

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

_____)	
D.B., Appellant)	
)	
and)	Docket No. 23-0857
)	Issued: February 7, 2024
DEPARTMENT OF HOMELAND SECURITY,)	
IMMIGRATION & CUSTOMS)	
ENFORCEMENT, Washington, DC, Employer)	
_____)	

Appearances:
Appellant, pro se
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
JANICE B. ASKIN, Judge

JURISDICTION

On June 7, 2023 appellant filed a timely appeal from a March 28, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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.³

¹ The Board notes that appellant has additional appeals pending before the Board under Docket No. 23-0858 concerning an April 5, 2023 OWCP merit decision under OWCP File No. xxxxxx122 and Docket No. 23-0852 concerning March 14 and April 5, 2023 OWCP decision under OWCP File No. xxxxxx881.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the March 28, 2023 decision, appellant submitted additional evidence to OWCP and with his appeal to the Board. 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 condition in the performance of duty on November 29, 2022, as alleged.

FACTUAL HISTORY

On December 2, 2022 appellant, then a 39-year-old program analyst, filed a traumatic injury claim (Form CA-1) alleging that on November 29, 2022 he experienced numbness and muscle pain in his left arm due to harassment from his supervisor, A.L., his section chief, while in the performance of duty.⁴ He alleged that A.L. gave him unrealistic demands and due dates concerning the special response teams (SRT) mailing project. Appellant asserted that he was walking back to his cubicle to sit down when A.L. had confronted him saying “come on, come on, D.” He indicated that he experienced tightness and muscle pain in his left arm. Appellant further noted that harassment had been going on since August 2022. He did not stop work.

Appellant submitted an unsigned urgent care treatment note dated November 29, 2022, by Dr. Jarita A. Hagans, a Board-certified family medicine physician, for complaints of left arm muscle pain after a supervisor confronted him.

In an email dated November 29, 2022, to D.W., acting chief of staff of the employing establishment, appellant alleged that A.L. and T.M., acting unit chief, had created a hostile workplace for him since August 2022. He alleged that A.L. and T.M. complained about him taking leave, were demeaning to doctors, noted recordings of his conversation in October, gave a negative appraisal, made rude and unprofessional comments, and rescinded his telework due to a complaint that he filed against A.L. Appellant also asserted that on November 28, 2022 A.L. demanded that he pick up boxes that were over his five-pound lifting restrictions and that he complete a mailing application without getting the proper training. He indicated that when he asked A.L. for help, he was told that he did not need training because he had done it in his previous agencies. Appellant further contended that he told A.L. that the project time was unrealistic and A.L. advised him to manage his time. He reported that A.L. kept coming to his desk and saying that he already did the training. Appellant alleged that on November 29, 2022 A.L. kept making comments to him to “come on come on come on” and asked him to lift over five pounds. He indicated that A.L. informed him that even if he put in sick leave, he was still expected to complete the project. Appellant asserted that when he told A.L. that he did not even have time to go to the bathroom, A.L. told him to continue the project until it was 4:29 p.m.

⁴ OWCP assigned the present claim OWCP File No. xxxxxx121. Appellant has several previously-filed traumatic injury claims (Form CA-1). Under OWCP File No. xxxxxx708, he filed a Form CA-1 on December 11, 2019 alleging that on November 25, 2019 he experienced heavy breathing and shortness of breath after being threatened and harassed while in the performance of duty. Under OWCP File No. xxxxxx730, appellant filed a Form CA-1 on December 17, 2014 alleging that on August 25, 2014 he developed post-traumatic stress disorder (PTSD) and vertigo due to stress from a hostile work environment while in the performance of duty. Appellant subsequently filed an occupational disease claim (Form CA-2) on December 5, 2022 alleging that he experienced tightness and muscle pain in his left arm due to harassment from his supervisor. OWCP assigned that case OWCP File No. xxxxxx122. Appellant subsequently filed another Form CA-1 on January 27, 2023 under OWCP File No. xxxxxx881 alleging that on January 26, 2023 he began to experience numbness in his left hand and two fingers due to a stressful work environment. OWCP has administratively combined OWCP File Nos. xxxxxx881, xxxxxx708, xxxxxx730, xxxxxx122, and xxxxxx121, with the latter serving as the master file.

Appellant also submitted a series of emails dated December 2, 2022 between him and A.L. regarding his request for sick leave. In an email sent at 5:58 p.m., he requested sick leave for December 5, 2022 due to a “my workplace injury caused by [A.L.’s] harassment this week November 28, 2022 to December 2, 2022.”

In a development letter dated December 7, 2022, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion.⁵ In a similar letter of the same date, OWCP requested additional information from the employing establishment, including comments from a knowledgeable supervisor on the accuracy of the statements provided by appellant. It afforded both parties 30 days to submit the requested information.

In a memorandum dated January 5, 2023, A.L. indicated that he was responding to OWCP’s request for additional information regarding appellant’s claim. He alleged that since appellant began to work for the employing establishment on August 3, 2022, he had resisted and questioned his assignments because he thought it would be too much work. A.L. described several situations that occurred from August 8 through November 29, 2022, where appellant resisted the work tasks assigned to him or refused to comply with the guidance and instructions provided. He indicated that on November 28, 2022 appellant was instructed to distribute radiation detectors and sensitive sterilized equipment to multiple field offices. A.L. noted that appellant was given detailed instructions on how to complete the task and additional refresher training on the use of the delivery company website. He alleged that appellant spent a substantial amount of work time trying to book a conference room for a personal meeting. A.L. reported that at approximately 10:00 a.m., appellant replied to his assignment with a copy of his previous work restrictions of five pounds. He asserted that from November 28 through December 1, 2022, appellant’s supervisor made himself available to the employee and moved, shifted, lifted, and transported all boxes and equipment related to his assignment. A.L. noted that on December 1, 2022 all items were mailed out to each respective office. He explained that on December 5, 2022 it was discovered that appellant had mailed the wrong number of radiation detectors to the wrong field offices and failed to document the proper serial numbers, resulting in approximately \$60,000.00 in equipment being unaccounted for.

By decision dated January 9, 2023, OWCP denied appellant’s traumatic injury claim, finding that the evidence of record was insufficient to establish that the November 29, 2022 employment incident and/or events occurred, as alleged.

On January 11, 2023 appellant requested reconsideration.

Appellant submitted a March 25, 2022 work status note by Dr. Ganjoo Dida, a psychiatrist, who indicated that appellant was receiving treatment for worsening symptoms of depression and anxiety. Dr. Dida recommended that appellant telework four days a week.

OWCP received a duty status report (Form CA-17) dated December 14, 2022, by an unknown provider who indicated that appellant could return to work with restrictions.

Appellant submitted a series of emails dated August 9, 2022 through February 28, 2023 alleging that he was subjected to harassment and a hostile work environment. He described various

⁵ OWCP also noted that appellant had filed a Form CA-2 alleging the same cause of injury. It requested that he clarify what type of injury he was claiming based upon the definitions of traumatic injury or occupational disease.

incidents and interactions with supervisors, in which he believed that they acted rudely and unprofessionally towards him, denied his leave requests, refused to provide training, made false accusations against him, stalked and harassed him, and requested updated work restrictions from his doctor's office. None of the emails referenced the alleged November 29, 2022 employment incident.

In a November 2, 2022 email, A.L. informed appellant that he had SRT equipment that needed to be counted and prepared for shipping. He advised appellant not to exceed his limitations or capabilities. A.L. noted that the items were lightweight and that he had provided appellant with a cart for ease of loading. He explained that appellant could put as many items as he could safely handle on the cart as needed. A.L. reported that he was available all month in the office. He instructed appellant to come into work every day until the task was completed with a suspense date of November 11, 2022.

In a return to work note dated January 10, 2023, Dr. Alan Schreiber, a Board-certified orthopedic surgeon, indicated that appellant may return to light-duty work on January 11, 2023 with restriction of no lifting.

OWCP received a performance appraisal review for the period August 1, 2021 through December 21, 2022 and a performance appraisal for the period October 1, 2021 through December 31, 2022, which demonstrated that appellant received an unacceptable rating and refused to sign the appraisal. It also received his resume and application documents, a December 13, 2022 memorandum by M.F., deputy assistant director, regarding a cease and desist order, a January 5, 2023 notice of proposed suspension, WebTA timekeeper training, and screenshots of text messages with appellant.

Appellant provided a statement, which described specific scenarios dated from August 2022 through January 27, 2023. He alleged that there was an SRT project in November 2022 and that A.L. did not care about his lifting restriction of five pounds. Appellant asserted that A.L. demanded that he did not delay the project. He contended that he was injured due to A.L.'s demands and the ongoing harassment for the SRT project.

In a February 2, 2023 memorandum, G.C. the acting section chief, noted that he was responding to appellant's recent request for reconsideration. He alleged that appellant did not specifically rebut the January 9, 2023 decision but merely provided additional emails with no specific reasoning for how the evidence related to OWCP's denial decision.

In a memorandum dated February 3, 2023, T.M. asserted that all of the emails provided by appellant were a fabricated perspective created by him and did not include the entire string of emails. He alleged that appellant had contested every assignment and set of instructions given to him by management. T.M. asserted that appellant continued to provide questionable medical evidence, make false claims of work injuries, and make false allegations of a hostile work environment. He reported that appellant had been served a seven-day suspension for multiple violations of the employing establishment code of conduct.

In a memorandum received by OWCP on February 6, 2023, A.L. alleged that appellant falsely claimed that no training was offered to him and provided a list of training courses that appellant had completed. He also asserted that he had provided appellant with one-on-one instruction regarding navigation and use of the employing establishment intranet, search functions within the websites, navigation, and use of the WebTA system. A.L. submitted appellant's certificate of completion courses and a list of training courses that appellant had completed.

In a letter dated February 9, 2023, appellant noted that the current WebTA at his old agency was not the same system. He further alleged that his position was a GS-9 trainee level, so he was required to be trained until he reached the GS-12 level. Appellant alleged that T.M. advised him not to file a workers' compensation claim and that what he was receiving from management did not constitute a hostile workplace. Appellant contended that management was only challenging his claim because of his current Equal Employment Opportunity Commission (EEOC) complaint. He further alleged that in November 2022, during the "1 SRT and prior," A.L. had informed him that he needed to find his own point of contact to do his assignments and that he did not need to take any training because of his prior work experience. Appellant described that on November 29, 2022 A.L. made comments "come on come on come on" and asked him to lift over five pounds. He indicated that A.L. advised him that, if he put in sick leave, he would still need to complete the project by the expected SRT in early November 2022. Appellant asserted that he had reached out to his whole chain of command over the last few months but had no resolution from management.

Appellant provided an individual complaint of employment discrimination dated February 21, 2023.

By decision dated March 28, 2023, OWCP denied modification of its January 9, 2023 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,⁷ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁸ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁹

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.¹⁰

⁶ *Supra* note 2.

⁷ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁸ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁹ *C.H.*, Docket No. 19-1781 (issued November 13, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

¹⁰ *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).

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.¹¹ In the case of *Lillian Cutler*,¹² the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition under FECA. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the concept or coverage under FECA.¹³ 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.¹⁴ However, disability is not compensable when it results from factors such as an employee's fear of reduction-in-force, or frustration from not being permitted to work in a particular environment, or to hold a particular position.¹⁵

Appellant's burden of proof includes the submission of a detailed description of the employment factors which he or she believes caused or adversely affected a condition for which compensation is claimed.¹⁶ As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim. The claim must be supported by probative evidence.¹⁷ To the extent that, disputes and incidents alleged as constituting harassment by coworkers are established as occurring and arising from a claimant's performance of his or her regular duties, these could constitute employment factors.¹⁸ However, for harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment did, in fact, occur.¹⁹ Mere perceptions of harassment or discrimination are not compensable under FECA.²⁰ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.²¹

¹¹ *H.M.*, Docket No. 22-0433 (issued September 27, 2022); *L.Y.*, Docket No. 18-1619 (issued April 12, 2019); *L.D.*, 58 ECAB 344 (2007).

¹² 28 ECAB 125 (1976).

¹³ *S.K.*, Docket No. 18-1648 (issued March 4, 2019); *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005),

¹⁴ *Cutler*, *supra* note 12; *O.P.*, Docket No. 19-0445 (issued July 24, 2019); *Trudy A. Scott*, 52 ECAB 309 (2001).

¹⁵ *Cutler*, *id.*

¹⁶ *P.T.*, Docket No. 14-0598 (issued August 5, 2014).

¹⁷ *L.S.*, Docket No. 18-1471 (issued February 26, 2020).

¹⁸ *T.L.*, Docket No. 18-0100 (issued June 20, 2019); *M.R.*, Docket No. 18-0304 (issued November 13, 2018); *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁹ *D.G.*, Docket No. 22-0654 (issued May 11, 2023); *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *K.W.*, 59 ECAB 271 (2007).

²⁰ *E.G.*, Docket No. 20-1029 (issued March 18, 2022); *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *M.D.*, 59 ECAB 211 (2007); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

²¹ *C.R.*, Docket No. 21-0463 (issued April 28, 2023); *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, 57 ECAB 622 (2006).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an emotional condition in the performance of duty on November 29, 2022, as alleged.

In his December 2, 2022 Form CA-1, appellant alleged that on November 29, 2022 he experienced numbness and muscle pain in his left arm due to harassment from A.L., his supervisor. He asserted that A.L. confronted him at his cubicle saying “come on come on D” and appellant began to experience pain and tightness in his left arm. In subsequent statements, appellant contended that A.L. neglected his five-pound lifting restrictions and demanded that he not delay the SRT mailing project. He also alleged that when he asked A.L. for help, he was told that he did not need additional training because he had completed these tasks in his previous jobs. Appellant further asserted that he informed A.L. that the project time was unrealistic, but A.L. told him to manage his time.

Appellant, however, has not provided any evidence to establish harassment by A.L. regarding the completion of the SRT mailing project on November 26, 2022. He has not submitted witness statements or other documentary evidence corroborating that A.L. asked him to ignore his lifting restriction or denied him additional training on November 29, 2022, as alleged.²² On the contrary, in a January 5, 2023 memorandum, A.L. indicated that on November 29, 2022 appellant was given detailed instructions on how to complete the task and additional refresher training on the use of the delivery company website. He also reported that from November 28 through December 1, 2022, appellant’s supervisor made himself available to the employee and moved, shifted, lifted, and transported all boxes and equipment related to his assignment. Accordingly, the Board finds that the evidence of record does not support appellant’s contention that A.L. harassed him on November 29, 2022, as alleged. Appellant also has not submitted corroborative evidence in support of his allegations that A.L. told him “come on come on D” while he was sitting in his cubicle. Verbal altercations, when sufficiently detailed and supported by the record, may constitute compensable factors of employment.²³ The Board finds that appellant has not provided reliable and probative evidence regarding A.L. harassing on November 29, 2022. Therefore, the Board finds that he has not established a compensable employment factor with respect to the claimed harassment on November 29, 2022.²⁴

As appellant has not established a compensable employment factor under FECA, the Board finds that he has not met his burden of proof.

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.

²² See *P.T.*, Docket No. 20-0825 (issued September 23, 2022); see also *B.S.*, Docket No. 19-0378 (issued July 10, 2018).

²³ *J.M.*, Docket No. 16-0717 (issued January 12, 2017); *L.M.*, Docket No. 13-0267 (issued November 15, 2013).

²⁴ See *L.W.*, Docket No. 23-0124 (issued April 25, 2023); see also *M.E.*, Docket No. 21-1340 (issued February 1, 2023).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an emotional condition in the performance of duty on November 29, 2022, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board