

ISSUE

The issue is whether appellant established an emotional condition in the performance of duty.

FACTUAL HISTORY

On October 10, 2016 appellant, then a 33-year-old corrections officer, filed an occupational disease claim (Form CA-2) alleging a stress-related condition. He indicated that on October 7, 2016 he became dizzy and went to the medical department at work where a nurse found elevated blood pressure and noted that appellant had difficulty talking. Appellant was then transported to a hospital. He did not return.³

In support of his claim, appellant submitted an emergency department report dated October 7, 2016 which noted that he was admitted at 11:46 a.m. and discharged at 4:48 p.m. that day. The report did not contain a diagnosis. Dr. John Garner, appellant's attending family physician, submitted treatment notes dated October 4 to 24, 2016. He noted a history of extreme stress at work and diagnosed hypertension and an anxiety state. Dr. Garner advised that appellant could not work.

By letter dated October 27, 2016, OWCP informed appellant of the evidence needed to establish his claim. By separate letter of the same date, it requested that the employing establishment respond to appellant's claim and provide comments from a knowledgeable supervisor regarding the claim's accuracy.

In undated statements, appellant indicated that after being assigned to a Special Operations Response Team (SORT) in 2011 he was subjected to hazing and was physically and sexually abused by team members. He related that this continued until October 2014, when he was no longer allowed inside the prison itself, and was assigned to its business office. Appellant indicated that he reported the events and an investigation was done by the Office of Inspector General (OIG) who recommended termination of individuals implicated in extreme hazing of appellant. He related that he was placed on administrative leave in 2015, and beginning in October that year was assigned near another officer who, appellant alleged, had been convicted of assaulting him, and constantly harassed him. Appellant reported that his allegations had been substantiated, but that the harassment continued to present. He also noted that he had filed an Equal Employment Opportunity (EEO) claim, but that its findings were confidential.

In a fitness-for-duty evaluation dated October 16, 2014, Brandon R. Olive, Ph.D., a licensed clinical psychologist, diagnosed post-traumatic stress disorder and advised that it was caused by severe hazing and bullying by coworkers.

³ The record indicates that appellant files other claims before OWCP, including two accepted traumatic injury claims, adjudicated under OWCP File Nos. xxxxxx673 and xxxxxx759, a traumatic injury claim that has not been accepted, adjudicated under File No. xxxxxx511, and an extended occupational disease claim that has not been accepted, adjudicated under File No. xxxxxx649. These other claims are not presently before the Board. The instant claim was adjudicated by OWCP under File No. xxxxxx157.

Appellant submitted a personal affidavit dated May 7, 2015 in which he alleged that S.W., a coworker, threw a large piece of concrete onto his car. A June 12, 2015 Kentucky State Police uniform citation cited B.W., a coworker, for criminal mischief.⁴ An August 2, 2016 memorandum from appellant to Captain F.G. outlined appellant's concerns regarding ongoing investigations and past practices. He explained that stress at work kept him from completing an assigned duty.

Appellant also forwarded additional treatment notes from Dr. Garner dated October 3, 2014 to June 9, 2015. On November 18, 2016 Dr. Garner related that he had been following appellant for over three years, noting that his blood pressure was dangerously high and his anxiety levels were out of control. He opined that appellant should not work at his present environment.

Dr. Kevin B. Johnson, an osteopath, provided a November 14, 2016 treatment note. He reported a history of sexual, mental, and physical abuse by fellow officers. Dr. Johnson diagnosed anxiety and advised that appellant be permanently removed from his current work environment.

In November 18, 2016 correspondence, L.M., one of appellant's supervisors, advised that appellant had suffered physical and mental damage at work, noting specific events of harassment by SORT team members. These included that he reported to a threat assessment committee that another staff member threatened to knife appellant for reporting wrongdoing against the SORT team. L.M. indicated that appellant had been placed directly into a hostile work environment in the business office where he was expected to work daily in close proximity to the same people who had physically and sexually assaulted him. He indicated that appellant continued to be harassed daily by coworkers. L.M. noted that he had witnessed appellant's condition worsen over 2.5 years. He concluded that each thing appellant reported had been confirmed as true by the OIG and the Federal Bureau of Investigation (FBI).

In January 3, 2017 correspondence, an employing establishment human resources manager indicated that appellant had been part of an intense investigation involving many coworkers and was temporarily assigned to the administration building where he listened to inmate telephone calls and reviewed inmate e-mails. She attached a position description for a correctional officer position.

By letter dated January 8, 2017, OWCP asked the employing establishment to furnish a copy of the OIG investigation report. A telephone memorandum dated January 13, 2017, indicated that the employing establishment would forward a redacted copy of this investigation.⁵

By decision dated February 15, 2017, OWCP denied the claim. It found that the evidence of record was insufficient to establish that the events occurred as alleged, noting that appellant had not submitted any evidence proving his allegations.

⁴ It is unclear from the record if S.W. and B.W., who share the same last name, are the same individual.

⁵ The record includes complaints in opposition to the employing establishment's motion for findings and conclusions without a hearing, filed with the EEO Commission's Indianapolis district office.

On February 16, 2017 the employing establishment forwarded a March 12, 2015 OIG report which indicated charges brought by appellant against a lieutenant for failure to report a violation of rules and regulations were sustained and that charges brought by appellant against a correction officer for unprofessional conduct were also sustained. These charges were in relation to threats made to appellant and for a rock thrown on his vehicle.

On April 4, 2017 counsel requested reconsideration. In a March 29, 2017 letter, he asserted that appellant had been the victim of repeated retaliation for reporting unprofessional behavior, including physical violence. Counsel maintained that this was substantiated by sworn affidavits and sworn deposition testimony, copies of which were said to be attached. The only items attached to the March 29, 2017 letter, however, were copies of two photographs. No affidavits or deposition transcripts are found in the case record.

Appellant retired on disability in the spring of 2017.

In a June 14, 2017 decision, OWCP denied modification of its February 16, 2017 decision. It noted that, while appellant claimed that working in a front lobby post, which included screening staff and answering telephones, caused his emotional condition and anxiety attack on October 7, 2016, he failed to submit any evidence proving these allegations. OWCP further noted that appellant had a previous claim that had been denied, filed on October 23, 2014 and adjudicated under File No. xxxxxx649, in which appellant claimed the same physical and sexual abuse. It advised him to follow his appeal rights in that case. OWCP further noted that counsel's reconsideration request did not differentiate current events from events claimed under File No. xxxxxx649. It concluded that the evidence submitted was insufficient to alter its prior decision in this case, adjudicated under the present claim, File No. xxxxxx157.

LEGAL PRECEDENT

To establish a claim for a stress-related condition in the performance of duty, the appellant must submit the following: (1) medical evidence establishing an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed the claimed condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her stress-related condition.⁶ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.⁷ 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.⁸

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*,⁹ the Board

⁶ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁷ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁸ *Id.*

⁹ 28 ECAB 125 (1976).

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.¹⁰ 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 requirements imposed by the employing establishment or by the nature of the work.¹¹ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.¹² Where a claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹³ Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁴

ANALYSIS

The Board finds that this case is not in posture for decision. When disability results from an emotional reaction to regular or specially assigned work duties, or a requirement imposed by the employment, the disability is deemed compensable.¹⁵

In this instance, appellant alleged that from 2011 to October 7, 2016 he had been subjected to harassment at the employing establishment. He maintained that this began with severe hazing, and sexual and physical abuse. Appellant noted that, beginning in October 2015, he was placed near coworkers who had been implicated in investigations of these past events, and this made his daily work of answering the telephone and screening e-mails more difficult such that he had a panic attack on October 7, 2016 and stopped work. He referenced an OIG investigation and an EEO claim.

In reaching its June 14, 2017 decision in the present claim, File No. xxxxxx157, OWCP referenced a decision in appellant's October 2014 claim under File No. xxxxxx649.

Pursuant to 20 C.F.R. § 501.2(c)(1), the Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Decisions on claims are based on the written record, which may include forms, reports, letters, and other evidence of various types such as photographs, videotapes, or drawings.¹⁶ Evidence may not be

¹⁰ See *Robert W. Johns*, 51 ECAB 137 (1999).

¹¹ *Supra* note 9.

¹² *J.F.*, 59 ECAB 331 (2008).

¹³ *M.D.*, 59 ECAB 211 (2007).

¹⁴ *Roger Williams*, 52 ECAB 468 (2001).

¹⁵ *Penelope C. Owens*, 54 ECAB 684 (2003); see *supra* note 9.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5a (June 2011).

incorporated by reference, nor may evidence from another claimant's case file be used.¹⁷ Evidence contained in another of the claimant's case files may be used, but a copy of that evidence should be placed into the case file being adjudicated.¹⁸ All evidence that forms the basis of a decision must be in that claimant's case record.¹⁹ As OWCP referenced a decision in File No. xxxxxx649, a copy of that decision and evidence upon which it relied should be placed in this case record, File No. xxxxxx157.

The Board also notes that OWCP did not address whether the incidents cited by appellant constituted compensable employment factors or were administrative or personnel matters. OWCP procedures provide that, when denying an emotional condition claim, the claims examiner must first determine whether the situations alleged actually existed or occurred. The claims examiner should then distinguish between those workplace activities and circumstances which are factors of employment and those which are outside the scope of employment for purposes of compensation by outlining work-related and nonwork-related elements into three parts. These should be labeled as accepted events that are factors of employment, accepted events that are not factors of employment, and incidents alleged which OWCP finds did not occur.²⁰

Moreover, L.M.'s statement supports some of appellant's allegations, as does the OIG report. He noted on November 18, 2016 that another staff member threatened to knife appellant for reporting wrongdoing against the SORT team, and that appellant had been placed directly into a hostile work environment in the business office where he was expected to work daily in close proximity to the same people who physically and sexually assaulted him, and that appellant continued to be harassed daily by coworkers. L.M. concluded that each thing appellant reported had been confirmed as true by the OIG and the FBI. The March 12, 2015 OIG report indicated that charges were sustained in relation to threats made to appellant and for a rock thrown on his vehicle.

The Board further notes that counsel indicated that he had forwarded affidavits and deposition testimony with his April 4, 2017 reconsideration. These were not found in the case record of OWCP File No. xxxxxx157 at issue here. Upon remand OWCP should ascertain if these were misfiled and should ask appellant, counsel, and the employing establishment to furnish any evidence relating to his EEO claims, or other investigatory proceedings, if relevant to establishing error and abuse on the part of the employing establishment.

Since the record lacks sufficient evidence for the Board to render an informed decision, the case shall be remanded to OWCP for further development. As noted, all evidence that forms the basis of a decision must be included in the case record.²¹ After OWCP has developed the

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at Chapter 2.1401.6 (November 2012).

²¹ *Supra* note 16.

record consistent with the above-noted directive, it shall issue a *de novo* decision regarding appellant's claim for an employment-related emotional condition.²²

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 14 and February 15, 2017 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for further proceedings consistent with this opinion of the Board.

Issued: February 14, 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

²² See *J.B.*, Docket No. 17-1356 (issued October 4, 2017).