

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

S.G., Appellant)	
)	
and)	Docket No. 22-0495
)	Issued: November 4, 2022
)	
DEPARTMENT OF LABOR, OCCUPATIONAL)	
SAFETY & HEALTH ADMINISTRATION,)	
Corpus Christi, TX, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 18, 2022 appellant filed a timely appeal from a January 10, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

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 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 10, 2022 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.*

FACTUAL HISTORY

On December 1, 2021 appellant, then a 44-year-old safety and occupational health inspector, filed an occupational disease claim (Form CA-2) alleging that he developed anxiety, depression, stress, and post-traumatic stress disorder (PTSD) while in the performance of duty. He asserted that he was wrongly accused of creating a hostile work environment. Appellant noted that he first became aware of his illness on January 3, 2010 and realized its relation to his federal employment on May 10, 2016. He did not stop work.

In an undated statement, appellant clarified that the date of the initial triggering event was May 16, 2016, not January 3, 2010.

In a December 9, 2021 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information including comments from a knowledgeable supervisor and an explanation of appellant's work activities. It also specifically requested copies of all grievances or other claims involving appellant, including the associated decisions, outcomes, or status if still pending. OWCP afforded both parties 30 days to submit the necessary evidence.

OWCP thereafter received an undated and unsigned employing establishment grievance form, filed by appellant, which indicated that, on July 29, 2019, two of his managers harassed him while he was performing military service. Appellant indicated that he provided memos to the employing establishment management team confirming the dates and locations of his military travel and was questioned whether his submissions were legitimate.

In an e-mail dated May 30, 2018, appellant requested a decision on a separate grievance wherein he alleged that H.A., M.S., and T.C., employing establishment managers, accused him of creating a hostile work environment and defamed his character. He indicated that he needed closure on the grievance, because their allegations had led to reductions and changes to his workload, which made him feel ineffective and unimportant in the office. Appellant noted that he developed anxiety and was fearful of retaliation.

In a report dated December 16, 2021, Dr. Gary Whiting, a counseling psychologist, noted that appellant related episodes of anxiety, depression, and paranoid ruminations, which he attributed to an incident in May 2016 when his supervisor publicly admonished him regarding his performance. He related that this caused him to become fearful that he was being unduly monitored and set up for failure by the employing establishment. Dr. Whiting noted that appellant related a history of PTSD in connection with 18 years of military service, and that hostile supervision at the employing establishment caused a precipitous decline in his ability to cope. He also administered and reviewed various psychometric tests. Dr. Whiting opined that appellant continued to warrant the diagnosis of PTSD secondary to his military experiences, and also diagnosed work-related adjustment disorder with anxious and depressed mood due an adversarial work environment.

In a January 7, 2022 response to OWCP's development questionnaire, appellant provided a timeline of incidents, which he believed contributed to his condition. He indicated that in May 2016, he answered a question during a steel erection class and was later approached by T.C.

who yelled at him in the hallway regarding his answer. Appellant alleged that, on April 27, 2017, M.S. counseled him for not attending a mandatory meeting, which appellant noted he did not receive notice of until after the meeting had occurred. He further related that M.S. advised him that T.C. had alleged that he created a hostile work environment. Appellant asserted that thereafter, in December 2017, he received three years' worth of overdue compensation, which made him feel like the employing establishment could intentionally destroy his life. He also noted that during a meeting on August 14, 2018, L.R., an employing establishment manager, indicated that he may be placed on a performance improvement plan (PIP). Appellant related that he told L.R. that there had been no prior counseling, which was required before a PIP could be implemented. He asserted that the improper threat of a PIP caused him psychological distress. Appellant further noted that, in April 2020, he requested that T.C. not assign him to work with H.A.

By decision dated January 10, 2022, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the claimed work factors occurred, as alleged, noting that his allegations were not factually substantiated.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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,⁴ 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.⁵ 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.⁶

To establish a claim for an emotional condition in the performance of duty, an employee must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; (2) medical evidence establishing that he or she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.⁷

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,⁸ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable

³ *Supra* note 1.

⁴ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued December 13, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *R.B.*, Docket No. 19-0343 (issued February 14, 2020).

⁸ 28 ECAB 125 (1976).

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 of FECA.⁹ When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.¹⁰

Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.¹¹ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹² Personal perceptions alone are insufficient to establish an employment-related emotional condition, and disability is not covered where it results from such factors as an employee's fear of a reduction-in-force, or 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 employer rather than regular or specially assigned work duties of the employee and are not covered under FECA.¹⁴ Where 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.¹⁵

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.¹⁶ Mere perceptions of harassment or discrimination are not compensable under FECA.¹⁷ A claimant must substantiate allegations of harassment or discrimination with probative and reliable

⁹ *M.R.*, Docket No. 18-0305 (issued October 18, 2018); *Robert W. Johns*, 51 ECAB 136 (1999).

¹⁰ *D.I.*, Docket No. 19-0534 (issued November 7, 2019); *T.G.*, Docket No. 19-0071 (issued May 28, 2019).

¹¹ *A.C.*, Docket No. 18-0507 (issued November 26, 2018).

¹² *G.R.*, Docket No. 18-0893 (issued November 21, 2018).

¹³ *Supra* note 11.

¹⁴ *C.V.*, Docket No. 18-0580 (issued September 17, 2018).

¹⁵ *Id.*

¹⁶ *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

¹⁷ *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

evidence.¹⁸ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁹

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.²⁰ If an employee does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. 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 regulations provide that an employing establishment 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.²² Its regulations further provide 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.²³

ANALYSIS

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

Appellant alleged that he sustained stress-related emotional conditions due to harassment by a manager in May 2016, wrongful accusations that he created a hostile work environment in April 2017, withheld pay in December 2017, and an improper threat of a PIP in August 2018. In a December 9, 2021 development letter, OWCP advised him of the type of factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. By separate letter of even date, it requested that the employing establishment address the accuracy of appellant's allegations and claims and provide copies of all grievances and claims and their outcomes.

As discussed, 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

¹⁸ *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, *supra* note 16.

¹⁹ *T.Y.*, Docket No. 19-0654 (issued November 5, 2019); *G.S.*, Docket No. 09-0764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

²⁰ *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *Dennis J. Balogh*, 52 ECAB 232 (2001).

²¹ *O.G.* *supra* note 16; *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

²² 20 C.F.R. § 10.117(a); *D.L.*, Docket No. 15-0547 (issued May 2, 2016).

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7(a)(2) (June 2011).

position.²⁴ Its regulations further provide in certain types of claims, such as a stress claim, a statement from the employer is imperative to properly develop and adjudicate the claim.²⁵ While appellant provided a detailed response to OWCP's development letter, along with supporting documentation, no response was received from the employing establishment. OWCP then denied his emotional condition claim, finding that he had not established a compensable employment factor.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.²⁶ Once OWCP undertakes to develop the evidence, it has the responsibility to do so in a proper manner, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.²⁷

This case must, therefore, be remanded to OWCP for further development of the evidence regarding appellant's emotional condition claim.²⁸ It shall request that the employing establishment provide a detailed statement and relevant evidence and/or argument regarding his allegations. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

²⁴ *Supra* notes 22 and 23.

²⁵ *Id.*; *see also* S.S., Docket No. 19-1021 (issued April 21, 2021); M.T., Docket No. 18-1104 (issued October 9, 2019).

²⁶ L.G., Docket No. 21-0690 (issued December 6, 2021).

²⁷ R.D., Docket No. 21-0050 (issued February 25, 2022); R.A., Docket No. 17-1030 (issued April 16, 2018).

²⁸ R.D., *id.*; V.H., Docket No. 18-0273 (issued July 27, 2018).

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2022 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: November 4, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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