

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

R.W., Appellant and DEPARTMENT OF VETERANS AFFAIRS, VA MEDICAL CENTER, New Orleans, LA, Employer)))))))))))))	Docket No. 17-1542 Issued: February 1, 2018
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 6, 2017 appellant filed a timely appeal from a June 20, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish an emotional condition in the performance of duty on March 17, 2016.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 11, 2016 appellant, then a 47-year-old supply technician, filed a traumatic injury claim (Form CA-1) alleging that on March 17, 2016² he sustained an emotional condition when he was inappropriately touched and assaulted at work.³ The claim form did not indicate whether appellant stopped work.⁴

Appellant submitted two handwritten employee health records dated July 8 and 26, 2016 from an unknown provider. In the July 8, 2016 note, the provider indicated that appellant complained of headaches and nightmares following an incident when he was groped by another employee in the ambulatory procedure unit (APU) while on duty. Appellant complained of mental anguish and post-traumatic stress disorder (PTSD).

By development letter dated July 28, 2016, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested that he respond to the attached questionnaire in order to establish that the employment incident occurred as alleged and provide additional medical evidence to establish a diagnosed condition causally related to the alleged incident. Appellant was afforded 30 days to submit the requested evidence. Appellant did not respond within the allotted time.

OWCP denied appellant's claim by decision dated August 30, 2016. It determined that appellant had failed to provide a factual basis for his claim because he only provided vague and general information about the alleged March 17, 2016 employment incident. OWCP also found that appellant had failed to submit sufficient medical evidence to establish a diagnosed condition causally related to his federal employment.

On October 27, 2016 appellant requested reconsideration. In an attached statement, he reported that on February 17, 2016 he was sexually assaulted by a physician at work. Appellant indicated that he was providing OWCP the police report and a copy of his psychologist's report. He alleged that the evidence showed clearly that the incident did happen and was reported to the police.

Appellant submitted a March 4, 2016 investigation report by Officer R.T. He indicated that on February 26, 2016 he received a telephone call about a possible sexual assault against appellant that had occurred on February 17, 2016. Officer R.T. had an informal conversation with appellant who informed him that someone had touched him on the back, and he did not like it. The report contained a March 1, 2016 statement by appellant. Appellant described that on the day or between the days of February 17 or 18, 2016 between the hours of 10:30 a.m. and 12:00 p.m. he was improperly touched by a doctor⁵ at the APU when he had his back turned. He

² Although appellant reported a date of injury of March 17, 2016 on the Form CA-1, subsequent medical reports and personal statements, however, indicated that the date of injury was February 17, 2016.

³ Appellant noted that the touching occurred from close to "sexual organ, up toward chest area and back."

⁴ On August 3, 2016 appellant filed a claim for compensation (Form CA-7) for intermittent periods of disability from March 17 to August 3, 2016.

⁵ The doctor's name was crossed out in the interview notes.

related that he was opening boxes and unloading material for the APU when the doctor came up from behind him, put his hands around appellant's stomach close to his male private parts, and slid his hands up to touch appellant's chest and back. Appellant stated that the doctor said something to him in a low voice and left quickly through the APU back exit door. He indicated that he felt violated and very uncomfortable for several days.

In a March 7, 2016 note, Officer R.T. indicated that he viewed the closed-circuit television (CCTV) recordings for the dates and times that appellant had provided. He initially saw no signs of an alleged sexual assault, but when he went back to the footage from February 17, 2016 at 10:00 a.m., he observed something that might be relevant to the investigation.

Officer R.T. provided a March 9, 2016 note about his interview with the physician who allegedly assaulted appellant. The physician explained that he had no recollection of the alleged assault. He stated that when he visited the APU, he always tried to provide encouragement to the staff and surgical team.

Ms. Ilyse S. Goldberg, a licensed clinical social worker, treated appellant. In an April 8, 2016 report, Ms. Goldberg related that appellant's primary care physician recommended a consultation after appellant "recently had [an] incident where he was groped by another employee." She reviewed appellant's history and noted that appellant currently reported problems with sleep, increased anxiety, nightmares, and intrusive thoughts. Appellant also indicated that he had violent feelings towards the individual who groped him at work and felt regret for not reacting violently when the alleged incident occurred. Ms. Goldberg reported no homicidal or suicidal ideation, no psychomotor problems observed, and no psychosis. She diagnosed acute stress reaction.

Appellant provided a May 27, 2016 consultation note cosigned by Dr. Eliza S. McManus, a postdoctoral fellow, and Dr. Lisa-Ann J. Cuccurullo, a clinical psychologist. Dr. Cuccurullo related appellant's complaints of chronic low back pain, nasal congestion and rhinitis, and sleep apnea.

In June 3 and July 7, 2016 reports cosigned by Dr. Cuccurullo, it was reported that appellant was referred for an assessment of Military Sexual Trauma (MST)/PTSD and related symptoms. Dr. Cuccurullo reviewed appellant's history and noted a history of ongoing sexual harassment from one of appellant's direct supervisors in the Navy for approximately six weeks. Appellant also related that on numerous occasions, while waiting to cash his check, other sailors and service members would whistle at him. He indicated that on a few occasions it escalated into physical fights when he confronted the men. Appellant further described an incident in February 2016 when a coworker inappropriately touched him at work. He stated that the coworker walked behind him, put his arms around him, and slid his arms up towards his chest. Appellant complained of unpleasant dreams related to his work-related incident and of feeling emotionally upset and nauseous when reminded of this incident. He also reported feeling "on guard and watchful" much of the time, especially at work. Dr. Cuccurullo diagnosed adjustment disorder with anxiety. She noted that appellant reported a "work-related stressor which occurred approximately three months ago." Dr. Cuccurullo related that appellant had numerous anxiety

symptoms related to this event. In a July 7, 2016 report, she indicated that appellant began treatment for his psychological symptoms.

OWCP received a September 3, 2016 handwritten statement by appellant. Appellant explained that on February 17, 2016 he was working in the rear employee entrance of APU when the alleged assaulter, a physician, walked through the door and they said “hello” to each other. He related that the physician came behind him, put his arms around his waist, and rubbed his hands all the way up to his chest area. The physician then put his head on appellant’s back and said something, but appellant could not hear because he was in shock. Appellant indicated that the physician moved rapidly out the back door of the APU. He stated that he told two nurses in the break area about the assault and also noted that there was a surveillance camera monitoring the hall way in addition to a VA police report. Appellant resubmitted Officer R.T.’s investigation report.

On February 13, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the medical record, to Dr. Talaat H. Mohamed, a Board-certified psychiatrist, for a second opinion examination to determine whether he sustained an emotional condition causally related to a compensable employment factor. In a March 9, 2017 report, Dr. Mohamed reviewed appellant’s history and noted his current complaints of sleep apnea and back pain. Upon examination, he reported that appellant was oriented to time, place, and person, but not to situation (partially). Dr. Mohamed noted that appellant’s thinking was intact and logical. He indicated no symptoms or signs of PTSD and no symptoms or signs of real depression or major mental illness. Dr. Mohamed reported a diagnosis of adjustment disorder with anxiety (DSMV) and personality disorder. He explained that, after a thorough evaluation, he concluded that there was no disability.

In response to OWCP’s questions, Dr. Mohamed reported that appellant had no major psychiatric or emotional issues to interfere with his daily work. He indicated that appellant could return to work with no limitations. Dr. Mohamed diagnosed adjustment disorder to stress with mild anxiety. He responded “No,” that appellant’s diagnosed condition was not caused, worsened, or precipitated by the accepted employment incident outlined in the SOAF.

In a May 30, 2017 addendum report, Dr. Mohamed related that back in 2016 appellant had psychological testing and received a diagnosis of adjustment reaction with anxiety per the DSM-V as he had reported numerous anxiety events. He indicated that appellant had numerous incidents that occurred prior to his federal employment, so appellant’s federal employment did not play a role in the diagnosed conditions. Dr. Mohamed further noted that a July 2016 police investigation was closed because they could not find sexual harassment.

By decision dated June 20, 2017, OWCP affirmed the denial of appellant’s emotional condition claim with modification. It accepted that the February 17, 2016 incident occurred as alleged, that appellant was diagnosed with a medical condition, and that the employment incident was within the performance of duty. OWCP denied appellant’s claim because he failed to establish that his emotional condition was causally related to the accepted February 17, 2016 compensable employment factor or incident.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.⁶ 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.⁷ In the case of *Lillian Cutler*,⁸ 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 injury or illness results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employing establishment or by the nature of the work, the injury, or illness comes within the coverage of FECA.⁹

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.¹⁰

Physical contact by a coworker or supervisor may give rise to a compensable work factor, if the incident is established factually to have occurred as alleged.¹¹ If a compensable factor of employment is substantiated, OWCP must base its decision on an analysis of the medical evidence.¹²

To establish an emotional condition claim, an employee must also submit rationalized medical evidence establishing that his or her claimed condition is causally related to the accepted compensable employment factor.¹³ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹⁴ The weight of the medical evidence is determined by its reliability, its probative value, its convincing

⁶ *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁷ *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

⁸ 28 ECAB 125 (1976).

⁹ *Id.*; see also *Trudy A. Scott*, 52 ECAB 309 (2001).

¹⁰ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹¹ *Denise Y. McCollum*, 53 ECAB 647 (2002); *Helen Casillas*, 46 ECAB 1044 (1995).

¹² *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹³ See *William P. George*, 43 ECAB 1159 (1992).

¹⁴ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.¹⁵

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of being inappropriately touched on February 17, 2016 by a physician at work. OWCP accepted as a compensable employment incident that he had been inappropriately touched by a physician, a co-worker, on that date.¹⁶ Appellant's burden of proof, however, also requires the submission of rationalized medical evidence establishing that his claimed condition is causally related to the compensable employment incident.¹⁷

The Board finds that appellant has failed to meet his burden of proof to establish that his emotional condition resulted from the compensable February 17, 2016 employment incident.

In support of his claim, appellant submitted medical reports dated May 27 through July 7, 2016 cosigned by Dr. Cuccurullo. Dr. Cuccurullo reviewed appellant's history and indicated that appellant reported ongoing sexual harassment when he was in the Navy. Appellant also stated that on numerous occasions while waiting to cash his check, other sailors and service members would whistle at him. Dr. Cuccurullo described a February 2016 incident when a coworker inappropriately touched him at work. She related that appellant complained of unpleasant dreams, feeling emotionally upset and nauseous, and feeling watchful most of the time following the work-related incident. Dr. Cuccurullo diagnosed adjustment disorder with anxiety. She did not, however, offer an opinion as to whether the February 17, 2016 incident caused or contributed to appellant's emotional condition. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁸ These reports, therefore, are insufficient to establish appellant's claim.

Appellant also provided an April 8, 2016 report by Ms. Goldberg, a licensed clinical social worker. Ms. Goldberg indicated that appellant recently had an incident where he was groped by another employee and diagnosed acute stress reaction. Social workers are not physicians as defined under FECA; therefore, their opinions are of no probative value.¹⁹

Likewise, the employee health records dated July 8 and 26, 2016 by an unknown provider are also insufficient to establish appellant's claim as there is nothing in the record to substantiate

¹⁵ *James Mack*, 43 ECAB 321 (1991).

¹⁶ *Supra* note 11.

¹⁷ *Supra* note 13.

¹⁸ *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

¹⁹ The Board has held that medical evidence must be from a qualified physician and that a social worker is not a physician as defined under FECA such that an opinion from a social worker is of no probative medical value. *See S.S.*, Docket No. 13-1919 (issued May 16, 2014); 5 U.S.C. § 8101(2) (defines the term physician).

that they were signed by a physician. The Board has found that a medical report may not be considered probative medical evidence if there is no indication that the person completing the report qualifies as a physician under FECA.²⁰

Thus, the Board finds that appellant has not submitted rationalized medical evidence establishing that his personality adjustment and anxiety disorder is causally related to the accepted compensable employment incident.²¹

Appellant was also examined by Dr. Mohamed, OWCP's second opinion examiner who indicated in a March 9, 2017 report that appellant's adjustment disorder with anxiety DSM-V and personality disorder were not caused, worsened, or precipitated by the compensable employment factor. In a May 30, 2017 addendum report, he noted that appellant reported numerous anxiety events and that a great deal of those incidents occurred prior to federal employment. The Board finds, therefore, that appellant did not meet his burden of proof to establish his emotional condition claim.

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 in the performance of duty on March 17, 2016.

²⁰ *R.M.*, 59 ECAB 690 (2008).

²¹ *See M.W.*, Docket No. 16-0877 (issued March 17, 2017).

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2017 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 1, 2018
Washington, DC

Christopher J. Godfrey, 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