United States Department of Labor
Employees' Compensation Appeals Board

A.F., Appellant	)	
and	)	**Docket No. 20-1635**
	)	**Issued: June 9, 2022**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, JEFFERSON NATIONAL EXPANSION MEMORIAL, St. Louis, MO, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On September 17, 2020 appellant filed a timely appeal from an August 31, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal

[1] Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, appellant asserted that oral argument should be granted so that he could be heard and comprehended. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

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.[3]

ISSUE

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

FACTUAL HISTORY

On February 20, 2020 appellant, then a 53-year-old maintenance mechanic, filed an occupational disease claim (Form CA-2) alleging that he sustained a cerebral vascular accident (CVA) and transient ischemic attack (TIA) due to factors of his federal employment, including dealing with stress from coworkers as well as ongoing harassment and discrimination since February 2019. He explained that he eventually had to take two and a half months of leave from work, which he alleged caused him to suffer a stroke while at work on February 13, 2020. Appellant indicated that he first became aware of his condition on February 13, 2020 and first realized its relation to factors of his federal employment on February 14, 2020. On the reverse side of the claim form the employing establishment noted that "all findings have come back unsubstantiated." Appellant stopped work on February 13, 2020.

In a development letter dated March 10, 2020, OWCP informed appellant of the deficiencies of his claim. It advised him of the factual and medical evidence necessary to establish his claim and attached a questionnaire seeking a full description of the employment factors alleged to have caused his condition. OWCP provided appellant 30 days to submit the necessary information.

In a February 13, 2020 diagnostic report, Dr. Charles Smittkamp, a Board-certified neuroradiologist, performed a magnetic resonance imaging (MRI) scan of appellant's brain, noting no acute intracranial abnormalities. In a separate diagnostic report of even date, Dr. Bilal Ahmed, a Board-certified radiologist, performed an x-ray scan of appellant's chest, finding no significant time interval change or active cardiopulmonary disease. In another February 13, 2020 diagnostic report, Dr. Simon Bekker, a Board-certified radiologist, performed a computerized tomography (CT) scan of appellant's head and neck, noting no evidence of occlusion of the proximal major segments of the circle of Willis, no hemodynamically significant stenosis of the neck and mild intracranial and extracranial atherosclerotic disease.

In a February 14, 2020 diagnostic report, Dr. Gabrielle Hickey, a Board-certified diagnostic cardiac sonographer, performed an echocardiography due to a stroke/CVA appellant experienced. She noted that his left ventricle size was normal, mild concentric left ventricular

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that, following the August 31, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

hypertrophy, the right ventricle size was mildly enlarged, the right ventricular systolic function was mildly depressed, no clear evidence of shunting into the left atrium and no evidence of pericardial effusion.

In a March 9, 2020 statement, appellant described a series of incidents dated from February 13, 2019 to March 1, 2020 in which he was involved in a verbal altercation with two coworkers that led to a hostile work environment report being filed against him on February 14, 2019. In the following days, he took time off from work due to stress and noted that many of his coworkers displayed anger and "heavy tension" toward him. Appellant met with management officials to inform them that the allegations against him were false and also filed a complaint with the Equal Employment Opportunity Commission (EEOC) on March 13, 2019. He described a February 13, 2020 employment incident in which he was feeling ill at work and the illness eventually developed into symptoms of a light stroke due to the stress he encountered at work. Appellant asserted that for the 24 hours preceding his illness he had been resting and noted that he had no prior history of heart problems.

In a March 11, 2020 medical report, Dr. Paban Saha, a Board-certified cardiologist, reviewed a February 28, 2020 stress test, diagnostic reports and indicated that appellant was implanted with a cardiac monitor. In a medical note of even date, Dr. John Scally, a Board-certified cardiologist, indicated that appellant was under his care for TIA, sleep apnea, and hyperlipidemia. He recommended that he keep his stress levels and physical demand low with respect to his job. Dr. Scally noted that appellant's current job duties required physical demands and were high stress and recommended that he take on a less physically demanding and less stressful position if possible.

In a March 12, 2020 medical note, Dr. Perris Monrow, a Board-certified psychologist, explained that he had been treating appellant since June 2018 for severe post-traumatic stress disorder (PTSD), which he developed during his time serving active duty in the United States Army from 1985 to 1990. He indicated that appellant had been suffering from severe work-related stress since 2019 and continuing and opined that the recent stroke he suffered was more likely than not caused by his work-related stress further aggravating his PTSD. Dr. Monrow recommend that, upon his return to work, he be assigned to a different position that would be less stressful.

Dr. Scally, in a March 16, 2020 medical note, requested that appellant be excused from work until his next appointment on March 23, 2020.

In a March 16, 2020 response to OWCP's questionnaire, appellant asserted that the instances that led to his condition amounted to Equal Employment Opportunity (EEO) and Occupational Safety and Health Administration (OSHA) violations, as well as instances of physical and verbal assault. In a series of letters dated from February 15, 2019 to March 1, 2020 attached to his response, he described particular employment instances alleged to have contributed to his stress. In the February 15, 2019 letter to the employing establishment, appellant detailed a hostile work environment between himself and the Arch Tram System (ATS) department. He described instances dated from September 10, 2018 to February 14, 2019 and asserted that he felt harassed and belittled by his coworkers' verbal assaults and that the stress of the situations had caused complications with his PTSD.

In a May 21, 2019 letter to the employing establishment, appellant described three separate incidents in which he felt his job assignment in the ATS department created a hostile work environment. He detailed incidents where he was split away from other workers, where he was pushed in order to make him angry and claimed that his coworkers used another worker to get bad information on him concerning the other coworkers.

Appellant submitted a June 25, 2019 statement of retaliation that he filed with the EEOC where he alleged that the ATS department committed multiple actions against him. He also described a June 20, 2019 incident in which his job briefing question was not answered and he was treated with hostility from his coworkers.

In a July 21, 2019 letter, appellant explained that, after his EEOC complaint was filed, the atmosphere in the ATS department had become worse. He described a July 5, 2019 incident where safety protocols were not followed, and he was tasked with working in a generator room alone. As appellant set up a work ladder, he lost his balance and fell onto a work bench. Appellant eventually had to request assistance from another department in order to complete his assignment in the generator room.

Appellant submitted a September 24, 2019 letter to the employing establishment in which he described an aggravated and verbal assault conflict that arose between himself and his coworkers in the ATS department. He alleged that on that morning he and another coworker were assigned to work on the waste pumps and an argument between the two resulted in the coworker yelling at him and throwing a sharp five-inch paint scrapper at him. Appellant asserted that he felt scared, intimidated and threatened. He continued by noting that the issue had gotten worse in the ATS department as individuals demonstrated aggravated anger, harassment, intimidation, and other threatening behavior towards him.

In a January 31, 2020 letter to the employing establishment, appellant described an employment incident involving a verbal assault where he alleged that a coworker failed to perform a job briefing in accordance with OSHA standards and another employee yelled and belittled him while he was searching for a job task to perform. He subsequently filed a complaint alleging verbal assault, but claimed the report returned inconclusive as another employee lied in a statement. Appellant further asserted that he was supposed to be moved from the ATS department in October 2019, but nothing had happened and that he had faced harassment, intimidation, and systematic racism since that time.

In a February 3, 2020 letter to the employing establishment, appellant reported an employment incident in which a coworker committed an OSHA violation.

In a February 10, 2020 statement, appellant described employment incidents that occurred on September 6 and 24, 2019. He indicated that several employees informed him that they believed he was taking advantage of his disability and that they did not like him. Appellant also detailed incidents on January 24 and 27, 2020 in which his coworkers refused to communicate with him about job tasks. He also attached a September 6, 2019 letter to the employing establishment wherein he reported a September 4, 2019 employment incident where a meeting was held with ATS department employees in order to address hostility. Appellant alleged that his coworkers informed him that they did not want to work with him and that he was taking advantage

of his veteran's disability. Afterwards, he experienced stress and anger and took leave in order to get away from work.

In a March 1, 2020 letter, appellant submitted an administrative grievance concerning a reprimand made against him, claiming that the allegations were an attempt to harass and retaliate against him. He asserted that this was causing him extreme stress.

Appellant submitted an April 17, 2020 form report with an illegible signature from a nurse practitioner in which she described his care as it related to his CVA, residual weakness, and hypertension. In a subsequent June 22, 2020 form report, Dr. Monrow detailed appellant's treatment for severe stress and anxiety and panic attacks that was preventing him from continuing his work.

By decision dated August 31, 2020, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish the implicated employment factors occurred as described. Thus, it concluded that the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,[5] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[6] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) medical evidence establishing that he or she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that his or her emotional condition is causally related to the identified compensable employment factors.[8]

[4] *Supra* note 2.

[5] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *G.R.*, Docket No. 18-0893 (issued November 21, 2018); *George H. Clark*, 56 ECAB 162 (2004).

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*,[9] 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 illness has some connection with the employment, but nevertheless does not come within coverage under FECA.[10] When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[11] Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[12] Where a claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[13] Personal perceptions alone are insufficient to establish an employment-related emotional condition.[14]

For harassment or discrimination to give rise to a compensable disability, there must be evidence, which establishes that the acts alleged or implicated by the employee did, in fact, occur.[15] Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[16] A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.[17] With regard to emotional claims arising under FECA, the term "harassment" as applied by the Board is not equivalent of "harassment" as defined or implemented by other agencies, such as the EEOC compliant, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under FECA, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment, or persecution, *i.e.*, mistreatment by coemployees or coworkers. Mere perceptions of harassment or discrimination are not compensable under FECA.[18]

[9] 28 ECAB 125 (1976).

[10] *See Robert W. Johns,* 51 ECAB 137 (1999).

[11] *Supra* note 7.

[12] *J.F.*, 59 ECAB 331 (2008).

[13] *M.D.*, 59 ECAB 211 (2007).

[14] *Roger Williams*, 52 ECAB 468 (2001).

[15] *B.Y.*, Docket No. 17-1822 (issued January 18, 2019); *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

[16] *James E. Norris*, 52 ECAB 93 (2000).

[17] *J.F., supra* note 12; *Robert Breeden, supra* note 15.

[18] *G.R., supra* note 8; *M.D., supra* note 13; *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

OWCP's regulations provide that in certain types of claims, such as a stress claim, a statement from the employing establishment is imperative to properly develop and adjudicate the claim.[19]

ANALYSIS

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

In his February 20, 2020 Form CA-2, appellant alleged that he suffered a stroke, CVA, and TIA after being subjected to stress, harassment, and discrimination by his coworkers beginning February 2019. The Board finds that OWCP has not properly developed appellant's claim.

In its March 10, 2020 development letter, OWCP requested additional evidence from appellant, noting that the evidence of record was insufficient to establish that he actually experienced the employment factors alleged to have caused his alleged condition. In response, appellant submitted multiple statements, where appellant described employment incidents that occurred and letters addressed to the employing establishment indicating that he had filed EEO and OSHA complaints with regard to his work environment. OWCP, however, did not request a statement from the employing establishment concerning appellant's allegations, as is required under its procedures.[20]

The Board finds that it is unable to make an informed decision in the case because OWCP failed to sufficiently develop the claim with regard to appellant's allegations of a stressful and hostile work environment. OWCP did not request all of the information required under its procedures.[21] Without this information, the case record is incomplete.

Although it is a claimant's burden of proof to establish his or her claim, OWCP is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[22] Since appellant's allegations and the evidence of record indicate that the employing establishment would have in its possession evidence relevant to appellant's allegations of a hostile work environment, OWCP should obtain a response from the employing establishment to the allegations of a hostile work environment and any additional relevant evidence or argument.[23]

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[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.800.7a(2) (June 2011).

[20] *Id*.

[21] *Id*.

[22] *See R.A.*, Docket No. 17-1030 (issued April 16, 2018); *K.W.*, Docket No 15-1535 (issued September 23, 2016).

[23] *Id*.; *see* 20 C.F.R. § 10.117(a), which provides that an employing establishment that has reason to disagree with any aspect of the claimant's report shall submit a statement to OWCP that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position. The employing establishment may include supporting documents such as witness statements, medical reports or records, or any other relevant information; *see also P.K.*, Docket No. 21-0967 (issued December 3, 2021).

The case will accordingly be remanded to OWCP for further development of the evidence regarding appellant's allegation of harassment. On remand, it shall request that the employing establishment provide a statement on and copies of any additional documents, video evidence, and any and all investigations regarding appellant's allegations. Following this and any such further development as deemed necessary it shall issue a *de novo* decision regarding appellant's claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 31, 2020 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 9, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board