

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
E.T., Appellant)	
)	
and)	Docket No. 17-0672
)	Issued: April 26, 2018
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE,)	
Covington, KY, Employer)	
_____)	

Appearances:
 Alan J. Shapiro, Esq., for the appellant¹
 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 February 3, 2017 appellant, through counsel, filed a timely appeal from a December 21, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 has met his burden of proof to establish that he sustained an emotional condition and related heart attack while in the performance of duty.

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

FACTUAL HISTORY

On June 18, 2015 appellant, then a 68-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that he sustained a heart attack and an emotional condition due to factors of his federal employment. Specifically, he contended that he experienced extreme stress on the job due to "resistance, embedded oppression, discrimination and retaliatory discrimination, repeated EEO issues leading to high pressure ..." and that the increased stress increased pressure on an artery in his heart. Appellant reported that he first became aware of his claimed conditions and their relation to his federal employment on June 5, 2015. He stopped work on that same date and has not returned.

Appellant submitted e-mails between himself, his supervisor P.B., and employing establishment human resources specialist V.F., indicating that he promptly reported his June 5, 2015 heart attack, which he believed was work related. He explained to V.F. that he had undergone triple bypass surgery 11 years prior. At that time, appellant was told that his arteries should be good for another 30 years. An abnormality was found in 2012, but his doctors determined that his heart was okay at that time and they would monitor it. Within the year before his June 5, 2015 heart attack, his arteries were again shutting down and he began experiencing angina. Appellant's doctors explained that the stress he was undergoing was causing a higher pumpage rate throughout his heart and, unless he reduced his work stress, he would have a heart attack. Appellant explained that the week prior to the heart attack, he had participated in a six-to-seven-hour alternative dispute resolution (ADR) mediation meeting concerning an Equal Employment Opportunity (EEO) complaint he had filed.³ He was concerned that the agreement reached in that EEO matter would affect another of his EEO cases. That issue was not resolved until the day before appellant's heart attack. The submitted e-mails also described his medical treatment and anxiety with regard to the following: (1) that he received two letters of counseling concerning harassment allegations made against him by employing establishment manager S.W. in August/September 2014; (2) that management discriminated against him based on his disability as a deaf employee in violation of the Rehabilitation Act of 1973; (3) that management retaliated against him for filing his EEO complaints; and (4) that supervisor P.B. discriminated against him when he instructed him to obtain permission in advance to use a computer for communication. Appellant asserted that the stress from those management actions continued nonstop for more than one year, causing him to withdraw from college. He noted that he was expected to return to work on August 10, 2015 and fully recover from his heart attack by November or December 2015. Appellant listed names of persons who had witnessed his stress at work.

³ Appellant noted that, beginning in early 2014, he had filed several EEO complaints against the employing establishment regarding discrimination based on his disability as a deaf employee and/or retaliation. The number of complaints filed escalated in May, July, October, November, and December 2014.

Appellant submitted a copy of a May 28, 2015 settlement agreement in his EEO case, which alleged discrimination based on his disability. The agreement provided that neither party admitted to any wrongdoing, fault, or liability of any nature whatsoever.⁴ Appellant also submitted medical reports dated June 6 to August 31, 2015, which addressed his heart attack, work capacity, and medical treatment.

In a July 2, 2015 statement, Supervisor P.B. controverted appellant's claim. He contended that appellant informed him *via* a June 7, 2015 e-mail that he had suffered a heart attack after work on June 5, 2015. P.B. noted that appellant had a long history of nonwork-related cardiovascular problems dating as far back as August 2009 for which he used Family and Medical Leave Act approved leave. He noted that Dr. Pete L. Caples, appellant's attending Board-certified internist specializing in cardiovascular disease, completed a report which indicated that appellant had been his patient since 2004 and that he treated him for his recent heart attack on June 15, 2015. However, Dr. Caples' report did not provide any medical linkage between appellant's work environment and his heart disease, nor did it mention personal stress factors that appellant may have been dealing with outside of work. P.B. claimed that he never received any correspondence from Dr. Caples advising him that work stress contributed to appellant's cardiovascular issues. He further claimed that appellant had suffered a setback in his OWCP claims for compensation in a denial letter dated June 15, 2015 under OWCP File No. xxxxxx142.⁵

By letter dated July 27, 2015, employing establishment human resources specialist V.F. controverted appellant's claim, contending that the alleged incident did not occur in the performance of duty. She also contended that the medical evidence submitted indicated that appellant's condition was caused by his prior heart bypass surgery rather than his employment. V.F. further asserted that the claimed incident did not occur on government property. Rather, it happened after work on Friday, June 6, 2015.

In an October 1, 2015 development letter, OWCP informed appellant of the deficiencies of his claim and requested that he respond to its inquiries. It also requested that the employing establishment respond to his allegations and submit treatment notes indicating whether he was treated at an employing establishment medical facility.

In response, appellant submitted the employing establishment's March 26, 2015 decision concerning appellant's August 3, 2014 EEO complaint along with the investigative file, which included evidence submitted in support of his discrimination claim. Appellant alleged that M.S., a lead employee, had refused to assign him additional work, that his appraisal violated the Rehabilitation Act of 1973 and the union contract, and that he did not receive proper accommodation. Appellant further indicated that S.W., a coworker, had falsely accused him of unwanted contact and that management issued appellant a letter of counseling in response to S.W.'s allegations, which they would not remove from his personnel file. In an April 11, 2014

⁴ In exchange for terms agreed to by the employing establishment, appellant agreed to withdraw his April 21, 2015 EEO precomplaint and any grievances, formal complaints, or Merit Systems Protection Board appeals relating to the allegations raised in his precomplaint with prejudice.

⁵ OWCP File No. xxxxxx142, a traumatic injury claim accepted for a March 13, 2013 sprain of the left shoulder and upper arm, disorder of bursae and tendons in the left shoulder, and other affections of the shoulder region is not presently before the Board.

memorandum, supervisor P.B. advised appellant to seek permission in advance from him before he put any more time under “990-59300.” Appellant contended that this policy only applied to him, the only deaf person on the team. He also contended that he did not receive this memorandum until after he had filed an EEO complaint on August 29, 2014.

Appellant also submitted additional medical reports and diagnostic test results dated June 7 to November 11, 2015, which indicated that he had a myocardial infarction on June 6, 2015 due to workplace stress.

In a November 2, 2015 e-mail, supervisor P.B. contended that appellant’s work stress was self-induced as it was based on his misunderstanding of the law, employing establishment/union agreements, the reasonable accommodations process, and EEO procedures. He contended that appellant’s EEO complaints were virtually meritless and that the principal cause of appellant’s stress was the denial of those complaints. P.B. noted that Dr. Caples incorrectly indicated that appellant had received favorable judgements regarding his EEO complaints of discrimination and harassment. He indicated that appellant incorrectly informed Dr. Caples that he was expected to work through five bakery carts of work. P.B. maintained that the work was positioned so that all employees could conveniently go through it as needed. He noted that appellant did not have a production quota.

By decision dated January 12, 2016, OWCP denied appellant’s occupational disease claim for a heart attack and an emotional condition, finding that he had not established that a medical condition arose during the course of employment and within the scope of compensable work factors.

In a January 19, 2016 letter, counsel requested a telephone hearing with an OWCP hearing representative.

Appellant then submitted a series of e-mails between himself, P.B., and S.W. S.W. had alleged that appellant harassed her, but appellant contended that her allegations were false. An October 2, 2014 e-mail from S.W. to appellant demanded that he cease contact with her, effective immediately. She indicated that she had informed him on August 11, 2014 that she was uncomfortable that he had invited himself to her family fundraiser event. S.W. also informed him that she was uncomfortable with his recent behavior. She related that, on September 23, 2014, appellant blocked her path as she tried to enter the employing establishment’s facility. Appellant kept tapping S.W.’s shoulder to get her attention as she tried to scan her badge to return to duty. S.W. further alleged that, on September 25, 2015, appellant was sitting at a table she usually sat at in the canteen. She walked back into the hallway and entered the canteen through a side entrance to avoid him. S.W. also alleged that, on September 26, 2014, appellant again blocked her path as she tried to return to the employing establishment facility. A short while later, appellant was seen lingering near windows outside of a unit looking in at S.W. S.W. contacted management about this behavior. Management advised her of her right to ask him to cease contact.

OWCP also received an October 2, 2014 letter of counseling from P.B., which served as formal notice to keep away from S.W. The letter noted that S.W. had complained of unwanted attention that she was receiving from appellant and it instructed appellant to cease contact with S.W.

Appellant submitted witness statements dated August 9 and October 24, 2014, which indicated that, on August 9, 2014, appellant was in attendance at a fundraiser sponsored by a deaf club and therefore could not have been at S.W.'s family event. He contended that the witness statements supported that S.W.'s allegations were false.

During the hearing, held before a representative of OWCP's Branch of Hearings and Review on September 12, 2016, appellant testified that he had preexisting coronary artery disease and underwent triple bypass surgery in 2004 due to arteriosclerosis. He related that his heart was thereafter very strong, and that doctors told him he was not expected to have any further heart problems for another 25 to 30 years, with follow up visits only once or twice a year. Appellant testified that, when his work stress intensified in 2014, his doctors warned him that unless his stress level came down at work, he was prone to have another heart issue. He explained that, on May 28, 2015, he had an ADR meeting and after they reached an agreement a question arose as to whether that agreement nullified another EEO matter that was proceeding to a court hearing. This created a lot of stress, to which appellant attributed his heart attack.

A copy of the hearing transcript was forwarded to the employing establishment for review and comment, and the case was held open for 30 days to allow appellant the opportunity to provide additional evidence to support his claim.

Appellant subsequently submitted hospital records, which indicated that appellant presented on June 6, 2015 with complaints of chest pain. He reported that he had chronic angina and was increasingly taking nitroglycerin over the prior week or two. Appellant related that he had awoken that morning with severe chest pain that did not go away after ingesting three nitroglycerin tablets. Dr. Callahan diagnosed acute myocardial infarction and performed a heart catheterization. Appellant also submitted November 18, 2015 laboratory test results.

By decision dated December 21, 2016, OWCP's hearing representative affirmed the January 12, 2016 denial of appellant's claim for a heart attack and emotional condition, finding that the evidence of record was insufficient to establish a compensable employment factor.

LEGAL PRECEDENT

A claimant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by factors of his or her federal employment.⁶ To establish that he or she sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the claimed condition; (2) medical evidence establishing a diagnosed emotional or psychiatric condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the claimed emotional condition.⁷

⁶ *Pamela R. Rice*, 38 ECAB 838 (1987).

⁷ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties, or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁸ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or hold a particular position.⁹

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 FECA¹⁰ However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.¹¹ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹²

For harassment or discrimination to give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment, retaliation or discrimination are not compensable under FECA.¹³

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.¹⁴ 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.¹⁵

⁸ *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁹ *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹⁰ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *reaff'd on recon.*, 42 ECAB 556 (1991); *Thomas D. McEuen*, 41 ECAB 387 (1990).

¹¹ See *William H. Fortner*, 49 ECAB 324 (1998).

¹² *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹³ *D.D.*, Docket No. 17-0466 (issued June 6, 2017).

¹⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁵ *Id.*

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an emotional condition and related heart attack condition while in the performance of duty.

The Board must initially review whether the alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties, as under *Cutler*.¹⁶ Rather, they generally pertain to administrative and personnel matters involving the employing establishment.

Appellant's allegations regarding the assignment of work,¹⁷ being required to obtain authorization before working additional hours and using a computer for communication purposes,¹⁸ receiving a lower performance appraisal rating,¹⁹ and issuance of the October 2, 2014 letter of counseling to cease contact with S.W.²⁰ All relate to administrative matters. As noted in *Thomas D. McEuen*,²¹ complaints about the manner in which a supervisor performs his duties or the manner in which a supervisor exercises his discretion falls outside the scope of coverage provided by FECA. A manager's style is not a compensable factor of employment. It must be established factually that the manager committed error or abuse to support a compensable factor pertaining to any administrative or personnel matter. The Board finds that the administrative and personnel actions taken by management in this case contained no evidence of employing establishment error or abuse, and are therefore not considered factors of employment.

Regarding the issuance of the October 2, 2014 letter of counseling from supervisor P.B., appellant submitted witness statements to support that S.W.'s allegations of harassment were false. While witness statements submitted by appellant indicated that, on August 9, 2014, appellant was in attendance at a fundraiser sponsored by a deaf club and could not have been at S.W.'s family event, the Board notes S.W.'s harassment allegation was not based on appellant's actually attending her family event. Rather, she complained that appellant had invited himself to her family event. S.W. had also complained to P.B. of incidents where she felt uncomfortable around appellant as he blocked her path when she tried to return to her office and he watched her through windows of a unit at work. The Board, therefore, finds that the employing establishment did not commit error in issuing the October 2, 2014 letter of counseling to appellant or in refusing to remove it from his personnel file.

¹⁶ See *supra* note 8.

¹⁷ *C.E.*, Docket No. 13-1860 (issued January 17, 2014).

¹⁸ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

¹⁹ *David C. Lindsey, Jr.*, 56 ECAB 263, 271-72 (2005).

²⁰ *Janice I. Moore*, 53 ECAB 777 (2002).

²¹ *Supra* note 10.

Appellant additionally contended that he was harassed and discriminated against by the employing establishment due to his disability as a deaf employee. Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.²² A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.²³ Appellant filed EEO complaints alleging harassment and discrimination by management. The Board notes that the filing of an EEO complaint related to an administrative matter.²⁴ Appellant submitted a May 28, 2015 resolution agreement. The agreement provided that it was not an admission of wrongdoing, fault, liability, or violation of federal, state, or local statutes, regulations, rules, or guidelines. Appellant listed names of coworkers who witnessed his workplace stress, but did not submit statements from these individuals to establish his allegations of harassment and discrimination as factual at particular times and places. In assessing the evidence, the Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.²⁵ There is no finding by EEO to establish error or abuse in establishing appellant's contentions as factual. Appellant, therefore, has not established harassment or discrimination on the part of the employing establishment.²⁶

As appellant has not established a compensable employment factor, the Board need not address the medical evidence of record.²⁷

On appeal counsel contends that OWCP's decision is contrary to fact and law. For the reasons stated above, the Board finds that appellant has not established a compensable work factor.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an emotional condition and related heart attack while in the performance of duty.

²² *T.G.*, 58 ECAB 189 (2006); *Doretha M. Belnavis*, 57 ECAB 311 (2006).

²³ *C.W.*, 58 ECAB 137 (2006); *Robert Breeden*, 57 ECAB 622 (2006).

²⁴ *Michael A. Salvato*, 53 ECAB 666, 668 (2002).

²⁵ *David C. Lindsey, Jr.*, 56 ECAB 263 (2005); 52 ECAB 468 (2001).

²⁶ *James E. Norris*, 52 ECAB 93 (2000).

²⁷ *A.K.*, 58 ECAB 119 (2006).

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2018
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