United States Department of Labor
Employees' Compensation Appeals Board

R.D., Appellant	)	
and	)	**Docket No. 19-0877**
	)	**Issued: September 8, 2020**
U.S. POSTAL SERVICE, CHARLOTTE MOTOR VEHICLE SERVICE FACILITY, Charlotte, NC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 18, 2019 appellant filed a timely appeal from a March 5, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

[1] Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated December 6, 2019, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0877 (issued December 6, 2019).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 13, 2018 appellant, then a 47-year-old motor vehicle service tractor trailer operator, filed an occupational disease claim (Form CA-2) alleging that he experienced stress and depression due to factors of his federal employment including numerous actions by management. He noted that he first became aware of his condition and its relation to his federal employment on June 1, 2018. Appellant further alleged that these actions aggravated his preexisting post-traumatic stress disorder (PTSD). He did not stop work.

In support of his claim, appellant submitted a September 2, 2016 memorandum from appellant to D.J., T.W, J.S., and C.B., employing establishment managers, which requested that "under the Rehabilitation Act of 1973" any communications from Supervisor D.J. be in writing. He noted that this included work requests, directives, and instructions. In support of his request, appellant noted that he was a disabled veteran and his disabilities must be accommodated.

Appellant also submitted a June 12, 2018 National Labor Relations Board charge filed against the employing establishment alleging acts of retaliation.

In a July 9, 2018 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to provide the necessary evidence. In a separate development letter of even date, it requested factual information from the employing establishment regarding his allegations.

OWCP subsequently received additional evidence. In an August 19, 2016 e-mail, appellant informed management that D.J. was "getting out of hand" which was aggravating his PTSD and causing him stress. He alleged that manager J.S. was lying for D.J. Appellant denied cursing or being aggressive towards D.J. as had been alleged. He asserted that he was subjected to retaliation as a union official and that he was a disabled veteran who was being mistreated and discriminated against.

In November 29 and December 19, 2016 reports, Dr. John Wheeler, a clinical psychologist, diagnosed PTSD and noted that appellant reported increased work stress.

In an August 25, 2017 report, Dr. Keith Logan, a Board-certified psychiatrist and neurologist, noted that he had treated appellant for a mood disorder and PTSD since May 2017.

Appellant, in February 7, 2018 e-mail, notified the employing establishment management that there were "very serious issues" with D.J. and immediate supervisors within his chain of command. He asserted that D.J. had lied about employees and engaged in harassment. Appellant claimed management had failed to act on complaints about D.J. even when there had been physical altercations caused by D.J.'s behavior. He asserted that D.J. made false statements and filed a police report as retaliation for his filing of an equal employment opportunity (EEO) complaint.

In an April 1, 2018 statement, appellant noted that on March 30, 2018 he was told that D.J. wanted to conduct an investigative interview with him.[3] He indicated that D.J. yelled at him. Appellant told D.J. that another supervisor could conduct the interview or he would respond to written questions, but D.J. continued the interview. He requested his time card to clock out and leave, but he could not as D.J. held his time card, which appellant asserted was attempting to hold him "hostage". Appellant acknowledged that when D.J. was near him, he commented "I see why your son acts like a woman, if I had a Dad like you I would be a MITCH too." Following this comment, D.J. informed appellant that he was on emergency placement and asked for appellant's badge, which appellant dropped at D.J.'s feet. Appellant was then placed in off-duty status with pay, effective March 29, 2018, as the result of an investigation into behavior deemed him injurious to himself or others.

OWCP thereafter received a number of witness statements relative to the alleged March 29, 2018 incident. The record contains an unsigned statement dated March 29, 2018 from T.F. to W.C.; an unsigned and undated note from E.I.; March 30, 2018 statements from T.K. and W.C.; and an undated statement from A.B. These witness statements generally note that there was an interaction between D.J. and appellant of March 29, 2018 in which D.J. was acting in a harassing manner and resulted in appellant's placement on emergency leave status. W.C. confirmed in his statement that appellant had stated something inappropriate to D.J. about a family member. T.F. noted that appellant informed D.J. of an agreement that he could not talk to appellant. T.K. noted that D.J.'s harassment had been ongoing. W.C. stated that D.J. made the only threating statement.[4]

In an April 10, 2018 note, Karen Clanton, a licensed professional counselor, reported that appellant was seen on December 20, 2017 due to stress and frustration with a coworker.

In a report dated April 16, 2018, Dr. Wheeler opined that appellant was disabled from work for an extended period due to PTSD and workplace stress.

On May 7, 2018 appellant was issued a notice of a 14-day suspension due to improper conduct. The suspension notice indicated that on March 29, 2018 he refused to meet with D.J. for an investigative interview, was abusive and very loud in front of coworkers, and verbally attacked D.J. in a very personal manner.

In May 10, 2018 e-mail correspondence to S.W., appellant discussed his 14-day suspension and contended that it was improper.

An undated statement from the appellant's union regarding the investigative interview noted he had not used the word "faggot" toward D.J.'s son during the investigative interview. The union alleged that in order to justify placing him on emergency placement that management made up this lie. It asserted that the issuance of a 14-day suspension was improper as it failed to follow progressive discipline and was issued without just cause, which violated management rules.

[3] While appellant indicated that the incident occurred on March 30, 2018, other evidence of record indicates a March 29, 2018 date.

[4] The record contains identical statements dated April 4, 2018 from various individuals concerning management's disparity in its issuance of discipline. The signatures are illegible.

Lastly, the union alleged that D.J.'s actions were intended to provoke appellant and there was a failure by management to honor appellant's reasonable accommodation request that any interaction with D.J. be in writing.

The record contains the first page of a July 9, 2018 report from Dr. Kamala L. Uzzell, a licensed counselor, noting appellant felt depressed, sad, and disengaged from his family due to mistreatment by managers at work.

By decision dated August 9, 2018, OWCP denied appellant's claim, finding that the evidence submitted was insufficient to establish that the employment events occurred as alleged.

In March 29, 2018 e-mail correspondence from D.J. to S.H., he asserted that on that morning he had requested interviews with appellant and W.C. regarding a March 23, 2018 incident involving L.B. Appellant allegedly refused to enter D.J.'s office, became loud, and used profanity in front of employees. D.J. alleged that appellant used a homophobic slur against him and his son, stating "you are a forgot [sic], no wonder your son is a forgot [sic] too, you are full of [s***]." At that point, he placed appellant on emergency leave and asked for his badge. Appellant then threw his badge on the floor and D.J. asked appellant to leave the premises. He replied by yelling "I am a disabled vet, you can do nothing to me, you watch, I will be back in 15 days."

OWCP received June 1, 2018 chronology of events from appellant in which he noted that in September 2016 he received 7- and 14-day suspensions. Appellant asserted that the seven-day suspension was based on a lie fabricated by D.J. who claimed that he saw appellant sleeping. He claimed the 14-day suspension was also based on another lie made by D.J., but management failed to act upon his reports of harassment. As a result of these actions, appellant requested a reasonable accommodation that any communication from D.J. be in writing. He also claimed that, in November 2016, an employee had left a racial slur on the office door and management failed to properly investigate or issue discipline due to perpetrators close relationship with management. Appellant asserted that his PTSD and depression were aggravated by being forced to work in close quarters with this employee, who he alleged was given preferential treatment. He alleged that D.J. harassed him and then lied when filing a police report in December 2017 asserting that appellant made threats and had a long history of violence with the employing establishment. In June 2018, appellant was interviewed by the postal investigation service regarding the December 2017 police report incident. During the interview he was advised that management had alleged that he physically assaulted D.J., which he asserted was an attempt to frame him for more serious charges.

In a June 17, 2018 statement, V.S. advised that she was present as appellant's union representative during an investigative interview on June 15, 2018 during which he was asked whether he had grabbed D.J. and thrown him to the ground. The investigator claimed that this was an accusation made by higher-level employing establishment management. Appellant denied making any threat or having physical contact with D.J. He informed the investigator that there was "courthouse video" and witnesses supportive of his account. Moreover, appellant stated that he was off-duty at the time of the incident and he played an audio of D.J. threatening to call 911.

In a statement dated July 16, 2018, W.C. indicated that he had represented appellant over the past few years and generally alleged that he had personally witnessed D.J. and C.B. lie on official documentation to discipline appellant and willfully make false statements regarding

appellant. He noted that management refused to do anything about appellant's complaints against management.

On August 21, 2018 appellant requested reconsideration.

In e-mail correspondence dated August 30, 2016, D.J. forwarded e-mails between C.B. and J.S dated August 15 and 30, 2016 regarding appellant's conduct.[5]

The employing establishment provided statements dated March 30, 2018 from M.M. and D.M. which both noted that the prior day D.J. had requested appellant to come into his office for an investigative interview. Both noted that thereafter appellant began to yell and act aggressively.

In a September 17, 2018 e-mail, D.J. responded to appellant's allegations of harassment and stress and commented upon appellant's job performance and interactions. He attached documentation for incidents occurring on March 23 and 29, 2018 in which he considered appellant's behavior to be disruptive. D.J. alleged that appellant created obstacles for the supervisor by threatening civil court, EEO complaints, and labor charges and demanding union time for both himself and his group and that appellant was unhappy that all the charges he previously filed against D.J. were dismissed due to lack of supporting evidence.

By decision dated November 8, 2018, OWCP denied modification finding that appellant had not established the factual portion of his claim.

On December 18, 2018 appellant requested reconsideration.

In a November 29, 2018 report, Dr. Milagros Valentin, a Board-certified psychiatrist and neurologist, requested that appellant be excused from work for the period November 30 to December 14, 2018 due to excessive work stress and medication changes to stabilize his psychiatric issues.

A copy of a December 7, 2018 grievance appeal settlement was submitted in which appellant's emergency placement on leave from March 28 to April 3, 2018 was to be expunged from his personnel record.[6]

By decision dated March 5, 2019, OWCP found that appellant had not established a compensable factor of employment.

[5] J.S. noted that on August 15, 2016 he witnessed appellant place his finger in D.J.'s face, swear, tell D.J. that he could not beat him or win anything against him, and tell D.J. that he would be removed from the Transportation Department just like R.G. J.S. noted that on August 30, 2016 D.J. was attempting to conduct an investigative interview with appellant, a union representative, and him. Appellant walked out of the meeting after informing both J.S. and D.J. that the meeting was over and that he was going to record them.

[6] It also noted that he was incorrectly charged 32 hours of FMLA leave when he had requested to remain in leave without pay/nonpay status until his return to duty on April 17, 2018.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] 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.[8] 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.[9]

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.[10]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.[11] 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.[12] 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.[13]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular

[7] *Id.*

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

[9] 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).

[10] *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).

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

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

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

or specially assigned work duties of the employee and are not covered under FECA.[14] 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.[15] 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.[16]

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.[17] Mere perceptions of harassment, retaliation, or discrimination are not compensable under FECA.[18]

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.[19] 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.[20] If a compensable factor of employment is substantiated, OWCP must base its decision on an analysis of the medical evidence which has been submitted.[21]

OWCP's procedures provide:

> "An employee who claims to have had an emotional reaction to conditions of employment must identify those conditions. The CE [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 employment. When an incident or incidents are the alleged cause of

[14] *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).

[15] *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).

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

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

[18] *Id.*; *see also Kim Nguyen*, 53 ECAB 127 (2001).

[19] *S.K.*, Docket No. 18-1648 (issued March 14, 2019); *Dennis J. Balogh*, 52 ECAB 232 (2001).

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

[21] *M.A.*, Docket No. 19-1017 (issued December 4, 2019); *Norma E. McAndrews*, 55 ECAB 711 (2004).

[21] *M.A.*, *id*.; *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

> 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."[22]

OWCP's regulations provide that an employer 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.[23]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an emotional condition in the performance of duty, as alleged.

The Board initially notes that appellant's allegations do not pertain to his regularly or specially assigned duties under *Cutler*.[24] Rather, appellant has alleged error and abuse by his supervisors in administrative and personnel actions, harassment, and a hostile work environment.

Appellant made several allegations regarding administrative and personnel actions. As noted above, an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of an employee unless there is error or abuse on the part of the employing establishment.[25] In determining whether the employing establishment erred or acted abusively, the Board will examine the factual evidence of record.[26]

Appellant alleged that management wrongfully issued a 7-day suspension on September 2, 2016, a 14-day suspension on September 19, 2016, and a 14-day suspension on May 7, 2018. Although the handling of disciplinary actions and evaluations are generally related to the employment, the Board has held that they are administrative functions of the employing establishment, not duties of the employee, and are not covered under FECA.[27] An administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing

[22] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17(j) (July 1997); *see also D.B.*, Docket No. 18-0537 (issued September 12, 2018).

[23] 20 C.F.R. § 10.117(a); *see id.* at Chapter 2.800.7(a)(2) (June 2011)

[24] *Supra* note 12.

[25] *Supra* note 14.

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

[27] *F.W.*, Docket No. 19-0107 (issued June 10, 2020); *see Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260 (1988).

establishment erred or acted abusively, the Board has to examine whether the employing establishment acted reasonably. Appellant submitted a grievance settlement form dated December 7, 2018 indicating that his suspension from March 28 to April 3, 2018 was to be expunged. He also alleged that he had filed a NLRA charge alleging that these actions were taken as retaliation. Appellant also submitted a March 28, 2017 prearbitration settlement removing the 7- and 14-day suspensions without prejudice, related to prior matters in 2016. These submissions, however, do not establish error or abuse on behalf of the employing establishment. Rather, they are merely settlement documentation without an admission of wrongdoing on the part of management. The Board finds that there is no evidence of record to establish that appellant was improperly disciplined as it related to the suspensions from work. Appellant has not offered evidence to establish error or abuse or that the employing establishment acted unreasonably in these matters and therefore he has not established a compensable employment factor relating to his disciplinary suspensions.[28]

Appellant has also asserted that on March 29, 2018 D.J. failed to honor his reasonable accommodation request by communicating verbally with him instead in writing. The Board has held that management's handling of reasonable accommodations are administrative functions of the employing establishment, and not duties of the employee.[29] While appellant submitted a copy of his September 2, 2016 request that communication by D.J., his supervisor, be in writing, the record does not contain evidence that this request for an accommodation had been approved and was binding upon D.J on March 29, 2018. Regarding investigative interviews, the Board has long held that such interviews can only be considered compensable factors of employment if there is probative evidence establishing error or abuse.[30] The evidence of record only establishes that appellant did not want to interact orally with D.J. The evidence of record also establishes, however, that appellant was not asked to leave the premises until after he made *ad hominem*, homophobic comments against D.J. and his son. As such, the Board finds that the evidence of record does not establish error or abuse by D.J. during the March 29, 2018 interview.[31] As appellant has not submitted corroborating evidence of error or abuse in this administrative matter, he has not established this matter as a compensable employment factor.[32]

Appellant asserted that he was subjected to mistreatment and harassment by management, specifically D.J. and C.B. While he submitted signed statements from his coworkers attesting to general mistreatment by management, these generalized and overly-road statements are insufficient to establish that he was subjected to mistreatment or harassing behavior by management, at any specific time. Mere perceptions of harassment or discrimination are not compensable under FECA.[33] Unsubstantiated allegations of harassment or discrimination are not

[28] *Supra* note 22.

[29] *See S.B.*, Docket No. 18-1113 (issued February 21, 2019); *Janet I. Jones*, *supra* note 27.

[30] *F.M.*, Docket No. 16-1504 (issued June 26, 2017); *G.S.*, Docket No. 09-0764 (issued December 18, 2009).

[31] *Id.*

[32] *Id.*

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

determinative of whether such harassment or discrimination occurred. As appellant has not established specific dates or times in which he was subjected to a specific action or event, he has not established a compensable employment factor relating to alleged mistreatment and harassment.[34]

Appellant has also asserted that a racial slur was placed on the office door which management refused to investigate, that manager engaged in a pattern of disparate discipline, that D.J. made retaliatory and false allegations including defamatory and false statements regarding his work record and character, and that a police report was filed in retaliation for his filing an EEO complaint against D.J. The Board finds, however, that appellant has not provided corroborating or supporting evidence to support any of these allegations. When a claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[35] As appellant has not provided evidence in support of his assertions he has, thus, not established a compensable employment factor as to any of these additional assertions.

As appellant has not submitted sufficient factual evidence to establish a compensable factor of employment, the Board finds that he has not met his burden of proof to establish his claim.[36]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an emotional condition in the performance of duty, as alleged.

[34] *A.L.*, Docket No. 17-0368 (issued June 20, 2018).

[35] *C.R.*, Docket No. 19-1721 (issued June 17, 2020); *M.D.*, 59 ECAB 211 (2007).

[36] Upon return of the case record OWCP should consider administratively combining the present claim with appellant's claim in OWCP File No. xxxxxx595.

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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