United States Department of Labor
Employees' Compensation Appeals Board

D.I., Appellant	)	
and	)	**Docket No. 19-0534**
	)	**Issued: November 7, 2019**
SMALL BUSINESS ADMINISTRATION, King of Prussia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 10, 2019 appellant, through counsel, filed a timely appeal from a November 2, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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.

[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.*

FACTUAL HISTORY

On June 28, 2017 appellant, then a 63-year-old business opportunity specialist (BOS), filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment caused severe depression and anxiety. He indicated that his case load had increased by 300 percent which required that he work 12 hours daily, including weekends and holidays. Appellant stopped work on May 7, 2017.

In a May 9, 2017 supplemental statement, appellant maintained that, beginning in January 2017, his workload increased astronomically because the employing establishment changed its method of processing applications, noting that it switched from a paper application to an electronic format which greatly increased the number of applicants. He supplied a chart in which he enumerated his workload from 2014 through 2017. Appellant reported that there were initially problems with the electronic format that were not resolved until April 2017. He also maintained that manager T.T. had instituted new procedures that were time-consuming, frustrating, and full of red-tape. Appellant noted bottlenecks, which also increased his workload, and that she forced him to work weekends and holidays. He alleged that T.T. mandated e-mails and telephone calls be replied to within one hour of receipt. Appellant also indicated that she assigned him cases when he was on sick leave. He noted that the San Francisco office performed less work with more employees, but that overwork and undue demands by employing establishment management in his office caused major depression with symptoms and anxiety with mood swings, a sense of hopelessness, a loss of interest in his usual activities, restless sleep, excessive hunger resulting in dramatic weight gain, and fatigue despite spending a long time in bed. Appellant also explained that he spent hours dwelling on the "injustice" he experienced at work which resulted in a lack of concentration and suicidal thoughts.

In a brief report dated May 1, 2017, Dr. Joseph P. Quintiliani, a Board-certified family physician, advised that appellant was under his care for depression and could not work beginning May 2, 2017, and for at least three months thereafter.

Appellant forwarded copies of e-mails that T.T. had sent to him and her entire staff, including a Thursday, March 2, 2017 e-mail which indicated that no employee should work over time unless it was authorized and officially approved. E-mails dated March 16 and 17, 2017 discussed workloads in the Philadelphia and San Francisco offices. A table within the e-mail purported to show that the Philadelphia office had a much heavier workload in February 2017. In an e-mail dated April 4, 2017, appellant requested sick leave for that day and the next. He included e-mails dated April 4 and 5, 2017 showing that he was assigned new cases, and one from T.T. who noted that there was no policy that he could not be assigned cases while on sick leave. In a number of e-mails dated Sunday, April 30, 2017, T.T. informed the staff of certain procedures, noted that appellant had only a few open files, and asked that he take on other cases that were old. She reviewed some of his cases with recommendations for changes.

Appellant also submitted a position description for a BOS which indicated that the position was sedentary, and his duties were to review and analyze complex applications. He also submitted a performance management template for the BOS position for the rating period October 1, 2016 through September 30, 2017 which indicated that a critical element was timeliness, with initial screens to be completed in 15 days; processing a complete application in 90 days; and processing a reconsideration in 45 days. A second critical element was quantity (completed applications).

This had five levels of annual measurement from 69 or less to more than 100 completed files. The standards included a worksheet to be used in determining a rating.

In an undated report, Carter J. Cloyd, Psy.D., a licensed clinical psychologist, noted seeing appellant for depression, anxiety, distress, and anger since April 13, 2017 with follow-up sessions through July 13, 2017. He indicated that appellant reported that working harder and longer hours was not resolving problems at work, and this led to feelings of depression, indecisiveness, distractibility, restlessness, edginess, headaches and fatigue, and fleeting thoughts of suicide. Dr. Cloyd referred appellant to his personal physician for physical problems and diagnosed major depression, unspecified anxiety disorder with symptoms consistent with post-traumatic stress disorder (PTSD). He concluded that he agreed with the recommendation of appellant's personal physician that he not return to work.

In a development letter dated August 10, 2017, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion and signature. This was to include a description of each event, statement, conversation, interaction, situation, action, or inaction that he felt responsible for his claimed condition. OWCP afforded appellant 45 days to provide the requested information.

In a letter dated November 1, 2017, OWCP forwarded information regarding the claim to the employing establishment. It requested that it provide comments from a knowledgeable supervisor regarding the accuracy of appellant's statements.

In an undated statement,[3] T.T. wrote that appellant had not informed the employing establishment of any impairment due to depression and anxiety prior to receipt of the CA-2 claim and, therefore, she was not given the opportunity to address his concerns. She noted that appellant had been on annual leave from March 19 to April 1, 2017 and on May 2, 2017 began extended sick leave. T.T. indicated that the role of the employing establishment had not changed since January 1990 which was to review and analyze initial business development program applications. She continued that the number of applications received varied, but that an individual BOS was rated upon individual production metrics. T.T. indicated that the employing establishment had begun to implement a new software system in March 2017 as part of a modernization program and, as with all new applications, there were growing pains, but that the goal was for the new system to ease the workload of each BOS. Regarding appellant's figures that the workload of the Philadelphia office was greater than that of San Francisco, T.T. reported that the San Francisco office handled more complex cases that required the review of legal counsel and were assigned a higher weight and could be considered two applications rather than one. She also countered appellant's assertion that it was timely to "unzip" the electronic files, noting that this was done by administrative staff and not by a BOS. T.T. also explained that appellant's complaint that she had changed procedures for processing an application were not warranted, as the procedure had always been in place. She noted that appellant was not in compliance with some of the procedures and was asked to follow proper procedure. T.T. wrote that appellant's assertion that responses to e-mails were to be made within an hour was completely false. She further explained that, while she assigned cases to appellant on the weekend or while he was on sick leave, appellant was not

[3] The statement is also unsigned. However, upon reading the statement it is clear that T.T. is responding to allegations appellant made about her management.

expected to respond to the e-mails or work during those periods as, noted in an e-mail submitted by appellant, employees were not to work overtime.

In a report dated December 1, 2017, Dr. Cloyd noted appellant's complaints that the employing establishment was insensitive to him and ignored him, that he felt overwhelmed by a significant increase in workload, and continued to feel that he had been treated unfairly. Dr. Cloyd noted that appellant appeared to feel traumatized by his current work environment and diagnosed major depression and symptoms consistent with PTSD. He advised that appellant could not work until his emotional difficulties subsided or resolved and recommended continued psychotherapy.

By decision dated April 3, 2018, OWCP denied the claim. It found no accepted compensable factors of employment, noting that the record did not establish that appellant was forced to work on weekends or while on sick leave, and that his complaint that he was overworked was unsubstantiated. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On April 10, 2018 appellant, through counsel, requested a hearing before an OWCP hearing representative.

OWCP subsequently received a May 18, 2018 report in which Dr. Cloyd reiterated appellant's complaints, his diagnoses, and an opinion that appellant should continue therapy and could not work.

A hearing was held on July 10, 2018.[4] Counsel maintained that appellant's job of reviewing business development applications was highly intensive and time sensitive. He asserted that appellant was doing fine until early 2017 when applications increased dramatically, which was acknowledged by the employing establishment. Counsel further argued that the evidence submitted supported an increased workload with time constraints, and Dr. Cloyd's opinion established the claim. He indicated that a class action suit had been filed.

Following the hearing, counsel submitted evidence previously of record and appellant's performance appraisals dated September 30, 2015, September 30, 2016, and September 30, 2017. These had critical elements which included customer satisfaction, written materials and quality, timeliness, and quantity. The 2015 and 2016 appraisals, which were signed by J.D., a manager, indicated that appellant received overall ratings of exceeds expectations. The 2017 appraisal, signed by T.T., indicated that appellant received a rating of "meets expectations" for each critical element including timeliness and application completion.

In a statement dated July 10, 2018, appellant maintained that his workload increased dramatically from 2016 to 2017, noting that from January through April he was assigned 19 cases in 2016 and 76 cases in 2017, and had he worked the entire year in 2017, by extrapolation, he would have completed 438 cases, whereas he completed 228 in 2016. He continued to assert that the Philadelphia office had a greater workload than the San Francisco office, that management agreed that there was increase in case filings, and that T.T. changed procedures on Sunday April 30, 2017 as shown by her e-mail that date. Appellant maintained that the employing

[4] Counsel reported that appellant's physician and psychologist strongly recommended that he not appear.

establishment did not relax its performance standards, even though the numbers of applications increased, and that his performance deteriorated due to the increased workload.

In an August 14, 2017 statement, A.G., a coworker, indicated that she had worked with appellant since June 2013, and that there had been an extreme increase in assigned cases beginning in January 2017 when filing applications was changed to an electronic process. She also maintained that, in February 2017, T.T. changed the closure process which increased the workload for BOS. A.G. also indicated that T.T. forced appellant to work on weekends, holidays, and sick days by sending him directives on cases. She also maintained that the San Francisco office had more employees and a lighter workload than the Philadelphia office, and that she had noticed a change in appellant's behavior beginning in early 2017. Appellant also forwarded copies of e-mails previously of record.

By decision dated August 13, 2018, OWCP's hearing representative affirmed the April 3, 2018 denial of the claim. He found that appellant had not met his burden of proof to establish a compensable factor of employment.

On August 27, 2018 appellant, through counsel, requested reconsideration and submitted evidence previously of record.[5]

By decision dated November 2, 2018, OWCP denied modification of the August 13, 2018 decision.

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 of FECA, 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.[6] 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.[7]

To establish an emotional condition in the performance of duty, the claimant must submit the following: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) medical evidence establishing a diagnosed emotional condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[8]

[5] The evidence submitted consisted of appellant's performance appraisals, his July 10, 2018 statements, e-mails, and the May 18, 2018 report from Dr. Cloyd.

[6] *T.G.*, Docket No. 19-0071 (issued May 28, 2019).

[7] *Id.*

[8] *E.M.*, Docket No. 19-0156 (issued May 23, 2019).

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*,[9] 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 of FECA.[10] 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.[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 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 this case is not in posture for decision.

Appellant has alleged that his workload greatly increased in January 2017 because the employing establishment switched from paper applications to an electronic format. The Board has held that overwork, when substantiated by sufficient factual information to corroborate a claimant's account of events, may be a compensable factor of employment.[15] In an undated statement, T.T. indicated that a new software system was instituted in March 2017. This contradicts appellant's assertion that it occurred in January 2017. However, OWCP also received an August 14, 2017 witness statement from coworker, A.G., who indicated that there had been an extreme increase in assigned cases beginning in January 2017 when filing applications were changed to an electronic process. Appellant has alleged that from January through April 2016, he was assigned 16 cases; and for this period in 2017, he was assigned 76 cases. The Board also notes that appellant's performance standard included a critical element of quantity (completed applications). This had five levels of annual measurement from 69 or less to more than 100

[9] 28 ECAB 125 (1976).

[10] *See M.R.*, Docket No. 18-0305 (issued October 18, 2018); *Robert W. Johns*, 51 ECAB 136 (1999).

[11] *T.G., supra* note 6.

[12] *T.L.*, Docket No. 18-0100 (issued June 20, 2019).

[13] *Id.*

[14] *T.G., supra* note 6.

[15] *G.G.*, Docket No. 18-0432 (issued February 12, 2019).

completed files. If appellant reached the highest level of 101 completed files, this would only be 8 to 9 cases a month. Thus, more information is needed regarding how the change to an electronic format impacted appellant, since he has indicated he was assigned 76 cases for the period January through April 2017. T.T. did not address the actual amount of case work assigned to appellant during the time period in question.

Appellant further asserted that he was forced to work on weekends and while on sick leave because T.T. assigned cases during those periods. As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of FECA.[16] The Board has long held that disputes regarding the assignment of work is an administrative function of the employing establishment and, absent error or abuse, is not compensable.[17] Absent evidence establishing error or abuse, a claimant's disagreement or dislike of such a managerial action is not a compensable factor of employment.[18] The record in this case, however, indicates that timeliness was a critical performance evaluation element with initial screens to be done in 15 days, processing a complete application in 90 days, and processing a reconsideration in 45 days. The Board has insufficient information to determine if T.T.'s actions in assigning cases on weekends and sick days constituted error or abuse. The record is unclear if the 15-day requirement and other time sensitive requirements were 15 business days or 15 calendar days.

In this case, further findings by OWCP are needed.[19] Although it is a claimant's burden of proof to establish his claim, OWCP is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment.[20] It shares responsibility to see that justice is done.[21] In a case where it "proceeds to develop the evidence and to procure evidence, it must do so in a fair and impartial manner."[22]

On remand OWCP should obtain a signed statement from the employing establishment addressing appellant's allegations. In particular, OWCP should obtain appellant's specific work records for the period he claimed he was overworked beginning in January 2017, including which days he was at work, which days he was on leave, and when he stopped work. The employing establishment should also furnish information regarding when the electronic application went into effect and how it affected performance standards and the day to day work required of a BOS. OWCP should also ask the employing establishment to provide appellant's case assignment history and an explanation of how it applied the quantity and timeliness critical elements, making clear how timeliness was calculated, including if there was an offset for leave, be it sick leave or otherwise. It should also request from the employing establishment a statement describing the

[16] *T.L.*, *supra* note 12.

[17] *G.G.*, *supra* note 15.

[18] *E.S.*, Docket No. 18-1493 (issued March 6, 2019).

[19] *See N.S.*, Docket No. 16-0914 (issued April 10, 2018).

[20] *T.B.*, Docket No. 19-0323 (issued August 23, 2019).

[21] *M.T.*, Docket No. 19-0373 (issued August 22, 2019).

[22] *S.L.*, Docket No. 17-1780 (issued March 14, 2018).

comparative work on a paper claim as compared to an electronic case file. After this and such other further development as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: November 7, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board