidents of alleged harassment occurred, when they occurred, or who engaged in harassment. As noted above, any claim based on harassment must be supported by probative and reliable evidence.[14] Appellant has not provided probative evidence establishing a compensable work factor in this regard.

The record indicates that appellant was subject to disciplinary actions that included a suspension on June 3, 2012. A disciplinary action can be a compensable work factor if there is evidence of error or abuse by the employing establishment.[15] In this case there was a settlement agreement that rescinded the suspension and allowed appellant to resign based on medical reasons. The January 24, 2013 agreement does not include an admission or acknowledgment of error by the employing establishment. The mere fact that an administrative action is later modified or rescinded does not, in and of itself, establish error or abuse.[16]

The Board finds that appellant has not alleged and substantiated a compensable work factor after his return to work in December 2010. The allegations of harassment and hostility are not detailed and not accompanied by probative evidence. In addition, there is no evidence of

[10] If new work factors are alleged with respect to an emotional condition, a new claim is developed. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(c) (June 2013).

[11] *See supra* note 5.

[12] *Id.*

[13] *P.S.*, Docket No. 16-0711 (issued June 27, 2016).

[14] *Supra* note 8.

[15] *See D.F.*, Docket No. 15-1057 (issued December 7, 2015).

[16] *See Michael Thomas Plante*, 44 ECAB 510 (1993); *Richard J. Dube*, 42 ECAB 916 (1991) (reduction of a disciplinary letter to an official discussion did not constitute abusive or erroneous action by the employing establishment).

error or abuse with respect to an administrative or personnel action. Since appellant has not established a compensable work factor, the Board will not address the medical evidence.[17]

On appeal, counsel has reiterated the argument that appellant's claim should be considered a recurrence of disability. He alleged that a light-duty job was withdrawn, or that appellant was forced to work outside restrictions. OWCP made findings with respect to this issue and will be discussed below.

LEGAL PRECEDENT -- ISSUE 2

OWCP's regulations define the term recurrence of disability as follows:

> "Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."[18]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[19] A recurrence of disability may be established if the light-duty job is outside the employee's work restrictions, but there must be sufficient evidence of record to support the finding that the job exceeded physical limitations.[20]

ANALYSIS -- ISSUE 2

Appellant has claimed an employment-related disability as of October 5, 2012. With respect to a change in the nature and extent of an employment-related condition, he did not submit probative medical evidence. Dr. Sheehan referred to appellant's condition worsening due

[17] *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

[18] 20 C.F.R. § 10.5(x).

[19] *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

[20] *See Cloteal Thomas*, 43 ECAB 1093 (1992).

to a hostile work environment after taking the permanent job in April 2011. A recurrence of disability does not include disability resulting from exposure to new work factors.[21]

The primary allegation regarding the recurrence of disability was that appellant was placed in a light-duty job in December 2010, and that the job was withdrawn or was changed to require work outside his established work restrictions. OWCP considered the evidence with respect to a withdrawal of light duty or work outside restrictions, and found that it was not established.

The Board finds that the evidence of record does not establish that a light-duty job was withdrawn or appellant was forced to work outside restrictions.[22] The employing establishment provided a temporary position from December 2010 to April 2011 that removed R.E. and K.M. as appellant's supervisors and involved little contact with these supervisors. While appellant was working in the temporary position, the employing establishment sought to find him a permanent reassignment. The record indicates that the employing establishment then offered him a permanent position as a safety occupational health manager. Appellant accepted this position in April 2011. There was no withdrawal of a light-duty position in this case.

With respect to the allegation of work outside of appellant's restrictions, no probative evidence was presented. The record contains a very brief report from Dr. Sheehan dated December 2, 2010, noting that appellant should not work "under" the same supervisors or in the same "environment" that caused his condition, without further explanation. Dr. Sheehan does not explain what specific restrictions he was recommending or the duration of such restrictions. The evidence indicates that in April 2011, appellant did have to work on the same floor as R.E. and K.M., and had occasional contact with these individuals at meetings, but he was not under their supervision and there is no probative evidence that any specific work restriction was violated. He accepted the position and performed the assigned work duties. Dr. Sheehan did not indicate in his July 26, 2011 report that appellant was having difficulty with the job or was being forced to work outside any restriction.

The Board finds that the evidence does not establish a recurrence of disability in this case. It is appellant's burden of proof, and the Board finds that he did not meet his burden of proof in this case.

Counsel has argued on appeal that OWCP erred in converting the recurrence of disability claim to a new occupational claim. As discussed above, when new employment factors have been alleged, as in this case, it is appropriate to create a new claim for compensation. With respect to the issues raised regarding the light-duty jobs performed from December 2010, OWCP did address the relevant evidence and the Board finds no employment-related disability as of October 5, 2012 was established.

[21] *Supra* note 18; *D.D.*, Docket No. 16-0701 (issued July 18, 2016).

[22] *Supra* note 19.

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 not established an emotional condition causally related to compensable work factors on or after April 2011. The Board further finds that he has not established a recurrence of disability as of October 5, 2012.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 7, 2016 is affirmed.

Issued: November 17, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy 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