United States Department of Labor
Employees' Compensation Appeals Board

S.O., Appellant	)	
and	)	**Docket No. 16-1156**
	)	**Issued: October 21, 2016**
SOCIAL SECURITY ADMINISTRATION, LOS ANGELES TELESERVICE CENTER, Los Angeles, CA, Employer	)	

Appearances:
William H. Brawner, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 11, 2016 appellant, through counsel, filed a timely appeal from a March 15, 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.*

ISSUE

The issue is whether appellant met his burden of proof to establish an emotional condition on November 7, 2011 in the performance of duty.

On appeal counsel asserts that OWCP did not implement the Board's mandate in its June 15, 2015 decision by its failure to properly develop the record and issue a proper *de novo* merit decision. He further asserts that the employing establishment violated the human instincts doctrine by delaying medical care.

FACTUAL HISTORY

This case has previously been before the Board. In a June 15, 2015 decision, the Board found the case not in posture for decision because OWCP did not request information from the employing establishment regarding appellant's assertions.[3] As described in the June 15, 2015 decision, on July 27, 2014 appellant, then a 49-year-old teleservice representative, filed a traumatic injury claim (Form CA-1) alleging that on June 12, 2014 he was required to be present at a meeting with his supervisor, R.L., and this caused anxiety, chest pain, respiratory distress, headache, and diminished feeling in appellant's face for which he was hospitalized overnight and resulted in long-term emotional and physical consequences such that he could not return to work.

In support of his claim, appellant submitted an affidavit indicating that on June 10, 2014 R.L. called appellant for a discussion regarding performance and that he had requested union representation, so the discussion was postponed until the next day, however, R.L. was not available then. He further related that on June 12, 2014 R.L. interrupted him and told him to go to his cubicle to have the discussion. Appellant claimed that this was code for a possible disciplinary action, so he again requested union representation, which R.L. refused in violation of Weingarten rights. He alleged that R.L. criticized appellant's work performance and implicitly indicated an adverse action against him, stating that he would lower appellant's grade. Appellant stated that he continued to ask for an union representative, which R.L. refused and appellant noted that he began to feel stress and his blood pressure was increasing. He continued that he told R.L. that he was not feeling well and needed to go to the physician. Appellant stated that he then went to urgent care for treatment, but was told that R.L. refused to authorize treatment and that later appellant went to an emergency room and was hospitalized overnight.

Medical evidence included documentation from Verdugo Hills Medical Associates dated June 12, 2014 noting that R.L. would not authorize treatment. It also included reports from Glendale Memorial Hospital and Health Center dated June 12 and 13, 2014. Dr. Mikhail Blinchik, Board-certified in internal medicine, completed a discharge summary. He described appellant's hospital course, noting that all tests were negative for acute changes, and that acute

[3] Docket No. 15-357 (issued June 15, 2015).

myocardial infarction was ruled out.[4] Discharge diagnoses included atypical chest pain and numbness and tingling sensation of perioral area and right arm, possibly due to anxiety attacks; an old cerebrovascular accident; hypertension; diabetes mellitus Type 2; anxiety disorder; and weakness of the left arm from childhood that had not changed recently.

Additional medical evidence included reports from Dr. Edgar Agvanyan, Board-certified in family medicine, and Dr. Sara Epstein, a Board-certified psychiatrist, who advised that the altercation at work caused panic attacks, post-traumatic stress disorder, and depression.

In a September 5, 2014 statement, Charlotte Elmore, a union representative, advised that on June 12, 2014 she received several telephone calls from distressed employees concerning appellant's meeting with R.L. She maintained that many employees would not complete witness statements for fear of reprisal. L.M., a coworker, indicated that she witnessed the confrontation between appellant and R.L. She reported that she was unsure why the confrontation was taking place, but witnessed that appellant was becoming very agitated and stressed and that R.L. denied appellant's request for union representation and to seek medical assistance.

By decision dated October 20, 2014, OWCP denied the claim, finding that the June 12, 2014 discussion did not establish error and abuse by the employing establishment. Appellant, through counsel, then appealed to the Board. In its June 15, 2015 decision, the Board found that the case was not in posture for decision because, as OWCP did not seek to obtain evidence by sending a development letter to the employing establishment, the case record was incomplete, and the Board could not render a fully informed decision.[5] The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference.

Subsequent to the Board's June 15, 2015 decision, by letter dated October 23, 2015 OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations and to discuss whether his position was stressful and whether there were performance or conduct problems.

In a response dated November 12, 2015, R.L. disagreed with appellant's allegations. He indicated that on June 10, 2014 he told appellant that he needed to have a routine discussion regarding his service observation and that the discussion was not intended to discipline appellant. R.L. related that he could not complete the discussion because appellant advised that he was not feeling well and wanted to go home, at which time he informed appellant that the discussion would continue at a later time. He continued that appellant was on leave on June 11, 2014 and that on June 12, 2014 he again told appellant that he did not intend to discipline him and that he would be notified of the need for union representation if the discussion might lead to disciplinary action. R.L. reported that appellant then walked away, yelling at him. He noted that, because appellant had not returned to work since June 12, 2014, a copy of appellant's service observation

[4] The tests included a normal stress test. A computerized tomography scan of the brain showed no evidence of intracranial hemorrhage, no large vessel distribution ischemic changes, an old right frontal cortical infarction, and encephalomalacia. A carotid ultrasound showed no evidence of hemodynamically significant carotid arteries, and a magnetic resonance imaging scan of the brain showed an old right cerebral infarct and no acute intracranial change.

[5] *Supra* note 3.

was given to the union on September 4, 2014. R.L. advised that there were no aspects of appellant's job that could be perceived as stressful, noting that these duties involved answering telephone calls, and that he had no additional workload or projects. He related that appellant did not openly welcome constructive feedback or directions and consistently challenged management decisions, displayed an unpleasant demeanor, and was confrontational. R.L. concluded that appellant did not report that he was feeling pressured, overwhelmed, and/or stressed before June 12, 2014, and that, while he generally performed all required duties, his interpersonal skills did not meet expectations, and that he did not effectively communicate with management.

By decision dated March 15, 2016, OWCP denied the claim. It found that a meeting took place on June 12, 2014 between appellant and R.L. and that appellant was denied union representation, but that, as the discussion was not disciplinary, appellant failed to establish error or abuse in this administrative function, and did not establish an injury in the performance of duty.

LEGAL PRECEDENT

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

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*,[9] 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.[10] When an employee experiences emotional stress in carrying out his or 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

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

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

[8] *Id.*

[9] 28 ECAB 125 (1976).

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

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.[11] Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[12] Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[13] Personal perceptions alone are insufficient to establish an employment-related emotional condition.[14]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[15] 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.[16]

ANALYSIS

Appellant has not alleged that his emotional condition was due to any specific job duties. Rather, his claim pertains to events that occurred on June 12, 2014. Appellant alleges that his supervisor, R.L., called him for a discussion regarding performance, and that, because appellant requested union representative, the discussion was postponed until the next day, but that R.L. was not available then. He continued that on June 12, 2014 R.L. interrupted appellant and told him to go to his cubicle to have the discussion which, appellant maintained, was code for a possible disciplinary action, so that he again requested union representation which R.L. refused in violation of Weingarten rights. Appellant alleged that R.L. criticized appellant's work performance and implicitly indicated an adverse action against him, stating that R.L. would lower appellant's grade. He stated that he continued to ask for union representation that was refused. Appellant began to feel stressed and that his blood pressure was getting high. He told R.L. that he was not feeling well and needed to go to the physician. Appellant stated that he then went to urgent care for treatment, but was told that R.L. refused to authorize treatment. He later went to an emergency room and was hospitalized overnight.

The Board has held that, while verbal abuse may constitute a compensable factor of employment, not every statement in the workplace will be covered by FECA.[17] A raised voice in the course of a conversation does not, in and of itself, warrant a finding of verbal abuse.[18] In the

[11] *Supra* note 9.

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

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

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

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

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

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

[18] *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

case at hand, while L.M. indicated that she witnessed a confrontation between appellant and R.L., she did not identify the day or time in question or offer specific details of the conversation. Her statement is of diminished probative value. Thus, appellant did not submit sufficient evidence to substantiate that R.L. committed error on June 12, 2010 by yelling at appellant. Moreover, reprimands, counseling sessions, and other disciplinary actions are administrative matters that are not covered under FECA unless there is evidence of error or abuse.[19] R.L. indicated that he told appellant that the discussion was not disciplinary, but a routine service observation. He related that appellant got upset and yelled at him and left work. Thus, the fact that a meeting was held would be considered an administrative matter and, in this case, there is insufficient evidence of error and abuse.

Appellant also maintained that his Weingarten rights were violated on June 12, 2014 because he requested union representation before the meeting, but R.L. denied his request. The Weingarten decision gave employees the right to representation during an investigative interview when the employee has the reasonable belief that the interview may lead to discipline.[20] There is no evidence of record to support that the June 12, 2014 meeting was any type of investigative interview or disciplinary matter, other than appellant's perception that he would be disciplined. As noted above, R.L. explained that it to discuss a routine service observation.

As to counsel's argument that the human instincts doctrine was violated on June 12, 2014, in his personal statement appellant merely indicated that he told R.L. that he was not feeling well and left. The record supports that an urgent care facility reported that R.L. refused to authorize treatment. Appellant related that when he was told this he left. While L.M. commented that she heard R.L. deny appellant's request for medical assistance, this does not correspond with appellant's rendition of the events. Under the human instincts doctrine, an employing establishment has the duty to make reasonable efforts to procure medical aid or other means of relief to an employee who becomes ill or injured on the job, and who as a result is helpless to provide for his or her own care. A failure, on the part of the employing establishment, to satisfy this duty may be sufficient to establish a causal connection between an employee's condition and the employment if it is shown that such failure contributed to the condition for which compensation is claimed.[21] The record does not support that appellant was helpless and unable to provide for his care. It appears from the record that he safely transported himself to the urgent care facility and the emergency room. There is nothing here to support that there was any action that would rise to the level contemplated by the human instincts doctrine.[22]

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

[19] *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

[20] *N.L.R.B., v. J. Weingarten*, 420 U.S. 251 (1975).

[21] *J.W.*, Docket No. 11-1655 (issued May 18, 2012).

[22] *Id*.

actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error, or abuse.[23]

The Board also disagrees with counsel's assertion that the March 15, 2016 OWCP decision does not constitute *de novo* review. Following the Board's June 15, 2015 decision, OWCP requested information from the employing establishment, and this was provided. It reviewed the evidence of record, including R.L.'s report, and issued a decision on the merits of appellant's claim on March 15, 2016.

For the foregoing reasons, appellant has not established a compensable factor of employment under FECA and, therefore, has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

Finally, as appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record.[24]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of the October 16, 2015 decision on the merits of his claim, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish an emotional condition on November 7, 2011 in the performance of duty.

[23] *Ernest J. Malagrida*, 51 ECAB 287 (2000).

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

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 21, 2016
Washington, DC

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

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

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