

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

J.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Orlando, FL, Employer**

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**Docket No. 17-0999
Issued: September 4, 2018**

Appearances:

Wayne Johnson, Esq., for the appellant¹

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 April 7, 2017 appellant, through counsel, filed a timely appeal from an October 12, 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 to consider the merits of this 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 filed a timely request for oral argument. After exercising its discretion, by order dated November 16, 2017, the Board denied his request, finding that his arguments could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-0999 (issued November 16, 2017).

ISSUE

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

FACTUAL HISTORY

On April 8, 2015 appellant, then a 44-year-old customer service supervisor, filed an occupational disease claim (Form CA-2) alleging that he developed an emotional condition due to his federal employment. He noted that he first became aware of the condition and its relationship to his federal employment on December 13, 2014. Appellant stopped work on April 1, 2015.

On April 28, 2015 OWCP received a supplemental statement from appellant which detailed incidents in 2013 and 2014 which he believed caused his emotional condition. Appellant also included a history of his employment and a mental breakdown, which had occurred about 12 years prior. He related that he requested a transfer to Florida when his position in New Jersey was abolished. When reporting for this new position in Florida, C.V., station manager, informed appellant that he had to use his personal vehicle to perform street observation, even though postal vehicles were available. Appellant described another incident, at this employing establishment, during which a carrier came in and started yelling at him after he asked the carrier why he was late. When he told the postmaster and C.V. about this incident, he was disciplined for violating the zero tolerance for violence in the workplace. Following this meeting, appellant went out on sick leave due to a stress-related stomach issue.

Appellant was subsequently reassigned to another station called “the mall.” During another reported incident, at his new work location, he overheard a discussion about shooting ranges and guns between a clerk, W.H., and Station Manager D.P. W.H. turned towards appellant saying appellant would make a good target. At the same time, W.H. informed appellant about his concealed weapon license and that sometimes his weapon was left in his car. At this point appellant told D.P. that W.H. threatened him and he was fearful for his life. D.P. responded by instructing W.H. to return to work and telling appellant that the comment was a joke. An investigation was conducted after appellant informed Human Resources. Following the investigation, appellant claimed that he was not allowed on the workroom floor and was forced to walk two miles to another office while the clerk who threatened him was given two weeks of administrative leave as punishment for his comment. He alleged this clerk had previously threatened and harassed other managers while appellant was made to feel that he was the problem.

Appellant alleged that he was then transferred to another station where C.V. was again station manager. C.V. again instructed him to use his personal vehicle to conduct street observations. Appellant informed her that he had been told he did not have to conduct street observations and that he did not have a personal vehicle for that use. As a result of the work stress he experienced, he alleged that he had another mental breakdown in December 2014. When returning to work on March 30, 2015, C.V. told appellant that he needed to provide work restrictions and that he would lose his job if there were too many restrictions.

On April 1, 2015 appellant alleged that a customer arrived cursing, screaming, and asking about the location of his mail. He related that he tried to assist the customer who had been told by the carrier that the mail was in the employing establishment. Another incident involved a customer who wanted to send a priority mail box by regular mail and not by priority mail. The customer left, returned to the employing establishment, and was again told the box had to go by priority mail as it was in a box marked priority mail. At this point the customer began screaming, requested a supervisor, and then started yelling in appellant's face about the state of the country, problems with the employing establishment, and being charged for insurance he did not want. At this point appellant called in a manager. He stated that he lost it and broke down when C.V. told him to go to lunch. Appellant alleged that his request for a reasonable accommodation as a clerk was denied despite available vacancies as were his repeated requests for a less stressful work environment.

On April 9, 2015 C.V. responded to appellant's Form CA-2 and accompanying statement. She denied telling appellant in 2014 to perform duties outside of his assigned duties. C.V. related that appellant was clear that he did not want to perform street supervision, which was part of his assigned supervisory duty and responsibility. With respect to not using his personal vehicle, C.V. related that an alternative could be worked out. Next, appellant objected to her assigning the stamp stock responsibility to him even though this was the responsibility of a station supervisor.

In an April 21, 2015 report, Dr. Segundo Imbert, a treating Board-certified psychiatrist, diagnosed obsessive compulsive disorder, anxiety, and depressive disorder. As the result of appellant's severe depression and anxiety symptoms, Dr. Imbert recommended appellant refrain from working.

In an April 24, 2015 report, Kelly Brenner, a certified physician assistant, noted that appellant had been treated for anxiety and depression since December 2014 and noted that he had been advised not to return to work. She attributed the depression and anxiety to appellant's work environment.

In a May 7, 2015 development letter, OWCP advised appellant that the evidence of record was insufficient to establish his claim. It advised him as to the factual and medical evidence required to establish his claim. Appellant was afforded 30 days to provide the requested information.

A December 11, 2014 certification of health care provider for employee's serious health condition (Family and Medical Leave Act), Form WH-380-E, was completed and signed by Ms. Brenner. Ms. Brenner indicated that appellant was disabled from work from December 11, 2014 to March 11, 2015 due to severe depression.

Progress notes covering the period February 4 to June 4, 2015 from Dr. Imbert provided a psychiatric assessment and recommended treatment. Dr. Imbert reported that appellant continued to exhibit severe anxiety with stress-related situations and thoughts, particularly work and financial consequences. He, in a March 25, 2015 treatment note, reported that appellant continued to be depressed and was anxious about returning to work due to a coworker conflict.

By decision dated September 14, 2015, OWCP denied appellant's claim as it found he had established an accepted factor of employment in that he had presented a note where his physician had noted that he should not have work exposure to heat; however, he failed to establish any other compensable factor of employment.

In a letter dated October 13, 2015, counsel requested an oral hearing before an OWCP hearing representative.

In the statement received from C.V., she stated that two clerks contacted her relating that they were fearful of appellant and worried about actions he might take toward himself or other people. The clerks related that appellant discussed his inability to control his emotions. Specifically, appellant related wanting to either kill himself or harm customers. C.V. noted that appellant required counseling and medical attention prior to a return to work.

At the June 15, 2016 telephonic hearing both appellant and Dr. Imbert testified. Dr. Imbert noted that at appellant's first examination he presented with anxiety and an episode of severe depression, conditions which had been present since 2000. He discussed his mental breakdown in December 2014 and the problems appellant was having with a coworker and his supervisor. Dr. Imbert noted that, as appellant's return to work date approached in March 2015, he began having panic attacks. He discussed work stressors and conflict, which included C.V. requiring appellant to work in the heat violating restrictions due to a pituitary tumor and appellant's fear of being fired or disciplined after being instructed to do street observations without a postal vehicle. Dr. Imbert testified that the incident with appellant's coworker making a comment about appellant making a good target, threatened his feelings, and the employing establishment's failure to consider the comment a threat despite the zero tolerance policy would also have exacerbated his condition. He also testified that all the incidents discussed would certainly have aggravated appellant's preexisting depression, panic disorder, and anxiety and that the aggravation was permanent. Dr. Imbert discussed how he arrived at his diagnoses and reference psychiatric practices and testing.

At the hearing appellant testified that the problem with C.V. began when he mentioned that he had been a postmaster for five years. He testified that performing street observations was a required job duty and that he could use either his own vehicle or a postal vehicle for this duty. According to appellant's testimony, he asked C.V. for the use of a postal vehicle to perform this duty and was told that he had to find a vehicle, which he inferred as C.V. refusing him the use of a postal vehicle. Appellant testified that C.V.'s refusal to provide him with a postal vehicle to perform street observations made him fearful, anxious, and stressed out as he felt this could be used against him and was a source of contention. Next, he testified that he had been instructed by his physician to avoid 90-degree or higher heat due to his pituitary tumor. C.V. had been told of this work restriction, but required appellant to ride for four hours in the back seat of a vehicle without air conditioning. This caused appellant to sweat profusely and he felt he might pass out and possibly die. Appellant also testified regarding C.V.'s assignment that he take over stock from a clerk who had not properly monitored the stock. He testified that he had no desire to pay for the shortage in the stock or cover it up, which is why he refused and D.B., a clerk, took over the stock. According to appellant, D.B. was eventually disciplined for taking over the stock and required to pay the shortage, which he testified could have happened to him if he had followed C.V.'s instructions. On September 17, 2014 he testified that he gave a warning to W.H. for his

refusal to follow orders and noted W.H. had problems with other supervisors. Next, appellant testified that he overheard W.H. discussing shooting with D.P. and commenting that appellant would make a good target. He stated that he felt threatened by this comment and reported it to D.P, his immediate supervisor, who found it was not a credible threat. Appellant testified regarding an altercation on October 1, 2014 and his e-mailing N.R, a district manager, regarding his feeling threatened and fearful for his life.

By decision dated October 12, 2016, an OWCP hearing representative affirmed as modified the denial of appellant's claim finding that appellant did not establish any compensable factors of employment. She found appellant established that he was asked to take over a stamp stock shortage and that he was required to perform street observation, but there was no evidence supporting error or abuse with respect to these incidents. Next, the hearing representative found no evidence supporting appellant's allegation that C.V. instructed him to work outside his medical restrictions or that he was required to walk over an hour to the postal annex from the postal facility. She found that, after receiving the doctor's note regarding heat restrictions, the restrictions were never violated and that there was no evidence that appellant was required to walk to another annex. The hearing representative found that the employing establishment had allowed appellant to follow the carrier in an air-conditioned van as opposed to riding in the unair-conditioned "LLV" with the carrier. She further found that, while appellant established feeling threatened by an employee he had issued a disciplinary letter, an investigation found poor judgment on the part of the employee and no threat. Lastly, the hearing representative found the evidence confirmed a confrontation with an angry customer following his December 2014 breakdown, that appellant was removed from the situation by being relieved from duty, and that the customer was handled by his supervisor. She further found that it was unclear from appellant's statement what occurred as he only stated the customer yelled about his mail.

LEGAL PRECEDENT

To establish a claim for an emotional condition in the performance of duty, an employee must submit: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.⁴

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.⁵ 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.⁶ 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.⁷

⁴ V.W., 58 ECAB 428 (2007); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁵ L.D., 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁶ A.K., 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

⁷ *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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 to hold a particular position.⁸

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.⁹ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.¹⁰ 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.¹¹

Administrative and personnel matters, although generally related to employment, are administrative functions of the employer rather than the regular or specially-assigned work duties of the employee and are not covered under FECA.¹² 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.¹³ 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.¹⁴

ANALYSIS

The Board finds that appellant has not established an emotional condition in the performance of duty.

Appellant has not established that he was unable to perform his regularly or specially-assigned employment duties and, therefore, has not implicated a compensable factor of employment under *Cutler*.¹⁵ As a customer service supervisor, it is apparent that appellant's duties would require interactions with customers. Appellant has alleged incidents regarding customers, including an incident involving an angry customer who wanted to send a priority mail

⁸ *J.F.*, 59 ECAB 331 (2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁹ *D.L.*, 58 ECAB 217 (2006); *Jerald R. Gray*, 57 ECAB 611 (2006).

¹⁰ *K.W.*, 59 ECAB 271 (2007); *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

¹¹ *Robert Breeden*, *supra* note 5.

¹² See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEwen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹³ See *William H. Fortner*, 49 ECAB 324 (1998).

¹⁴ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁵ *Supra* note 7.

box *via* regular mail. The evidence regarding this allegation included a statement by C.V. confirming that appellant sought help with an angry customer. C.V. stated that she instructed appellant to wait in her office while she handled the customer. While appellant has alleged that he felt stress as a result of having to deal with this customer, the evidence of record does not establish that he was unable to perform his employment duty. The Board has consistently held that an employee's emotional reaction based on his desire to hold a different position is considered as self-generated.¹⁶

Appellant has also attributed his emotional condition as a result of a number of administrative actions of the employing establishment. OWCP denied his emotional condition claim because he failed to establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

Appellant alleged that his employing establishment committed wrongdoing with respect to various administrative matters, including street observation assignments, assignment to conduct a stamp shortage review, work site relocation, denial of a request for a transfer, and disciplinary actions. These are administrative functions of the employer rather than the regular or specially-assigned work duties of the employee and are not covered under FECA, absent error or abuse.¹⁷

The handling of work assignments,¹⁸ transfers,¹⁹ and discipline²⁰ are administrative functions of a supervisor. The manner in which a supervisor exercises his or her discretion generally falls outside FECA's coverage. This principle recognizes that supervisors must be allowed to perform their duties and at times employees will disagree with their supervisor's actions. Mere dislike or disagreement with certain supervisory actions will not be compensable absent error or abuse on the part of the supervisor.²¹ There is no credible evidence of any error or abuse on the part of appellant's supervisor, C.V., with respect to assigning appellant street observation duties and vehicle use, review of the stamp shortage, work site relocation, denial of a request for transfer, or discipline for appellant's violation of the zero tolerance violence policy. Appellant has not submitted any evidence showing error or abuse by the employing establishment with respect to these allegations. To establish a compensable factor of employment, appellant must provide any corroborating evidence to establish an allegation of

¹⁶ *Ronald C. Hand*, 49 ECAB 113 (1997).

¹⁷ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005); *Beverly R. Jones*, 55 ECAB 411 (2004); *Charles D. Edwards*, 55 ECAB 258 (2004).

¹⁸ *T.H.*, Docket No. 17-1578 (issued April 26, 2018).

¹⁹ *E.M.*, Docket No. 16-1695 (issued June 27, 2017).

²⁰ *G.M.*, Docket No. 17-1469 (issued April 2, 2018).

²¹ *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

error or abuse on the part of the employing establishment.²² Thus, appellant has not established a compensable factor of employment with respect to these allegations.

Appellant has alleged that he was forced to work outside his work restrictions when he was required to walk to the annex. Being required to work outside one's work restrictions may constitute a compensable employment factor if it is substantiated by the record.²³ Appellant alleged that it took him an hour to walk from the main postal facility to the annex. However, the record is devoid of any evidence that appellant was required walk to the annex from the main facility and not allowed to use his personal vehicle to drive to the annex.²⁴ Thus, appellant has not established a compensable factor with respect to this allegation. For the above reasons, appellant has not established any compensable work factors under FECA with respect to administrative matters.

Regarding appellant's allegation that W.H. threatened him, the Board has recognized that verbal threats when sufficiently detailed by the claimant and supported by evidence, may constitute compensable employment factors.²⁵ In the instant case, appellant overheard W.H. discussing guns with D.P. who commented to appellant that he would make a good target. The employing establishment investigated the incident and found no threat by W.H, only bad judgment in the comment made by W.H. Appellant has not established with corroborating evidence that any specific threat was made against him and has not alleged or established that management ignored or tolerated any alleged threats or that it failed to take preventative action.²⁶ The Board has recognized the compensability of physical threats in certain situations, but the factual aspects of such claimed threats must be established in order to show a compensable employment factor.²⁷

For the foregoing reasons, appellant has not established a compensable factor of employment under FECA and therefore has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty. As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record.²⁸

On appeal counsel argues that appellant has established compensable factors of employment with respect to the street observation, the stamp shortage, and the threat made by W.H. Contrary to counsel's contentions, appellant has not established any compensable factor of employment for the reasons discussed above.

²² See *J.E.*, Docket No. 17-1799 (issued March 7, 2018).

²³ *Philip L. Barnes*, 55 ECAB 426 (2004).

²⁴ *Supra* note 22.

²⁵ *T.G.*, 58 ECAB 189 (2006).

²⁶ *C.G.*, Docket No. 15-0909 (issued April 5, 2016).

²⁷ See *C.O.*, Docket No. 07-1290 (issued December 6, 2007); see also *Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

²⁸ See *F.M.* Docket No. 16-1504 (issued June 26, 2017); *Katherine A. Berg*, 54 ECAB 262 (2002).

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 appellant has not met his burden of proof to establish an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 12, 2016 is affirmed.

Issued: September 4, 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