

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

P.T., Appellant)	
)	
and)	Docket No. 20-0825
)	Issued: September 23, 2022
DEPARTMENT OF VETERANS AFFAIRS,)	
SALEM VA MEDICAL CENTER, Salem, VA,)	
Employer)	
)	

Appearances:
Sally L. LaMacchia, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 3, 2020 appellant, through counsel, filed a timely appeal from a February 6, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

On August 22, 2018 appellant, then a 50-year-old licensed practical nurse, filed an occupational disease claim (Form CA-2) alleging that he sustained post-traumatic stress disorder (PTSD), anxiety, panic attacks, nightmares, and insomnia causally related to factors of his federal employment. He noted that he first became aware of his condition on September 17, 2015 and realized its relation to his federal employment on January 21, 2016. Appellant did not stop work. On the reverse side of the claim form, the employing establishment noted that he was placed in a different service (health administration) as a medical records technician at the same grade/step/salary, pursuant to a settlement agreement.

In an accompanying statement, appellant alleged that he was treated differently because of his sexual orientation, given disciplinary counseling based on hearsay, was sworn at, called a drama queen, shoved, stalked, had \$6,000.00 removed from his bank account, had a fake Facebook account created in his name with damaging information, and had his automobile vandalized. He asserted S.F., a coworker, L.V., a nurse manager, and P.M., the chief nurse, all were involved or had knowledge of these actions.

In support of his claim, appellant submitted a February 5, 2018 intake evaluation and progress notes covering the period February 21 through August 8, 2018 from Jackie B. Wilkinson, Ph.D., a licensed professional counselor. Dr. Wilkinson noted appellant's description of work events and diagnosed PTSD.

In an undated statement, appellant asserted a hostile work environment, harassment, retaliation, and disciplinary actions involving L.V. including allowing S.F. to assault, stalk, harass, and destroy appellant's personal property. He described a number of interactions with L.V. and S.F. with him during the period September 2015 through September 22, 2017. Appellant also asserted that during this period L.V. used offensive and obscene language with him, rolled her eyes, scowled at him, and was nonresponsive to his questions. In October 2015, L.V. told him that he could not change his request for annual leave to bereavement leave for his aunt's funeral. She, in November 2015, requested that S.F. keep track and report appellant's activities to L.V. so that a case could be made against him. L.V. was aware of multiple incidents involving his computer being unplugged and keyboard disconnected in November and December 2015 without attempting to correct the situation. S.F., in December 2015 refused to provide work guidance to appellant causing extra work for him and placing the employing establishment at risk. Following a staff meeting in December 2015, appellant alleged that S.F. slammed into him causing him to knock into a coworker who prevented him from falling. He asserted that at the beginning of December 2015 he noticed inappropriate posts appearing to be from him on his Facebook account, which he attributed to S.F. as she had set up his account and knew his password. Appellant alleged that he discovered S.F. in his office picking up personal items. On December 14, 2015 he alleged that L.V. threatened him after learning that he had reported S.F.'s threats. In January 2016, appellant alleged that S.F. used an automated teller machine (ATM) to withdraw a large amount

of cash from his checking account and he found his earnings and leave statements in S.F.'s cabinet. He alleged that on February 2, 2016 he informed both L.V. and P.M. of his concerns regarding attending a monthly meeting due to verbal and physical assaults by S.F. On January 13, 2016 appellant alleged that, following management's meeting with S.F. to discuss her harassment of him, he found his tire punctured and was told by L.V. that nothing was found on a surveillance camera. He asserted that he was coerced by S.F. and P.M. to not file criminal charges against S.F. if they agreed to address his harassment and hostile work environment complaints. P.M., according to appellant, suggested his participation in the Employee Assistance Program (EAP) on January 14, 2016 which, because of his probationary status, he was afraid to do. On January 19, 2016 appellant alleged that L.V. banged her fist and screamed at him when he suggested donating a wreath he prepared for the winner of a healthy heart demonstration. He alleged that, in February 2016, his request for union representation was denied. Appellant also alleged a number of incidents occurring in March 2016 involving S.F. parking her car next to his car. According to him, when he reported this to L.V., she swore and told him to park somewhere else. On April 4, 2016 L.V. instructed appellant to move medication from a faulty refrigerator and he requested her assistance as he was fearful of encountering S.F.; however, she swore at him and told him to find someone else. Appellant asserted that from July 25 to August 2, 2016 he requested a day off from L.V. and was told that he would have to take extra steps for this to occur. He asserted that on August 2, 2016 he was coerced by P.M. into participating in alternate dispute resolution (ADR) with L.V. which he had originally declined. Appellant asserted that on August 2, 2016 P.M. revealed that L.V. did not want him in her office because of his sexual orientation. In March 2017, he overheard P.M. tell L.V. to clean out the room across from appellant's office and she then moved items into appellant's office, which blocked patient care. Later P.M. instructed L.V. to have the items she moved be picked up, and L.V. instructed appellant to do so even though she was aware he was performing patient duties. On September 7, 2017 appellant stated that L.V. issued him a verbal counseling for second hand knowledge of an event he failed to report. He asserted that, in September 2017, L.V. provided information to a coworker regarding offset for verbal counseling that had been issued, but did not provide this information to appellant. Next, appellant asserted that on September 14, 2017 P.M. was unresponsive to his request for information about alternative dispute resolution (ADR) to resolve issues from his verbal counseling.

Dr. Wilkinson, in a February 5, 2018 intake evaluation, noted that appellant reported a number of incidents that were listed in his Equal Employment Opportunity Commission (EEOC) complaint. The incidents appellant alleged included verbal and emotional abuse at work including threats, verbal assaults, and physical aggression. Appellant related that he and S.F. a coworker were initially friends, but subsequently their relations became strained, and she refused to answer questions or provide requested information. In September 2015, S.F. told appellant that L.V. did not like him due to his sexual orientation and requested S.F. keep him out of L.V.'s office. Appellant asserted that L.V. would frown, scowl, roll her eyes, look away from him, and would not provide requested help. He asserted that L.V. threatened him, informed him that if he crossed her she would eventually get him, and told him not to mess with her as she had been a union steward. On December 11, 2015 appellant stated that S.F. ran at him and tried to knock him down when she came out of the bathroom and on December 24, 2015 she slammed into him and knocked him into C.W., a coworker. On January 13, 2016 he learned that his rear driver's tire was flat due to a clean puncture with no nail or screw in the tire. Appellant stated that L.V. slammed her fist down on the table and denied his request to teach a refresher cardiopulmonary resuscitation (CPR)

course on January 16, 2016. Dr. Wilkinson attributed appellant's emotional symptoms to the traumatic events appellant was subjected to from December 2015 through January 2016.

In a development letter dated August 29, 2018, OWCP notified appellant that the evidence submitted was insufficient to establish his emotional condition claim. It requested that he submit a detailed description of the employment factors that he believed caused or contributed to his illness, factual evidence corroborating any workplace incidents, and a report from his attending psychiatrist or clinical psychologist addressing causation. OWCP informed appellant that, a licensed counselor was not considered a physician under FECA and, thus, her reports are insufficient to establish his claim. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding his occupational disease claim, including comments from a knowledgeable supervisor regarding the accuracy of appellant's statements. OWCP afforded both parties 30 days to respond.

In a September 14, 2018 statement, the employing establishment disagreed with appellant's allegations of harassment. It noted that his issue involving disagreements with a coworker were thoroughly investigated. The employing establishment advised that no proof of slander, vandalism, or harassment were found. Appellant was asked to provide additional documentation regarding a police investigation into the alleged matters, but this documentation was not provided. An investigation was conducted by an Administrative Investigative Board (AIB) into his allegations regarding harassment and his allegations were found to be unsubstantiated.

In a development letter dated January 11, 2019, OWCP requested the employing establishment to provide documents mentioned in appellant's and/or the agency statements and an incident report filed by C.W. on or about December 24, 2015.

In a statement dated September 28, 2017, appellant described events occurring during the period September 20, 2015 through September 20, 2017, which he alleged constituted harassment, retaliation, and hostile work environment.

On January 23, 2019 OWCP received an April 23, 2018 notice of amended complaint regarding appellant's allegations of reprisal, harassment, and hostile work environment and April 25, 2018 notice of acceptance of EEOC complaint by appellant. It also received progress notes from Dr. Wilkerson covering the period September 6, 2018 through January 25, 2019, a September 7, 2017 verbal counseling report, an August 17, 2018 settlement agreement and compliance report, and an October 18, 2017 notice of informal counseling. OWCP also received a December 18, 2017 employing establishment AIB report, which concluded that appellant had not established that L.V. had created a hostile work environment.

By decision dated February 20, 2019, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish any compensable employment factors. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On March 20, 2019 appellant requested reconsideration. In support of his claim, he submitted his EEOC complaint alleging reprisal for his EEOC activity, harassment, and retaliation,

his August 17, 2018 settlement agreement, performance appraisals, reports and therapy notes from Dr. Wilkerson covering the period November 13, 2018 through March 25, 2019, correspondence regarding verbal counseling dated February 14, 2018, and witness statements.

In a December 24, 2015 report of contact, C.W. noted that she was standing next to appellant when S.F. got up from her chair and walked passed the area where they were. At this point she felt appellant brush against her and he asked if she saw S.F. brush into him. C.W. stated that she did not witness S.F. brush into him.

Appellant submitted statements dated October 2017 from F.V., E.W., D.C., and H.V. in which they answered “Yes” to the question of whether L.V. treated appellant differently. F.V. additionally stated that she believed that L.V. would retaliate against appellant if he returned from his detail. She also related that she had witnessed L.V. swear and slam her fist on a desk. E.W. stated that she witnessed L.V. being short and hateful when speaking to appellant and not to others. She also related that she felt there was a very hostile work environment, she witnessed L.V. swearing, and she feared L.V. would retaliate against appellant. D.C. stated that L.V. created a tense work environment and she had witnessed L.V. being hateful to her and no one else, and witnessed L.V. giving appellant dirty looks. H.V. stated that she witnessed L.V. swearing.

By decision dated April 25, 2019, OWCP denied modification finding the evidence insufficient to establish any compensable factors of employment.

On November 20, 2019 counsel requested reconsideration asserting that appellant had established compensable factors of employment. In support of his request, appellant submitted additional evidence, including an April 25, 2019 progress note and May 29, 2019 statement from Dr. Wilkerson.

By decision dated February 6, 2020, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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.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 causally related to factors of his or her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his or her condition; (2) rationalized

³ *Id.*

⁴ *G.G.*, Docket No. 18-0432 (issued February 12, 2019).

⁵ *B.Y.*, Docket No. 17-1822 (issued January 18, 2019).

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.⁶

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.⁷ 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 emotional condition arising under FECA. 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.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

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.¹¹ Mere perceptions of harassment or discrimination are not compensable under FECA.¹² A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹³ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁴

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.

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and factors during the period September 2015 through September 22, 2017.

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 *L.Y.*, Docket No. 18-1619 (issued April 12, 2019); *L.D.* 58 ECAB 344 (2007).

⁸ 28 ECAB 125 (1976).

⁹ See *G.R.*, Docket No. 18-0893 (issued November 21, 2018).

¹⁰ *Supra* note 8.

¹¹ *G.G.*, Docket No. 18-0350 (issued August 7, 2019); *K.W.*, 59 ECAB 271 (2007).

¹² *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *M.D.*, 59 ECAB 211 (2007); *Jack Hopkins, Jr.*, 42 ECAB 818 (1991).

¹³ *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, 57 ECAB 622 (2006).

¹⁴ *T.Y.*, Docket No. 19-0654 (issued November 5, 2019); *G.S.*, Docket No. 09-0764 (issued December 18, 2009).

OWCP denied his emotional condition claim because he had not established a compensable employment factor. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.¹⁵

The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Cutler*.¹⁶ Rather, appellant has alleged error and abuse in administrative matters by the employing establishment and harassment by his supervisor and a coworker

Appellant made multiple allegations regarding administrative actions involving his supervisors. He alleged that the employing establishment erred in denying his request to use bereavement leave instead of annual leave for his aunt's funeral, and that he was advised that extra steps were required in order to take days off. Appellant also alleged that L.V. erred in issuing a verbal warning for second-hand knowledge of an event he failed to report. He also asserted that, in December 2015, S.F. refused to provide work guidance to him or provide information on ADR to resolve issues from verbal counseling. Appellant also alleged that L.V. failed to provide him the same information she had provided coworker regarding offset for verbal counseling that had been issued. He asserted that there were multiple incidents involving his computer being unplugged and keyboard disconnected in November and December 2015, with no investigation or correction of the situation.

In March 2017, appellant overheard P.M. tell L.V. to clean out the room across from appellant's office and she moved the old items into appellant's office, which blocked patient care. He noted that he had been assigned by L.V. relocate these items by L.V. and that P.M. had assigned that duty to L.V. Appellant stated that he told L.V. that he was busy with patient care at that time, but she assigned him the duty of getting the items moved. Another incident involving L.V. occurred on April 4, 2016 when she instructed him to move medication from a faulty refrigerator. Appellant alleged that she swore at him when he requested her assistance due to fear of encountering S.F. and she told him to find someone else to assist him. Other allegations included the denial of his request for union representation.

As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of FECA.¹⁷ The Board has long held that disputes regarding the handling of leave requests and attendance matters,¹⁸ disciplinary matters,¹⁹ and the assignment of work,²⁰ are administrative functions of the employing establishment and, absent error or abuse, are not

¹⁵ See *E.S.*, Docket No. 18-1493 (issued March 6, 2019).

¹⁶ *Supra* note 8.

¹⁷ *E.M.*, Docket 19-0156 (issued May 23, 2019); *F.C.*, Docket No. 18-0625 (issued November 15, 2018).

¹⁸ *B.O.*, Docket No. 17-1986 (issued January 18, 2019); *Lori A. Facey*, 55 ECAB 217 (2004); *Judy L. Kahn*, 53 ECAB 321 (2002).

¹⁹ *B.Y.*, *supra* note 5.

²⁰ *M.C.*, Docket No. 18-0585 (issued February 13, 2019).

compensable.²¹ Absent evidence establishing error or abuse, a claimant's disagreement or dislike of such a managerial action is not a compensable factor of employment.²²

Appellant has not provided sufficient evidence to substantiate his allegations of error or abuse by the employing establishment in an administrative matter. He has not submitted any evidence, such as an admission of error or a finding of fault, establishing that the employing establishment acted unreasonable in administrative matters.²³ Appellant submitted e-mails and EEOC documents that concerned some of these administrative matters, but this evidence did not demonstrate that L.V. or other employing establishment officials committed error or abuse. He did not demonstrate error or abuse by submitting the final finding of an EEOC complaint or grievance that he filed with respect to these matters.²⁴ Although appellant expressed dissatisfaction with supervisory actions, the Board has held that mere dislike or disagreement with certain supervisory actions will not be compensable absent error or abuse on the part of the supervisor.²⁵

Appellant also alleged that L.V., his supervisor, harassed him after she learned of his sexual orientation, threatened him, and allowed harassment and physical and verbal assaults by S.F. He contended that she called him a drama queen and retaliated against him after he reported S.F.'s harassment to management. Appellant also alleged being threatened by L.V. after she learned of his reporting S.F.'s threats to him as she had instructed him not report those threats. He maintained that management was aware of the problems with S.F. including his allegations that she used his personal information to take cash from ATMs from his checking account, vandalized his car, parking near him, accessed his Facebook account posing as him to post inappropriate posts and physically assaulted him.

Disputes and incidents alleged as constituting harassment and discrimination by managers and coworkers may constitute compensable employment factors if they are established as occurring and arising from appellant's performance of his regular duties.²⁶ The Board has held that unfounded perceptions of harassment do not constitute an employment factor.²⁷ For harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did in fact occur.²⁸ Regarding appellant's allegations that L.V. harassed and discriminated against him, the employing establishment investigated his allegations in this regard and found that the investigation did not substantiate a hostile work environment. Appellant has

²¹ *G.G.*, *supra* note 4.

²² *Supra* note 15.

²³ *See E.M.*, *supra* note 17; *B.O.*, *supra* note 18.

²⁴ *F.W.*, Docket No. 19-0107 (issued June 10, 2020).

²⁵ *Id.*

²⁶ *E.M.*, *supra* note 17; *D.B.*, Docket No. 18-1025 (issued January 23, 2019).

²⁷ *E.M.*, *supra* note 17; *A.C.*, Docket No. 18-0484 (issued September 7, 2018).

²⁸ *Supra* note 17.

not established with corroborating evidence that any specific threat was made against him and has not alleged or established that management ignored or tolerated any alleged threats or that it failed to take preventative action.²⁹ While he has submitted witness statements from C.W, F.V, E.W. D.C, and H.V., none of these statements with specific details such as dates, what occurred, and who was present in their statements. F.V., H.V., E.W, and D.C. all answered “Yes” to the question of whether L.V. treated appellant differently, but provided no specifics.

Regarding appellant’s allegations that S.F., harassed him, Appellant alleged that after a December 2015 staff meeting, S.F. slammed into him causing him to knock into a coworker who prevented him from falling. S.F. also was seen by him in his office picking up his personal items after she had been administratively moved from the office they shared. C.W. stated that she did not observe S.F. push appellant into him on December 24, 2015. Regarding his allegations that S.F. used ATMs to withdraw a large amount of cash out of his checking account, accessed his Facebook account without permission, physically assaulted him, inappropriately parked near him, and vandalized his car, he has not submitted any supporting evidence such as police reports or any evidence supporting his allegations against S.F. As there is no factual evidence to support his allegations of sexual orientation or verbal harassment, he has not established a compensable work factor with respect to those allegations.³⁰

As the Board finds that appellant has not established a compensable employment factor, it is not necessary to consider the medical evidence of record.³¹

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.

²⁹ *J.W.*, Docket No. 17-0999 (issued September 4, 2018); *C.G.*, Docket No. 15-0909 (issued April 5, 2016).

³⁰ *See M.C.*, *supra* note 20; *see also S.B.*, Docket No. 11-0766 (issued October 20, 2011).

³¹ *See R.B.*, Docket No. 19-0434 (issued November 22, 2019); *B.O.*, *supra* note 18 (finding that it is not necessary to consider the medical evidence of record if a claimant has not established any compensable employment factors). *See also Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2022
Washington, DC

Patricia H. Fitzgerald, 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