

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

C.R., Appellant)	
)	
and)	Docket No. 19-1721
)	Issued: June 17, 2020
U.S. POSTAL SERVICE, LITTLE ROCK)	
PROCESSING & DISTRIBUTION CENTER,)	
Little Rock, AR, Employer)	
)	

Appearances:
Paul Felser, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 14, 2019 appellant, through counsel, filed a timely appeal from a June 17, 2019 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 while in the performance of duty on September 29, 2017, as alleged.

FACTUAL HISTORY

On October 25, 2017 appellant, then a 67-year-old mail handler equipment operator, filed a traumatic injury claim (Form CA-1) alleging that on September 29, 2017 he developed “emotional stress” as a result of being fired and having the postal inspectors and local police called on him while in the performance of duty. He stopped work on October 24, 2017.

In an October 25, 2017 statement, appellant noted that on September 29, 2017 he had a meeting at 8:00 a.m. and during the meeting protested disparate treatment by kneeling on one knee. He noted that M.E., a supervisor for distribution operations, ended the meeting abruptly. Appellant indicated that 10 minutes later M.E. called him back into the office and told him to punch off the clock because he was fired for protesting in the meeting. He reported that he refused to punch off the clock so M.E. called the local police and postal inspectors. Appellant explained that since that incident he had not been able to sleep or eat and had nightmares, constipation, headaches, anxiety, anger, and impotency. He noted that his doctor had informed him that he had post-traumatic stress disorder (PTSD). Appellant indicated that he was returned to work because the employing establishment had violated his constitutional rights, but he was put in an environment where the “big guns” were watching him.

In an October 24, 2017 note, Dr. Derek Lewis, a Board-certified family practitioner, requested that appellant be excused from work from October 24 through November 7, 2017 due to a medical illness.

In a development letter dated October 30, 2017, OWCP advised appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for completion. OWCP also asked appellant to provide witness statements or evidence from anyone who could verify his allegations and explain how the incidents had caused or contributed to his condition. It afforded him 30 days to provide the necessary information.

In a separate letter, also dated October 30, 2017, OWCP requested that the employing establishment provide details regarding appellant’s claim and whether they concurred with his allegations.

Appellant submitted a November 6, 2017 work status note and attending physician’s report (Form CA-20) by Dr. Lewis who noted a September 29, 2017 date of injury and described that a “traumatic event triggered [patient’s] PTSD.” He explained that appellant was arrested and dragged out of his workplace because he “took a knee.”

By decision dated November 30, 2017, OWCP denied appellant’s traumatic injury claim finding that the evidence of record was insufficient to establish that he actually experienced the September 29, 2017 incident, as alleged, and therefore had not established the factual component

of fact of injury. It noted that he had failed to respond to OWCP's October 30, 2017 development letter or complete the attached questionnaire.

Following the decision, OWCP received a November 15, 2017 statement from appellant's supervisor, M.E. M.E. explained that on September 28, 2017 appellant was on the clock eating breakfast in the breakroom when he instructed appellant to load the "northwest ark truck." He alleged that appellant began to argue with him and he informed appellant that if he did not follow instructions then he would end appellant's tour. M.E. noted that on September 29, 2017, during the daily five-minute "stand up meeting" at the beginning of the tour, appellant knelt down in protest and extended his left arm straight up in the air with his fist clenched. He indicated that he went back to his office and sent two e-mails. M.E. reported that after approximately 10 minutes he requested that appellant come into his office. He noted that he informed appellant that he was giving him an "Official Discussion" concerning his actions during the meeting. M.E. asserted that appellant threatened to "hit," "beat," and "murder" him. He indicated that he told appellant that he was ending his tour and that he needed to leave. M.E. explained that when appellant refused to leave, he contacted the local police department and the postal inspectors.

On December 14, 2017 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.³ He also submitted his completed development questionnaire, wherein he noted that on September 28, 2017 he was verbally assaulted by M.E. who told him to shut up or else he would be fired. Appellant indicated that after the incident he was too nervous and upset to perform his duties as a forklift driver. He also described that on September 29, 2017 he was put in nonpay status because he knelt down during a meeting in protest of disparate treatment. Appellant noted that the local police and postal inspectors were called and he was escorted out of the building. He reported that the postal inspectors came to his house later that same day to retrieve his keys and badge, which humiliated him in front of his neighbors. Appellant asserted that he experienced nightmares, sleepless nights, panic attacks, and anger attacks following the September 29, 2017 events.

Appellant also submitted additional evidence, including witness statements. In an undated handwritten statement, J.M., a tour II group leader, stated that during a stand-up talk by M.E. on September 29, 2017 he observed appellant kneel down on one knee and raise his hand in protest at the way that he had been treated. He indicated that approximately 20 minutes later M.E. stormed out of his office toward appellant, who was driving a forklift, and ordered him off the clock. J.M. noted that he did not hear appellant threaten or make any kind of gesture toward M.E.

In an October 2, 2017 e-mail, A.T., an OSS In-Plant support, indicated that on September 28, 2017 M.E. informed him that he had a problem with appellant and that if appellant did anything else then he would put appellant off the clock. He explained that around 9:30 a.m. he observed M.E. lean into appellant's face to speak to him and that appellant did not appear to like what M.E. had said. A.T. confirmed that this was not the first time that M.E. had singled out a certain individual because M.E. thought that individual had been on break more than the allotted

³ In a December 27, 2017 letter, appellant requested to withdraw his request for an oral hearing. By decision dated December 28, 2017, OWCP's Branch of Hearings and Review granted appellant's request to withdraw his hearing request.

time. He explained that most of the issues concerning employees at the employing establishment postal annex were a result of M.E.

In an October 3, 2017 handwritten statement, T.B. indicated that on “October 28, 2017” M.E. entered the breakroom and instructed appellant to get out of the breakroom and onto the workroom floor. She explained that from her perspective as a supervisor his behavior was very unprofessional and created a hostile work environment. T.B. confirmed that on “October 29, 2017” appellant knelt in protest during a meeting without saying a word.

In an October 3, 2017 statement, J.M. explained that on September 28, 2017 he was in the breakroom when he observed M.E. yell at appellant to go to work. He indicated that M.E. yelled at appellant to “shut up” or he would put him off the clock and fire him right then. J.M. stated that he thought M.E.’s behavior was very unprofessional and should not be tolerated in the employing establishment.

OWCP received an employing establishment standard grievance form dated September 28, 2017 by appellant. Appellant described that on that date M.E. yelled at him in the breakroom in front of several employees and threatened to fire him. He asserted that he felt threatened by M.E.’s racial overtone in his words and that he feared for his safety, his job, and his life. Appellant also alleged that M.E. had continually stalked and harassed him since a previous altercation.

Appellant also submitted an October 3, 2017 standard grievance form which described an incident when M.E. informed the postal inspector that appellant had threatened to kill him. The standard grievance form noted that a witness, J.M., had informed the postal inspectors that appellant had not made any threatening motion or said that he was going to kill M.E.

Appellant submitted an agreement to mediate letter dated December 5, 2017. He also provided a December 5, 2017 no agreement letter, which indicated that appellant and M.E. had appeared for their scheduled mediation, but they were unable to find a resolution to their dispute.

On January 3, 2018 appellant requested reconsideration and submitted additional evidence.

In a December 21, 2017 narrative report, Dr. Kenneth Counts, a clinical psychologist and neuropsychologist, indicated that appellant was experiencing low energy levels, anxiety, and worry and was having difficulty with concentration, memory, and sleeping at night. He diagnosed adjustment disorder with mixed anxiety and depressed mood. Dr. Counts opined that the cause of his current condition was the trauma that he experienced at work and being unable to continue to work and suffering both financially and emotionally.

OWCP also received a September 29, 2017 letter from M.E. to appellant, which advised appellant that he had been placed on emergency nonpay, off-duty status due to allegations of improper conduct and that the allegations would be pending an investigation. An October 13, 2017 letter from the employing establishment to appellant also informed him that an investigative interview was scheduled for October 17, 2017.

By decision dated April 5, 2018, OWCP modified the November 30, 2017 decision finding that the factual evidence of record had established that the September 29, 2017 events had

occurred, as alleged. However, it denied appellant's claim finding that he had not established a compensable employment factor as the cause of his alleged emotional condition.

On April 4, 2019 appellant, through counsel, requested reconsideration.

Appellant submitted additional evidence in support of his reconsideration request. In a statement dated January 9, 2019, he contended that the employing establishment took two individuals from a three-person job and asked him to do the work of three. Appellant explained that he worked under duress and the daily pressure to perform the job of three men or he would be fired. He also asserted that M.E. bullied, harassed, and stalked him daily to the point that he now suffered from anxiety, depression, PTSD, and depressive disorder. Appellant further explained that while low mail volume affected the mail clerks, it had not affected a mail handler's job of loading trucks, bulk mail containers (BMC), and pallets because the same amount of pallets were loaded onto a truck no matter how much mail is on them.

In an October 24, 2017 statement, J.M., explained that he was a mail handler and union steward and asserted that M.E. abused his power daily from August to September 2017 to threaten, bully, and harass appellant into performing the work of three individuals. He explained that he had advised appellant to file a grievance with the postal inspector because he saw appellant suffer from depression, anxiety, and panic attacks from the duress and pressure from M.E. J.M. indicated that he was present on September 29, 2017 when appellant knelt down on one knee during a meeting and described M.E.'s subsequent actions towards appellant. He explained that M.E. became agitated and called the local police and postal inspectors. J.M. reported that he was also present when the postal inspectors came to appellant's home. He noted that appellant was very upset and had a panic attack.

In an October 24, 2017 letter, J.W., appellant's coworker at the employing establishment's annex, indicated that he worked with appellant and had observed him being ordered to perform the work of two or three workers due to downsizing of the workforce and excessing of jobs. He explained that the low mail volume had not affected appellant's job in loading trucks because appellant still had to load the same amount of BMC's, wires, pallets, and cages whether or not they were full. J.W. reported that M.E. had threatened, bullied, and stalked appellant. He observed that appellant started having panic attacks, anxiety, depression, and could not function due to the duress and pressure from M.E.

OWCP also received additional progress notes dated March 15 to June 18, 2018 by Dr. Counts who reported a diagnosis of adjustment disorder with mixed anxiety and depressed mood. In narrative reports dated May 24 to November 14, 2018, Dr. Counts noted that appellant had felt bullied and threatened, and the work environment was hostile. He opined that appellant had significant job-related stress that caused a deteriorating effect on his mood, thought, and behavior. Dr. Counts reported that appellant's work-related injury had not resolved nor improved and that appellant was unable to work at that time due to his mood disorder.

Appellant submitted a February 23, 2016 settlement agreement. It specifically noted that, by entering into this settlement agreement, neither party had waived its respective position. A February 23, 2016 letter also noted that both parties had mutually agreed that appellant would be paid back for 96 hours.

OWCP received an August 10, 2017 letter from the employing establishment to appellant, which informed him that due to a loss of mail volume a job held by a senior employee was abolished and he needed to submit an in-section bidding sheet.

By decision dated June 17, 2019, OWCP denied modification of the April 5, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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.⁸ 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.⁹ On the other hand, the disability is not covered when 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.¹⁰

⁴ 5 U.S.C. § 8101 *et seq.*

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); *see T.O.*, Docket No. 18-1012 (issued October 29, 2018); *see Michael E. Smith*, 50 ECAB 313 (1999).

⁷ *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).

⁸ *T.G.*, Docket No. 19-0071 (issued May 28, 2019); *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁹ *L.H.*, Docket No. 18-1217 (issued May 3, 2019); *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁰ *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Gregorio E. Conde*, 52 ECAB 410 (2001).

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.¹¹ 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.¹² 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.¹³

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.¹⁴ Mere perceptions of harassment, retaliation, or discrimination are not compensable under FECA.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 compensable factors of employment and may not be considered.¹⁶ If an employee does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim. The claim must be supported by probative evidence.¹⁷ If a compensable factor of employment is substantiated, OWCP must base its decision on an analysis of the medical evidence which has been submitted.¹⁸

ANALYSIS

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

Appellant has alleged that he sustained an emotional condition as a result of a number of employment incidents and work conditions. OWCP denied his emotional condition claim finding that he had not established a compensable employment factor. The Board must, therefore, initially

¹¹ See *G.R.*, Docket No. 18-0893 (issued November 21, 2018); *Andrew J. Sheppard*, 53 ECAB 170-71 (2001), 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

¹² See *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *D.R.*, Docket No. 16-0605 (issued October 17, 2016); *William H. Fortner*, 49 ECAB 324 (1998).

¹³ *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁴ *T.G.*, Docket No. 19-0071 (issued May 28, 2019); *Marlon Vera*, 54 ECAB 834 (2003).

¹⁵ *Id.*; see also *Kim Nguyen*, 53 ECAB 127 (2001).

¹⁶ *Y.W.*, Docket No. 19-1877 (issued April 30, 2020); *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁷ *L.S.*, Docket No. 18-1471 (issued February 26, 2020); *Charles E. McAndrews*, 55 ECAB 711 (2004).

¹⁸ *M.A.*, Docket No. 19-1017 (issued December 4, 2019); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

review whether these alleged incidents are covered employment factors under the terms of FECA.¹⁹

Appellant has alleged that he was overworked as he was required to perform the work of two or three individuals. The Board has held that overwork, when substantiated by sufficient factual information to corroborate appellant's account of events may be a compensable factor of employment.²⁰ Appellant explained that the employing establishment took away two men from a three-man job and he was under the daily pressure to perform the job of three men. He further indicated that, while low mail volume affected the mail clerks, he was still required to load the same number of trucks, mail containers, and pallets onto a truck. Appellant substantiated his account by statements of his coworker, J.W., who reported that he had observed appellant being ordered to perform the work of two or three men due to downsizing in the workforce. Moreover, an August 10, 2017 letter by the employing establishment also indicated that a more senior job position was eliminated. OWCP had determined that the fact that a job position was eliminated due to lower mail volume showed that appellant was not overworked. The Board notes, however, that appellant submitted supportive evidence that the elimination of staff resulted in overwork as the same number of containers were moved during the shift, despite an alleged reduction in overall volume of mail. Furthermore, both appellant and his coworkers have explained that a lower mail volume would not affect appellant's duties operating a fork lift as he was still required to move the same amount of pallets and containers.

The Board finds that appellant has met his burden of proof to establish the compensable factor of overwork.

Appellant has also attributed his emotional stress to a hostile work environment alleging that he had been harassed, bullied, and threatened by his supervisor, M.E. He specifically described events that occurred at work on September 28 and 29, 2017. Appellant reported that on September 28, 2017 he was in the breakroom when M.E. yelled at him in front of everyone to get back to work. He indicated that M.E. told him to shut up or else he would be fired.

Appellant submitted several witness statements regarding the pattern of harassment and verbal abuse from M.E. Regarding the September 28, 2017 incident in the breakroom, OWCP received statements from A.T. and T.B. who noted that on that date, M.E. entered the breakroom and instructed appellant to go onto the workroom floor. A.T. claimed that this was not the first time that M.E. had singled out a certain individual and indicated that most of the issues concerning employees at the postal annex stemmed from M.E.'s actions. In an October 3, 2017 statement, J.M. also explained that on September 28, 2017 he was in the breakroom when he observed M.E. yell at appellant to "shut up" and get to work or else be fired. Both T.B. and J.M. explained that they found M.E.'s behavior to be unprofessional and created a hostile work environment.

Appellant further described that on September 29, 2017 he knelt down on one knee during an 8:00 a.m. meeting in protest of the disparate treatment. He indicated that M.E. abruptly ended

¹⁹ *Supra* note 16.

²⁰ *W.F.*, Docket No. 18-1526 (issued November 26, 2019); *I.P.*, Docket No. 17-1178 (issued June 12, 2018); *William H. Fortner*, 49 ECAB 324 (1998).

the meeting, subsequently called appellant to his office, and told him to punch off the clock due to improper conduct during the meeting. Appellant explained that, when he refused to leave, M.E. called the local police and postal inspectors to put him out of the building. He further related that when he got home postal inspectors came to his house to obtain his keys and badge.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from the employee's performance of his or her regular duties, these could constitute employment factors.²¹ However, for harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did in fact occur.²² Verbal altercations and difficult relationships with supervisors/managers, when sufficiently detailed and supported by the record, may constitute compensable factors of employment. However, this does not imply that every ostensibly abusive or threatening statement uttered in the workplace will give rise to coverage under FECA.²³ A claimant must establish a factual basis for his or her allegations that the harassment occurred with probative and reliable evidence.²⁴

Regarding the September 29, 2017 incident, appellant submitted statements from J.M. who explained that he had observed M.E. threaten, bully, and harass appellant from August to September 2017. He noted that he was present on September 29, 2017 when appellant knelt down in protest during a meeting and observed that M.E. became agitated and called the local police and postal inspectors. J.M. noted that appellant had not threatened anyone or made any kind of gesture toward M.E. He reported that he was also present when the postal inspectors came to appellant's home and observed that appellant was very upset and had a panic attack.

The evidence of record demonstrates that M.E.'s calling of the police and postal investigators on September 29, 2017 was part of his pattern of harassment and abusive behavior. Furthermore, the statements do not support M.E.'s version of the story. Thus, the Board finds that appellant has submitted reliable and supportive evidence corroborating M.E.'s abusive conduct and mistreatment of appellant on September 28 and 29, 2017 and his pattern of harassment.²⁵ Appellant, therefore, has established compensable employment factors with respect to these allegations of harassment and discrimination.

The Board finds that appellant has established compensable employment factors with respect to overwork and his allegations of harassment by M.E., his supervisor, regarding his actions on September 28 and 29, 2017. Thus, OWCP must base its decision on analysis of the medical opinion evidence with regard to causal relationship. The Board will therefore remand the case for OWCP to review the medical evidence as it relates to the accepted compensable factors

²¹ *Supra* note 11.

²² *Supra* note 12.

²³ *J.M.*, Docket No. 16-0717 (issued January 12, 2017), *Y.J.*, Docket No. 15-1137 (issued October 4, 2016); *L.M.*, Docket No. 13-0267 (issued November 15, 2013).

²⁴ *Supra* note 14.

²⁵ *See D.H.*, Docket No. 17-1529 (issued February 14, 2018); *see also E.M.*, Docket No. 16-1695 (issued June 27, 2017).

of employment.²⁶ Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 17, 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: June 17, 2020
Washington, DC

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

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

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

²⁶ See *T.Y.*, Docket No. 19-0654 (issued November 5, 2019); *T.F.*, Docket No. 12-0439 (issued August 20, 2012).