United States Department of Labor
Employees' Compensation Appeals Board

S.K., Appellant	)	
and	)	**Docket No. 18-0705**
	)	**Issued: July 29, 2020**
DEPARTMENT OF JUSTICE, OFFICE OF THE UNITED STATES ATTORNEYS, Buffalo, NY, Employer	)	

Appearances:
Gerald T. Walsh, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 15, 2018 appellant, through counsel, filed a timely appeal from an August 24, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (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] Appellant timely requested oral argument before the Board. By order dated October 2, 2018, the Board exercised its discretion and denied the request as the matter could be adequately addressed based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 18-0705 (issued October 2, 2018).

[3] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish an emotional condition in the performance of duty.

FACTUAL HISTORY

On March 9, 2016 appellant, then a 42-year-old victim witness coordinator, filed an occupational disease claim (Form CA-2) alleging that she experienced an aggravation of celiac disease, irritable bowel syndrome, depression, panic attacks, migraines, and recurrent nephrolithiasis causally related to factors of her federal employment. She attributed her condition to harassment and being continually on call. Appellant noted that she first became aware of her condition on January 1, 2010 and realized it was caused by her federal employment on January 28, 2013. She stopped work on September 18, 2015.

In a March 9, 2016 narrative statement, appellant described her work duties, noting that she had created the victim witness program in 1995 and currently had a caseload of 400 cases and over 25,000 victims. She also assisted 91 members of the legal staff. Appellant related that her condition began in June 2012 when W.B., a manager, became angry when she spoke with him about an office move. W.B. told her that she did not deserve her grade, that she was not doing enough work, and that he could hire more attorneys if he did not have to pay her salary. Appellant informed him that she needed help because her job was overwhelming. She asserted that, beginning in January 2013, she was expected to be available after-hours, and on weekends and holidays. Appellant related:

> "I am to be available even if I am sick or on vacation or in the bathroom. I must respond immediately to all calls and e-mails at all times. There is no room for error or leeway in response time nor any latitude given my disability. I was told by our [human resources] officer that I should ask my supervisor for permission to do any activities after hours and to notify him whenever I was going to the bathroom and how long I expected to be in the bathroom."

Appellant asserted that attorneys called her after hours instead of responding to her e-mails or calling the back-up number that she provided when she was out of the office. Management instructed her to provide witnesses with money even though there were no funds available for this purpose. Appellant related that she was told to remain at her desk and not to attend court with victims, but when she complied she was blamed when a victim appeared in court "alone and upset." She related, "I am exposed to the stress caused by my job every day of every week because I am forced to be on call 24/7 365 days a year." Appellant also attributed her stress to W.H.'s desire to terminate her employment. She related that work stress had aggravated her irritable bowel syndrome and celiac disease such that she was disabled from employment.

In an accompanying statement, appellant described events occurring in August and October 2014. She related that in August 2014, J.G., her supervisor, told her that she should not accompany victims to court per the instructions of W.H.; however, when she submitted a request for vacation leave he asked her who would cover a trial during that date. During her mid-year review, J.G. told her that W.H. wanted her to perform paralegal duties, but never provided her with

a description of the duties she was supposed to perform. In October 2014 appellant was told to perform grand jury duties even though she had provided a medical note indicating that she could no longer perform two full-time jobs. On October 29, 2014 J.V., a coworker, screamed at her and intimidated her with his body language because she was not in the courtroom at his trial. Appellant responded that she had been in the courthouse, in the room where he had told her to wait.

On March 9, 2016 appellant provided a synopsis of the alleged hostile work environment that she had experienced beginning June 2012. She advised that management set impossible standards in having her ensure availability weekends, holidays, and after hours, requiring her to respond immediately to e-mails, refusing her request for additional help, criticizing her without explanation, giving conflicting instructions, discussing the details of her medical condition, refusing to send her for training, and instructing her to misuse government funds and violate policy. Appellant maintained that she was told to see attorneys in person, but also told not to leave her desk. W.H. told her to write job justifications on two separate occasions. A human resources officer told her to e-mail her supervisor after hours for permission to do any activity, like walking her dogs or going to the bathroom. Appellant asserted that the attorneys would not read her e-mails or tell her what they needed until the last minute at which time they expected her "to be immediately available."

The record indicates that on August 10, 2015 appellant filed an Equal Employment Opportunity (EEO) complaint alleging discrimination by the employing establishment based on gender, age, and disability. In her complaint, she related that she became sick on June 8, 2015 with a kidney stone. Appellant told her supervisor that she would be late to work because she had a medical test scheduled for Monday, June 15, 2015. After leaving work on Friday, June 12, 2015, she related, "I was violently ill the rest of the night and the rest of the weekend. I never checked my [cellphone] the entire weekend as I was too ill." Appellant went to a physician on Monday, June 15, 2015, who informed her that she needed emergency surgery. When she arrived at work after her appointment, she checked her messages and saw that W.H. had tried to contact her after 5:00 p.m. on Friday by telephone, and when he could not reach her, had sent her e-mails accusing her of "willfully failing to respond to him." Appellant asked why W.H. had not called her backup, K.P., and was told he only wanted to speak with her. After her surgery, her physician told her that she was too ill to be on call and she requested a reasonable accommodation from the employing establishment. At appellant's mid-year evaluation, she was marked down for failing to communicate the weekend she was sick. J.G. had informed her that the employing establishment would not remove the on-call status from her performance plan.

Appellant filed an amendment to her August 10, 2015 EEO complaint of discrimination. She maintained that on August 6, 2015 she reminded an attorney that she was on vacation until Monday, August 10, 2015 and to contact K.P. if he needed anything. Appellant also left an autoreply message on her e-mail that she was out of the office until Monday, August 10, 2015 and that K.P. would address witness needs. When she returned to the office on August 10, 2015, J.P. had sent her an e-mail questioning why she had not responded to the attorney's e-mail and telephone call on Sunday, August 9, 2015. Appellant told her supervisor that she was on annual leave and that her e-mail had provided an autoreply explanation. She advised that management and attorneys refused to call her backup. Appellant related, "I am expected to be available when I am at lunch, when I am sleeping, when I am in the bathroom, when I am on sick leave, and when

I am on annual leave." She advised that she was "immediately reprimanded whenever there is a missed call" even when she was on annual or sick leave.

On September 25, 2015 appellant again amended her August 10, 2015 EEO complaint to include an allegation of reprisal. She maintained that she had received e-mails on August 28 and September 4, 2015 instructing her that she had to be always available, even after hours. On September 15, 2015 appellant missed a sentencing with a victim because the court had changed the time "at the last minute," but the attorney did not inform her of the change. Due to this incident management told her that she was not doing her job. Appellant asserted that management disciplined her when she failed to meet impossible demands.

In a development letter dated July 8, 2016, OWCP advised appellant of the factual and medical information necessary to establish her emotional condition claim and provided a questionnaire for her completion. It afforded her 30 days to submit the necessary evidence. In a separate letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's contentions, including an explanation of why she was on call every day.

On August 4, 2016 the employing establishment challenged appellant's contention that she sustained a medical condition due to harassment and discrimination. It advised that she had submitted a reasonable accommodation request to reduce her hours to 32 per week from April 10 to August 28, 2013, which was approved. The employing establishment indicated that it had denied her September 10, 2013 request to remove the "on-call status during evenings, weekends, and when on leave" requirement from her position due to the lack of adequate medical documentation. When appellant again requested removal from on-call status on June 24, 2015, it suggested accommodation by limiting calls to before 9:00 p.m. unless someone was in danger and having a backup coordinator if she was on sick leave or during vacations. Appellant stopped work during the period of negotiations and did not return.

On August 5, 2016 J.G. challenged appellant's contention that her stress resulted from harassment and being on call. He maintained that she was not on call 24/7 every day of the year, but was required to meet all witnesses needs "even if after hours or on weekends." J.G. advised that appellant was upset about an office move. In January 2013 an attorney was unable to contact her on a weekend. In 2013 appellant's performance plan included a requirement that she ensure availability after hours, weekends, and holidays. Later plans specified that she ensure reasonable availability. J.G. noted that appellant did not perform significant overtime. He related that in response to her request for accommodation, on July 23, 2015 he had proposed limiting after hours contact, if possible, to before 9:00 p.m., and providing her with one hour to respond to after-hours calls and e-mails.

In a statement dated September 1, 2016, appellant related that she had requested a reasonable accommodation from the employing establishment based on her physicians' advice. In September 2013 she asked to be removed from the on call requirement for one month to adjust to a change in medication. Appellant alleged that she had experienced stress due to harassment and as a result of performing her employment duties, which she noted constituted a compensable work factor.

By decision dated September 14, 2016, OWCP denied appellant's emotional condition claim, because the requirements had not been met for establishing that she sustained an emotional condition that arose during the course of employment and within the scope of compensable work factor as defined by FECA.

Thereafter, OWCP received an August 5, 2016 statement from appellant. Appellant related, "My ability to deal with the increased stress of a hostile work environment was compromised by the continual harassment by [W.H.] and the continued enforcement of being on call 24/7 making it impossible to get away from the work stressors." She advised that she was required to be immediately available at all times, which she asserted was not necessary for her position. Appellant related that it was stressful listening to the stories of victims, especially child exploitation, and assisting them with the process.

On October 7, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on May 16, 2017. Appellant advised that she had not received a decision on her EEO complaints. She indicated that she had been diagnosed with irritable bowel syndrome as a child and with celiac disease in 2009 or 2010. Appellant described her work duties, noting that her physical symptoms were controllable until January 2012, when she had to perform grand jury coordination for two weeks in addition to her regular job. She became ill and she told her physician that she could not perform both positions. In June 2012 appellant tried to explain to W.H. that it was easier for victims and witnesses to talk to her on the fourth floor because they would not see the defendants and he yelled that she did not do any work and that he could hire attorneys for the cost of her salary. She responded that she would be happy to do anything he wanted, but he refused to answer her questions. Appellant told him that she was overwhelmed with work and he informed her that she would receive no assistance. She noted that her caseload had increased greatly, and that in 2014 she had 470 open cases. In January 2013 management added the element that appellant had to ensure availability for her services on evenings, weekends, and holidays to her performance work plan. Appellant tried to get clarification of the policy, including what to do when she was on sick leave or vacation, but never received a response. She related that W.H. constantly found fault with her and that she feared for her job. W.H. told appellant to sit at her desk all day and not go to court even though it was in her job description and a required duty by law. He also questioned why she was not attending training and made her write two job justifications.[4]

Appellant related that the requirement to be constantly on call, combined with the increased workload, exacerbated her condition causing severe abdominal pain and continuous diarrhea. In 2014 her performance appraisal was downgraded in two categories because she did not immediately respond to W.H. In 2013 appellant had a kidney stone and she was too sick to look at her telephone on the weekend. W.H. recommended disciplinary action because she had not responded to his telephone calls and e-mails over the weekend. After appellant filed her request for reasonable availability she had received numerous e-mails reminding her to always be

[4] During the telephonic hearing, OWCP's hearing representative noted that the record did not contain copies of witness statements and requested that she resubmit this evidence.

available. J.G. blamed her when sentence time got changed at the last minute even though she had not been notified of the change.

Following the telephonic hearing, appellant provided a July 29, 2016 witness statement from C.D., a former coworker. C.D. advised that in 2012 appellant had become a target of W.H., who moved her work location to a noisy area. She related that appellant received blame if she was not in the courthouse and if she was not at her desk because she was at the courthouse. C.D. indicated that in 2013 appellant was told that she had to be readily available after hours, on weekends, and on holidays, and was told to take her telephone to the bathroom. Attorneys would scream at her and not read her e-mails confirming whether she was needed. Appellant got in trouble if she did not respond when at lunch or on Sundays.

In a witness statement dated July 30, 2016, K.R., a former coworker, related that she overheard an attorney use profanity to describe her. Appellant told her in June 2015 that an attorney censured her for failing to answer her telephone over a weekend when she was incapacitated by kidney stones. K.R. related other events that appellant had told her had occurred.

On June 19, 2017 appellant submitted a timeline of events that she maintained demonstrated a hostile work environment. She told W.H. in January 2012 that she did not have cash to give witnesses and asked to be removed from grand jury coordination. After auditors asked appellant about expenditures she was moved to the fifth floor. She again described her altercation with W.H. in June 2012 and noted that he had changed an answer on her evaluation report regarding whether there was enough staff in her position. In January 2013 she missed a weekend telephone call because the battery in the telephone was dead. Subsequently, W.H. changed her performance plan to require that she had to always be available. In August 2013 he became angry when appellant missed a call when she was at lunch. W.H. did not want her to be in court with victims. An administrative officer had her medical information on her desk. J.V. yelled at her for not being in court October 29, 2014 when she had been in the room where he told her to go. In December 2014 three trials were scheduled with over 200 witnesses. In February 2015 an administrative officer told her to falsify her timesheet and an attorney asked her to give cash to witnesses for living expenses. Appellant received e-mails on August 28 and September 4, 2015 reminding her to be available at all times even after hours.

Appellant submitted copies of performance work plans.

On June 13, 2017 the employing establishment challenged appellant's claim, contending that she had alleged administrative and personnel matters, and harassment. It maintained that she was not required to perform work 24 hours a day all year, but instead to ensure the needs of witnesses regardless of the hour.

OWCP received partly redacted internal employing establishment e-mails on June 22, 2017. In an e-mail dated July 22, 2015, J.G. proposed that appellant be allowed to respond to after-hours calls within one hour unless quicker action was required. In a July 22, 2015 response, M.R. asked whether that meant that appellant had to keep her telephone with her and check it 24/7.

By decision dated August 24, 2017, OWCP's hearing representative affirmed the September 14, 2016 decision, finding that appellant had not established a compensable employment factor.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence 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.[6] 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.[7]

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*,[8] 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.[9] 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.[10]

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.[11] Mere perceptions of harassment are not compensable under FECA.[12]

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[5] *Supra* note 3.

[6] *G.G.*, Docket No. 18-0432 (issued February 12, 2019); *Gary J. Watling*, 52 ECAB 278 (2001).

[7] *C.S.*, Docket No. 19-0116 (issued January 10, 2020); *B.Y.*, Docket No. 17-1822 (issued January 18, 2019).

[8] 28 ECAB 125 (1976).

[9] *See M.C.*, Docket No. 18-1354 (issued April 2, 2019); *G.R.*, Docket No. 18-0893 (issued November 21, 2018).

[10] *Supra* note 8.

[11] *S.L.*, Docket No. 19-0387 (issued October 1, 2019); *S.B.*, Docket No. 18-1113 (issued February 21, 2019).

[12] *Id*.

An employee's emotional reaction to administrative or personnel matters generally falls outside of FECA's scope.[13] Although related to the employment, administrative and personnel matters are functions of the employer rather than the regular or specially assigned duties of the employee.[14] In determining whether the employing establishment has erred or acted abusively in discharging its administrative or personnel responsibilities, the Board will examine the factual evidence to determine whether it acted reasonably.[15]

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.[16] 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.[17]

ANALYSIS

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

Appellant primarily attributed her emotional condition to the requirement that she remain on call after hours beginning in 2013. She related that she was expected to respond immediately even when she was sick or on vacation. The employing establishment confirmed that appellant was required to be on call. On August 4, 2016 it advised that it had denied her request to be taken off on-call status after hours, on weekends, and when she was on leave. In an August 5, 2016 statement, J.G., her supervisor, indicated that appellant was expected to meet all witness needs after hours and on weekends, noting that her 2013 performance plan required her to ensure availability after hours, weekends, and holidays. He advised that subsequent performance plans instructed her to provide reasonable availability. In responding to appellant's request for reasonable accommodation, J.G. proposed limiting after hours contact, if possible, to before 9:00 p.m. and allowing her one hour to respond to after-hours calls and e-mails.

As discussed, when a disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.[18] Appellant's job duties included being on call after hours to respond to the needs of witnesses. As she attributed her emotional condition, in part, to the stress of trying to meet the

[13] *D.W.*, Docket No. 19-0449 (issued September 24, 2019); *Thomas D. McEuen*, 41 ECAB 387 (1990).

[14] *Id*.

[15] *F.V.*, Docket No. 19-0006 (issued September 19, 2019).

[16] *See R.B.*, Docket No. 19-0434 (issued November 22, 2019); *O.G.*, Docket No. 18-0359 (issued August 7, 2019).

[17] *Id*.

[18] *See M.R.*, Docket No. 17-1803 (issued February 8, 2019).

duties of her position, she has met her burden of proof to establish a compensable factor of employment.[19]

Appellant further maintained that her workload had increased, which combined with constantly being on call, exacerbated her condition causing severe abdominal pain and continuous diarrhea. She described her work duties, noting that her physical symptoms were controllable until January 2012, when she had to perform grand jury coordination for two weeks in addition to her regular job. She had 470 open cases in 2014 and, in December 2014, three trials were scheduled with over 200 witnesses for whom she was responsible. The Board has held that overwork is a compensable factor of employment if appellant submits sufficient evidence to substantiate this allegation.[20] Thus, the Board finds that she has established overwork as a compensable factor of employment.[21]

Appellant also attributed her stress to management providing conflicting instructions regarding her work duties, assigning her paralegal work without explaining the duties, requiring her to write two job justifications, marking her down on a performance assessment, discussing her medical condition, refusing her request for help and training, denying her request for reasonable accommodation, and asking her to provide money to witnesses. The Board has held that 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.[22] However, the Board has also 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.[23]

The Board finds that appellant has not submitted sufficient evidence to establish error or abuse by the employing establishment in an administrative matter. There is no corroborating evidence, such as a final determination from an administrative body, showing that the employing establishment committed error or abuse.[24] Although appellant expressed dissatisfaction with the actions of her superiors, the Board has held that mere dislike or disagreement with certain supervisory actions will not be compensable absent error or abuse on the part of the supervisor.[25] As she has not substantiated error or abuse by the employing establishment, she has not established a compensable employment factor with respect to administrative or personnel matters.[26]

[19] *J.K.*, Docket No. 19-0720 (issued November 21, 2019); *Lillian Cutler*, *supra* note 8.

[20] *W.F.*, Docket No. 18-1526 (issued November 26, 2019); *J.E.*, Docket No. 17-1799 (issued March 7, 2018).

[21] *Id*.

[22] *T.L.*, Docket No. 18-0100 (issued June 20, 2019); *Thomas D. McEuen*, *supra* note 13.

[23] *S.K.*, Docket No. 18-1648 (issued March 14, 2019); *William H. Fortner*, 49 ECAB 324 (1998).

[24] *See T.S.*, Docket No. 19-0164 (issued November 13, 2019).

[25] *T.C.*, Docket No. 16-0755 (issued December 13, 2016).

[26] *T.S.*, *supra* note 24.

Appellant additionally contended that she experienced harassment and discrimination by management and coworkers. Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.[27] A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.[28]

Appellant related that W.H. became angry with her in June 2012 when she questioned him about an office move and subsequently harassed her and created a hostile work environment such that she feared for her job. She additionally maintained that in October 2014 an attorney yelled at her and was physically intimidating. Appellant, however, has not submitted sufficient evidence corroborating her allegations. While a witness statement provides some support for her contention that a coworker used profanity regarding her, and that attorneys would yell at her, they fail to describe an incident that would rise to the level of harassment or verbal abuse.[29] Furthermore, J.G. denied appellant's allegations of harassment. The Board finds, therefore, that appellant has not established a compensable work factor with respect to her allegations of harassment.[30]

As appellant has established compensable factors of employment namely overwork and being on call, OWCP must base its decision on an analysis of the medical evidence. The case will therefore be remanded to OWCP to analyze and develop the medical evidence.[31] After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[27] *S.S.*, Docket No. 17-0959 (issued June 26, 2018); *Doretha M. Belnavis*, 57 ECAB 311 (2006).

[28] *Id*.

[29] The Board has held that, while verbal abuse may constitute a compensable factor of employment, not every statement uttered in the workplace will be covered by FECA. Being spoken to in a loud or harsh tone does not in itself constitute verbal abuse or harassment. *T.Y.*, Docket No. 19-0654 (issued November 5, 2019).

[30] *W.F.*, *supra* note 20.

[31] *C.S.*, Docket No. 19-0116 (issued January 10, 2020); *L.Y.*, Docket No. 18-1619 (issued April 12, 2019).

ORDER

IT IS HEREBY ORDERED THAT the August 24, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 29, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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