United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 23-0628**
	)	**Issued: September 22, 2023**
U.S. POSTAL SERVICE, NORTH TEXAS PROCESSING & DISTRIBUTION CENTER, Coppell, TX, Employer	)	

Appearances:
Alexandra Reasonover, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 22, 2023 appellant, through counsel, filed a timely appeal from a September 29, 2022 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 to consider the merits of this case.[3]

[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*.

[3] The Board notes that following the September 29, 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*.

ISSUE

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

FACTUAL HISTORY

On October 23, 2018 appellant, then a 55-year-old expeditor, filed a traumatic injury claim (Form CA-1) alleging that on October 2, 2018 he developed stress and depression due to "[c]onstant harassing, baseless accusations, bullying and demeaning comments made by [m]anagement." He did not stop work.

In a statement accompanying his claim form, appellant related that he had good relationships with management at the employing establishment from April 1991 until February 2018, when A.C. became his direct supervisor. In April 2018 he filed a successful Equal Employment Opportunity (EEO) complaint against A.C. for moving him instead of junior employees to other positions. On May 16, 2018 A.C. issued a predisciplinary action against appellant for attendance on a technical issue that was subsequently corrected. He referred to appellant as "silly" and used profanity on May 31, 2018. Appellant contacted the employing establishment's police, who advised him to set up a meeting with management. On August 1, 2018 A.C. told J.J., another supervisor, to set up a predisciplinary meeting about a July 23, 2017 incident, even though he had not told appellant of any work deficiencies on that date. On August 15, 2018 appellant received a suspension regarding a July 23, 2017 incident that was subsequently rescinded based on K.H., a coworker's statement. He requested but did not receive assistance from management. From October1 to 2, 2018 appellant indicated that A.C. assigned him to another facility without a "scanner 'person'" to assist him. He noted that he believed he was "set up."

In a June 5, 2018 letter to the employing establishment, appellant advised that A.C. had behaved toward him in an unprofessional way. He related that he had informed management that A.C. had made derogatory statements and used profanity, but no action had been taken.

In an August 20, 2018 letter to B.K., a manager at the employing establishment, appellant related that A.C. used abusive language towards him and reassigned without providing the training. He advised that on August 3, 2018 A.C. had J.J. issue him a predisciplinary action for failure to follow instructions even though J.J. was not his supervisor. On August 15, 2018 appellant received a seven-day suspension. A.C. told appellant on August 16, 2018 to go home if he did not know his bid job when he requested assistance working on a particular machine for the first time.

In a September 24, 2018 statement to the local union, appellant asserted that A.C. used profanity towards him on September 19, 2018.

On November 27, 2018 OWCP determined that the claim should be adjudicated as an occupational disease as appellant had attributed his condition to events occurring over more than one work shift.

In a development letter dated November 28, 2018, OWCP advised appellant of the factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. It afforded him 30 days to submit the requested information.

Subsequently, OWCP received an August 16, 2018 witness statement from A.R., a coworker who advised that on August 15, 2018 appellant was assigned to print labels for outgoing mail in an area in which he was unfamiliar. Appellant called his supervisor and asked for someone to brief him on the procedures for using the sorter machines. He called a second time and G.A., a supervisor, told him to "bid off" or leave if he did not know his job. A.R. asserted that employees were instructed to ask if they did not know how to do something, which is what appellant had done.

In a statement dated December 27, 2018, appellant advised that he had filed an EEO complaint earlier that year against A.C. because he received less favorable treatment than a junior employee. On May 30, 2018 A.C., G.A., and F.G, all managers, bullied him into attending a redress meeting he did not request. A.C. instructed appellant to go to the conference room. When he asked the reason, A.C. asked loudly if he was refusing to go. G.A. told him that attending a redress hearing was mandatory. J.J., who was at the facility to investigate his EEO complaint, later told appellant that it was not a redress hearing, leaving him confused and stressed. He signed an agreement dropping his EEO complaint so that he could leave the room.

Appellant further asserted that on June 7, 2018 he went with coworkers to the breakroom before his overtime shift. After he had been there about two minutes A.C. entered the room and yelled at him to get off the clock even though there were others sitting with him. E.R., a coworker, asked appellant why A.C. had only yelled at him. On August 15, 2018 appellant requested help or instructions because he was working in an unfamiliar area. On September 17, 2018 A.C. scanned mail behind him and told a coworker he was there to make sure appellant was doing his job. On September 19, 2018 A.C. called him a "b**ch ass." Appellant noted that he had already discussed the October 2, 2018 incident, which caused him to experience anxiety and physical issues. On October 17, 2018 P.G., his union steward, signed a mutual agreement, but the harassment and unfair treatment continued.

In a February 12, 2019 development letter, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations, the identity of employees that might have additional information, any documents that corroborated, refuted, or clarified the allegations, and witness statements from employees with additional information. It afforded the employing establishment 30 days to submit the requested evidence.

By decision dated May 1, 2019, OWCP denied appellant's emotional condition claim. It found that he had not established the implicated employment factors. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Subsequently, OWCP received letters from appellant to the employing establishment regarding absence inquiries and a May 17, 2019 letter scheduling an investigative interview. Appellant further submitted additional medical evidence.

On February 5, 2020 appellant requested reconsideration.

By decision dated April 30, 2020, OWCP denied modification of its May 1, 2019 decision.

Thereafter, OWCP received a December 27, 2018 statement from I.C., a coworker. I.C. related that on September 17, 2018 A.C. walked behind appellant scanning mail and when she

asked why A.C. replied that it was to make sure that he did his job. I.C. related that supervisors did not scan mail and that he "was obviously harassing [appellant]."

In a December 28, 2018 witness statement, J.J., a coworker, related that on May 29 or 30, 2018 A.C. told appellant "in a harsh and threatening tone to go to a meeting." After, appellant asked what the meeting was about, A.C. told F.G. that he had refused to attend the meeting. Appellant advised that he had not requested a redress hearing, but they told him to go with them.

In another December 28, 2018 witness statement, A.S., a coworker, related that he and appellant were shooting pool on their break. A.C. came into the area and stood by appellant in front of the pool table and refused to move. A.S. advised that this was the second time he had seen "this type of harassment" by A.C. toward appellant.

On February 26, 2021 M.J., a coworker, asserted that A.C. had harassed her and other coworkers. In another witness statement of even date, M.J., another coworker, advised that A.C. had yelled and acted unprofessionally toward a coworker.

On July 30, 2018 P.G., appellant's union representative, signed a mutual agreement that management and employees would treat each other with respect.

On April 9, 2021 appellant, through counsel, requested reconsideration. Counsel asserted that the evidence established that A.C. harassed appellant causing stress-related conditions, including post-traumatic stress disorder, generalized anxiety disorder, adjustment disorder with mixed anxiety and depressed mood, cervical sprain, and sprains of the bilateral shoulder joints.[4] She reviewed the statements from appellant and witnesses and asserted that he had established harassment. Counsel also noted that his suspension was overturned.

By decision dated July 6, 2021, OWCP modified its April 30, 2020 decision to reflect that appellant had established the implicated employment factors. It denied the claim, however, as he was not in the performance of duty as he had not established any compensable employment factors.

Subsequently, appellant submitted a March 21, 2021 statement. He related that A.C. began harassing him after he was successful in an April 2018 EEO claim against him. Appellant related that he could no longer work beginning October 2, 2018 because of the harassment. He asserted that he developed stress-related psychological conditions, including anxiety, depression, headaches, and symptoms of pain and stiffness in his neck and shoulders due to harassment by A.C. Appellant described in detail instances of harassment by A.C. from May through October 2018. He noted that on October 2, 2018 A.C. had questioned him about an off-load scan even though it was not his job. Appellant asserted that he had filed multiple grievances against A.C., but that the harassment continued.

The Equal Employment Opportunity Commission (EEOC), in a decision dated January 10, 2022, determined that the employing establishment erred in dismissing appellant's complaint as

[4] In a report dated February 1, 2021, Dr. Robert J. Spicer, a Board-certified physiatrist, diagnosed a sprain of the ligaments of the cervical spine and bilateral shoulder joints as a result of muscle tension due to work stress, including harassment by A.C.

he failed to state a claim and in finding that he failed to respond to a written request for clarification. It ordered the employing establishment to process the remanded claims.

In an undated statement received July 5, 2022, M.S. advised that at work on February 24, 2021 A.C. approached her in an aggressive manner. In February 26, 2021 statements, M.J. and M.S. both described harassing treatment of A.C. toward M.S.

On July 5, 2022 appellant, through counsel, requested reconsideration. Counsel reviewed the evidence submitted and argued that the employing establishment erred in failing to follow its reasonable accommodation policy when it did not separate A.C. from appellant based on medical evidence from 2020 and 2021.

By decision dated September 29, 2022, OWCP denied modification of its July 6, 2021 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] 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 of FECA,[6] 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.[7] 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.[8]

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.[9]

Workers' compensation law does not apply to 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

[5] *Supra* note 2.

[6] *C.B.*, Docket No. 21-1291 (issued April 28, 2022); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[7] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *R.C.*, 59 ECAB 427 (2008).

[8] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[9] *See C.C.*, Docket No. 21-0283 (issued July 11, 2022); *S.K.*, Docket No. 18-1648 (issued March 14, 2019); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

work duties or a requirement imposed by the employment, the disability is deemed compensable.[10] 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.[11]

For harassment or discrimination to give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment or discrimination did in fact occur.[12] Mere perceptions of harassment are not compensable under FECA.[13]

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.[14] 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.[15]

OWCP's procedures provide:

> "An employee who claims to have had an emotional reaction to conditions of employment must identify those conditions. The [claims examiner] must carefully develop and analyze the identified employment incidents to determine whether or not they in fact occurred and if they occurred whether they constitute factors of the employment. When an incident or incidents are the alleged cause of disability, the [claims examiner] must obtain from the claimant, agency personnel and others, such as witnesses to the incident, a statement relating in detail exactly what was [stated] and done. If any of the statements are vague or lacking detail, the responsible person should be requested to submit a supplemental statement clarifying the meaning or correcting the omission."[16]

[10] *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).

[11] *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Gregorio E. Conde*, 52 ECAB 410 (2001).

[12] *See E.G.*, Docket No. 20-1029 (issued March 18, 2022); *S.L.*, Docket No. 19-0387 (issued October 1, 2019); *S.B.*, Docket No. 18-1113 (issued February 21, 2019).

[13] *Id*.

[14] *R.B.*, *id*.; *O.G.*, Docket No. 18-0359 (issued August 7, 2019).

[15] *Id*.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17j (July 1997); *J.R.*, Docket No. 20-1382 (issued December 30, 2022); *P.K.*, Docket No. 21-0967 (issued December 3, 2021); *G.K.*, Docket No. 20-0508 (issued December 11, 2020); *S.L.*, Docket No. 17-1780 (issued March 14, 2018).

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.[17] 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.[18]

ANALYSIS

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

Appellant attributed his stress-related conditions to harassment and verbal abuse by A.C., his supervisor, and administrative actions taken by the employing establishment.

OWCP, in a development letter dated February 12, 2019, requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations. The employing establishment did not respond to these requests.

The Board finds that it is unable to make an informed decision in this case as the employing establishment did not respond to OWCP's requests for information.[19] As discussed, OWCP's procedures provide that, in emotional condition cases, a statement from the employing establishment is necessary to adequately adjudicate the claim.[20]

Although it is a claimant's burden of proof to establish his claim, OWCP is not a disinterested arbiter, but rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment.[21]

The case will accordingly be remanded for OWCP to further develop the evidence. On remand OWCP shall request that the employing establishment provide a detailed statement and relevant evidence and/or argument regarding appellant's allegations. Following this, and any necessary further development, it shall issue a *de novo* decision regarding whether he has established an emotional condition in the performance of duty.[22]

[17] 20 C.F.R. § 10.117(a); *J.R., id.*; *D.L.*, Docket No. 15-0547 (issued May 2, 2016).

[18] *Supra* note 16 at Chapter 2.800.7a(2) (June 2011).

[19] *G.K., supra* note 16; *G.I.*, Docket No. 19-0942 (issued February 4, 2020); *V.H.*, Docket No. 18-0273 (issued July 27, 2018).

[20] *Supra* note 18.

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

[22] *J.R., supra* note 16.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 29, 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: September 22, 2023
Washington, DC

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

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

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