

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 9, 2019 appellant, then a 35-year-old supervisory customs and border protection officer, filed an occupational disease claim (Form CA-2) alleging that he experienced panic attacks, anxiety, insomnia, and depression due to factors of his federal employment including threats to his safety, harassment, and physical intimidation. He noted that he first became aware of his condition and its relationship to his federal employment on October 16, 2018. On the reverse side of the claim form, his supervisor indicated that he was unaware of appellant's situation and had been "just recently informed of the alleged threats that transpired in 2018." Appellant did not stop work.

In a development letter dated April 23, 2019, OWCP advised appellant of the additional factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding appellant's alleged injury, including comments from a knowledgeable supervisor on the accuracy of his allegations of threats and explaining any points of disagreement. OWCP further requested that the employing establishment address whether it had performed an investigation and, if so, submit the written results as well as any other pertinent information, such as witness statements. It afforded both parties 30 days to submit the requested evidence.

In a June 14, 2019 response, appellant related that in October 2011 he was ordered to violate an employing establishment policy by not checking the safety of a custodial subject. He disregarded the order and found that the subject had attempted to hang herself. In February 2018, a few weeks after appellant had transferred to his current workstation, he was assigned to supervise two officers who had known work performance and behavioral issues. Appellant's immediate supervisor told appellant that he had been made a supervisor because of his race. In the summer of 2018, one of his supervisees, who began to show "a questionable mental state," became fixated on him. Appellant repeatedly informed management about her behavior. When management finally took action by removing the officer's firearm she passively threatened to shoot appellant. Appellant felt unprotected by management, noting that the officer was allowed to continue working in his location.

Appellant maintained that he experienced difficulty as a supervisor due to lack of support from management. He e-mailed his superiors on September 13, 2018 that he was uncomfortable supervising Officers A.S. and B.K. Appellant advised that while at work on October 1, 2018 Officer A.S. threatened him for enforcing policy. He asked his supervisor for help dealing with Officer A.S., but his supervisor refused. Appellant began experiencing insomnia and racing thoughts. He again asked management for help with Officer A.S. after another incident occurred on October 31, 2018.

Appellant described e-mails that he was submitting verifying that he had requested assistance from management addressing issues with subordinates, including being physically threatened. In late October 2018, Officer A.S. watched as he walked to his car at night after work in an attempt to intimidate him. On February 7, 2019 appellant received an e-mail from M.S., a fact finder, advising that she was inquiring into allegations at his workstation. Management treated him differently from another officer who had been threatened. Appellant's chief of staff told appellant that he was not liked and should not supervise. Management instructed him not to address Officer A.S.'s violation of the cellphone policy and assigned him a mentor based on race. Appellant advised that management used Officer A.S. to threaten him and failed to address the irrational behavior of an officer who thought she could feel him through walls. He described e-mails he had sent to management asking for help with his supervisees, Officers A.S., and B.K., as well as the officer with mental issues. In April 2019, after filing appellant's Form CA-2 the employing establishment came to his house and took possession of his firearm and badge. Management continued to force him to work with Officer A.S.

In support of his claim, appellant submitted a memorandum to the employing establishment dated October 1, 2018. He advised that Officer A.S. had approached him and asked whether he thought he used sick leave to avoid him. Appellant related that A.S. repeatedly asked him if he thought A.S. was afraid of him and A.S. became "more aggressive with the apparent intent to be physically intimidating." Officer A.S. stated that if appellant did not stop "messing" with him there would be problems.

Appellant submitted numerous e-mail messages. In an e-mail dated October 9, 2018, he advised B.V., who works for the employing establishment, that Officer A.S. admitted to approaching him aggressively and using language that could be considered threatening. Appellant noted that he had asked for assistance from upper level management to address difficulties with Officer A.S. and the officer with a questionable mental state, but had been ignored.

In e-mails dated December 25, 2018 and January 29, 2019, appellant requested that the employing establishment update him on the status of its investigation into the threat made against him by Officer A.S. on October 1, 2018. In an April 5, 2019 e-mail response, the employing establishment advised that the information into allegations of misconduct could not be disclosed for privacy reasons.

In an e-mail dated February 14, 2019, A.B., an Equal Employment Opportunity (EEO) officer who works for the employing establishment, noted that appellant had advised him that a subordinate had physically and verbally threatened him on October 1, 2018 and that management had not taken any action. EEO Officer A.B. noted that appellant had decided not to file an EEO complaint.³

In a development letter dated October 9, 2019, OWCP again requested that the employing establishment provide comments from a knowledgeable supervisor on the accuracy of appellant's allegations and any additional information such as witness statements. It enclosed a copy of his June 14, 2019 statement.

³ Appellant additionally submitted medical evidence in support of his claim.

Thereafter, OWCP received a July 24, 2019 letter from the employing establishment to appellant transferring his workstation and informing him that he could again carry a firearm.

By decision dated December 13, 2019, OWCP denied appellant's emotional condition claim. It found that he had not established any compensable factors of employment and thus had not established an injury in the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim 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.⁵ 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 an emotional condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.⁶

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*,⁷ 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 an illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation.⁸ 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.⁹

OWCP's procedures provide:

“An employee who claims to have had an emotional reaction to conditions of employment must identify those conditions. The [claims examiner] must carefully develop and analyze the identified employment incidents to determine whether or not they in fact occurred and if they occurred whether they constitute factors of the

⁴ *Supra* note 2.

⁵ *G.G.*, Docket No. 18-0432 (issued February 12, 2019).

⁶ *B.Y.*, Docket No. 17-1822 (issued January 18, 2019).

⁷ 28 ECAB 125 (1976).

⁸ *See G.R.*, Docket No. 18-0893 (issued November 21, 2018).

⁹ *Supra* note 6.

employment. When an incident or incidents are the alleged cause of disability, the [claims examiner] must obtain from the claimant, agency personnel and others, such as witnesses to the incident, a statement relating in detail exactly what was [stated] and done. If any of the statements are vague or lacking detail, the responsible person should be requested to submit a supplemental statement clarifying the meaning or correcting the omission.”¹⁰

OWCP’s regulations provide that an employing establishment who has reason to disagree with an aspect of the claimant’s allegation should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.¹¹ Its regulations further provide in certain types of claims, such as a stress claim, a statement from the employing establishment is imperative to properly develop and adjudicate the claim.¹²

ANALYSIS

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

Appellant attributed his condition, in part, to supervising difficult employees. He contended that one of his subordinates became fixated on him after she deteriorated mentally and threatened to passively shoot him. Appellant related that, another subordinate, Officer A.S., physically threatened him. He advised that he had requested, but did not receive assistance from management. Appellant further attributed his emotional condition to harassment and discrimination by management and his subordinates and to administrative actions taken by the employing establishment.

OWCP, in development letters dated April 23 and October 9, 2019, requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant’s allegations. The employing establishment did not respond to its request.

The Board finds that it is unable to make an informed decision in this case as the employing establishment did not respond to OWCP’s requests for information.¹³ As discussed, OWCP’s procedures provide that, in emotional condition cases, a statement from the employing establishment is necessary to adequately adjudicate the claim.¹⁴

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,

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17(j) (July 1997); *see also S.L.*, Docket No. 17-1780 (issued March 14, 2018).

¹¹ 20 C.F.R. § 10.117(a); *see also D.L.*, Docket No. 15-0547 (issued May 2, 2016).

¹² *Supra* note 10 at Chapter 2.800.7(a)(2) (June 2011).

¹³ *G.I.*, Docket No. 19-0942 (issued February 4, 2020); *V.H.*, Docket No. 18-0273 (issued July 27, 2018).

¹⁴ *Supra* note 11. *See M.T.*, Docket No. 18-1104 (issued October 9, 2019).

particularly when such evidence is of the character normally obtained from the employing establishment.¹⁵

The case will accordingly be remanded for OWCP to further develop the evidence. On remand, OWCP shall request that the employing establishment provide a detailed statement and relevant evidence and/or argument regarding appellant's allegations. Following this and any necessary further development, it shall issue a *de novo* decision regarding whether he has established an emotional condition in the performance of duty.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 11, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁵ R.A., Docket No. 17-1030 (issued April 16, 2018); K.W., Docket No. 15-1535 (issued September 23, 2016).