

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

R.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 19-0434
Issued: November 22, 2019**

Appearances:

Thomas S. Harkins, Esq., for the appellant¹

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 December 18, 2018 appellant, through counsel, filed a timely appeal from an August 10, 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, as alleged.

FACTUAL HISTORY

On June 15, 2017 appellant, then a 33-year-old supervisor of customer service, filed an occupational disease claim (Form CA-2) alleging that he sustained post-traumatic stress disorder (PTSD) due to a toxic/hostile work environment. He alleged that on December 2, 2012 one of his subordinate employees, T.C., threatened him and on the following day she came to work with a loaded handgun and was arrested by the employing establishment's Office of Inspector General.³ Appellant also alleged that on June 9, 2017 another employee, W.B., approached him "violently" and threatened him with physical harm using vulgar language. He indicated that he first became aware of his claimed condition on February 4, 2014 and first realized its relation to his federal employment on August 8, 2017. He stopped work on June 15, 2017. On the reverse side of the claim form, appellant's immediate supervisor, L.C., indicated that she did not hear a threat being made against appellant.⁴

In a June 22, 2017 development letter, OWCP requested that appellant submit additional evidence in support of his emotional condition claim, including a physician's opinion supported by a medical explanation as to how the alleged employment incidents caused or aggravated a medical condition. It provided a questionnaire for his completion which posed a series of questions regarding the alleged employment incidents. OWCP afforded appellant 30 days to respond. In a separate development letter of even date, it also requested additional information from the employing establishment which was to be submitted within 30 days.

In response, appellant submitted an undated document entitled, "unusual occurrence incident report," in which he reported that at approximately 11:30 a.m. on June 9, 2017 he was at his usual workstation (Bowling Green Station) with L.C. and B.H., a union shop steward, when W.B., an employee from another workstation (Church Street Station), jumped in front of him and screamed threats at him using vulgar language. He maintained that W.B. was about to punch him and noted that W.B. was pulled back by other employees in the area.

Appellant also submitted medical evidence, including June 15 and July 11, 2017 notes from Moses Weksler, PhD, a clinical psychologist, who diagnosed PTSD (chronic, acute) and advised that appellant should remain off work from June 16 to September 16, 2017 due to his distressed and traumatized state.

³ On the Form CA-2, appellant inadvertently indicated that these claimed events occurred on December 2 and 3, 2013. The record, however, indicates that they instead occurred on December 2 and 3, 2012.

⁴ The case record reflects that appellant filed two prior emotional condition claims, assigned OWCP File Nos. xxxxxx194 and xxxxxx018, related to claimed incidents/conditions in 2010 and 2012, respectively, which were denied by OWCP.

In a June 26, 2017 letter, L.C. advised that the employing establishment was challenging appellant's present emotional condition claim.⁵ She questioned how appellant was able to work until 3:00 p.m. on June 9, 2017 if he had, in fact, been threatened at approximately 11:30 a.m. on that date. L.C. also questioned how he was able to work eight hours on June 15, 2017 if he had, in fact, suffered an employment-related emotional condition due to the events of June 9, 2017.

By decision dated July 25, 2017, OWCP found that appellant had not submitted evidence sufficient to establish that the claimed events occurred as described. Therefore, it denied his claim for failure to establish the factual component of fact of injury. OWCP concluded that appellant therefore had not met the requirements to establish that he sustained an injury as defined by FECA.

On May 18, 2018 appellant, through counsel, requested reconsideration of the July 25, 2017 decision. Counsel argued that the factual evidence of record was sufficient to establish that appellant was exposed to threats at work as alleged.

Appellant submitted a November 13, 2017 statement in which he provided additional details of his assertions regarding T.C.'s actions on December 2 and 3, 2012.⁶ He asserted that on December 2, 2012 T.C. threatened to shoot him. Appellant further maintained that, immediately after W.B. threatened him on June 9, 2017, K.E., another employee from the Church Street Station worksite, placed W.B. in a chokehold and hauled him off the work floor. He indicated that the actions of W.B. "really did me in" because he did not work at the same location as W.B. and he never even interacted with him. Appellant maintained that K.G., another employee, witnessed the June 6, 2017 incident, and he noted that he had not obtained statements from any of the witnesses to the incident.⁷

Appellant submitted documents from several Equal Employment Opportunity (EEO) claims. In a December 10, 2014 settlement agreement, appellant and L.C. agreed to each complete an online sensitivity training course. In a September 16, 2016 settlement agreement, management agreed to reduce a 14-day suspension action against appellant to a 7-day suspension. The case record does not show that either settlement agreement resulted in a finding of wrongdoing by any party.⁸

Appellant also submitted additional medical evidence, including February 4, 2014, July 7, and September 13, 2017 narrative reports and progress notes from early 2017 in which Dr. Weksler

⁵ L.C. indicated that appellant had a prior claim for PTSD, assigned OWCP File No. xxxxxx018, which was denied by OWCP.

⁶ In this document, appellant answered questions posed in the development questionnaire that OWCP provided on June 22, 2017.

⁷ With respect to a question regarding "prior emotional conditions," he asserted that he previously sustained an emotional condition because the employing establishment falsely accused him of tampering with the time/attendance system in January 2010 and improperly issued him a letter of removal.

⁸ The September 16, 2016 settlement agreement explicitly provided that the agreement should not be considered an admission of wrongdoing/discrimination by an employing establishment official.

diagnosed employment-related PTSD, depression, and adjustment disorder with mixed anxiety and depressed mood.

In a July 18, 2017 statement, L.C. noted that with respect to the claimed June 9, 2017 incident, she reported that she was “also [a] witness to the incident” and that she did not hear any of what appellant alleged. L.C. further noted that other employees present on June 9, 2017 were interviewed, but that each employee indicated that he or she did not hear W.B. threaten appellant. She maintained that disciplinary actions issued to appellant were proper given his failure to adequately carry out his work duties and responsibilities.

By decision dated August 10, 2018, OWCP again denied appellant’s emotional condition claim.⁹ It noted that a number of his assertions with regard to incidents/conditions at work had been denied under previously filed claims in OWCP File Nos. xxxxxx194 and xxxxxx108, including his assertions regarding T.C.’s actions in December 2012.

LEGAL PRECEDENT

An employee seeking benefits under FECA¹⁰ 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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty, as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.¹¹ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.¹²

To establish an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying an employment factor or incident alleged to have caused or contributed to his or her claimed emotional condition; (2) medical evidence establishing that he or she has a diagnosed emotional or psychiatric disorder; and (3) rationalized medical opinion

⁹ In its August 10, 2018 decision, OWCP indicated, “Since there is at least one accepted event, this satisfies the [f]act of [i]njury -- [f]actual portion of your claim.” It then noted that “the evidence presented is sufficient to modify the decision dated [July 25, 2017] from a denial based on one of the 5 basic elements for FECA coverage to a denial based on another basic element...” The Board notes, however, that the content of OWCP’s August 10, 2018 decision shows that OWCP has not accepted that appellant established a compensable employment factor. Therefore, OWCP actually denied appellant’s claim on August 10, 2018 for the same reason it denied it on July 25, 2017, *i.e.*, the failure to establish a factual basis for the claim.

¹⁰ *Supra* note 2.

¹¹ *A.J.*, Docket No. 18-1116 (issued January 23, 2019); *Gary J. Watling*, 52 ECAB 278 (2001).

¹² 20 C.F.R. § 10.115(e); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *see T.O.*, Docket No. 18-1012 (issued October 29, 2018); *see Michael E. Smith*, 50 ECAB 313 (1999).

evidence establishing that the accepted compensable employment factors are causally related to the diagnosed emotional condition.¹³

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. 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. 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.¹⁴ 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.¹⁵

A claimant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by employment factors.¹⁶ This burden includes the submission of a detailed description of the employment factors or conditions which he or she believes caused or adversely affected a condition for which compensation is claimed, and a rationalized medical opinion relating the claimed condition to compensable employment factors.¹⁷

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.¹⁸ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. 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.¹⁹

¹³ See *S.K.*, Docket No. 18-1648 (issued March 14, 2019); *M.C.*, Docket No. 14-1456 (issued December 24, 2014); *Debbie J. Hobbs*, 43 ECAB 135 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

¹⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁵ *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹⁶ *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

¹⁷ *P.B.*, Docket No. 17-1912 (issued December 28, 2018); *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

¹⁸ See *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁹ *Id.*

ANALYSIS

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

Appellant alleged that he sustained an emotional condition due to various incidents and conditions at work. OWCP denied appellant's claim, finding that he had not established compensable employment factors. The Board must, thus, initially review whether these incidents and conditions are covered employment factors under the terms of FECA. The Board notes that appellant's allegations do not directly relate to his regular or specially assigned duties under *Lillian Cutler*.²⁰ Rather, appellant primarily alleged that he was subjected to harassing actions at work.

Appellant alleged that he was harassed by employees at work. Appellant claimed that on December 2, 2012 one of his subordinate employees, T.C., threatened him and that on the next day she came to work with a loaded handgun. Appellant, however, did not submit corroborative evidence in support of his allegations regarding T.C.'s actions.²¹

Appellant also alleged that on June 9, 2017 another employee, W.B., approached him "violently" and threatened him using vulgar language. However, he did not submit evidence supporting his assertions regarding W.C.'s actions on June 9, 2017. W.B. identified several individuals as being present during the claimed June 9, 2017 incident, however, he did not submit witness statements from them. In addition, appellant's immediate supervisor, L.C., indicated that she witnessed the events of June 9, 2017, and reported that she did not hear W.C. make any threatening comments. She further advised that other employees present on June 9, 2017 were also interviewed, but that each employee noted that he or she did not hear W.B. threaten appellant.²² Therefore these statements do not corroborate appellant's allegations of harassment. For these reasons, appellant has not established a compensable employment factor with respect to the claimed harassment at work.²³

²⁰ See *supra* note 14.

²¹ See *F.K.*, Docket No. 17-0179 (issued July 11, 2017).

²² Appellant submitted settlement agreements from EEO claims, but these agreements do not contain findings relating to matters claimed as causing an emotional condition in the present claim. Moreover, the agreements did not indicate that wrongdoing was committed by any party. See *generally M.R.*, Docket No. 18-0304 (issued November 13, 2018) regarding the probative value of the final findings of EEO claims and grievances.

²³ Appellant also generally alleged that he was exposed to a toxic/hostile work environment, but he did not provide a specific instances and a clear explanation for this allegation or evidence to support it. He also advised that he had previously sustained an emotional condition due to his belief that the employing establishment made false accusations against him in January 2010 and improperly issued him a letter of removal. However, appellant did not claim that these alleged events caused or contributed to the emotional condition claimed in the present case.

As the Board finds that appellant has not established a compensable employment factor, it is not necessary to consider the medical evidence of record.²⁴

On appeal counsel asserts that the factual evidence of record is sufficient to establish that appellant was exposed to threats at work as alleged. As explained above, the evidence of record is insufficient to support this assertion.

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, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 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

²⁴ See *B.O.*, Docket No. 17-1986 (issued January 18, 2019) (finding that it is not necessary to consider the medical evidence of record if a claimant has not established any compensable employment factors). See also *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).