

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

C.V., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
DALLAS MEDICAL CENTER, Dallas, TX,)
Employer)

Docket No. 18-0580
Issued: September 17, 2018

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 January 24, 2018 appellant filed a timely appeal from a December 11, 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 to consider the merits of the case.

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 March 15, 2017 appellant, then a 39-year-old surgical technician, filed an occupational disease claim (Form CA-2) alleging that he had developed anxiety, trouble focusing, aggravation

¹ 5 U.S.C. § 8101 *et seq.*

and irritation, intimidation and fear, loss of sleep, and fatigue due to his federal employment. He attributed his conditions to consistent stress at work. Appellant noted that supervisors had not educated him regarding the claim process and had not given him the resources to follow through with his claim.

In development letters dated April 18, 2017, OWCP requested additional factual and medical evidence in support of appellant's alleged occupational disease from both appellant and the employing establishment. It afforded 30 days for responses.

Appellant provided treatment notes dated December 28 and 29, 2016 from Dr. Erika M. Navarro, a Board-certified psychiatrist, at the employing establishment medical clinic. Dr. Navarro noted that appellant reported that he was having problems with his peers and upper management at work. Appellant felt that he was singled out and overwhelmed due to stress.

Appellant also submitted a journal listing the work events which he felt contributed to his emotional condition. These included unfair distribution of workload, hostile work environment, and discrimination by S.C., the evening charge nurse. Appellant also alleged discrimination by his supervisor, T.T., and by D.A. He alleged that services such as general, orthopedics, podiatry, plastic, vascular, neurological, and eyes were not rotated equally. Appellant alleged that he was denied participation in training conferences and that his limited-duty restrictions were not accommodated while those of other surgical technicians were.

Appellant also provided a chronological listing of work events beginning December 22, 2016. On December 28, 2016 the evening charge nurse verbally counseled appellant and directed him to notify her when he left the operating room. T.T., his supervisor, wrote appellant up regarding this incident. On December 30, 2016 appellant's request to attend a February conference was denied. A coworker received assistance from the union within a day, while appellant had to wait six weeks. On January 18, 2017 appellant protested his schedule and requested to work in cardiology or orthopedic surgery. He alleged that a coworker was allowed an hour break, while he was denied a short break on February 23, 2017. On March 6, 2017 the charge nurse referred to appellant as a "smart ass" after he objected to her demands. Appellant reported that he was treated differently from other employees on March 7, 2017 as he was working without help, while his coworkers "hung out" in the office. In a staff meeting on March 8, 2017, he asserted that he was treated unfairly, and was told to "hush" by the evening charge nurse who interrupted and talked over him. At that same meeting appellant began to leave when he was told the staff meeting was over, and T.T. made a "very unprofessional gesture," raised her voice, and pointed her finger at appellant. He alleged that he was denied breaks on March 8 and 15, 2017. On March 16, 2017 T.T. was rude to appellant on the telephone. On March 30, 2017 a coworker used profane language. Also on March 30, 2017 T.T. asked why appellant took his time, and he replied that he was on light duty. On April 19, 2017 appellant reported that T.T. rudely and aggressively made him sign his mid-term performance sheet.

On May 1, 2017 the employing establishment responded to OWCP's request for information and asserted that the operating room was a stressful environment, that it was very busy, and that the employing establishment pushed to complete as many surgical procedures as possible in a day. It noted that appellant was not allowed to attend a conference for robotic surgery as he was not experienced in this area. The employing establishment asserted that appellant

became upset if he thought that he was working harder than his coworkers and that he believed that he received the worst assignments. It denied these allegations and alleged that all the staff was treated equally and fairly. The employing establishment noted that appellant was on light-duty after slipping on a wet floor. It further noted that there were staffing shortages, but that appellant's workload was no different from his coworkers. The employing establishment alleged that appellant was afforded more breaks than his coworkers. It also noted that appellant became outspoken and belligerent at a meeting in March, that he left the meeting angrily slamming the door into a wall, and that this upset his coworkers.

In a statement dated May 19, 2017, T.T. reported that the operating room was a very stressful area due to critically ill patients, demanding needs of surgical procedures, occasionally irate surgeons, and a tight schedule. She denied that the workload was distributed unfairly, noted that appellant received breaks that others did not, and explained that appellant was denied training so that a more experienced person could go to better serve the employing establishment.

In an undated statement received by OWCP on May 23, 2017, appellant asserted that his previous surgical technician work while in the armed forces was far more demanding than his current position due to the additional specialties provided. He also noted that he had previously learned to adapt to multiple personalities in a large work environment. Appellant asserted that he was passionate about his line of work. He again attributed his emotional condition to unfair distribution of workload, lack of respect from the evening charge nurse, harassment, retaliation, outbursts of disrespect, and denial of training in robotics.

By decision dated August 14, 2017, OWCP denied appellant's occupational disease claim finding that he had not submitted any medical evidence containing a medical diagnosis in connection with the incidents described. On August 17, 2017 it amended the August 14, 2017 decision to reflect that Dr. Navarro did not provide a diagnosis of an emotional condition.

On September 11, 2017 appellant requested reconsideration of the August 17, 2017 decision and provided a report dated August 28, 2017 from Dr. Navarro. Dr. Navarro noted that appellant was a combat veteran with a prior diagnosis of post-traumatic stress disorder (PTSD), depressive disorder, attention deficit hyperactivity disorder, and adjustment disorder. She opined that on December 28, 2016 appellant was in crisis with significant stress at work causing anxiety, depression, and anger. Dr. Navarro opined that appellant's stress could exacerbate underlying mental health conditions such as depression and PTSD. She noted, "Given the potential consequences of having a veteran in crisis working in a high stress environment (Operating Room), I made the decision to authorize a seven-day leave from work to prevent an impact on patient care and further exacerbation of the patient's condition."

By decision dated December 11, 2017, OWCP modified the August 17, 2017 decision to reflect that appellant had provided medical evidence of diagnosed emotional conditions. However, it found that he had not established that his emotional condition was sustained in the course of employment as he had not established compensable factors of employment.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, appellant must submit the following: (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 the condition; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.²

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*,³ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.⁴ There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under FECA.⁵ 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 requirement imposed by the employing establishment or by the nature of the work.⁶ In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is insufficient 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 disability 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.⁷

Administrative and personnel matters, although generally related to the employee's 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.⁸ 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.⁹ A claimant must support his or her allegations with probative and reliable

² *R.L.*, Docket No. 17-0883 (issued May 21, 2018).

³ 28 ECAB 125 (1976).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Robert W. Johns*, 51 ECAB 136 (1999).

⁶ *Cutler*, *supra* note 3.

⁷ *Id.*

⁸ *Charles D. Edwards*, 55 ECAB 258 (2004).

⁹ *Kim Nguyen*, 53 ECAB 127 (2001). See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁰

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.¹¹

ANALYSIS

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

Appellant alleged that he developed an emotional condition as a result of a series of events at his work. OWCP denied his emotional condition claim, finding that he had not established any compensable employment factors. The Board must, initially review whether these alleged incidents and conditions of employment are covered by employment factors under FECA.

The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Lillian Cutler*.¹² While the employing establishment and appellant's supervisor, T.T., noted that the operating room was an inherently stressful work environment, appellant did not attribute his emotional condition to the performance of his work duties in the operating room. He specifically noted that he had worked without issue in more stressful operating room locations and attributed his current emotional condition to harassment, discrimination, and retaliation as well as other actions by the employing establishment.

Appellant made several allegations related to administrative and personnel actions. In *Thomas D. McEuen*,¹³ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employing establishment and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the

¹⁰ *Roger Williams*, 52 ECAB 468 (2001).

¹¹ *R.L.*, *supra* note 2; *Alice M. Washington*, 46 ECAB 382 (1994).

¹² *Cutler*, *supra* note 3.

¹³ *McEuen*, *supra* note 9.

employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁴

Appellant has alleged that he was required to work outside his work restrictions, while other employee's disabilities were accommodated.¹⁵ He has presented no evidence establishing error or abuse by the employing establishment. The employing establishment acknowledged that appellant was on light duty and indicated that he was provided work within his restrictions. A claimant must submit probative evidence sufficient to establish that he or she was required to work outside his or her medical restrictions.¹⁶ There is no probative evidence of record established that appellant was forced to work outside his medical restrictions in this case.

Appellant alleged unfair distribution of work, denial of breaks, and unequal discipline. The Board has long held that disputes regarding improperly assigned work duties and discipline related to administrative or personnel matters are unrelated to regular or specially assigned work duties and do not fall within the coverage of FECA. Although the assignment of work duties, the monitoring of work duties, and the handling of disciplinary actions are generally related to the employment, they are administrative functions of the employer, not duties of the employee, and not compensable absent evidence of error or abuse.¹⁷ Appellant has not submitted probative evidence establishing error or abuse in the handling of these activities by the employing establishment.

Appellant attributed his emotional condition to the employing establishment's denial of his request for training in robotics. The Board notes that matters pertaining to training are an administrative function of the employing establishment.¹⁸ The employing establishment explained that its needs were better served by an employee more experienced in robotics attending the training. The evidence of record is insufficient to establish that the employing establishment acted unreasonably in the manner in which it determined which employee should receive training in robotics. As noted, mere disagreement or dislike of a supervisor or management action will not be actionable, absent evidence of error or abuse.¹⁹

Regarding appellant's perception of hostile work environment, discrimination, harassment, and retaliation by employing establishment management, generally, complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by FECA. This principle recognizes that a supervisor or manager in general must be allowed to perform his or her duties

¹⁴ *R.L.*, *supra* note 2; *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁵ *B.H.*, Docket No. 17-1437 (issued November 21, 2017).

¹⁶ *Id.*; *K.E.*, Docket No. 11-0861 (issued November 25, 2011).

¹⁷ *G.M.*, Docket No. 17-1469 (issued April 2, 2018); *Peter D. Butt*, 56 ECAB 117 (2004).

¹⁸ *R.L.*, *supra* note 2.

¹⁹ *Id.*, *Marguerite J. Toland*, 52 ECAB 294 (2001).

and employees will, at times, dislike the actions taken.²⁰ Here again, the record contains no corroborating evidence that any employing establishment supervisor or manager treated appellant in a disrespectful manner. Error or abuse in discharging management duties has not been established. This allegation is not compensable.²¹

With his allegations of hostile work environment, discrimination, harassment, and retaliation, appellant indicated that he was verbally abused. The Board has held that, while verbal abuse may constitute a compensable factor of employment, not every statement uttered in the workplace will be covered by FECA. A raised voice in the course of conversation does not, in and of itself, warrant a finding of verbal abuse.²² Appellant alleged that a coworker used profane language, that the evening charge nurse told him to “hush,” and that T.T. was rude to him on the telephone, raised her voice to him in a meeting, and rudely and aggressively instructed him to sign his midterm performance sheet. Appellant’s allegations have not been sufficiently corroborated by witness statements or other evidence to support that these incidents occurred as alleged. He did not provide any corroboration or probative evidence to establish that these incidents rise to the level of compensable verbal abuse or harassment.²³ Appellant submitted no corroborating evidence to establish hostile work environment, harassment, discrimination, or retaliation.

Regarding appellant’s allegations that the union treated him differently from other employees, the Board has adhered to the principle that union activities are personal in nature and are not considered to be within the course of employment.²⁴

On his claim form, appellant alleged that the employing establishment did not aid him in developing his OWCP claim. The handling of OWCP compensation claims by either OWCP or the employing establishment would not arise in the performance of duty because the processing of these claims bears no relation to appellant’s day-to-day or specially assigned work duties and therefore are not compensable factors of employment.²⁵

Thus, appellant has not established compensable employment factors under FECA and, therefore, has not met his burden of proof to establish that he sustained an emotional or stress-related condition in the performance of duty. As appellant has not established compensable employment factors, the Board need not consider the medical evidence of record.²⁶

²⁰ *G.M.*, *supra* note 17; *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

²¹ *Id.*

²² *R.L.*, *supra* note 2.

²³ *R.L.*, *id.*; *see F.A.*, Docket No. 17-0315 (issued July 11, 2017) (appellant described staff meetings that occurred where she perceived her supervisor was at times singling her out or speaking to her in a condescending tone; the Board found that appellant provided no probative evidence of harassment or abusive actions by the supervisor).

²⁴ *C.M.*, Docket No. 17-0027 (issued July 5, 2017); *Jimmy E. Norred*, 36 ECAB 726 (1985).

²⁵ *Willis E. Tomlin*, Docket No. 05-0923 (issued August 11, 2005); *Matilda R. Wyatt*, 52 ECAB 421 (2001).

²⁶ *G.M.*, *supra* note 17; *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 that 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 December 11, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 17, 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