United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 17-1976**
	)	**Issued: April 9, 2018**
GENERAL SERVICES ADMINISTRATION, Kansas City, MO, Employer	)	

Appearances:
Analese B. Dunn, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 22, 2017 appellant, through counsel, filed a timely appeal from a March 28, 2017 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 to consider the merits of the case.[3]

[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.*

[3] Appellant submitted additional evidence to the Board on appeal. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from considering this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

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

FACTUAL HISTORY

On April 19, 2016 appellant, then a 50-year-old marketing specialist, filed an occupational disease claim (Form CA-2) alleging that his federal employment caused emotional conditions of anxiety, depression, mood disorder, post-traumatic stress disorder (PTSD), dysthymic disorder, bipolar disorder, obsessive-compulsive personality, mixed personality disorder, and attention deficit hyperactivity disorder (ADHD). He claimed that his emotional conditions were caused or aggravated by work factors, including the denial of his request for reasonable accommodation to allow additional time to perform assignments and a job coach, low performance evaluations, and increased criticism. Appellant stopped work on July 13, 2015. He first became aware of his condition on July 14, 2015 and first attributed this condition to factors of his federal employment on December 29, 2015.

In a development letter dated April 27, 2016, OWCP requested that appellant provide additional factual and medical evidence in support of his occupational disease claim. It afforded him 30 days to submit the requested information.

Appellant responded, through counsel, on April 21, 2016 and provided medical evidence regarding his previously diagnosed conditions as well as factual evidence and legal argument. Counsel's legal brief attributed the aggravation of his underlying emotional conditions to the April 3, 2014 requirement that he report to the employing establishment one day per pay period. She also alleged that the employing establishment improperly denied appellant's requests for reasonable accommodation including requests for a job coach, for 240 hours of advanced sick leave, and additional time to complete his assignments. Counsel also implicated his February 12, 2015 mid-year review and denial of promotion as a cause of his emotional conditions. In addition, she noted appellant's difficulties in performing his job duties due to deadlines.

In an undated statement, appellant expanded on the factors described by counsel and noted that he began to telework full time on January 31, 2010 due to his diagnosed emotional conditions. Appellant alleged that on April 3, 2014 his supervisor, W.N., indicated that appellant delivered "[sh*t] communications" and that he might not make it. W.N. informed appellant that his performance would not be acceptable in the military and ordered him to come into the office one day per pay period. Appellant was required to report to the workplace one day a pay period beginning on April 3, 2014 and that this increased his stress and anxiety. He alleged that, due to these actions by his supervisor, he used two months of Family and Medical Leave Act (FMLA) leave from April 21 through June 7, 2014.

Appellant further alleged that, when he reported to work at the employing establishment, his supervisor, D.W., praised the employees working around appellant, but stated nothing to appellant. D.W. provided appellant with his 20-year pin at 22 years of service and informed him that he would be recognized in a future meeting. The recognition never happened. Appellant's coworkers asked what he was doing at work, and he had to explain that D.W. required his presence

one day a pay period. Appellant alleged that he experienced spatial disorientation due to a recent remodel of the employing establishment. He further alleged that coworkers did not associate with him for fear of harming their careers.

On June 2, 2014 when appellant returned to work after FMLA leave, he discovered that a job vacancy had been posted while he was on leave, but that he had not been informed. He alleged that this failure violated the Equal Employment Opportunity laws. Appellant further alleged that his request for a job coach and employment counseling was improperly denied on July 16, 2014. His June 30, 2014 reasonable accommodation request did not result in the required interactive process within five calendar days and a decision within 30 days as required. Appellant's decision was delayed until September 16, 2014 making it 48 days past due. The employing establishment also denied his request for a job coach and recommended online training.

Appellant requested sick leave on November 4, 2014 and the employing establishment called the police to perform a welfare check at his home. The police reported that he seemed fine. However, appellant was told by employing establishment management not to enter the workplace for his November 5, 2014 performance appraisal and was forced to take administrative leave on that date.

After November 7, 2014 appellant teleworked full time, but was still required to report to the employing establishment for meetings, performance appraisals, and technology upgrades.

Appellant noted that the employing establishment denied his request for 240 hours of advanced sick leave on December 30, 2014. He further noted that he received a level 3 performance appraisal, but was not granted the appropriate performance award. Appellant received an additional reasonable accommodation letter on February 5, 2015 which denied his request for time-and-a-half to complete assignments. The employing establishment failed to follow appropriate procedures in denying this request.

On April 20, 2015 appellant's mother died and his supervisor, D.W. responded, "we all grieve in different ways." He then asked appellant about his assigned work and informed him that if he was working then work product must meet the production schedule he assigned. D.W. failed to approve appellant's attendance at the annual training and job conference on April 23, 2015. At appellant's May 29, 2015 performance appraisal, D.W., informed appellant that he was not meeting critical elements and that a performance improvement plan was possible. Appellant was denied a promotion to GS-14 Program Analyst. He alleged stress and anxiety in researching and writing articles for the National Disability Employment Awareness Month (NDEAM) 2014. Appellant asserted that the program manager for these articles hung up on him, and that D.W. repeatedly rejected his ideas for articles. D.W. also rejected appellant's article ideas in 2015. Appellant attributed his emotional conditions of increased in stress, depression, fear, and high blood pressure to hostile work experiences, employing establishment abuses, disagreements with his supervisor, and performing job duties outside his medical restrictions.

On August 3, 1989 Dr. Janet Anderson, a clinical psychologist, diagnosed a perceptual-motor learning disability affecting memory and concentration. Dr. Cyril G. Hardy, a psychiatrist, began treating appellant on September 22, 1994 and diagnosed major depression as well as affective disorder, bipolar disorder, dysthymic disorder, panic disorder, learning disorder, and

obsessive-compulsive personality. On October 29 and November 21, 2003, and January 11, 2005, he recommended a reasonable accommodation of teleworking full time. Dr. Martin Brandes, a Board-certified forensic psychiatrist, provided a review of appellant's medical history and recommended that appellant telework five days a week on March 22, 2007.

Appellant also submitted a copy of the Equal Employment Opportunity Commission (EEOC) decision dated April 22, 2010 finding that the employing establishment had discriminated against him based on his disabilities of bipolar disorder, panic disorder, learning disability, obsessive compulsive disorder, and mixed personality disorder. EEOC also found that he was a qualified individual with a disability within the meaning of section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 *et seq.*, and that the employing establishment's decision to deny his request for reasonable accommodation of a minimum of four days a week of telework was discrimination. It further found that appellant was subjected to retaliation by his supervisors. In a letter dated July 21, 2010, the employing establishment provided appellant with the reasonable accommodation of at least four days of work at home and damages.

On June 27 and November 26, 2014 Dr. Catherine K. Lee, a clinical psychologist, diagnosed ADHD and PTSD, respectively. She initially requested assignment of work that matched appellant's skill set and interests, a quiet room on the days he was required to be at the employing establishment, noise-cancelling headphones, job assignments broken down into smaller pieces, extra time to complete tasks, regular feedback, and a job coach for 90 days to assist appellant in returning to the workforce. On November 26, 2014 Dr. Lee further requested additional time to complete tasks, typically time-and-a-half as well as the removal of deadlines to complete online training videos.

In a memorandum dated September 16, 2014, the employing establishment granted accommodations of providing job instructions and assignments in writing, establishing performance goals, providing performance feedback, providing noise-cancelling headphones, providing a quiet room, and providing online training for computer programs. It offered other technology solutions and online training in lieu of the requested job coach. The employing establishment denied appellant's request to be reassigned to the Office of Human Resources Management, Diversity Programs. Appellant was to continue to telework four days a week. On November 7, 2014 the employing establishment responded to his request for reasonable accommodation and granted full-time telework.

On December 7, 2014 appellant submitted an emergency request for eight weeks of FMLA leave. He asked for either eight weeks of administrative leave or four weeks of administrative leave and 240 hours of advanced sick leave. In a letter dated December 19, 2014, the employing establishment noted that appellant was entitled to 480 hours of FMLA leave during any 12 months. It further noted that he had used 264 hours of FMLA leave from April 15 through May 30, 2014 and had a current balance of 116 hours of FMLA leave available for his absence beginning December 8 through 29, 2014. The employing establishment informed appellant that afternoon on December 29, 2014 that his leave would be charged to non-FLMA leave without pay through February 2, 2015. It further responded on December 30, 2014 and denied his request for advanced sick leave.

On January 9, 2015 Dr. Lee recommended that appellant return to full-time work within his reasonable accommodations. In a reasonable accommodation decision dated February 5, 2015, the employing establishment granted his November 26, 2014 request to eliminate training deadlines, but denied his request for time-and-a-half to complete work assignments. On August 9, 2015 Dr. Lee found that appellant's level of stress had escalated to the point that he could not work.

In a report dated January 19, 2016, Dr. John R. Lion, a Board-certified psychiatrist of professorial rank, reviewed appellant's medical history and diagnosed mood disorder with recurrent depression and anxiety, mixed personality disorder with obsessive-compulsive, histrionic, and paranoid features. He concurred with the diagnosis of PTSD and opined that workplace stresses and abuse aggravated appellant's mental health to the point that he became totally disabled for work after July 14, 2015.

OWCP also received appellant's September 30, 2015 mid-year review.

By decision dated September 12, 2016, OWCP denied appellant's claim for aggravation of his underlying emotional conditions. It found that he had not responded to the requests for additional information and had therefore not implicated compensable factors of his federal employment as aggravating his underlying emotional conditions.

The employing establishment provided additional information on September 13, 2016 and asserted that appellant did not receive a performance appraisal in 2015 due to his extended leave without pay status. It further alleged that his reaction to the reasonable accommodation process should be evaluated as an administrative function and that he had not established error or abuse.

Counsel requested a review of the written record by an OWCP hearing representative on November 11, 2016.

By decision dated March 28, 2017, OWCP's hearing representative found that appellant had not substantiated a compensable factor of employment. She further noted that OWCP had failed to "adequately address the allegations" made by him in its September 12, 2016 decision "in making the findings of fact." OWCP's hearing representative then addressed three of the alleged factors raised by appellant and counsel, specifically telework requirements, denial of reasonable accommodation, and the February 12, 2015 midyear review. She found that he had not established error or abuse in administrative actions by the employing establishment and had not established a compensable employment factor.

LEGAL PRECEDENT

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*,[4] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable

[4] 28 ECAB 125 (1976).

emotional condition arising under FECA.[5] There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under FECA.[6] 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 emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[7] In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of FECA. Thus, disability is not covered when it results from an employee's fear of a reduction-in-force, nor is it covered when it results from such factors as an employee's frustration in not being permitted to work in a particular environment or to hold a particular position.[8]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[9] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[10] Aclaimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.[11]

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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[12]

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

[5] *Supra* note 2.

[6] *See Robert W. Johns*, 51 ECAB 136 (1999).

[7] *Supra* note 4.

[8] *Id.*

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

[10] *Kim Nguyen*, 53 ECAB 127 (2001). *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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

[12] *E.C.*, Docket No. 15-1743 (issued September 8, 2016); *Alice M. Washington*, 46 ECAB 382 (1994).

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.[13] If a claimant does implicate a factor of employment, OWCP should then determine 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.[14]

ANALYSIS

The Board finds that this case not in posture for a decision.

FECA and its implementing regulations provide that OWCP shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as it considers necessary with respect to the claim.[15] The reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.[16]

In its September 12, 2016 decision, OWCP found that appellant had not identified any specific employment factors as causing his emotional condition on July 15, 2015. The Board notes that he had provided a detailed statement of the events of employment which he felt contributed to his emotional condition as well as a brief summary of his allegations by counsel. Appellant attributed his emotional condition in part to performance of his regular work duties under *Cutler*,[17] as well as to administrative matters. OWCP's hearing representative noted the defects in the September 12, 2016 decision, *i.e.*, that OWCP did not "adequately address the allegations" made by appellant "in making the findings of fact." However, she also failed to provide a complete review of appellant's allegations. For example, the hearing representative failed to address his allegations of harassment by Supervisor D.W. and his coworkers. Instead, she reviewed only three generally implicated employment factors: appellant's telework requirements, denial of his request for reasonable accommodation, and the February 12, 2015 midyear review.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has an obligation to see that justice is done.[18] OWCP did not properly discharge its responsibilities in making findings of fact regarding the

[13] *See I.J.*, Docket No. 16-0506 (issued November 15, 2016); *Dennis J. Balogh*, 52 ECAB 232 (2001).

[14] *Id.*

[15] *Id.;* 5 U.S.C. § 8124(a)(2); 20 C.F.R. § 10.125.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5(c) (February 2013). *See also G.S.*, Docket No. 14-1933 (issued November 7, 2014).

[17] *Supra* note 4. Specifically, appellant mentioned his difficulties in completing articles for the NDEAM 2014. He asserted that D.W. rejected his story ideas in 2014 and 2015.

[18] *See I.J., supra* note 13.

allegation made by appellant as aggravating his underlying emotional conditions.[19] On remand it should consider all the evidence in the record, determine if additional response is required from the employing establishment, and shall issue a *de novo* decision consistent with its own procedures which includes findings of fact and a statement of reasons[20] clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.[21]

CONCLUSION

The Board finds that this case not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2017 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: April 9, 2018
Washington, DC

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

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

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

[19] *Id*.

[20] 20 C.F.R. § 10.126.

[21] *See supra* note 16.