

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

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T.G., Appellant)	
)	
and)	Docket No. 19-0071
)	Issued: May 28, 2019
DEFENSE AGENCIES, PENTAGON FORCE)	
PROTECTION AGENCY, Alexandria, VA,)	
Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 11, 2018 appellant filed a timely appeal from a September 21, 2018 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.

FACTUAL HISTORY

On April 17, 2018 appellant, then a 35-year-old police officer, filed an occupational disease claim (Form CA-2) alleging that he sustained hypertension, stress, anxiety, depression, panic

¹ 5 U.S.C. § 8101 *et seq.*

attacks, and insomnia due to factors of his federal employment. He indicated that he first became aware of his claimed conditions on January 29, 2018 and realized that they were related to his federal employment on March 24, 2018. On the reverse side of the claim form the employing establishment indicated that appellant first reported his conditions on March 25, 2018, and that he was last exposed to the conditions alleged to have caused disease on March 26, 2018.

In an accompanying undated statement, appellant related that at approximately 11:00 p.m. on March 24, 2018 he was dispatched to respond to the employing establishment's overflow parking lot. Immediately upon arriving on the scene, he observed Captain T.A. situated in the middle of the parking lot among other officers. Appellant indicated that he perceived this to be a training scenario. He then began to experience a series of panic attacks and fear due to his anxiety, which seemed uncontrollable. Appellant called his immediate supervisor, Sergeant J.H., and requested immediate leave due to his condition which was granted. He recalled a prior similar training session held on January 29, 2018 during which he had been humiliated by his captain. Appellant noted that he experienced nightmares and insomnia following the January 29, 2018 session, during which he was assigned the role of a "casualty" which he found confusing and discriminatory and during which he was directed to retrieve his gas mask, rather than simulate wearing a gas mask. He noted that he had constant fear of his captain humiliating him again, and worried about the potential harm done to his professional reputation. Appellant alleged that he experienced continuous hostile work environment due to retaliation for previous involvement in the equal employment opportunity (EEO) process. He related that he had reported these events through the chain of command, but no action was taken to correct the problem. Appellant further indicated that from February 1, 2018 onward he had been subjected to the receiving end of distasteful jokes from multiple sources in relation to the January 29, 2018 training incident. He noted that the effects from such humiliation had been so severe that it had adversely altered the conditions of his employment in creating an intimidatingly hostile work environment.

Appellant related that on November 14, 2017 he made shift management aware of an agency email that had been circulated regarding mandatory training that was required of all employees. He forwarded the email to all supervisors, but never received a response from his captain or any other supervisors as to how officers could go about completing training. Appellant alleged that the captain appeared physically angry that he had made the inquiry. He noted, like most instances, she became verbally combative in her responses. Appellant further alleged that he was retaliated against from making protected disclosures.

Appellant also described a November 15, 2017 incident in which he was riding a Segway through the employing establishment parking lot and a civilian vehicle who appellant identified as a police sergeant intentionally pulled his vehicle out of a parking space, causing appellant to decelerate his vehicle to a near stop. He believed that this was done to intimidate and bully him and indicated that he had a genuine fear for his safety.

OWCP received a January 18, 2018 decision from the Equal Employment Opportunity Commission (EEOC), which reversed prior dismissals of complaints made by appellant and remanded the claim for review.

In a fitness-for-duty evaluation request dated April 11, 2018, the employing establishment related that appellant's condition of panic attacks and uncontrollable anxiety impeded his ability

to safely and appropriately respond to actual incidents and service calls required of police officers and thus, was not fit for duty.

By development letter dated April 19, 2018, OWCP informed appellant of the factual and medical evidence needed to support his claim. By separate letter of even date, it asked the employing establishment to comment regarding the accuracy of appellant's allegations. OWCP afforded 30 days for response.

In a duty status report (Form CA-17) dated April 20, 2018, Dr. Guido Rojas, a family medicine specialist, diagnosed anxiety and depression, and noted that appellant was able to return to work full time without restrictions.

In an attending physician's report (Form CA-20) dated April 20, 2018, Dr. Rojas diagnosed hypertension, anxiety, insomnia, panic attacks, and depression. He checked a box marked "yes" when asked whether he believed appellant's condition to be caused or aggravated by his employment activities.

In a response to the questionnaire dated April 25, 2018, appellant indicated that a major factor that caused his condition to be exacerbated was management's failure to act appropriately, and in a timely fashion, to his disclosures of alleged abuse. He noted that his mistreatment began in the later months of 2015 and occurred sporadically over time. Appellant related that he filed a number of complaints through the chain of command when he realized that he was disparately treated. He indicated that he filed two complaints.

In a memorandum dated May 5, 2018, J.M., appellant's second level supervisor at the employing establishment, responded to OWCP's April 19, 2018 request. He indicated that he could not testify to the veracity or accuracy of appellant's allegations because he had limited knowledge and experience regarding allegations of employment-related emotional conditions. J.M. noted that there were no aspects of appellant's employment that he perceived as stressful, but noted that appellant could have perceived an incident as stressful when two years ago he received disciplinary action as a result of sleeping while on duty. He related that, after this incident, appellant was moved to a different squad, with a different supervisor, and had different work assignments in order to minimize any future conflicts between appellant and that supervisor. J.M. further indicated that the work shortages experienced by the employing establishment had no direct effect on appellant, that appellant usually met/exceeded work expectations, and that he had no performance problems.

In a report dated May 31, 2018, Janice M. Shabe, a clinical psychologist, diagnosed chronic post-traumatic stress disorder, generalized anxiety disorder, and moderate major depressive disorder. She opined that appellant's conditions were related to his employment-related stress.

By decision dated September 21, 2018, OWCP denied appellant's claim for an emotional condition, finding that the evidence was not sufficient to establish a compensable factor of employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,² that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.³ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

To establish an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he or she 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 identified compensable employment factors are causally related to the emotional condition.⁵

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*,⁶ the Board 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.⁷ 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. Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁸ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.⁹ Personal

² *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

³ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁴ *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁵ See *M.R.*, Docket No. 18-0305 (issued October 18, 2018); *George H. Clark*, 56 ECAB 162 (2004).

⁶ *S.B.*, Docket No. 18-1113 (issued February 21, 2019); see also 28 ECAB 125 (1976).

⁷ *S.K.*, Docket No. 18-1648 (issued March 14, 2019); see *Robert W. Johns*, 51 ECAB 137 (1999).

⁸ *S.B.*, *supra* note 2; *J.F.*, 59 ECAB 331 (2008).

⁹ *G.G.*, Docket No. 18-0432 (issued February 12, 2019); *M.D.*, 59 ECAB 211 (2007).

perceptions alone are insufficient to establish an employment-related emotional condition.¹⁰ 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.¹¹

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.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 erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹⁴

For harassment or discrimination to give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment or discrimination did in fact occur.¹⁵ Mere perceptions of harassment, retaliation, or discrimination are not compensable under FECA.¹⁶

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 sustained hypertension, stress, anxiety, depression, panic attacks, and insomnia as a result of several employment incidents and factors. The Board must initially review whether these alleged incidents and conditions of employment are compensable employment factors under the terms of FECA. The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Cutler*.¹⁷ Rather, appellant has alleged abuse and harassment on the part of his supervisor.

Appellant has attributed his emotional conditions to actions of his supervisor, including humiliation during a training exercise, and management's failure to act upon receiving his complaints. As a general rule, a claimant's reaction to administrative or personnel matters falls

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

¹¹ *See P.B.*, Docket No. 17-1912 (issued December 28, 2018).

¹² *S.K., supra* note 7; *see Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹³ *S.K., id.*; *S.B., supra* note 2; *see William H. Fortner*, 49 ECAB 324 (1998).

¹⁴ *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *see Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁵ *S.B., supra* note 2; *Marlon Vera*, 54 ECAB 834 (2003).

¹⁶ *S.B., id.*; *Kim Nguyen*, 53 ECAB 127 (2001).

¹⁷ *Supra* note 2.

outside the scope of FECA.¹⁸ Absent evidence establishing error or abuse, a claimant's disagreement or dislike of such a managerial action is not a compensable factor of employment.¹⁹

With regard to the training exercise of January 29, 2018, appellant has not established that his assignment as a "casualty" and his Captain's directive that he retrieve his gas mask for the exercise, rather than simulate wearing a gas mask were abusive. The Board has explained that a dislike of the manner in which a supervisor carried out his or her duties is not compensable absent error or abuse.²⁰ Appellant's own confusion regarding the circumstances of this training scenario does not establish error or abuse by his supervisor. Similarly, his perception that the March 24, 2018 training exercise could be abusive is not compensable as appellant did not participate in this event. The perception of mistreatment, let alone the perception of possible mistreatment, is not sufficient to establish a compensable work factor.²¹

Appellant has also alleged that his complaints regarding inappropriate jokes were improperly handled. However, handling of complaints is an administrative function of the employer and not a duty of the employee.²² Appellant has not established a compensable factor of employment as he has not submitted corroborating evidence of error or abuse in this administrative matter.²³

The Board also finds that appellant submitted no evidence corroborating his allegations of harassment. Harassment can constitute a factor of employment if it is shown that the incidents constituting the claimed harassment actually occurred, however, mere perceptions are not compensable under FECA.²⁴ The parking lot incident appellant described as occurring on November 15, 2017 when he was riding his Segway through the employing establishment is merely appellant's unsubstantiated perception of harassment. In reviewing appellant's statement, the Board finds that appellant has not provided evidence substantiating a specific incident of harassment. As he has not substantiated his allegations with probative evidence, appellant has not established a compensable employment factor under FECA with respect to the claimed harassment.

Appellant also submitted a copy of the January 18, 2018 EEOC decision, which remanded his claim for further review. As the decision remanded appellant's EEO claim for further action

¹⁸ *S.B.*, *supra* note 2; *see Carolyn S. Philpott*, 51 ECAB 175 (1999).

¹⁹ *M.C.*, Docket No. 18-0585 (issued February 13, 2019); *see Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

²⁰ *See L.K.*, Docket No. 16-1311 (issued January 17, 2017).

²¹ *See M.B.*, Docket No. 16-0917 (issued May 8, 2017).

²² *M.C.*, *supra* note 19; *see Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

²³ *Id.*

²⁴ *B.L.*, Docket No. 18-0965 (issued November 19, 2018); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

and therefore it did not establish error and abuse by the employing establishment. Thus, this decision does not establish a compensable employment factor under FECA.

Consequently, appellant has not established his claim for an emotional condition as he has not attributed his claimed condition to any compensable employment factors. The Board therefore does not need to consider the medical evidence of record.²⁵

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 September 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 28, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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

²⁵ See *S.W.*, Docket No. 17-1016 (issued September 19, 2018); see *G.S.*, Docket No. 09-0764 (issued December 18, 2009).