United States Department of Labor
Employees' Compensation Appeals Board

R.A., Appellant	)	
and	)	**Docket No. 21-0412**
	)	**Issued: January 10, 2023**
DEPARTMENT OF THE NAVY, FLEET & FAMILY SUPPORT CENTER, San Diego, CA, Employer	)	

Appearances:
Lonnie Boylan, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On January 29, 2021 appellant, through a representative, filed a timely appeal from a December 31, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal 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.

[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 met his burden of proof to establish an emotional condition in the performance of duty.

FACTUAL HISTORY

On March 18, 2020 appellant, then a 56-year-old director of the Fleet and Family Support Program, filed an occupational disease claim (Form CA-2) alleging that work stress caused anxiety, sleep apnea, hypertension, Bell's palsy, and aggravated his preexisting post-traumatic stress disorder (PTSD). He noted that he first became aware of his condition on March 31, 2005 and realized its relation to his employment on December 4, 2019. Appellant stopped work on January 16, 2020. In an attached statement, he noted that he had retired from the U.S. Navy in March 2005 when he was diagnosed with general anxiety disorder and PTSD. Appellant asserted that, beginning in 2015, his work environment at the employing establishment became very stressful.

In a January 14, 2020 report, Lisa McIunkin, Lead, a licensed marriage and family therapist, noted that appellant was admitted to the Sharp Mesa Vista Trauma and PTSD recovery intensive outpatient program on December 3, 2019. She related that appellant had been attempting to manage work demands and treatment simultaneously, but found his current work environment interfered with his treatment. Ms. McIunkin recommended appellant take a leave of absence until February 24, 2020 in order to focus on healing and his mental health.

In a February 17, 2020 report, Silvia Aguayo, a licensed marriage and family therapist, confirmed that appellant completed the outpatient program on February 24, 2020 and would transition to outpatient individual psychotherapy. She recommended appellant remain off work until March 31, 2020 or until further assessment.

In an April 14, 2020 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the requested evidence.

In an April 30, 2020 statement, appellant reiterated that he had been diagnosed with general anxiety and PTSD at the time of his 2005 retirement from the Navy, and that he began working for the employing establishment in May 2009. According to him, appellant's PTSD and anxiety had been manageable until 2014 or 2015 when his work stress significantly increased triggering his anxiety and PTSD.

In a work capacity evaluation (Form OWCP-5a) dated April 30, 2020, Dr. Ci Ma, a physician Board-certified in psychiatry, neurology, and preventive medicine, indicated that appellant was totally disabled from work. Dr. Ma opined that appellant's working environment triggered his PTSD. Dr. Ma, in a medical questionnaire dated April 30, 2020, reported active symptoms of erratic sleep, poor concentration, night terrors, irritable mood, and mixed depression. In a May 1, 2020 report, Dr. Ma diagnosed general anxiety, adjustment disorder with depressive mood, and PTSD (combat related).

In a May 6, 2020 development letter, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations. It afforded both parties 30 days to respond.

OWCP received appellant's February 18, 2014 response to a proposed three-day suspension wherein appellant asserted that the suspension was unwarranted. Appellant noted that he had been overseeing a program and had successfully met a performance improvement plan, which ended on October 28, 2013. However, he was reassigned by management from the program. Appellant submitted email correspondence and his September 30, 2013 performance evaluation, indicating that his job performance met leadership expectations.

In a July 25, 2017 memorandum, regarding a July 24, 2017 meeting with J.P., an employing establishment manager, appellant noted that he asked J.P. why he was treated differently and held to a different standard, than the other employing establishment directors. He related that L.A., a scheduler and coworker, had to be retrained three times as she did not have the skills necessary to perform her job, and he therefore had to prepare her metrics report for her. Appellant asserted that he would be held accountable and responsible for scheduling duties and had every right to complain about the degradation of services. He stated that R.S. was slow to hire new schedulers and only did so after appellant complained to M.S. Appellant alleged that coworkers witnessed that L.A. belittled him, cut him off from talking in the committee, and treated him differently than the other directors.

In an August 1, 2017 memorandum of a July 31, 2017 meeting with J.P. and Dr. M.T., appellant noted that he was instructed not to coerce statements from former schedulers. During the meeting appellant denied that he forced or coerced anyone to provide statements, which had been freely given. He agreed to comply with J.P.'s direct order not to seek additional statements from former contractors, but that he would use the statements he had or would be receiving.

In an August 17, 2017 statement, appellant noted that prior to receiving a five-day proposed suspension from his supervisor, J.P., he was not provided formal counseling, a letter of warning, or a reprimand on any of the issues addressed in the proposed suspension. He further alleged that this was a harsh measure especially because it was not his supervisor's usual practice with other employees at his level in the department. Appellant referred to his successful September 30, 2016 performance appraisals and praise regarding the efficiency of the programs he directed. He responded to the proposed charges for the suspension alleging that it was an attempt to undermine him after he had pressed the contract manager to replace R.S. with a new supervisor. Appellant stated that for the past two years he had discussed R.S.'s lack of performance and leadership. He noted his supervisor's approval was not technically required for his request for a new supervisor, but that he had attempted to get his supervisor's support for his decisions. Appellant stated that J.P. disagreed with his proposal to have C.M. be named supervisor as C.M. was an off-base contractor supervisor. However, a few weeks later, J.P. named C.M. Ombudsman Coordinator, which was an on base contractor position. Appellant detailed allegedly inaccurate information R.S. provided to him. He further indicated that R.S. failed to timely fill and fully staff positions. Appellant also explained that R.S.'s attempts to undermine appellant's decisions, resulted in confusion, impacted the morale of schedulers, and led to a degradation of services. He attached statements from former schedulers and his emails in support of his decision to have R.S. replaced as director.

In an April 19, 2017 email from appellant to M.S. and R.S., and copied to J.M. and S.C., appellant informed M.S. and R.S. that another staff member was needed to help a coworker schedule appointments and answer calls. He noted that the coworker was performing the work of five schedulers, which was having a negative impact on services to their client. Appellant attached a list of Centralized Scheduling Center coverage for April 19 through 25, 2017 and performance requirements summary.

In a July 24, 2017 statement, S.C. related that over the past 4 years he had observed J.P. treat appellant differently than other Fleet and Family Support Center directors. He related that appellant was required to obtain documentation upon documentation regarding issues with staff members to obtain approval from J.P. to take action; however, when he and C.C. wanted to move employees due to similar issues no documentation was required. S.C. also related that during meetings, J.P. would usually take time to consider someone's suggestions, but if appellant made a suggestion she would not listen to appellant, cut him off from speaking, addressed appellant in a demeaning manner, and insinuated that his judgement was not to be trusted. He also noted that J.P. micromanaged appellant's programs, even though his programs had been certified as perfect during a certification inspection.

In a July 24, 2017 statement, T.J. noted that she witnessed R.S. on multiple occasions going against the decisions and policies appellant had promulgated, thereby undermining appellant. She provided an example of R.S. stating that he did not understand why the employing establishment had to capture productivity weekly or complete weekly reports. T.J. related that appellant gave clear work task instructions, however, if appellant was not present R.S. would tell staff that they did not have to complete certain tasks or reports, which negatively affected staff communication and morale.

In a July 31, 2017 statement, T.S. noted that from January 2016 to April 2017 she worked with R.S. as her supervisor. She related that R.S. would dismiss and make light of policies and decisions made by appellant. T.S. related that R.S. would tell the schedulers that the metrics/reports they ran were not looked at by anyone, and were a waste of time.

In an email to J.P. dated June 23, 2017, appellant noted that he understood his role as government director. He noted the number of calls made and received in 2015 when employing establishment was fully staffed with schedulers in contrast to the number made and received in 2016 when it was not fully manned. Appellant stated that the blame was on the contractor and R.S. for failing to fully staff with five schedulers. He noted that limited number of schedulers and that closing during lunch hours had a significant negative impact on the region's customer service.

The record contains a January 14, 2020 notice of proposed 14-day suspension from J.P. to appellant along with supporting documentation. The suspension notice included a series of offenses including unbecoming conduct, failure to follow instructions, and lack of candor.

In a May 19, 2020 statement, J.P. responded to appellant's allegations, noting her disagreement. She noted that he sustained an injury on March 31, 2005 while he was on active duty in the U.S. Navy. J.P. asserted that at no time did appellant inform her of any workplace injury while she was his supervisor beginning on July 28, 2014 until she last saw him on January 14, 2020. She stated that she issued a proposed 14-day suspension to appellant on

January 14, 2020, and that on the following day he submitted requests for a medical leave of absence. Appellant subsequently filed an occupational disease claim with a December 4, 2019 injury date. J.P. noted that, on that date, she had a meeting with appellant in the presence of Dr. M.T. regarding a number of staff complaints against appellant and his failure to adhere to agreements reached regarding off base site operations. She alleged that some serious complaints from staff at off-base sites had been lodged regarding appellant, and a senior supervisor stated that her resignation was in part due to appellant's conduct. During an investigation into the allegations, appellant had been instructed to temporarily cease any communication with the staff. As a result of the investigation, J.P. stated that she issued a proposed 14-day suspension to appellant for unbecoming conduct, failure to follow instructions, and lack of candor. After appellant had signed the proposed January 14, 2020 disciplinary action, he submitted requests for medical leave and a request for disability retirement. J.P. listed the employees who had lodged complaints against appellant which resulted in the 14-day suspension. She concluded that he had managed to satisfactorily perform his job duties until the fall of 2019 when his conduct resulted in the staff lodging complaints about his behavior.

In a report dated May 21, 2020, Dr. Ma noted that appellant had experienced anxiety since 1991. He noted that in 2016 appellant had frequent conflicts with his immediate supervisor, was placed on performance improvement plan, moved to another position, and suspended several times. Dr. Ma recounted that on January 13, 2020 appellant received a 14-day suspension without any prior warning of misconduct, which caused a significant exacerbation of his preexisting depression, anxiety, and panic attacks. He diagnosed generalized anxiety disorder with panic attacks, combat related PTSD, and adjustment disorder with depressed mood. Dr. Ma noted appellant had a stressful work environment, and had financial stressors. He attributed appellant's current medical conditions and symptoms to complex and time-sensitive tasks he was frequently required to perform, as well as the program functions he performed. Dr. Ma concluded that it was unlikely appellant would be able to return to his position.

Ms. Aguayo, in a June 12, 2020 report, noted that appellant had been referred for psychotherapy for a provisional diagnosis of unspecified anxiety disorder, which became chronic PTSD after his evaluation. She noted that he related stressors of hostile work environment, harassment by his supervisor and a lengthy divorce case. Ms. Aguayo noted appellant's prognosis was fair provided continued treatment and stress-free environment. She noted recovery time was unclear due to pending work-related issues, home stressors, and medical complications.

In reports dated July 22, 2020, Dr. Raphael Morris, a Board-certified psychiatrist, responded to the charges noted in the employing establishment's suspension proposal and concluded that appellant's advocacy did not meet the definition of a prohibited personnel practice.

By decision dated September 11, 2020, OWCP denied appellant's emotional condition claim, finding that he failed to establish a compensable factor of employment.

On October 5, 2020 appellant, through counsel, requested reconsideration.

In a letter dated December 9, 2020, the employing establishment responded to appellant's request for reconsideration, asserting that appellant failed to establish any compensable factor of employment. It attached three notification of personnel action (Form SF-50) forms concerning a

suspension effective June 7, 2020, a return to duty effective June 21, 2020, and his voluntary retirement effective July 31, 2020.

By decision dated December 31, 2020, OWCP denied modification.

LEGAL PRECEDENT

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

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*,[4] 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.[5] 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.[6]

Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[7] Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[8] 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.[9]

[3] *N.S.*, Docket No. 21-0355 (issued July 28, 2021); *W.F.*, Docket No. 18-1526 (issued November 26, 2019); *C.M.*, Docket No. 17-1076 (issued November 14, 2018); *C.V.*, Docket No. 18-0580 (issued September 17, 2018); *Kathleen D. Walker*, 42 ECAB 603 (1991).

[4] 28 ECAB 125 (1976).

[5] *N.S.*, *supra* note 3; *G.M.*, Docket No. 17-1469 (issued April 2, 2018); *Robert W. Johns*, 51 ECAB 137 (1999).

[6] *N.S.*, *id.*; *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, *supra* note 4.

[7] *N.S.*, *id.*; *A.C.*, *id.*

[8] *N.S.*, *id.*; *G.R.*, Docket No. 18-0893 (issued November 21, 2018).

[9] *N.S.*, *id.*; *A.C.*, *supra* note 6.

An employee's emotional reaction to administrative or personnel matters generally falls outside of FECA's scope.[10] Although related to the employment, administrative and personnel matters are functions of the employer rather than the regular or specially assigned duties of the employee.[11] However, to the extent 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.[12]

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.[13] Mere perceptions of harassment or discrimination are not compensable under FECA.[14] A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.[15] Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[16]

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's allegations do not pertain to his regularly or specially assigned duties under *Cutler*.[17] Rather, appellant has alleged error and abuse by his supervisors in administrative and personnel actions, harassment, and a hostile work environment.

[10] *See P.B.*, Docket No. 19-1673 (issued December 1, 2021); *G.R.*, *id.*; *Andrew J. Sheppard*, 53 ECAB 170-71 (2001), 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[11] *P.B.*, *id.*; *David C. Lindsey, Jr.*, 56 ECAB 263, 268 (2005); *McEuen*, *id*.

[12] *Id*.

[13] *N.S.*, *supra* note 3; *O.G.*, Docket No. 18-0350 (issued August 7, 2019); *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

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

[15] *N.S.*, *id.*; *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, *supra* note 13.

[16] *N.S.*, *id.*; *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).

[17] *L.H.*, Docket No. 18-1217 (issued May 3, 2019); *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, *supra* note 4.

Appellant's allegations center around his dissatisfaction with supervisory actions[18] and the handling of disciplinary actions.[19] These allegations relate to administrative or personnel management actions. Administrative and personnel matters, although generally related to employment, are administrative functions of the employer. For an administrative or personnel matter to be considered a compensable factor of employment, the evidence must establish error or abuse on the part of the employer.[20] In determining whether the employing establishment erred or acted abusively, the Board must examine whether the employing establishment acted reasonably.[21]

The record establishes that appellant was issued progressive suspensions over the years. In an August 17, 2017 statement, appellant noted that prior to receiving the five-day proposed suspension from his supervisor, J.P., he was not provided formal counseling, a letter of warning or reprimand on any of the issues addressed in the proposed suspension. Appellant has not however submitted any further documentation that the employing establishment acted unreasonably in issuing his suspensions, by documentation of personnel policies, and similar corroborating evidence.[22] J.P., appellant's supervisor, explained that appellant was advised that he did not have supervisory authority over contractor employees, and that his only role was that of oversight of the programs. She cited incidents in which appellant disagreed or disregarded supervisory instructions issued by the program's supervisors and management. J.P. further indicated in a May 19, 2020 statement that appellant had managed to satisfactorily perform his job duties until the Fall of 2019 when his conduct resulted in staff lodging complaints about his behavior. She listed the employees who had lodged complaints against appellant which resulted in the 14-day suspension. The evidence of record does not establish that the employing establishment acted unreasonably in issuing appellant's progressive suspensions.[23]

Appellant also attributed his emotional condition to management allowing R.S., a supervisor, who appellant believed to be a subordinate, to undermine appellant's authority. The evidence of record indicates that appellant believed R.S. should have hired more schedulers and that appellant had suggested to management over a period of years that R.S. be reassigned. The witness statements from T.S. and T.J. indicated that R.S. instructed schedulers that certain weekly reports and tasks did not have to be performed, contrary to appellant's instructions. However, these statements are vague and lack specific detail, such as dates and names of employees involved, and do not indicate why the reports/tasks requested by appellant were necessary. The Board finds that appellant has not established a compensable employment factor with respect to these personnel and administrative matters.

[18] *P.B.*, Docket No. 19-1673 (issued December 1, 2021); *N.S.*, Docket No. 21-0355 (issued July 28, 2021); *T.C.*, Docket No. 16-0755 (issued December 13, 2016).

[19] *P.B.*, *id.*; *C.J.*, Docket No. 19-1722 (issued February 19, 2021); *R.D.*, Docket No. 19-0877 (issued September 8, 2020); *D.L.*, Docket No. 09-1103 (issued February 26, 2010).

[20] *Thomas D. McEuen*, *supra* note 10.

[21] *R.D.*, Docket No. 19-0877 (issued September 8, 2020).

[22] *D.D.*, Docket No. 12-1739 (issued September 16, 2013).

[23] *Supra* note 22.

Appellant further alleged that he was harassed and treated differently by J.P. than other directors. The Board has held that for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did in fact occur as alleged. Mere perceptions of harassment are not compensable under FECA. Although appellant alleged that his supervisor engaged in actions, which he believed constituted harassment and reprisals, the evidence of record is insufficient to establish his allegations. In a July 25, 2017 memorandum regarding a July 24, 2017 meeting with J.P. appellant noted that he asked J.P. why he was treated differently and held to a different standard, than the other employing establishment directors. However, appellant did not note any specific instances in this memorandum wherein he was held to a different standard. Appellant also alleged in this memorandum that coworkers witnessed him being belittled, cut him off from talking in the committee, and had treated him differently than the other directors. However, he again only related vague allegations without providing context or specific dates of these events. Appellant has not submitted sufficient evidence to establish these allegations as compensable.[24] OWCP did receive statements from coworkers regarding appellant's allegations. In a July 24, 2017 statement, S.C. related that over the past four years he had observed J.P. treat appellant differently when compared to other directors. He related that appellant was required to obtain documentation regarding issues with staff members to obtain approval from J.P. to take action, however, when he and C.C. wanted to move employees due to similar issues no documentation was required. S.C. also related that during meetings J.P. would usually take time to consider someone's suggestions, but if appellant offered a suggestion she would not listen to appellant, cut him off from speaking, address appellant in a demeaning manner, and insinuate that his judgement was not to be trusted. He also noted that J.P. micromanaged appellant's programs, even though his programs had been certified as perfect during a certification inspection. While this statement is generally supportive of appellant's allegations, it again lacks specificity as to context. S.C. did not provide details regarding the actions appellant wanted to take which required documentation, nor did he provide contextual details regarding the meetings, and specific incidents that transpired during these meetings. Based on the evidence of record, the Board finds that appellant has not established, with corroborating evidence, that he was harassed, discriminated against, and subjected to disparate treatment and reprisals by the employing establishment.

As the Board finds that appellant has not met his burden of proof to establish a compensable employment factor, it is not necessary to consider the medical evidence of record.[25]

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.

[24] *J.J.*, Docket No. 07-0796 (issued July 12, 2007).

[25] *See P.B.*, Docket No. 19-1673 (issued December 1, 2021); *B.O.*, Docket No. 17-1986 (issued January 18, 2019) (finding that 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).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 31, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2023
Washington, DC

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

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

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