United States Department of Labor
Employees' Compensation Appeals Board

B.K., Appellant	)	
and	)	**Docket No. 16-0698**
	)	**Issued: September 6, 2016**
DEPARTMENT OF THE NAVY, U.S. MARINE CORPS, Camp Pendleton, CA, Employer	)	

Appearances:
Sally F. LaMacchia, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 26, 2016 appellant, through counsel, filed a timely appeal from a September 9, 2015 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.

ISSUE

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

[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.*

On appeal counsel asserts that the evidence establishes that appellant was secretly monitored while in the performance of duty and that the medical evidence supports that appellant's diagnosed condition was caused by this event. She maintains that the doctrines of personal comfort and friction and strain and the case *Leonard Dureseau* were applicable.[3]

FACTUAL HISTORY

This case has previously been before the Board. The facts in this case indicate that on July 22, 2005 appellant, then a 41-year-old firefighter, filed an occupational disease claim (Form CA-2), alleging that factors of his employment caused an emotional condition.[4] In a letter dated September 23, 2010, OWCP asked the employing establishment to respond to his allegation that on December 4, 2003 he was secretly microphoned and baited into a confrontation with firefighter T.G., a coworker. The employing establishment thereafter forwarded Equal Employment Opportunity (EEO) documentation including decisions dated June 2, 2006, February 12, 2007, and January 14, 2008, none of which were favorable to appellant.

By decision dated May 13, 2011, OWCP found that he had not established any factors of employment and denied his claim. It noted that appellant's allegation that he was improperly monitored by microphone on December 4, 2003 had been properly and thoroughly adjudicated under another claim, File No. xxxxxx758.[5] On July 26, 2013 appellant, through counsel, requested reconsideration. He alleged that OWCP had committed clear evidence of error because, contrary to the assertion in its May 13, 2011 decision in this claim under File No. xxxxxx880, OWCP had not adjudicated the claimed December 4, 2003 microphoning incident in File No. xxxxxx758. In an October 17, 2013 decision, OWCP denied appellant's reconsideration request as his request was untimely filed and had failed to demonstrate clear evidence of error on the part of OWCP. Appellant then filed an appeal with the Board.

In an October 8, 2014 decision the Board found, under the specific facts and circumstances of the case, that the claimed monitoring event had not been fully and appropriately adjudicated by OWCP and therefore he had established clear evidence of OWCP error. The Board remanded the case to OWCP for an appropriate decision on his claimed factor that he was secretly monitored.[6] The findings of facts and conclusions of the previous Board decision are incorporated herein by reference.

[3] 39 ECAB 1062 (1988).

[4] OWCP initially designated this claim as a duplicate of File No. xxxxxx758, but on July 14, 2009 determined that it was a new claim. *See* discussion *infra* regarding File No. xxxxxx758.

[5] *Id*.

[6] Docket No. 14-277 (issued October 8, 2014).

Appellant has a second occupational disease claim, adjudicated by OWCP under File No. xxxxxx758, accepted for prolonged depressive adjustment reaction, caused by seven accepted employment factors. That claim file remains open for medical treatment.[7]

Evidence of record relevant to the claimed monitoring incident includes correspondence dated December 4, 2003, in which appellant alleged that he was told by another firefighter that T.G. had a monitor in her room that was five feet away, placed facing his room, and that a receiver was in the office of their supervisor Captain D.K. Appellant described the sleeping quarters as divided by seven-foot tall partitions and submitted copies of photographs of a monitor, taken on December 5, 2003. On June 23, 2004 appellant reiterated that he was secretly monitored by a hidden microphone.

A single page of undated testimony initialed by T.G. was submitted. She indicated that she placed a baby monitor in her room on her own and that she did not turn it on. T.G. related that she had slept in her car one night because she was afraid to be alone with appellant. A second submission, that appears to be by D.K., noted that T.G. felt that she was being harassed by appellant. He related that he called a meeting of all crewmembers to establish a standard for bunkroom behavior, including that the door should be left open at all times. D.K. continued that T.G. informed him that she would like to resign because she felt harassed and could not continue to work under current conditions, and that she had brought in a baby monitor which she put in her room and his. He concluded that the monitor was used only once and no conversation or sounds were heard that night.

An EEO counselor's report dated March 16, 2005 indicates that D.K. authorized the use of a baby monitor for one night because T.G. had complained that appellant made sarcastic and intimidating remarks to her, which he denied. D.K. indicated that he was advised to remove the monitor by management, and that it had only been there one night. A final EEO decision dated January 14, 2008 upheld the employing establishment's finding of no discrimination. It specifically found that placing the monitor on one occasion did not prove discriminatory/ retaliatory animus.

A January 8, 2006 Merit Systems Protection Board decision upheld the employing establishment's removal of appellant, effective May 17, 2006.

In a September 7, 2010 report, Suzanne L. Martin, Ph.D., a clinical psychologist, advised that she had provided psychotherapy services to appellant from February 28, 2006 to March 27, 2010. She noted that he had described a series of actions by the employing establishment that occurred in the fall/winter 2003, particularly when an attempt was made to gather evidence against him *via* a secret microphone, which was planted in his cubicle. Dr. Martin opined that appellant's debilitating symptoms were directly precipitated by the events in 2003, which escalated to an incapacitating level when he learned that he was recorded.

[7] Under File No. xxxxxx758, in a January 29, 2008 decision, Docket No. 07-1437, the Board affirmed a February 6, 2007 OWCP decision that found that appellant had not met his burden of proof to establish that his claimed disability on or after July 15, 2005 was causally related to the accepted employment injury. On October 20, 2008 the Board denied his petition for reconsideration. *See* Docket No. 07-1437 (issued February 6, 2007, *petition for recon. denied* (issued October 20, 2008). File No. xxxxxx758 is not presently before the Board.

Following the Board's remand on October 8, 2014,[8] on October 21, 2014 appellant forwarded reports from Dennis Patrick Wood, Ph.D., a clinical psychologist, dated September 23, 2010 and July 7, 2014. In the former report, Dr. Wood noted that he had examined appellant in October and November 2005 and August and September 2010. He provided an extensive history, described evidence provided by appellant, and noted appellant's report that he was secretly recorded in his sleeping quarters at work in an attempt by management to bait him into a confrontation. Dr. Wood opined that this event aggravated appellant's diagnoses of generalized anxiety disorder, adjustment disorder with depressed mood, post-traumatic stress disorder, and rule-out dysthymic disorder *vs.* major depressive disorder, which were caused by a campaign of reprisal waged against appellant by the employing establishment. On July 7, 2014 he advised that appellant asked that his report be added to File No. xxxxxx880.

In a February 5, 2015 merit decision, OWCP found that the fact that T.G. set up a baby monitor in firehouse sleeping area was not a compensable employment factor. It noted that she placed the monitor in her room, but did not turn it on, and had it to protect herself because she was fearful. OWCP found that the monitor had not been used for the purpose appellant alleged and did not rise to the level of harassment required for compensability.

Appellant, through counsel, timely requested a hearing before an OWCP hearing representative.[9] In a pleading, submitted on August 20, 2015, counsel maintained that the December 2003 incident where T.G. monitored appellant was a compensable factor of employment, arguing that, but for employment, he would not be required to occupy limited work/sleep space with T.G., and that the friction and strain doctrine was applicable because their workplace created situations leading to conflicts. She further asserted that the personal comfort doctrine was applicable because it was usual for appellant to sleep in the workplace, and any injury sustained during his sleep period would occur in the performance of duty.

In a decision dated September 9, 2015, an OWCP hearing representative outlined appellant's previous claim, adjudicated under File No. xxxxxx758, including the accepted incidents. He found the personal comfort and friction and strain doctrines were not applicable, and that appellant's reaction to T.G. placing a monitor in her sleeping area was self-generated. The hearing representative affirmed the February 5, 2015 decision.[10]

LEGAL PRECEDENT

To establish his claim for an emotional 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 the stress-related

[8] *Supra* note 5.

[9] The request was later changed to a review of the written record.

[10] The hearing representative also noted that OWCP could consider doubling the claims.

condition.[11] If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.[12] 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]

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*,[14] 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.[15] 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 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.[16] Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[17] Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[18] Personal perceptions alone are insufficient to establish an employment-related emotional condition.[19]

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations that the harassment occurred with probative and reliable evidence.[20] With regard to emotional claims arising under FECA, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other agencies, such as the EEO, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under FECA, the term

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

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

[13] *Id.*

[14] 28 ECAB 125 (1976).

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

[16] *Supra* note 14.

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

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

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

[20] *James E. Norris*, 52 ECAB 93 (2000).

"harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or coworkers. Mere perceptions and feelings of harassment will not support an award of compensation.[21]

ANALYSIS

Appellant has not attributed his emotional condition to the performance of his regular duties as a firefighter or to any special work requirement arising from his employment duties under *Cutler*. Rather, this case is solely based on his allegation that he was secretly monitored in December 2003 as part of a campaign of harassment waged against him by the employing establishment. In its October 8, 2014 decision, the Board remanded the case to OWCP to address the issue of secret monitoring, which had not been previously adjudicated by OWCP.[22]

The Board finds that this one incident does not rise to the level of harassment as contemplated under FECA. While the evidence establishes that T.G. placed a baby monitor in her cubicle on one occasion, she testified that she did not turn it on and D.K. testified that on that occasion he heard no conversation or sounds. As noted above, in evaluating claims for workers' compensation under FECA, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment, or persecution, *i.e.*, mistreatment by coemployees or coworkers. Mere perceptions and feelings of harassment will not support an award of compensation.[23]

Moreover, a January 14, 2008 EEO decision found that placing the monitor on one occasion did not establish discrimination or retaliatory animus. As to counsel's reliance on the *Dureseau* case,[24] the instant case is based on only one incident of claimed harassment, not on a period of persecution and harassment that occurred over a period of years as described in *Dureseau*.

Counsel also maintained that the doctrines of friction and strain and personal comfort were applicable here. The friction and strain doctrine recognizes that workplaces can cause employees under strains and fatigue from human and mechanical impacts creating frictions to explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal, and official. The explosion point is merely the culmination of antecedent pressures. That it is not relevant to the immediate task, involves a lapse from duty, or contains an element of violation or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences.[25] The Board

[21] *Beverly R. Jones*, 55 ECAB 411 (2004).

[22] *Supra* note 6.

[23] *Supra* note 21.

[24] *Supra* note 3.

[25] A. Larson, *The Law of Workers' Compensation* § 8.00 (May 2004); *see M.A.*, Docket No. 08-2510 (issued July 16, 2009), *Shirley I. Griffin*, 43 ECAB 573 (1992).

has recognized the friction and strain doctrine in cases involving altercations and clashes between employees.[26] In the case at hand, there was no altercation or clash. Rather, the issue is based on one incident of placing a baby monitor in sleeping quarters. The Board finds that this does not rise to the level contemplated by the friction and strain doctrine.

As to the personal comfort doctrine, this doctrine has evolved to provide coverage to employees who are injured on the employing establishment premises when ministering to their personal comfort.[27] Appellant, a firefighter, is required to sleep at work. This would be considered a *Cutler* factor. However, he has not alleged that the monitoring incident interfered with his sleep on the day in question. It is not a compensable factor of employment under *Cutler* or under the personal comfort doctrine.

A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.[28] Appellant did not do so in this case. His perception of harassment by the placement of the baby monitor, which was not turned on, was self-generated and would not constitute a compensable factor of employment.[29] For the foregoing reasons, appellant has not met his burden of proof to establish that the placement of the monitor caused an emotional condition in the performance of duty.[30]

As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record.[31]

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 did not meet his burden of proof to establish an emotional condition in the performance of duty.

[26] *C.O.*, Docket No. 09-217 (issued October 21, 2009); *Shirley I. Griffin, id.*

[27] *V.O.*, 59 ECAB 500 (2008).

[28] *Robert Breeden*, 57 ECAB 622 (2006).

[29] *See supra* note 17.

[30] *Supra* note 28.

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

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 6, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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