United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 20-0500**
	)	**Issued: July 6, 2021**
SOCIAL SECURITY ADMINISTRATION, OFFICE OF DISABILITY ADJUDICATION & REVIEW, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On January 2, 2020 appellant filed a timely appeal from a July 10, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish an emotional condition in the performance of duty; and (2) whether OWCP abused its discretion in denying appellant's request for a subpoena.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 20, 2016 appellant, then a 59-year-old senior attorney advisor, filed an occupational disease claim (Form CA-2) alleging that he experienced an aggravation of his post-traumatic stress disorder (PTSD) due to factors of his federal employment. He attributed his condition to unfair targeting by management in response to whistleblowing activity, which triggered childhood trauma of bulling, mockery, ridicule, and physical attacks. Appellant noted that he first became aware of his condition on December 29, 2013 and realized its relation to his federal employment on March 31, 2016. He stopped work on March 31, 2016.

In an April 20, 2016 narrative statement, appellant related that, in February 2016, he informed his supervisor, J.D., that a contracted vocational expert witness may have been exaggerating his experience and credentials during employing establishment hearings. Shortly afterward, he was asked to make corrections on a draft decision he had prepared for a judge. In the early March 2016, J.D. discussed his decision writing with him, noting that the corrections he made were not acceptable and also indicated that another judge had returned a case. On March 17, 2016 he related that appellant was failing because he lacked basic job knowledge, which he asserted was specious. Appellant indicated that, once he realized that he was being targeted by management, his childhood trauma was triggered.

In an April 1, 2016 note, Dr. Victoria Currall, a Board-certified internist, indicated that appellant was unable to work due to his current mental illness.

In an April 18, 2016 note, Dr. Janet C. Wilson, a clinical psychologist, indicated that appellant had bipolar disorder and complex post-traumatic disorder. She related that, since harassment began at work, he had been unable to concentrate and complete his work assignments. In light of appellant's mental health conditions, history of past trauma, and the current level of stress, Dr. Wilson opined that appellant should not return to work, under his current management structure, as it rendered him vulnerable to stress and unable to perform his work.

In a development letter dated April 26, 2016, OWCP informed appellant that additional evidence was necessary to establish his claim. It advised him of the type of the factual and medical information necessary and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence. In a separate letter of even date, it requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's contentions.

On May 16, 2016 appellant responded to OWCP's development questionnaire. He explained that he prepared draft decisions based on instructions from Administrative Law Judges (ALJs) following hearings. Appellant described his normal work process of submitting draft decisions and edits directly to the ALJs. He alleged that, after he informed his supervisor of probable witness perjury, he was singled out for unfair treatment, which he believed was intended to remove him from the workplace. Appellant asserted that, within days of reporting the alleged perjury, his supervisor indicated that there were problems with his writing. He alleged that management instituted a new work process for him in which the ALJs returned his draft decisions to management, who then confronted him with the problems. After correcting the draft, appellant

was to submit the draft to the manager, not the ALJs. He alleged that the criticism of his work was specious and subjective as his draft decisions were all legally sufficient.

Appellant advised that the retaliation began on March 1, 2016 when he had an informal meeting with his supervisor. The triggering event for his mental illness was March 17, 2016 when he received an evaluation in which he was rated as failing. Appellant alleged that, when his supervisor read the failing evaluation to him, her tone was inflammatory, personal, derogatory, and demeaning. This brought up feelings, which triggered his childhood trauma and rendered him unable to work or perform his job duties after March 17, 2016. Appellant advised that, by April 1, 2016, he had totally decompensated mentally. He noted that his reasonable accommodation requests for a transfer were denied. Copies of e-mail conversations with management regarding appellant's requests for reasonable accommodation and return to work were attached.

In an undated statement, J.D., appellant's supervisor, denied that management had targeted appellant. She advised that discussions with an employee regarding work product (draft decisions) were a necessary part of supervision. J.D. explained that the decisions, which were returned to appellant for corrections, were based on complaints from the ALJs, not management. When an ALJ returned a decision for correction, it was management's responsibility to address the deficiencies with the employee. J.D. advised that, as several different ALJs had complained about the quality of appellant's drafts, she reviewed his drafts. She advised that appellant had not been informed that he was failing, but rather she held an optional performance discussion with appellant to discuss writing quality decisions. J.D. noted that appellant was in good standing and was not on a formal performance improvement plan. She was informally trying to assist him in improving the production and quality of his draft decisions. J.D. also denied that appellant was being targeted because he was a "whistleblower." Appellant's position description was also received.

By decision dated June 2, 2016, OWCP denied appellant's emotional condition claim, finding that the evidence of record was insufficient to establish an emotional condition arising from a compensable factor of employment.

On June 28, 2016 appellant, through his then-counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing, held on October 19, 2016, appellant testified regarding the probable witness perjury, how he discovered the witness' credentials, and the possible effect of the witness' prior testimony during the last 35 years. He testified that he was required under the employing establishment's policies to report his findings. Appellant related that he had reported his findings to his supervisor, who then informed second-level management. Shortly thereafter, he alleged that management changed his work process by requiring that he submit his decisions to his supervisor. Appellant alleged that, despite his supervisor's assertions, he was not in good standing as he had to submit his work to his supervisor. He also alleged that he was clearly placed on a performance improvement plan (PIP), as his rating was 1 in every category, which indicated that he was failing. Appellant additionally alleged that an exhibit was added to a case file after he had submitted a draft decision and that his supervisor erroneously assessed him with a legal deficiency, a serious error, for omitting the exhibit in his draft decision.[2] He testified that, when he discovered he had been assessed with a

[2] Appellant submitted copies of screenshots supporting this assertion.

legal deficiency, although he was not at fault, he spent the night in the hospital for suicide prevention. Appellant submitted two samples of his draft decisions, both original and amended submissions, which showed original instructions and comments by his supervisor, as well as subsequent annotations or new criticisms.

In November 10, 2016 e-mails, appellant's supervisor denied placing appellant on a performance improvement plan. She emphasized that she only had an optional informal performance discussion with him. After the optional performance discussion took place, appellant was off work for three months. Upon his return, appellant's supervisor continued to review his decisions. She was about to stop reviewing appellant's decisions when he again went out on medical leave and began his retirement process. A copy of the March 17, 2016 optional performance plan discussion was attached, with handwritten notations from appellant indicating that his request for a union representative and request to record the discussion were denied.

In a December 14, 2016 letter, appellant alleged that an affidavit from Hearing Office Chief Judge F.A. supported his allegation that his supervisor lied that he was not on a performance improvement plan. In a December 8, 2016 affidavit, Judge F.A. provided her opinion of appellant's draft decisions and analysis. She indicated that she did not receive employee performance reports, appellant's performance issues were not discussed with her, and she did not discuss performance evaluations with supervisors. Judge F.A. indicated that, in early 2016, J.D. became appellant's supervisor and appellant was unhappy with his mid-year evaluation. She also indicated that she was aware that appellant reported suspicion of a contracted witness falsifying his experience, but she was not aware of any action taken in that regard.

By decision dated February 3, 2017, the hearing representative found the case was not in posture for review and remanded the case for OWCP to make further findings pertaining to appellant's allegations that an exhibit was added to a case record after he submitted his draft decision and that he was erroneously assessed with a legal deficiency. The hearing representative also noted that the employing establishment had not responded to appellant's allegations concerning retaliation in response to whistleblowing. Following further development, OWCP was to issue a *de novo* decision.

In a February 14, 2017 letter, OWCP requested that the employing establishment address appellant's allegation that his supervisor edited an exhibit after he submitted his draft and then assessed him with a legal deficiency. It also requested that the employing establishment address appellant's whistleblowing allegation.

Appellant submitted a copy of his supervisor's affidavit in his Equal Employment Opportunity (EEO) case, which he alleged supported his contention that she lied in saying that he was "in good standing." In a December 14, 2016 affidavit, J.D. indicated that she was appellant's first-line supervisor from February 8, 2016 until he retired in August 2016. She noted that a few weeks after becoming his supervisor, appellant informed her of his belief that a contracted expert witness had falsified his credentials and that she passed along the information to her manager. J.D. explained that their office did not vet expert witnesses, but rather selected from a contracted regional pool of expert witnesses. She also explained that management brought issues regarding appellant's performance to her attention when she first started her position in February 2016 and that she performed an out-of-cycle optional discussion regarding his performance on

March 17, 2016. J.D. denied being aware of appellant's mental condition at the time of the optional performance discussion. She denied that there was a set procedure for reviewing draft decisions and she related that she had informed appellant during the optional discussion that she would be reviewing his decisions before submission to the ALJs. J.D. indicated that, as appellant's first-line supervisor, she did not have the authority to make a decision on appellant's April 18, 2016 reasonable accommodation transfer request and had forwarded the request to a different supervisor, who denied the transfer request. She also indicated that appellant did not respond to her alternative solution. When appellant returned to work in June 2016, he mentioned that he did not like or want the alternative plan. J.D. indicated that generally few changes were needed in appellant's draft decisions. However, appellant had a set back after she informed him that one of his decisions was missing an opinion. J.D. indicated that this was not a big issue and she did not counsel him about the opinion, just informed him that the opinion would have to be added to the decision. Appellant, however, did not like her noting the issue and left work. J.D. noted that appellant last worked on July 15, 2016. She received an e-mail from appellant at the end of July 2016, which related his intent to retire in August 2016.

OWCP also received multiple affidavits from the employing establishment ALJs. In a December 8, 2016 affidavit, ALJ F.A. denied consulting with other judges regarding appellant's drafts. She indicated that it was normal operating procedure to send a draft back for edits to a manager. ALJ F.A., as well as all other ALJ's whose affidavits were received, denied knowing that appellant had performance issues. In an April 6, 2017 affidavit, ALJ T.R noted that he had suspicions that appellant had a disability. He also noted that he had related his concerns regarding appellant's draft decisions to the Chief Judge when she first arrived.

In an April 28, 2017 affidavit, S.S., an employing establishment regional management officer, indicated that appellant's allegation into possible perjury by a contract witness was investigated and found to be without merit. She also indicated that, as there were concerns about appellant's performance and/or the quality of his work, it was natural for his supervisor to review his work.

In an April 12, 2017 affidavit, A.M., an attorney advisor, indicated that she advised management regarding employee relation issues and noted that employing establishment management reached out to her around February 2016 for guidance regarding concerns they had with appellant's performance. It was decided that an optional discussion to informally assist appellant would be pursued.

OWCP also received appellant's rebuttal statement. Appellant essentially alleged that he was being bullied by the employing establishment. He also alleged that the employing establishment was retaliating in response to his whistleblowing activity.

By decision dated December 3, 2018, OWCP denied appellant's claim, finding that the evidence of record failed to establish an emotional condition arising from a compensable factor of employment.

On December 27, 2018 appellant, through his then-counsel, requested an oral hearing before OWCP's Branch of Hearings and Review. Then-counsel subsequently changed the request to one for a review of the written record.

On February 14, 2019 appellant forwarded discovery requests to OWCP.

On March 19, 2019 OWCP advised appellant regarding his request for subpoenas and production of documents relating to his upcoming hearing. It related that his request for issuance of subpoenas and production of document was denied as appellant had not provided any persuasive argument or evidence that presence of the individuals or documents at the hearing was necessary for full adjudication of the compensation case.

In a May 25, 2019 letter, appellant's then-counsel argued that it is impossible to obtain the necessary evidence unless the requested subpoenas were issued.

By decision dated July 10, 2019, OWCP's hearing representative affirmed the December 3, 2018 OWCP decision and denied appellant's subpoena requests.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim, including the fact 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.[4] 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.[5]

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.[6]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. 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.[7] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or

[3] 5 U.S.C. § 8101 *et seq.*

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

[5] 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).

[6] *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).

[7] *Lillian Cutler*, 28 ECAB 125 (1976).

his or her frustration from not being permitted to work in a particular environment, or to hold a particular position.[8]

As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of FECA.[9] 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.[10] Where, however, the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[11]

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. Mere perceptions of harassment, retaliation, or discrimination are not compensable under FECA.[12] 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.[13]

ANALYSIS -- ISSUE 1

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

Appellant has not attributed his emotional condition to the performance of his regular duties as a senior attorney adviser or to any special work requirement arising from his employment duties under *Cutler.*[14] Rather, appellant has attributed the crux of his emotional condition claim to administrative and personnel actions on the part of his supervisor, which he related were taken in retaliation for his whistleblowing activity.

The record establishes that appellant reported to his supervisor that a vocational rehabilitation expert who had served as a contracted witness in employing establishment proceedings for 35 years may have committed perjury regarding his credentials. Appellant's supervisor then informed second-level management of appellant's disclosure. In an April 28, 2017 affidavit, S.S., regional management officer, indicated that appellant's disclosure of possible perjury by a contracted witness was investigated and found to be without merit. Appellant alleged that he was placed on a PIP, treated differently from others regarding submission of his draft

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

[9] *R.B.*, Docket No. 19-0343 (issued February 14, 2020).

[10] *D.T.*, Docket No. 19-1270 (issued February 4, 2020); *Thomas D. McEuen*, 41 ECAB 387 (1990).

[11] *M.A.*, Docket No. 19-1017 (issued December 4, 2019); *Robert W. Johns*, 51 ECAB 137 (1999).

[12] *C.R.*, Docket No. 19-1721 (issued June 17, 2020); *Kim Nguyen*, 53 ECAB 127 (2001).

[13] *L.S.*, Docket No. 18-1471 (issued February 26, 2020).

[14] *Supra* note 8.

decisions, assessed with a legal deficiency for which he was not responsible, denied requests for reasonable accommodation, and a "failing" performance evaluation and denials of his reasonable accommodation requests. However, the Board has previously found that performance evaluations,[15] work assignments,[16] management directives,[17] monitoring of an employees' work activities and training,[18] as well as evaluation of reasonable accommodation requests,[19] are administrative functions of the employer, and not duties of the employee.[20] Absent evidence establishing error or abuse, a claimant's disagreement or dislike of a managerial action is not a compensable factor of employment.[21] The Board also notes that the record does not contain any formal EEO decisions substantially of any of the charges appellant has made. Without that proof and without any other evidence that an actual event of error or abuse occurred, appellant has not demonstrated that his claim is one that can be covered by workers' compensation.

Appellant also alleged that he was denied his request for union representation during the March 17, 2016 discussion. However, there is no evidence to support that the March 17, 2016 meeting was anything more than an informal performance discussion. Not every workplace interaction with a supervisor or manager gives rise to a right to union representation. This right is commonly associated with investigatory interviews where there is a possibility of disciplinary action.[22] Although appellant was allegedly denied union representation, he has not established a right to representation under the particular circumstances.[23] Appellant further alleged that management improperly denied his request to record the March 17, 2016 discussion. However, the Board finds that the denial of his request was a reasonable exercise of supervisory discretion.[24] Therefore, appellant has not established error or abuse with regard to the March 17, 2016 performance discussion. Absent evidence establishing error or abuse, a claimant's disagreement or dislike of such a managerial action is not a compensable factor of employment.[25]

Appellant also alleged that he was harassed by management. He did not, however, provide specific dates or other details regarding management's alleged harassment. General allegations of

[15] *G.M.*, Docket No. 17-1469 (issued April 2, 2018).

[16] *V.M.*, Docket No. 15-1080 (issued May 11, 2017).

[17] *S.B.*, Docket No. 18-1113 (issued February 21, 2019).

[18] *See R.L.*, Docket No. 17-0883 (issued May 21, 2018); *L.R.*, Docket No. 14-1990 (issued January 27, 2015).

[19] *D.C.*, Docket No. 16-1870 (issued May 19, 2017).

[20] *See M.C.*, Docket No. 18-0585 (issued February 13, 2019); *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, 1266-67 (1988).

[21] *See S.S.*, Docket No. 18-1519 (issued July 17, 2019); *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

[22] *NLRB v. J. Weingarten, Inc*., 420 U.S. 251 (1975).

[23] *R.G*., Docket No. 13-818 (issued August 1, 2014).

[24] *Terry A. Howe*, Docket No. 05-279 **(**issued April 25, 2005).

[25] *See E.S.*, Docket No. 18-1493 (issued March 6, 2019).

harassment are insufficient to establish that such actions did, in fact, occur.[26] Personal perceptions and allegations by a claimant alone are insufficient to establish an employment-related condition.[27] Thus, appellant has not established a compensable employment factor under FECA with respect to his alleged harassment claims.

As the Board finds that appellant has not established a compensable employment factor, it is not necessary to consider the medical evidence of record.[28]

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.

LEGAL PRECEDENT -- ISSUE 2

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[29] The hearing representative of OWCP's Branch of Hearings and Review has discretion to approve or deny a subpoena request.[30] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are clearly contrary to logic and probable deductions from established facts.[31]

ANALYSIS -- ISSUE 2

The Board finds that OWCP did not abuse its discretion in denying appellant's request for a subpoena.

Appellant failed to demonstrate that the testimony of the specific persons would be pertinent to the issues to be addressed at the hearing. He also failed to demonstrate that the information sought could not be obtained by means other than issuance of subpoenas. In denying his request for issuance of subpoenas, OWCP explained that appellant had not provided any persuasive argument or evidence that presence of the individuals or documents at the hearing was necessary for full adjudication of the compensation case. The Board notes that the record contains

[26] *See Paul Trotman-Hall*, 45 ECAB 229 (1993).

[27] *See O.G.*, Docket No. 18-0359 (issued August 7, 2019); *J.F.*, 59 ECAB 331 (2008); *Roger Williams*, 52 ECAB 468 (2001).

[28] *See B.O.*, Docket No. 17-1986 (issued January 18, 2019) (it is not necessary to consider the medical evidence of record if the claimant has not established any compensable employment factors). *See also Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[29] *See* 20 C.F.R. § 10.619.

[30] *Id.*

[31] *See T.C.*, Docket No. 20-1170 (issued January 29, 2021); *B.M.*, Docket No. 17-1157 (issued May 22, 2018); *Gerald A. Carr*, 55 ECAB 225 (2004).

several affidavits, which relate to the issues for which subpoenas were requested. The Board finds that the hearing representative's denial of appellant's request for subpoenas did not constitute an abuse of discretion under the above-noted standard.[32]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an emotional condition in the performance of duty. The Board also finds that OWCP did not abuse its discretion in denying appellant's request for subpoenas.

ORDER

IT IS HEREBY ORDERED THAT the July 10, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[32] *See T.C., id.*; *E.S.*, Docket No. 20-0559 (issued October 29, 2020).