United States Department of Labor
Employees' Compensation Appeals Board

J.Z., Appellant	)	
and	)	**Docket No. 19-1156**
	)	**Issued: July 28, 2020**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Manchester, NH, Employer	)	

Appearances:
Marc J. Levy, 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 April 26, 2019 appellant, through counsel, filed a timely appeal from an April 11, 2019 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 a stress-related condition in the performance of duty, as alleged.

[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

This case has previously been before the Board.[3] The facts and circumstances as presented in the prior appeal are incorporated herein by reference. The relevant facts are as follows.

On October 27, 2015 appellant, then a 38-year-old mine safety and health inspector, filed an occupational disease claim (Form CA-2) alleging that his life was threatened by a mine operator in 2014. He alleged that he developed seizures as a result of the continued threats on October 22, 2015.

An incident report dated October 22, 2015 revealed that, on that date, the fire department was dispatched to a hotel because appellant was having difficulty breathing. When they arrived appellant was noted to be staggering and staring off into space. His mental status improved and he reported that he was in town for his federal employment and that he had a history of seizures. Appellant had arrived at the hotel early, sat in the parking lot reading a book, and awoke in handcuffs, confused. The fire department transported him to the emergency department. On October 22, 2015 appellant was treated in an emergency room for seizure disorder by Dr. Amber Richards, a physician Board-certified in emergency medicine.

On October 30, 2015 the employing establishment controverted appellant's claim, noting that he had a seizure while on government travel. Appellant was sitting in his car at the hotel when he experienced the seizure. The employing establishment reported that he had a history of seizures and was on anti-seizure medication. As such, it argued that the seizure activity was not causally related to appellant's employment.

Appellant subsequently submitted a copy of the Bill of Rights to the U.S. Constitution. He also provided a May 28, 2015 Maine newspaper article reporting that M.L., the mine operator he alleged was threatening him, was accused of reckless conduct with a firearm after he allegedly fired a gun at an all-terrain vehicle rider. Appellant provided internet comments from "Skidddah" alleging that appellant had put his sand pit out of business. "Skidddah" had asserted that appellant had failed to inspect three other sand pits within the immediate area. He also asserted that inspectors would be met with resistance and noted, "I will protect my property with my 2nd amendment right, to defend my 4th and 8th amendment rights."

In development letters dated November 9, 2015, OWCP requested additional factual and medical evidence in support of appellant's occupational disease claim from him and the employing establishment. It afforded both parties 30 days to respond.

Appellant submitted medical evidence regarding a September 16, 2014 motor vehicle accident in which he collided with a concrete barrier. He was apparently knocked unconscious and was diagnosed with unspecified concussion and postconcussive syndrome. On November 24, 2014 appellant's physician, Dr. Oscar G. Bernal, a Board-certified neurologist, noted that appellant had a petite mal seizure disorder in childhood and may have had a seizure three weeks prior while sitting in a parked car. On January 22, 2015 he noted that appellant has postconcussive syndrome and reported a medical history of grand mal seizure in 2015.

[3] *Order Remanding Case*, Docket No. 18-0428 (issued February 21, 2019).

In an undated report, appellant's attending physician Dr. Dwight Smith, an osteopath, reported that appellant experienced a state of emotional distress since learning of a threat on his life from a mine operator in the state of Maine. Appellant reported his concerns over the lack of response by the employing establishment. He noted that the individual who threatened his life was also the subject of an investigation for shooting at a trespasser within the pit. Dr. Smith opined that emotional stress and lack of sleep could trigger grand mal seizures or generalized seizure attacks. He attributed appellant's seizures on October 22, 2015 to his work activities.

In a letter dated November 16, 2015, the employing establishment reported that appellant was never verbally threatened nor was a restraining order issued. A YouTube video was taken to the Federal Protection Service (FPS) and was determined not to be a threat.

Appellant responded to OWCP's request for factual information on March 22, 2016. He asserted that he was claiming an emotional condition which led to seizure activity at his temporary duty station. Appellant asserted that the threat was made on social media on March 15, 2015 and that he reported the threat to his supervisor, R.D., who was also named in the threat. He alleged that the mine operator, M.L., admitted to using the screen name "Skidddah." Appellant contended that M.L. continued to send letters to the employing establishment, but that, when appellant asked for these letters, the employing establishment reported that they had been removed. When he returned to work, he alleged that the comments made by M.L. were well known and discussed by various mine operators during his inspections. Beginning October 27 and 28, 2015, the employing establishment performed a compliance assistance visit at M.L.'s mine which appellant asserted was in violation of employing establishment policy. Appellant alleged that the employing establishment decided to work with M.L. rather than follow required steps. He asserted that he experienced increased anxiety when starting inspections due to a lack of protection from harassment. Appellant asserted that the employing establishment removed all correspondence from M.L. and also removed appellant's computer.

By decision dated May 13, 2016, OWCP denied appellant's emotional condition claim. It found that he had not provided the necessary factual information to support his allegations of threats or harassment by M.L. OWCP noted that appellant did not provide any documentation of threatening letters from M.L. It concluded that he had not provided sufficient factual evidence to establish that M.L. threatened his life and, thus, there was no factual basis for his claim.

The employing establishment subsequently provided several letters from M.L. On November 25, 2013 M.L. contested two safety citations. He alleged that there were two sand pits in his town that had never had an employing establishment inspector. M.L. asserted that he was bitter. On February 26, 2014 he protested two fines and further asserted that he would no longer allow inspectors on his property. M.L. noted that other sand pit operators in the area were not inspected and cited. In an undated letter addressed to "whoever runs this terrorist organization," he, alleged that he had been bullied and mentioned appellant by name. M.L. alleged that the employing establishment was terrorizing him and threatened to come to the employing establishment and demand answers. He disagreed with the paperwork required and asserted all he had received was "Just fines from you terrorist [p****s]!" M.L. mentioned the fine from appellant as a consequence of standing on a concrete block while greasing his machine and asserted that appellant made it seem that he was standing on a 10-story building. M.L. concluded, "One last time, if I don't get a response from you real soon I will take a day off from my other job and drive to your office, and do what I have to do! I will defend and protect my rights and property at any

cost!" He signed this note, "[M.L.,] one pissed off son of a [b***h]!!!!" In a final note, M.L. again asked why he was inspected and fined while the other sand pits in his town were not.

On March 24, 2015 appellant's supervisor, R.D., contacted the FPS regarding an online threat that he became aware of in the previous week. He noted that FPS did not feel that the information posted was a direct threat. In an e-mail dated November 17, 2015, appellant's supervisor discussed the result of the compliance assistance visit with M.L. on November 12, 2015. He noted that the meeting was concluded with a handshake and M.L.'s agreement to comply with the notices issued on January 27, 2015.

R.D., appellant's supervisor, also noted that appellant had performed inspections on M.L.'s mine on July 17, 2013 which included citations and orders with no adverse comment.

In an e-mail dated May 24, 2016, M.T., the area commander of the FPS, noted reviewing the materials from M.L., and opined that these comments did not reach the level of a direct threat and would not be considered to meet the threshold for assaulting, resisting, or impeding federal employees.

On June 10, 2016 appellant requested reconsideration of the May 13, 2016 decision. He provided statements from witnesses who had read some portion of the letters from M.L. and found them to be threatening. Appellant submitted a statement asserting that the comment from "Skidddah" or M.L. was placed on March 10, 2015 and that he became aware of the comment in late March or early April 2015. Immediately, upon seeing the comment, he felt threatened. Appellant was confident that M.L. made the remark, found that the tone was extreme anger, and noted that M.L. referenced protecting his property and his right to bear arms. He alerted his supervisor, R.D., who was also mentioned in the comment. R.D. then alerted the FPS. M.L. continued to contact the employing establishment through telephone calls and letters. Appellant identified the undated letter from M.L. as delivered to the employing establishment in late September 2015. He noted that, in October 2015, R.D. informed him that the employing establishment had decided to engage in a compliance assistance visit with M.L. rather than taking legal action against him. Shortly, thereafter, appellant experienced what he and his physicians believed was a stress-induced seizure event on October 22, 2015.

The employing establishment responded on July 18, 2016 and noted that M.L. contacted the employing establishment by telephone on two occasions, neither of which were aggressive.

By decision dated October 14, 2016, OWCP denied modification of the May 13, 2016 decision, finding that appellant had not established a compensable factor of employment as causing or contributing to his diagnosed emotional condition.

On October 28, 2016 appellant requested reconsideration of the October 14, 2016 merit decision. He resubmitted the information provided by the employing establishment as well as additional medical evidence. Appellant again provided the undated letter from M.L. He also submitted e-mails from R.D. noting that he had provided a copy of M.L.'s photograph on September 29, 2015 and included the article concerning M.L. firing a gun on September 28, 2015.

By decision dated August 18, 2017, OWCP denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a). It found that he had not submitted any new and relevant evidence in support of his request for reconsideration.

Appellant appealed to the Board on December 26, 2017. In a February 21, 2019 order, the Board set aside the August 18, 2017 decision, finding that OWCP's delay in issuing a decision regarding his October 28, 2016 request for reconsideration effectively precluded him from appealing OWCP's most recent merit decision to the Board. The Board remanded the case to OWCP for a merit decision.[4]

On remand, by decision dated April 11, 2019, OWCP denied modification of the October 14, 2016 decision, again finding that appellant has not established that his life was directly threatened and, therefore, has not established a compensable factor of employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] 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.[5] 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.[6]

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 evidence establishing that the accepted compensable employment factors are causally related to the diagnosed 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

[4] *Id*.

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

[6] 20 C.F.R. § 10.115(e); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *T.O.*, Docket No. 18-1012 (issued October 29, 2018); *Michael E. Smith*, 50 ECAB 313 (1999).

[7] *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).

[8] 28 ECAB 125 (1976).

[9] *G.R.*, Docket No. 18-0893 (issued November 21, 2018).

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]

Perceptions and feelings, alone, are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting his or her allegations with probative and reliable evidence.[11] 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.[12]

ANALYSIS

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

OWCP denied appellant's emotional condition claim, finding that he had not established a compensable employment factor. The Board must, therefore, initially review whether the alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

Regarding appellant's allegation that M.L. threatened him, the Board has recognized that verbal and written threats when sufficiently detailed by the claimant and supported by evidence, may constitute compensable employment factors.[13] In the instant case, appellant provided copies of internet comments establishing that M.L. wrote that inspectors would be met with resistance and that he would protect his property rights with his right to bear arms. The employing establishment also provided letters from M.L. in which he asserted that he would no longer allow inspectors on his property, that appellant had bullied and harassed him, and that the employing establishment was terrorizing him. M.L. further asserted that he was going to drive to the employing establishment and defend and protect his rights and property "at any cost" and "do what [he] had to do."

The Board finds that M.L.'s verbal and written statements rise to the level of a credible bodily threat directed at appellant.[14] Appellant has established with corroborating evidence that specific verbal and written threats were made against him.[15] The Board has recognized the compensability of threats, when the factual aspects of such claimed threats are established.[16]

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

[11] *D.W.*, Docket No. 19-0449 (issued September 24, 2019); *supra* note 9.

[12] *V.R.*, Docket No. 18-1179 (issued June 11, 2019); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[13] *J.W.*, Docket No. 17-0999 (issued September 4, 2018).

[14] *See M.R.*, Docket No. 17-1803 (issued February 8, 2019) (finding that a statement made directly to the claimant that he would be "among the nonliving" was a credible bodily threat directed at the claimant).

[15] *But see M.F.*, Docket No. 17-1649 (issued July 20, 2018) (verbal disagreements without a specific bodily threat did not sufficiently affect the conditions of employment to constitute a compensable factor of employment).

[16] *See C.O.*, Docket No. 07-1290 (issued December 6, 2007) (defacing a time card with KKK was a compensable factor of employment.); *but see Leroy Thomas, III*, 46 ECAB 946, 954 (1995) (a joking threat was not compensable).

For the foregoing reasons, the Board finds that appellant has established a compensable factor of employment under FECA. OWCP did not analyze or develop the medical evidence given its finding that there were no compensable employment factors. The case will therefore be remanded to OWCP for this purpose.[17] After any further development as deemed necessary, it shall issue a *de novo* decision on the issue of whether appellant has a stress-related condition due to the compensable factor of his federal employment.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 11, 2019 decision of the Office of Workers' Compensation Programs is set aside and remanded for further proceedings consistent with this decision of the Board.

Issued: July 28, 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

[17] *K.A.*, Docket No. 14-0017 (issued August 4, 2014); *Robert Bartlett*, 51 ECAB 664 (2000).