

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

R.B., Appellant

and

**DEPARTMENT OF THE ARMY, ROCK
ISLAND ARSENAL GARRISON,
Rock Island, IL, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 21-0643
Issued: February 9, 2023**

Appearances:

*Glenn L. Smith, 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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 19, 2021 appellant, through counsel, filed a timely appeal from a September 24, 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 to consider 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 a stress-related condition in the performance of duty.

FACTUAL HISTORY

On April 3, 2017 appellant, then a 42-year-old detective, filed an occupational disease claim (Form CA-2) alleging that he was hospitalized twice in February 2017 causally related to factors of his federal employment. He did not stop work.

In a statement dated March 16, 2017, appellant related that on July 6, 2016 management had informed him that it was reclassifying his position, lowering his grade from a GS-12 to a GS-8, and removing him from special retirement coverage. He had requested a determination about his special retirement coverage, but the employing establishment had delayed acting on his request. Appellant asserted that on February 1, 2017 he “assisted in recovering and processing a dead body in violation of employing establishment regulations, which required someone from the criminal investigation command division.” He related, “The body had been in the Mississippi River since November 26, 2016 (about three and a half months). The body was bloated. The face was not recognizable and disfigured.” Appellant advised that he tried to pilot the boat, but hit a concrete structure twice. The body got caught between the boat and the shore and appellant and two firefighters had to pull the body onto the boat. The body began to thaw and smell. At the funeral home, there were “seven other bodies in the area in various stages of the burial process some with missing limbs.” A coworker told appellant that he looked like he might throw up in the funeral home processing area. Appellant maintained that the work environment was toxic with “political in-fighting.”

In a memorandum dated December 9, 2015, the employing establishment advised that a review had revealed that the position description for criminal investigator did not meet the provisions for special retirement coverage and that affected employees would be switched to properly classified positions. On July 6, 2016 it notified appellant that a reclassification review demonstrated that employees in criminal investigator positions were performing detective work and thus his position was being reclassified. The employing establishment noted that he would receive grade and pay retention for two years.

An August 24, 2016 notification of personnel action (SF-50) indicated that effective August 21, 2016, appellant’s position was changed from GS-12 criminal investigator to GS-8 detective.

On August 29, 2016 the employing establishment notified appellant of its correction of his retirement coverage. It indicated that one or more of his prior positions was not approved for special retirement coverage and that it would refund his extra retirement contributions. The employing establishment advised, “Typically, a refund will occur in two parts. The first refund is received soon after the correction is processed and is for any erroneous deductions made in the previous 12 months. The second refund takes additional time and is for the period of erroneous

deductions made prior to the last 12 months.” On September 9, 2016 appellant requested a formal determination about the change in his retirement.³

The record contains a February 2, 2017 law enforcement report regarding a dead body found on February 1, 2017 in the water near the hydroelectric plant. It noted that the body was retrieved from the water and taken to a funeral home to be processed by detectives.

In a statement dated March 31, 2017, N.S., appellant’s supervisor, indicated that appellant’s position had been reclassified after a review of all criminal investigator positions. The review determined that criminal investigator positions were not necessary. Appellant was moved to a new position that required certain conditions, including a physical examination and agility test. The position was not covered under the special retirement category. N.S. advised that appellant “was part of the first responder team who were called to the recovery of a deceased person in the Mississippi River...” He maintained that acting as a first responder, which included recovering and assessing the deceased, securing crime scenes, and collecting evidence, occurred infrequently but was part of appellant’s employment duties. N.S. related, “As part of his duties he did assist in the recovery of the deceased person from the river and subsequent preliminary examination with the [c]ounty [c]oroner. Upon return from the release of the deceased person to the [c]ounty [c]oroner, [appellant] was asked about his well-being and offered the ability to speak with myself or a counselor [or] chaplain. [Appellant] responded that he was fine and did not require any assistance at that time.” N.S. advised that even before the February 1, 2017 incident appellant had various medical issues. On February 23, 2017 he had expressed concern about his health. N.S. related, “During this meeting [appellant] explained that he was having problems after the recovery of the deceased person earlier in the month and with the reclassification and the body recovery.” He noted that appellant had become upset during the meeting and seemed to be having chest pains, so N.S. called an ambulance to take him to the hospital. Appellant told N.S. that he was experiencing stress from the reclassification of his position and could have post-traumatic stress disorder (PTSD).

On April 3, 2017 the employing establishment controverted appellant’s claim. It asserted that his reclassification was an administrative matter and that it had “followed its established internal procedures in administering the across-the-board actions.”

In a development letter dated April 24, 2017, OWCP informed appellant of the deficiencies of 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. OWCP afforded appellant 30 days to respond.

Thereafter, appellant submitted April 7 and May 23, 2016 letters from the employing establishment advising that his position had been reclassified following an audit. It indicated that the audit had found that appellant’s position description had been “misclassified and/or did not meet the applicable SRC [special retirement coverage] statutory and regulatory requirements.” The employing establishment indicated that he had been “erroneously charged extra retirement contributions” and could contact the Thrift Savings Plan for information about roll-over options.

³ In a January 11, 2017 memorandum, appellant asserted that he participated in various committees and performed duties that were not covered by his reclassified position.

In a May 22, 2017 statement, appellant related that the employing establishment had informed him on July 6, 2016 that his job would be reclassified. He asserted that, for 15 months, he did not know what job he would have or where it would be located. On November 8, 2016 appellant's supervisor told him he would be removed from employment if he could not meet the conditions of his new position. He further asserted that the employing establishment had mismanaged his appeal of his change of retirement category. Appellant also contended that he was assigned work outside of his position description, including investigating deaths and viewing and processing dead bodies, in violation of regulations.

Appellant further related that he had a panic attack after meeting with his supervisor, N.S., on February 23, 2017. He received medical treatment in the emergency room. Appellant advised that he had been having anxiety about work since July 6, 2016. He generally maintained that the work environment was toxic, but asserted that he did not want to provide specific examples, citing privacy concerns. Appellant noted that there were communications problems between branches and political infighting. He related that hearing arguments between coworkers "triggered a run/fight response in me causing numerous panic attacks." Appellant related, "Here is the bottom line. This is all happening while I am dealing with the severe repercussions of position reclassification and medically diagnosed illnesses. Dealing with the toxic work environment exacerbated my illnesses and continues."

By decision dated June 14, 2017, OWCP denied appellant's emotional condition claim. It found that he had not established any compensable employment factors.

On July 22, 2017 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated September 6, 2017, OWCP denied appellant's request for a telephonic hearing as untimely under 5 U.S.C. § 8124(b).

On January 30, 2018 appellant, through counsel, requested reconsideration. He asserted that it was "clear from the presented evidence that [appellant's] responding to the dead body investigation aggravated [his] anxiety and panic disorder.... The recovery scene in which the condition of the body was so graphic that the photos of the body were withheld...." Counsel noted that the body had been in the river for around three and a half months. It thawed during transport and smelled. He noted that appellant was exposed to additional dead bodies and body parts at the medical examiner's office.

By decision dated April 27, 2018, OWCP denied modification of its June 14, 2017 decision.

Appellant requested reconsideration. In an April 24, 2019 statement, counsel argued that even if appellant's job required him to retrieve dead bodies, he could still receive benefits "for the adverse mental health effects he suffered as a result."

By decision dated July 10, 2019, OWCP denied modification of its April 27, 2018 decision.

In a June 30, 2020 statement, R.A., a fireman, described the effects of the Mississippi River on a dead body.

On July 9, 2020 appellant, through counsel, requested reconsideration. In a July 6, 2020 statement, counsel asserted that appellant had factually established that he "recovered and

transported an extremely deteriorated faceless body that had been floating in the Mississippi river over two months” and that the incident occurred during the performance of his work duties.

By decision dated September 24, 2020, OWCP denied modification of its July 10, 2019 decision.

LEGAL PRECEDENT

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.⁴

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to a claimant’s employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers’ compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.⁵ However, disability is not compensable when it results from factors such 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.⁶

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.⁷ 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.⁸

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur.⁹ Mere perceptions of harassment or discrimination are not

⁴ See *S.K.*, Docket No. 18-1648 (issued March 14, 2019); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁵ *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

⁶ *Lillian Cutler*, *id.*

⁷ See *R.M.*, Docket No. 19-1088 (issued November 17, 2020); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff’d on recon.*, 42 ECAB 556 (1991).

⁸ *M.A.*, Docket No. 19-1017 (issued December 4, 2019).

⁹ *O.G.*, Docket No. 18-0350 (issued August 7, 2019); *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

compensable under FECA.¹⁰ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹¹

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 factors of employment and may not be considered.¹² If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.¹³

ANALYSIS

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

Appellant attributed his emotional condition in part to *Cutler*¹⁴ factors. He related that on February 1, 2017 he had helped retrieve and process a corpse pulled from the Mississippi River. Appellant advised that the body had been in the water for over three months and was in an advanced state of decay. He related that during transport the body had begun to smell. While processing the body at the funeral home, appellant saw other bodies with missing limbs. N.S., appellant's supervisor, confirmed that he was performing his work duties when he aided in recovering the body from the river and when he participated in the coroner's examination.

The Board has held that conditions related to stress from situations in which an employee is trying to meet his or her positions requirements are compensable.¹⁵ The evidence in this case is sufficient to establish that appellant experienced stress performing his regularly or specially assigned duties. Under *Cutler*,¹⁶ he has established that retrieving and processing the body from the river on February 1, 2017 constituted a compensable work factor.

Appellant further attributed his condition to administrative or personnel matters, specifically the employing establishment's reclassification of his position from criminal investigator to detective, lowering his grade from a GS-12 to a GS-8, and removing him from special retirement coverage. In a December 9, 2015 memorandum, the employing establishment

¹⁰ *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ See *Michael Ewanichak*, 48 ECAB 364 (1997).

¹² See *R.B.*, Docket No. 19-0434 (issued November 22, 2019); *O.G.*, Docket No. 18-0359 (issued August 7, 2019).

¹³ *Id.*

¹⁴ *Supra* note 5.

¹⁵ *K.J.*, Docket No. 17-1851 (issued September 25, 2019); *P.W.*, Docket No. 08-0315 (issued August 22, 2008); *Jeral R. Gray*, 57 ECAB 611 (2006).

¹⁶ *Supra* note 5.

indicated that a review had demonstrated that its criminal investigator positions did not meet the provisions for special retirement coverage and that employees in those positions would be moved to properly classified positions. On July 6, 2016 it informed appellant that his position as a criminal investigator had been reclassified as work for a detective and that he would receive grade and pay retention for two years. The employing establishment further advised on August 29, 2016 that his retirement had been changed from special retirement coverage to regular retirement. On March 31, 2017 N.S. noted that a review by the employing establishment had established that criminal investigator positions were unnecessary. The employing establishment, on April 3, 2017, indicated that it had followed its established internal procedure in reclassifying the positions.

In *Thomas D. McEuen*,¹⁷ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. However, the Board has also held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, such action will be considered a compensable employment factor.¹⁸

The Board finds that appellant has established error in an administrative matter. In letters dated April 7 and May 23, 2016, the employing establishment advised that his position had been reclassified after a review had revealed that his position description had been "misclassified" and/or failed to meet the requirements for the special retirement category. It noted that it had erroneously charged appellant extra retirement contributions. As the employing establishment, by its own finding, asserted that it had misclassified appellant's original position, placed him in the wrong retirement category, and charged him extra retirement contributions, he has established error or abuse in an administrative matter. When an employing establishment's actions in an administrative matter are shown to be erroneous or abusive, the claim is compensable.¹⁹

Appellant further alleged that his work environment was toxic, with arguments between coworkers and in-fighting among groups. However, he has not submitted any corroborative evidence to establish a factual basis for his allegations. As noted above, 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.²⁰ Mere perceptions of harassment or discrimination are not compensable under FECA. Based on the evidence of record, the Board finds that appellant has not established, with corroborating evidence, harassment as a compensable employment factor.²¹

As OWCP found that there were no compensable employment factors, it has not analyzed or developed the medical evidence. Thus, the Board will set aside OWCP's September 24, 2020

¹⁷ See *Thomas D. McEuen*, *supra* note 7.

¹⁸ *M.B.*, Docket No. 29-1160 (issued April 2, 2021); *William H. Fortner*, 49 ECAB 324 (1998).

¹⁹ See *D.B.*, Docket No. 19-0443 (issued November 15, 2019).

²⁰ *Supra* note 11.

²¹ *E.A.*, Docket No. 19-0582 (issued April 22, 2021); *Y.B.*, Docket No. 16-0194 (issued July 24, 2018).

decision and remand the case for consideration of the medical evidence with regard to whether appellant has established an emotional condition in the performance of duty causally related to the compensable employment factors.²² After other such further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's emotional condition claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 24, 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: February 9, 2023
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

²² *E.A., id.*