

ISSUE

The issue is whether appellant met his burden of proof to establish a traumatic injury on May 8, 2014 in the performance of his federal employment duties.

FACTUAL HISTORY

On October 20, 2014 appellant, then a 46-year-old administrative investigator, filed a traumatic injury claim (Form CA-1) alleging that on May 8, 2014 he sustained post-traumatic stress, anxiety, hypervigilance, depression, anger, fear, and sleeplessness in the performance of duty. He indicated that he was conducting surveillance as part of his investigation of a workers' compensation claimant when he witnessed and recorded a drug transaction. The subjects of the drug transaction later threatened to kill him. Appellant stopped work on October 20, 2014.³

In a May 8, 2014 e-mail to an investigator for the employing establishment, appellant noted that, while performing surveillance, he followed a claimant's vehicle to a parking lot and noticed two people shooting up drugs in a vehicle next to him. He began to videotape them and called the local police department. Appellant noted that at the same time that the drug users departed the area, he observed the claimant driving in the same direction. He followed the claimant and observed the drug users pull into a driveway. Appellant notified the local police department of the new information. He explained that he was unable to locate the claimant so he returned to his surveillance position in the parking lot. Appellant observed a sport utility vehicle (SUV) parked in the same area where he observed the drug users and noticed that its two occupants were staring at his vehicle. A few minutes later a second vehicle pulled up next to the SUV and the driver pointed at appellant's vehicle. Appellant reported that the second vehicle slowly drove up next to appellant's vehicle and the driver yelled that he was going to kill appellant. He further noted that when the local police department contacted him, they informed him that he was in an area known for drug activity. Appellant stated "given those events and the position I was put in with this ... NARC-looking vehicle and what I just witnessed.... I bailed out of the area, fearing for my life." He mentioned that he sat in his vehicle shaking and sweating and "staring at every vehicle ... and wondering if they're looking for me."

Appellant also sent an e-mail dated May 8, 2014 to his supervisor. He stated "became sick to my stomach, scared to death, and afraid for my life." Appellant indicated that he left work an hour early and was very nervous and afraid that someone was following or chasing after him.

Appellant provided several other e-mails between himself and his supervisor regarding several occasions when he went to the emergency room because of severe pain in his lower and upper back, which he believed was caused by stress from work. He requested time off work and wage-loss compensation for his medical treatment.

Dr. Justin M. Hill, a neuropsychologist, treated appellant and related in narrative reports dated September 22 and November 19, 2014 that appellant experienced multiple symptoms

³ On October 22, 2014 OWCP offered appellant a light-duty assignment as a workers' compensation specialist. In a letter dated November 11, 2014, appellant declined the assignment.

consistent with a diagnosis of Adjustment Disorder with Anxiety and Depression. He noted that appellant complained of chronic pain with regard to his symptoms of anxiety and depression. Dr. Hill indicated that appellant had a particularly difficult time in the military and that these memories continued to negatively impact his mood and other areas of life. He reported that appellant's current job as a workers' compensation investigator created a significant amount of stress for him and negatively impacted other areas of his life. Dr. Hill further stated: "It is likely very difficult to consistently perform at a high level at your job given the very nature of what you do while you continue to suffer from significant mental health and medical issues."

In a letter dated October 29, 2014, OWCP advised appellant that the evidence of record was insufficient to establish his claim. It requested additional evidence to demonstrate that he actually experienced the May 8, 2014 employment incident, that the alleged injury occurred in the performance of duty, and that he sustained a diagnosed psychological condition as a result of the employment incident. A similar letter was sent to the employing establishment. Appellant was afforded 30 days to submit the additional evidence.

In a November 11, 2014 statement, appellant reiterated that on May 8, 2014 he was inside his government vehicle, which had confidential license plates and heavily tinted windows, and conducting discreet surveillance on a workers' compensation claimant. He asserted that his government vehicle stood out in the area and he noticed many long stares and comments as people walked by the vehicle. While appellant was in a parking lot conducting surveillance, he observed that two people in another vehicle were shooting up drugs. He started to videotape the illegal activity and called the local police department. Appellant explained that at the same time that the drug users left the area he thought he observed the claimant leaving the area in the same direction. He followed the claimant and observed the drug users pull into a driveway. Appellant called the local police department to inform them of the new location. When he was unable to locate the subject of his investigation he returned to his surveillance viewpoint in the vacant parking lot. While waiting in his vehicle appellant observed an SUV parked in the same area and noticed that the two occupants were staring at him. He related that a few minutes later another vehicle pulled up alongside the original vehicle and the driver pointed to appellant's vehicle. Appellant noted that the vehicles drove by his car and yelled out death threats.

Appellant explained that he became very nervous, paranoid, and feared for his life because he got himself mixed up with a drug dealer or something. He further noted that the nature of his employment required him to be discreet, confidential, and anonymous. Appellant alleged that seven years of this type of work had made him an emotional mess and a very disabled employee. He indicated that he had provided numerous notifications to his supervisor, but the traumatic event on May 8, 2014 was one of the primers in which he realized that he was no longer capable of performing the duties of an investigator. Appellant asserted that he suffered immensely from this incident and that it aggravated more psychological issues. He explained that he suffered from post-traumatic stress disorder (PTSD), depression, anxiety, and other psychological-related issues while on active duty in the Army, but that this incident caused him the worst type of pain. Appellant reported that his delay in filing the emotional condition claim was due to his confidential position as an investigator and in knowing how filing his claim would affect his job, life, and health. He noted that after the May 8, 2014 life-threatening incident he had a nervous breakdown and became ill over the incident. Appellant reported that he could no longer take the stress of having his life threatened, challenged, or not knowing who could be

trusted. He indicated that there were no witnesses to the incident, but his supervisor was aware of similar incidents when his life had been threatened or when he was placed in similar life threatening situations. Appellant asserted that since May 8, 2014 he has been unable to function normally and that he suffered from out of control fear and hypervigilance that did not allow for him to function normally.

The employing establishment controverted the claim by letter dated November 19, 2014. She contended that on May 8, 2014 appellant had deviated from his employment duties when he videotaped illegal drug activity while conducting surveillance on a claimant. The workers' compensation program specialist asserted that appellant decided on his own to continue to observe the illegal activity when he was conducting surveillance and to record the activity even though it did not involve the subject of his workers' compensation surveillance.

In a November 29, 2014 statement, appellant related that it was "beyond embarrassing" to go to anyone about filing a workers' compensation claim and to be a workers' compensation investigator filing a claim. This had always plagued him since his first injury on the job. He noted that he would have to speak to various employees who were past targets of his investigation, which caused major anxiety attacks and major depression. Appellant further explained that the May 8, 2014 incident triggered his emotional condition and that he had been unable to function normally since that incident. He indicated that he now suffered from out of control fear and hypervigilance and that everyone in the city looked suspicious to him. Appellant also described an incident which occurred about one week after the May 8, 2014 incident when someone spray painted a large penis on the drivers' side of his government window. He included pictures of the painting. Appellant noted that he was diagnosed with PTSD in 2000 after serving in the Army and related that many factors caused him severe and debilitating flare-ups and bouts of depression.

The employing establishment reiterated in a December 22, 2014 letter that the May 8, 2014 injury did not occur in the performance of duty. She clarified that investigators were advised not to take any action if they saw illegal activity taking place. When appellant witnessed illegal activity on May 8, 2014 and started to record the activity, this action broke the scope of his employment and was a deviation from his assigned duties. It noted that appellant continued to stay in the area and watch the illegal activity even though the subject of his surveillance was no longer present.

Appellant received treatment from Dr. J. Michael O'Connell, Board-certified in emergency medicine, who noted in a December 8, 2014 record that he had treated appellant for management of chronic medical issues, most noticeably, for anxiety around his employing agency due to his job as a workers' compensation investigator. Dr. O'Connell related that appellant felt threatened when he was a patient and when he had to interact with employees whom he had investigated in the past. He reviewed appellant's history and diagnosed radicular pain, essential hypertension, indigestion, low back pain, obesity, osteoarthritis of the knee, shoulder pain, adjustment disorder with mixed anxiety and depressed mood, depression, chronic PTSD, and major depressive disorder, and sleep apnea.

In a January 28, 2015 statement, appellant related that on October 20, 2014 he filed an occupational disease claim for a lumbar condition that originated on or around August 14, 2012.

He noted that this letter would contain numerous medical and psychological records from the Department of Veterans Affairs pertaining to his back and other conditions. Appellant explained that he filed the claim after years of worsening medical issues to his back and knee and psychological issues, including stress, anxiety, depression, and PTSD. He noted that beginning in August 2007 he began to work as a workers' compensation investigator and that this position required him to remain seated for extended periods of time in a vehicle while conducting covert surveillance. Appellant asserted that the vehicles were widely known as government vehicle makes and models and were not equipped for "blending in." He described the physical requirements of his job to conduct surveillance and alleged that these activities caused significant pain in his lower and upper back.

Appellant submitted various progress notes dated August 14, 2013 to December 8, 2014 regarding treatment for lumbar symptom, depression, and anxiety.

OWCP denied appellant's emotional condition claim in a decision dated March 20, 2015. It found that the factual and medical evidence of record was insufficient to establish an injury on May 8, 2014 while in the performance of duty. OWCP stated that appellant deviated from his normal and assigned duties when he videotaped illegal drug activity because the illegal activity was not relevant to the assigned surveillance of the subject of appellant's investigation.

On April 13, 2015 OWCP received appellant's request for a hearing before an OWCP hearing representative which was held on October 30, 2015. Appellant alleged that OWCP's conclusion that the May 8, 2014 incident did not occur in the performance of duty had no factual support. He explained that his work involved more than simply taking pictures of the subject of the investigation and that he also took pictures of background information such as a subject's neighborhood, home, vehicle, and other features related to the subject. Appellant asserted that all observations were relevant to his investigations and were used in the investigative process either immediately or for future events. Thus, he alleged that he was still performing the essential functions of his position at the time of the May 8, 2014 incident. Appellant also noted that his job required him to be in that location on that day and that he was still performing his duties of conducting surveillance when he videotaped the illegal activity. He stated that he was sitting in the parking lot because a vehicle that matched the subject's vehicle came into view. Appellant noted that he was documenting that vehicle and the environment as part of his investigation. He further noted that the death threats were made while he was sitting in a government-owned vehicle, and not while he was videotaping the illegal activity. Appellant also discussed his history of PTSD from his military service and described his anxiety, feelings of helplessness, and stress that he experienced after the May 8, 2014 incident and the treatment he received.

In a November 25, 2015 letter, counsel described in detail the May 8, 2014 incident. He related that appellant filed a claim for traumatic injury alleging that the described events, specifically the threat against his life, caused him to suffer an emotional condition. Counsel asserted that OWCP's decision was based on conjecture that the drug users were aware that appellant was videotaping them and that is why they threatened to kill appellant. He alleged that the drug users noticed appellant because he was in a government vehicle with heavily tinted windows and not because he was videotaping the illegal activity. Counsel argued that appellant

was performing his normal duties as an investigator and did not deviate from any of those duties on May 8, 2014.

On December 28, 2015 OWCP received the employing establishment's response to the hearing testimony. The employing establishment reiterated that appellant deviated from his assigned duties as an investigator on May 8, 2014, thereby taking himself out of the performance of duty. It disagreed with appellant's contention that the government-issued vehicle used on May 8, 2014 stood out. The employing establishment explained that although appellant often took pictures of the environment surrounding the subject of the investigation, he took pictures of identifying locations, such as street intersections and house numbers, in order to verify that appellant was in the location that he claimed to be. Appellant had never photographed illegal activity. The employing establishment asserted that appellant would not have lost sight of the subject of his surveillance if he had not been videotaping the illegal activity. It also noted several discrepancies in his testimony, e-mails, and narrative statements regarding the events on May 8, 2014. The employing establishment noted that in appellant's initial statement he indicated that he moved to the parking lot because he wanted a more discreet surveillance position, but in his e-mail to the investigator appellant explained that he followed the claimant to the parking lot. It further asserted that appellant initially claimed that he observed the claimant in the parking lot but in his hearing testimony he indicated that he could not clearly identify whether the claimant was in his vehicle. The employing establishment noted that the evidence was unclear regarding why appellant was in the vacant parking lot, where the drug users were parked when he witnessed the illegal activity, and for how long he remained in the parking lot after the described incident.

By decision dated February 8, 2016, an OWCP hearing representative affirmed the March 20, 2015 denial decision. He determined that appellant had failed to establish that the alleged May 8, 2014 employment injury occurred in the performance of duty. The hearing representative noted that appellant deviated from his course of employment when he intentionally videotaped illegal activity and abandoned the surveillance activity that was his actual work assignment.

LEGAL PRECEDENT

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ The phrase sustained while in the performance of duty in FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment.⁵

To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his master's business, at a place when he may reasonably be expected to be in connection with his employment and while he was reasonably

⁴ 5 U.S.C. § 8102(a).

⁵ See *Valerie C. Boward*, 50 ECAB 126 (1998).

fulfilling the duties of his employment or engaged in doing something incidental thereto.⁶ In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances a causal relationship exists between the employment itself or the conditions under which it is required to be performed and the resultant injury.⁷

Workers' compensation law does not apply to each and every injury or illness that is somehow related to a claimant's employment.⁸ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation.⁹ In the case of *Lillian Cutler*,¹⁰ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition under FECA. Where the employee experiences emotional stress in carrying out his duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his 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 resulted from his emotional reaction to his day-to-day duties. The same result is reached when the emotional disability resulted from the employee's emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of the work.¹¹

On the other hand, when a disability results from an employee's feelings of job insecurity per se, fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position, unhappiness with doing work, or frustration in not given the work desired or hold a particular position, such disability falls outside FECA's coverage because they are found not to have arisen out of employment.¹² The only requirements of employment which will bring a claim within the scope of coverage under FECA are those that relate to the duties the employee is hired to perform.¹³

The Board has recognized the compensability of verbal threats and abuse in certain circumstances.¹⁴ This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.¹⁵ To be considered compensable under FECA, there

⁶ *T.F.*, Docket No. 08-1256 (issued November 12, 2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Eugene G. Chin*, 39 ECAB 598 (1988).

⁷ See *Mark Love*, 52 ECAB 490 (2001).

⁸ *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁹ *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

¹⁰ 28 ECAB 125 (1976).

¹¹ *Id.*; see also *Trudy A. Scott*, 52 ECAB 309 (2001).

¹² *William E. Seare*, 47 ECAB 663 (1996).

¹³ See *Anthony A. Zarcone*, 44 ECAB 751 (1993).

¹⁴ See *Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666,669-70 (1991).

¹⁵ See *Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783 (1991).

must be evidence that the alleged verbal altercation occurred and rose to the level of verbal abuse or otherwise fall within coverage of FECA.¹⁶ The Board finds that the emotional reaction to the behavior must be considered self-generated in that it resulted from his perceptions regarding the alleged third parties.¹⁷

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 work 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 compensable factors of employment and may not be considered.¹⁸ If a claimant does implicate a factor of employment, OWCP should then consider whether the evidence of record substantiates that factor. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim. The claim must be supported by probative evidence.¹⁹

ANALYSIS

Appellant has alleged that he experienced post-traumatic stress, anxiety, hypervigilance, depression, anger, fear for his life, and sleeplessness as a result of a May 8, 2014 employment incident. OWCP denied appellant's claim finding that he failed to establish that his alleged work injury occurred in the performance of duty. As a preliminary matter, the Board must review whether the alleged incident is a covered employment factor under FECA.²⁰

Appellant has alleged that he feared for his life and became extremely nervous on May 8, 2014 while conducting surveillance on a subject as part of his duties as an administrative investigator. He noticed that in the vehicle next to him two people were shooting up drugs. Appellant began to videotape the criminal activity and called the police. He then observed that the subject of his surveillance departed the area so he followed the subject. Appellant explained that he was unable to locate the subject of his surveillance so he returned to his initial surveillance position in the parking lot. He asserted that while he was in his "NARC looking" vehicle he noticed two passengers in an SUV looking at him. Appellant alleged that another vehicle then drove up next to his vehicle and the driver yelled that he was going to kill appellant. He related that when the local police department later contacted him, they informed him that the area where he was performing surveillance was known for drug activity. Appellant alleged that he became very nervous, paranoid, and feared for his life that he had become involved with a drug dealer or criminal.

¹⁶ *Harriet J. Landry*, 47 ECAB 543, 547 (1996); see *Leroy Thomas, III*, *supra* note 14.

¹⁷ See *David S. Lee*, 56 ECAB 602 (2005).

¹⁸ See *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁹ See *Charles E. McAndrews*, 55 ECAB 711 (2004).

²⁰ *Id.*

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment.²¹

In *P.B.*,²² the Board determined that the claimant had deviated from his mail delivery when he got out of his mail truck to chase and attempt to catch an assailant who threw gasoline on him. The injuries he sustained while attempting to capture the assailant were found to have been outside the performance of duty. OWCP had accepted as a compensable factor that the claimant sustained injuries in the performance of duty when the assailant threw gasoline on the claimant while the claimant was delivering mail. The Board distinguished, however, that following the accepted gasoline attack incident, the claimant stopped work and deviated from his mail delivery duty to attend to a purely personal matter of chasing the assailant.

In *L.F.*,²³ OWCP denied the claim because he left his work location prior to the end of his tour of duty, thereby removing himself from the performance of duty. The mere fact that a claimant was on the premises at the time of injury is not sufficient to establish entitlement to compensation benefits. It must also be established that he or she was engaged in activities which may be described as incidental to his or her employment, *i.e.*, that he or she was engaged in activities which fulfilled or were incidental to his or her employment duties or responsibilities thereto. The Board further explained that in *B.I.*,²⁴ the employee was robbed at gunpoint during his work tour while walking on the premises of the employing establishment's parking garage. However the employee was found not to be in the performance of duty as he had not submitted any evidence establishing that he was engaged in any duty reasonably incidental to his employment at the time of the robbery. The Board further found that appellant had departed his workstation for unknown reasons and without authorization at the time of the robbery.²⁵

Likewise, in this case the evidence of record supports that appellant was acting in the performance of duty when he initially conducted surveillance of a subject in the parking lot, but he deviated from the course of his employment when he returned to the parking lot after he stopped conducting surveillance on the subject. He has stated that he followed the subject of the

²¹ *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

²² Docket No. 13-1092 (issued June 19, 2014).

²³ Docket No. 13-1804 (issued January 10, 2014).

²⁴ Docket No. 12-1060 (issued January 11, 2013).

²⁵ *See also W.F.*, Docket No. 14-15 (issued June 4, 2014). The Board determined that the claimant's actions constituted a personal deviation from the normal activities incidental to his employment and authorized travel when he rebooked his June 13, 2012 flight to June 15, 2012. The Board noted that although appellant was under orders to travel to work, he did not provide a valid explanation for why he rebooked his June 13, 2012 flight for June 15, 2012, and therefore, failed to establish that he was engaged in authorized incidental activity at the time of the alleged June 15, 2012 injury.

surveillance out of the parking lot, but returned to the parking lot when he was unable to locate the subject of his surveillance. Appellant has not provided any reason for returning to the parking lot or any explanation as to why he needed to return to the parking lot in furtherance of his employment duties after he had lost track of his target. He was no longer conducting surveillance on the subject of his investigation and has provided no evidence to show that he was engaged in activity that was reasonably incidental to his duties as an investigator when he was sitting in his vehicle in the parking lot after the surveillance ceased. Because returning to the parking lot constituted a deviation from his employment duties, the death threats he allegedly received and the information from the local police department that he was in a high crime activity area did not arise in the course of his employment as an investigator.

In *Katina D. Edwards*,²⁶ the Board found that the claimant's April 17, 2000 injury did not occur in the performance of duty because the claimant had deviated from her employment for personal reasons. The claimant's trip was found to be a "personal mission, rather than an activity incident to her employment and placed her, at the time of the accident, at a place where she would not reasonably be expected to be in connection with her employment."

Like the claimants in *P.B.* and *Edwards*, appellant was performing his employment duties on May 8, 2014, but he deviated from his employment when he returned to the parking lot. The Board finds, therefore, that when appellant later returned to the parking lot after the surveillance on the subject ceased, he engaged in activities that were not incidental to or reasonably expected by the employing establishment and thus removed himself from coverage under FECA.²⁷ Accordingly, the conditions he attributed to those events did not occur in the performance of duty.

Appellant has also alleged an emotional condition due to performing this type of work for seven years. He has related that his work as an investigator was a source of significant stress for him and negatively impacted his life. Appellant has explained that he could not handle the stress of having his life threatened, challenged, or not knowing who could be trusted, and that the May 8, 2014 incident showed him that he was no longer capable of performing the duties of an investigator.

On appeal, counsel contends that OWCP's decision was based on the assumption that appellant would not have been threatened if the subjects did not know that they were being videotaped. He alleged that there was nothing in the record to support that this was the case and asserted that appellant was at all times performing his normal duties as an investigator when the death threats were made against him. As explained above, however, appellant deviated from his employment duties and was no longer in the performance of duty when he returned to the parking lot after losing contact with the target. Accordingly, any injuries he claimed that resulted from the individuals threatening him on May 8, 2014 were a result of his personal actions, and not his duties as an investigator. For this reason, appellant has failed to establish a compensable factor of employment for his emotional condition claim.

²⁶ Docket No. 02-64 (issued September 16, 2002). It noted that it was the claimant's personal preference to travel to a more distant restaurant from her route for lunch.

²⁷ See *J.P.*, Docket No. 12-145 (issued March 25, 2013).

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a traumatic injury on May 8, 2014 in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2016 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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