United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 15-0986**
	)	**Issued: September 23, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Wood Dale, IL, Employer	)	

Appearances:
Cecil W. Watson, for the appellant[1]
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 30, 2015 appellant, through his representative, filed a timely appeal from a November 12, 2014 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 the case.

ISSUE

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

[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.*

FACTUAL HISTORY

On April 4 and 12, 2013 appellant, then a 52-year-old part-time flexible (PTF) letter carrier, filed occupational disease claims alleging stress and anxiety as a result of working in a hostile work environment due to managerial actions. He stated that he was subjected to harassment, sexual and racial discrimination, retaliatory actions, and other hostile actions by management.

In his May 1, 2013 supplemental statement, appellant explained that for the past two years former 204-B Supervisor M.C. and Postmaster K.P. had aggressively attempted to terminate appellant's employment through baseless disciplinary actions, while subjecting him to a hostile work environment. He alleged that he had filed numerous grievances, equal employment opportunity (EEO) complaints, and National Labor Relations Board (NLRB) claims for management's alleged disparate treatment and retaliation while creating a hostile work environment.

Appellant outlined his disciplinary history. On August 9, 2012 he was issued a notice of seven-day suspension. Appellant denied all allegations associated with the charge as false and noted the NLRB was addressing that charge. On October 23, 2012 he was issued a 14-day suspension for "Failure to Maintain a Regular Schedule." On December 22, 2012 appellant was issued a notice of removal. On February 12, 2013, however, a Step B decision, issued by the Dispute resolution team, reduced the 14-day suspension to a job discussion. On February 16, 2013 the employing establishment issued a notice of suspension of 14 days or less for the same conduct for which the previous notice of removal had been issued, referring to an alleged typographical error in the previously-issued notice of removal.

Appellant alleged that management engaged in double jeopardy by issuing him disciplinary offence again for the same alleged offense which had been rescinded in its totality.

Appellant alleged that these aggressive actions and the work-related stress caused by M.C. and K.P. resulted in anxiety, sleepless nights, headaches, and abdominal pain. He also alleged that M.C. and K.P. went out of their way to make it a difficult place to work after appellant wrote to upper management and his senator and filed grievances, NLRB charges, and EEO complaints. Appellant noted that his prior EEO complaint case against M.C. and K.P. for unlawful discrimination and retaliation charges was still pending.

On April 2, 2013 M.C. issued a notice of removal for failure to perform his duties as assigned, including when appellant failed to obtain a signature from the recipient of a piece of certified mail.

On April 5, 2013 appellant was seen by Dr. Bahir Mansur, a Board-certified family practitioner, and Dr. Wendy A. Oman, a clinical psychologist, for work-related stress. He stated that he had never previously taken any prescribed medication for stress, suffered from any anxiety disorders, or felt the need to seek medical treatment or counseling services prior to April 2013.

Along with his claim, appellant submitted a February 20, 2013 medical report from Dr. Mansur diagnosing anxiety and stress disorder, an April 29, 2013 report from Dr. Dennis

Deer, a rehabilitation psychologist, advising that appellant could return to work and February 15, 2013 letters to Senator Richard J. Durbin and to Postmaster General Donahoe, outlining the hostile work environment at the employing establishment by M.C. and K.P., and the responses from the employing establishment.

Also submitted were copies of appellant's various disciplinary actions. These included: an August 9, 2012 7-day suspension for failure to perform duties as assigned (unauthorized disposal of mail), failure to follow instructions, and conduct unbecoming an employing establishment employee, an October 23, 2012 14-day suspension for failing to maintain a regular work schedule, citing three unscheduled absences within a three-month period, a December 22, 2012 notice of removal for failure to perform duties as assigned (unauthorized disposal of mail), a February 8, 2013 letter rescinding the December 22, 2012 notice of removal, a February 12, 2013 Step B decision reducing the 14-day suspension to a job discussion, a February 16, 2013 notice of suspension for 14 days or less, replacing the previous December 22, 2012 notice of removal (which was stated to have been rescinded on February 8, 2013 due to a typographical error), and the April 2, 2013 notice of removal for failure to perform duties as assigned.

The February 12, 2013 Step B decision, which reduced the 14-day suspension to a job discussion dated October 23, 2012, stated "management failed in their obligations by not discussing appellant's attendance issues before resorting to discipline and providing opportunity to correct the problem." It further stated that "there was no doubt that [appellant's] attendance record ... was unacceptable. Almost six days in a three[-]month period is excessive."

In an October 2, 2013 letter, OWCP advised appellant of the deficiencies in his emotional condition claim and requested additional medical and factual evidence, including responses to its questionnaire. Appellant was provided 30 days to submit the requested information. No further evidence was received.

By decision dated March 26, 2014, OWCP denied appellant's claim for failing to establish any compensable factors of employment.

On April 30, 2014 OWCP received appellant's request for an oral hearing, which was held by video conference on July 31, 2014.

In an April 25, 2014 statement, appellant reiterated that he was issued the April 2, 2013 notice of removal as a result of continued harassment and hostile work environment created by M.C. and K.P. He alleged that these managers deliberately and willfully issued disciplinary actions and abused their positions of authority by charging him with alleged violations that were inconsistent with the employing establishment or union policies and/or regulations. Appellant stated that both M.C. and K.P. conspired in this nefarious scheme to discriminate, retaliate against appellant, and cause him mental anguish because he had filed grievances, EEO complaints, and written letters to upper management against them.

Appellant alleged that there had been no investigation prior to his being charged with some of the alleged offenses in the August 9, 2012 notice of suspension, and that M.C. had created a bogus letter of warning on August 7, 2012 for the same offenses for which he had been charged on August 9, 2012. He noted that the October 23, 2012 14-day suspension was reduced to a job discussion in the February 12, 2013 Step B decision issued by the Dispute resolution

team. Appellant stated that the representative representing him in his EEO complaint case indicated that there was no rule that carriers were required to be disciplined for three unscheduled occurrences within a three-month period. He disputed the grounds of the December 22, 2012 notice of removal, noting that it was rescinded on February 8, 2013. Appellant alleged that management could not engage in double jeopardy by issuing him the February 16, 2013 notice of suspension of 14 days or less as it was for the same disciplinary offense for which the rescinded December 22, 2012 notice of removal had been issued. He stated that he also denied the basis of the allegations surrounding the April 2, 2013 notice of removal.

On July 19, 2013 the Dispute resolution team issued a Step B decision combining the April 2, 2013 notice of removal and the February 16, 2013 14-day suspension into one 14-day suspension. The Dispute resolution team noted that the employing establishment had just cause to issue discipline. Appellant was advised that he must correct the stated deficiencies to avoid further discipline. The letter would remain in his personnel record in accordance with the national union agreement.

Appellant alleged that his record was now tarnished because of the misconduct of M.C. and K.P. He desired to transfer to Chicago as a clerk, but that the transfer did not work out because of the 14-day suspension on his record. Appellant alleged that M.C. and K.P. had a personal vendetta against him and both conspired to aggressively cause him harm and unwarranted stress by issuing him baseless punitive disciplinary action and subjecting him to a hostile work environment until they were successful at terminating his employment.

In further support of his allegations, appellant submitted copies of material previously of record, additional medical reports of his condition, employing establishment's responses in his EEO complaint case number xxxxxx077, a copy of the USPC and NALC Joint Contract Administration Manual, partial transcripts of multiple depositions in his EEO complaint case number xxxxxx077, and the Step B decision, which reduced the April 2, 2013 notice of removal to a job discussion.

On May 9, 2014 appellant requested multiple subpoenas be sent for the hearing. In a July 10, 2014 letter, the subpoena request was denied.

At the July 31, 2014 hearing, appellant's representative explained that appellant's problems began in 2009 when then-supervisor, K.P. claimed that appellant yelled at him on the workroom floor. The representative related the history of the disciplinary actions issued to appellant and argued that they were not progressive as required: job discussion, letter of warning, 7-day and 14-day suspensions, and a final notice of removal. Appellant's representative explained that K.P. issued unwarranted notices of suspension and disciplinary actions that remained in appellant's file. The representative indicated that the facts contradicted the charges against appellant for which he received discipline. He noted that all allegations of misconduct regarding the individuals referenced herein were dismissed and found in favor of the employing establishment. These decisions were currently on appeal. Appellant testified that he was subjected to harassing behavior by management.

Additional evidence received following the hearing included: duplicative evidence previously of record, an August 15, 2014 witness statement from Rosa Willareal, a coworker,

Mr. Watson's August 20, 2014 declaration, duplicative copies of various disciplinary action notices, and 2011, 2012, and 2013 letters from appellant.

By decision dated November 12, 2014, an OWCP hearing representative affirmed the prior decision.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.[3] Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.[4]

An employee's emotional reaction to administrative or personnel matters generally falls outside the scope of FECA.[5] Although related to the employment, administrative, and personnel matters are functions of the employing establishment rather than the regular or specially assigned duties of the employee.[6] However, to the extent 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.[7]

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his or her regular duties, these could constitute employment factors.[8] However, for harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under FECA.[9]

Appellant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that an emotional condition was caused or adversely affected by his employment.[10] Neither the fact that a disease or condition manifests itself during a period of

[3] *Pamela D. Casey*, 57 ECAB 260, 263 (2005).

[4] *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[5] *Andrew J. Sheppard*, 53 ECAB 170, 171 (2001); *Matilda R. Wyatt*, 52 ECAB 421, 423 (2001).

[6] *David C. Lindsey, Jr.*, 56 ECAB 263, 268 (2005).

[7] *Id.*

[8] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[9] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

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

employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[11]

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.[12] If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. 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.[13]

ANALYSIS

The Board notes that appellant did not attribute his emotional condition to the performance of his regular or specially assigned duties as a PTF carrier under *Lillian Cutler*.[14] Although appellant made general allegations and submitted some evidence with regard to some of the matters for which he received discipline, he did not provide specific evidence with regard to incidents pertaining to his work duties or allege that his work duties caused or contributed to his emotional condition. Rather, he contended that his emotional condition was related to the disciplinary actions taken by the employing establishment and his disagreement with the basis of such disciplinary actions. Appellant also contends that Postmaster K.P. and his supervisor, M.C., engaged in managerial harassment and discrimination in the handling of the disciplinary actions.

After reviewing the evidence of record including arguments by the employing establishment and appellant, witness statements, and the two Step B decisions issued by the Dispute resolution team, the Board finds that he has failed to establish a compensable factor with regard to these administrative and personnel actions.

In *Thomas D. McEuen*,[15] the Board held that an employee's emotional reaction to administrative or personnel matters by the employing establishment is generally not covered under FECA as such matters pertain to procedures and requirements of the employing establishment and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining

[11] *See Ronald K. Jablanski*, 56 ECAB 616 (2005); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[12] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[13] *Id.*

[14] 28 ECAB 125 (1976).

[15] 41 ECAB 387 (1990); *reaff d on recon.*, 42 ECAB 556 (1991).

whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[16]

The record reflects that appellant received an August 9, 2012 7-day suspension, an October 23, 2012 14-day suspension, a December 22, 2012 notice of removal which was rescinded, a February 16, 2013 notice of suspension of 14 days or less, and an April 2, 2013 notice of removal. Appellant alleges error and abuse as the disciplinary actions were subsequently reduced following the filing of employing establishment grievances.

The Board finds no error or abuse in the handling of discipline by the employing establishment in this regard. Admittedly, the February 12, 2013 Step B decision, which reduced the October 23, 2012 14-day suspension to a job discussion, found that management had failed in their obligations by not discussing appellant's attendance issues before resorting to discipline and giving him an opportunity to correct the problem. It further found, however, that there was "no doubt that [appellant's] attendance record during the period cited was unacceptable. Almost 6 days in a 3[-]month period is excessive as [appellant] is using sick leave faster than it is being earned."

As to the second Step B decision on July 19, 2013, which combined the removal action and the 14-day suspension into one 14-day suspension, the Dispute resolution team acknowledged that management had just cause to issue discipline and advised appellant that such actions would have to be corrected to avoid future discipline.

The Board has previously considered whether a finding by a third party that the employing establishment acted improperly in a disciplinary matter established a compensable factor of employment. In *T.G.*,[17] the employee claimed an emotional condition as a result of the issuance of a notice of removal, which was later reduced by the employing establishment to a 105-day suspension without pay. The employee submitted an arbitrator's decision reducing the suspension to seven days, finding that the employing establishment's response to the employee's misconduct was excessive. The Board found that the employee had established a compensable factor of employment. The record established that, although the employee's actions were worthy of discipline, the arbitrator found that the notice of removal was inappropriate as the employee had no prior disciplinary action in his record and the employing establishment did not establish two of the charges against the claimant.[18]

In *R.G.*,[19] the employing establishment indefinitely suspended the employee for filing a false tax return and fraudulent bankruptcy petition, but the arbitrator found that the suspension was premature as the tax investigation was still in process. The Board found that the decision by the arbitrator constituted sufficient evidence to establish the employing establishment erred in prematurely suspending the employee from work. There was no evidence of record that the employee had committed fraud at the time he was suspended. Accordingly, the Board found that

[16] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[17] Docket No. 11-1176 (issued December 22, 2011).

[18] *Id*.

[19] Docket No. 10-0947 (issued April 25, 2011).

the claimant established a compensable factor of employment pertaining to error in the administrative action of his suspension.[20]

The Board finds the facts of the instant case distinguishable from these cases. Prior to both grievance decisions in the current case, appellant had a prior disciplinary action. The disciplinary action was timely and not issued prematurely. Further, disciplinary action was found in both instances to be warranted. Although the Dispute resolution team found that the employing establishment should first have counseled appellant regarding his leave abuse before resorting to further disciplinary measures, it found that appellant's actions nonetheless were clearly worthy of discipline. It did not overturn the discipline, but simply reduced the extent of discipline. Under the specific facts of this case, the Board finds that appellant has failed to show error or abuse in the exercise of these personnel actions.

Appellant also alleged that management failed to investigate the charges against him, made it a personal vendetta towards getting rid of him, and fabricated disciplinary actions. As noted above, the Dispute resolution team found in its July 19, 2013 Step B decision that management had just cause to issue discipline with regard to the subject matter of the April 2, 2013 notice of removal and the February 16, 2013 14-day suspension. There is no evidence that management fabricated any of the disciplinary actions or had failed to investigate the charges. While appellant submitted various letters to upper management and copies of his EEO complaint claims in which he provided details about his claims of employing establishment wrongdoing in administrative and personnel matters, he did not submit any corroborative evidence to support the assertions contained in these documents. For these reasons, he has not established a compensable work factor with respect to administrative or personnel matters.

Appellant claimed that he was subjected to harassment and discrimination at work. He generally alleged that his managers subjected him to retaliatory actions, sexual harassment, and hostile work environments. However, the record is devoid of any evidence to establish a specific incident or conclusive documentation to support managerial abuse, harassment, discriminatory action, or other improper behavior by management toward appellant that would substantiate a compensable employment factor. While appellant submitted portions of depositions and witness statements for corroboration of his allegations that he was a target of management's disciplinary actions and that K.P. and M.C. were not truthful in the accounts regarding actions toward him, he did not submit the full documents for them to be properly evaluated. He submitted only the portions that were favorable to his argument. Appellant filed numerous grievances, EEO complaints, and NLRB charges as a result of his allegations of disparate treatment and retaliation by management, however, no formal finding of fault has been issued. The record is devoid of any formal finding of wrongdoing, harassment, or other improper action in response to either the disciplinary actions or disparate treatment in response to his filing of EEO complaints or writing letters to upper management. Thus, appellant has not established a compensable employment factor under FECA with respect to the claimed harassment and discrimination. While he may have been frustrated with the employing establishment's issuance of and handling of disciplinary

[20] *Id*.

actions, his dissatisfaction with management constitutes frustration from not being permitted to work in a particular environment and is not compensable under FECA.[21]

As noted, the evidence of record fails to establish any compensable factors of employment. The Board finds that, as appellant has failed to substantiate any factors of employment, he has failed to meet his burden of proof to establish his emotional condition claim.

CONCLUSION

The Board finds that appellant has failed to meet his burden of proof to establish his emotional condition claim.

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[21] *See Cyndia R. Harrill,* 55 ECAB 522, 529 (2004) (the Board noted that appellant's reaction to perceived poor management must be considered self-generated in that it resulted from her frustration in not being permitted to work in a particular environment).