

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

L.Y., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Concord, NH, Employer**

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**Docket No. 18-1619
Issued: April 12, 2019**

Appearances:

Juli D. Hincks, 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 August 20, 2018 appellant, through counsel, filed a timely appeal from a June 11, 2018 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 over the merits of this case.

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.*

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 September 16, 2016 appellant, then a 54-year-old rural carrier, filed a traumatic injury claim (Form CA-1) under OWCP File No. xxxxxx043, alleging that on September 12, 2016 while driving his delivery vehicle in the performance of duty, he was struck from behind by a school bus, causing head and neck injuries. OWCP accepted the claim for a concussion, cervical strain, left upper extremity abrasion, left knee contusion, and left knee abrasion. Appellant returned to modified duty casing mail for four hours a day on January 31, 2017. OWCP paid wage-loss compensation for the remaining hours. Appellant resumed full-time, full-duty work on February 25, 2017.

On September 9, 2017 under OWCP File No. xxxxxx043, appellant filed a notice of recurrence (Form CA-2a) alleging that on August 18, 2017 a discussion with managers caused a recurrence of post-concussion syndrome symptoms and anxiety. He noted that after the accepted concussion, he had been prescribed medication for depression and had difficulty functioning. On the back of the form, appellant's supervisor, A.M., contended that on August 18, 2017, appellant refused to follow her instructions and was escorted from the premises by police. Appellant did not return to work. OWCP administratively converted the claim to one for a new occupational disease and assigned File No. xxxxxx853.

In a statement dated August 18, 2017, A.M. contended that at 8:00 a.m. that day she met with appellant and a union steward, T.G., regarding appellant's refusal to climb steps to deliver packages to the front door of a residence. As appellant became agitated, A.M. located Postmaster J.L. When A.M. and J.L. returned, appellant refused to continue the discussion and insisted on returning to his case. J.L. asked him to leave the premises. As appellant refused, J.L. telephoned the police, who arrived several minutes later and escorted appellant from the premises.³

In a statement dated August 18, 2017, T.G. explained that A.M. had called appellant to her office to discuss his refusal to deliver packages to a location on his assigned route. She corroborated that appellant became agitated, refused to follow instructions, and was escorted from the premises by police officers.

In a separate statement dated August 18, 2017, J.L. describing the same incident, indicated that during the discussion earlier that day appellant began shouting and returned to his mail case. As he would not follow instructions to return to the office or leave the building J.L. called the police, who arrived approximately 10 minutes later and escorted appellant from the premises.

³ The employing establishment provided witness statements dated August 18, 2017 from appellant's coworkers. Two of the coworkers, T.H. and D.L., noted that they heard appellant raise his voice. Coworkers R.T. and K.I. recalled that appellant became agitated and shouted that he wanted everyone's attention.

A.M. provided a supplemental statement dated September 12, 2017. She noted that following the accepted September 12, 2016 injuries, appellant had returned to full duty, but had bid on a different route. On Saturday, May 20, 2017 A.M. was in appellant's delivery area to investigate an issue, located appellant to ask him a question, and noted that he was not wearing a lap or shoulder belt. Appellant became defensive and accused A.M. of spying on him. He called in sick the following Monday. On May 27, 2017 appellant became agitated when A.M. requested that he sign a leave slip for his unscheduled absence. On August 15 and 17, 2017 the customer who resided at location in question reported difficulties with appellant's delivery of packages. A.M. called appellant and T.G. to her office for a meeting at 8:00 a.m. August 18, 2017.

Appellant also provided September 25, 2017 reports from Dr. Mark Walrod, an attending Board-certified family practitioner, noting a history of a September 12, 2016 concussion with a frontal headache commencing August 18, 2017. Dr. Walrod held appellant off work through October 17, 2017 pending a neurologic consultation.⁴

In a development letter dated October 4, 2017, OWCP notified appellant of the additional factual and medical evidence needed to establish his occupational disease claim, including a detailed description of the August 18, 2017 incident, and a report from his attending physician explaining how and why that event would cause the claimed condition. It afforded him 30 days for submission of the necessary evidence.

In a statement dated October 10, 2017, A.M. noted that appellant had used his own vehicle to deliver his route and had done so without incident "until he was instructed to effect a particular delivery a certain way." In June 2016, appellant had been issued a letter of warning as he left his keys in the ignition while delivering his route.

In a statement dated October 25, 2017, T.G. contended that the employing establishment had become stressful due to a "lack of employees and high mail volume." She further noted that since returning to work in February 2017, appellant experienced chronic headaches, visual problems, and dizziness that made it difficult for him to perform his duties.

Appellant provided a statement dated October 25, 2017 asserting that stress at work on August 18, 2017 caused a recurrence of his concussion symptoms, including headaches, dizziness, and nervousness.

Appellant also submitted a report dated September 27, 2017 from Dr. Irena R. Danys, an attending Board-certified neurologist, who diagnosed post-concussive syndrome, anxiety, and depression. She held appellant off work.

By decision dated November 14, 2017, issued under File No. xxxxxx853, OWCP denied appellant's emotional condition claim finding that the factual evidence of record failed to establish any compensable factors of employment.

On December 13, 2017 appellant requested a hearing before an OWCP hearing representative. In a letter dated March 9, 2018, counsel contended that appellant had claimed a

⁴ Appellant also submitted forms signed by Sarah Bell, a certified physician assistant.

recurrence of disability and not a new injury. He noted that appellant was not a native English speaker and had difficulty with oral and written communication.

At the telephonic hearing held on April 19, 2018, D.L., a coworker, attested that management treated appellant unfairly by forcing him to climb hazardous stairs to deliver packages, and demanding his badge on August 18, 2017. T.G. testified that appellant had refused to ascend the steps at a residential address as they were hazardous. Dr. John Crampton, an attending licensed clinical psychologist, testified that the September 12, 2016 work-related motor vehicle accident caused traumatic brain injury with major depressive disorder, post-traumatic stress disorder (PTSD), post-concussion syndrome, and major neurocognitive disorder. Dr. Crampton found that appellant remained totally disabled from work due to sequelae of the accepted September 12, 2016 accident.

Following the hearing, counsel submitted a letter dated May 4, 2018 contending that appellant predicated his emotional condition claim on sequelae from the September 12, 2016 concussion and not only the August 18, 2017 meeting and submitted additional evidence.

In a statement dated November 2, 2017, D.L., contended that on August 18, 2017 A.M. accompanied appellant to his mail case and stood behind him in an intimidating manner, and that J.L. deliberately embarrassed and belittled appellant by demanding his badge.

In a statement dated May 10, 2018, A.M. contended that on August 18, 2017, appellant stated that he would continue to refuse to deliver parcels to the residential address at issue as he did not do favors for rural customers. He claimed that he did not have his badge, but later surrendered it to the police officers who escorted him from the building. Appellant also refused to report for duty on August 19, 2017 as directed.⁵

By decision dated June 11, 2018, an OWCP hearing representative modified and affirmed the prior decision. She found that appellant had established the accepted September 12, 2016 motor vehicle accident as a compensable employment factor. The hearing representative further found that the May 20 and 27, and August 18, 2017 supervisory discussions were administrative matters related to the assignment and supervision of work, and that no error or abuse was established. She also found that appellant had not established as factual that he had difficulty performing his duties after he returned to work in February 2017, or that managers harassed or otherwise mistreated him. In conclusion, the hearing representative determined that the only compensable employment factor was the accepted employment incident of September 12, 2016 under File No. xxxxxx043. Therefore, it was unnecessary to address the medical evidence of record under File No. xxxxxx043. The hearing representative noted that as the September 12, 2016 injury had been cross referenced in the present claim, that it would be appropriate for OWCP to combine the claim under File No. xxxxxx043 with the present claim, File No. xxxxxx853.

⁵ The employing establishment also provided coworker statements regarding parcel delivery procedures and the September 12, 2016 motor vehicle accident.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence⁷ including that he or she sustained an injury in the performance of duty and that any specific condition or disability from work for which he or she claims compensation is causally related to that employment injury.⁸

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.⁹ 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.¹⁰ In the case of *Lillian Cutler*,¹¹ 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.¹² On the other hand, when an injury or illness results from an employee's feelings of job insecurity per se, fear of a reduction-in-force, or his or her frustration from not being permitted to work in a particular environment or hold a particular position, unhappiness with doing work, or frustration in not given the work desired or hold a particular position, such injury or illness falls outside FECA's coverage because they are found not to have arisen out of employment.¹³

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.¹⁴ If an employee 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

⁶ *Supra* note 2.

⁷ *J.P.* 59 ECAB 178 (2007).

⁸ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁹ *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

¹⁰ *A.K.* 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

¹¹ 28 ECAB 125 (1976).

¹² *Lillian Cutler, id.*; *see also Trudy A. Scott*, 52 ECAB 309 (2001).

¹³ *William E. Seare*, 47 ECAB 663 (1996).

¹⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

condition claim. The claim must be supported by probative evidence.¹⁵ If a compensable factor of employment is substantiated, OWCP must base its decision on an analysis of the medical evidence.¹⁶

ANALYSIS

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

OWCP accepted that on September 12, 2016 appellant sustained a concussion in the performance of duty when a school bus struck his delivery vehicle. In his September 9, 2017 claim for recurrence of disability, appellant asserted that the accepted concussion had caused ongoing depression, anxiety, and difficulty functioning. OWCP administratively converted appellant's recurrence claim into a new occupational disease claim as he attributed his emotional condition, in part, to an August 18, 2017 meeting with his supervisor. In converting the claim to a new occupational disease claim it did not develop appellant's original contention that the accepted September 12, 2016 employment incident was a precipitating event.

The Board finds that the September 12, 2016 motor vehicle accident is a compensable factor of employment under *Cutler*.¹⁷ OWCP's hearing representative found that the accepted September 12, 2016 employment incident was a compensable employment factor, but did not review the medical evidence. The Board finds, however, that as appellant established the September 12, 2016 employment incident as a compensable employment factor in the development of his claimed emotional condition, OWCP must review the medical evidence of record in order to determine if he has submitted sufficient evidence to substantiate his claim.¹⁸ Following this and any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁵ *Charles E. McAndrews*, 55 ECAB 711 (2004).

¹⁶ *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁷ *W.F.*, Docket No. 17-0640 (issued December 7, 2018); *Z.S.*, Docket No. 16-1783 (issued August 16, 2018)

¹⁸ *Id.*; *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the June 11, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: April 12, 2019
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