

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

B.K., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
DORIS MILLER VA MEDICAL CENTER,
Waco, TX, Employer

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Docket No. 23-0679
Issued: January 18, 2024

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 April 13, 2023 appellant filed a timely appeal from a November 17, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On August 17, 2022 appellant, then a 39-year-old painter, filed an occupational disease claim (Form CA-2), alleging that he sustained anxiety, depression, and insomnia due to factors of

¹ 5 U.S.C. § 8101 *et seq.*

his federal employment. He noted that he first became aware of his claimed conditions and their relation to his federal employment on August 9, 2022. On the reverse side of the claim form, appellant's supervisor indicated that appellant was last exposed to conditions alleged to have caused his illness on August 9, 2022.

In an attached letter, appellant alleged that he was being bullied by coworkers and managers. He described that a coworker cussed at him and balled his fists at him, the same coworker would follow up or try to inspect his work in different areas, a supervisor disrupted an appointment in employee health and loudly berated him in front of the health provider, and a manager harassed him concerning his light duty and ordered him to return to full permanent duty. Appellant also asserted that he felt he had been held to a higher work standard than other employees and treated differently by other employees. He explained that he was given jobs to complete with an unrealistic deadline and was assigned more difficult and physical jobs. Appellant contended that he felt that he was constantly harassed and singled out by upper management and coworkers, which created a hostile work environment. He reported that a supervisor called him "deaf and dumb" when he wrote down instructions, ordered him to work with another employee that was known to be hostile towards him, ordered to do a job on Building 6 ceiling that was unsafe, and gave him unfair performance appraisals. Appellant indicated that he had missed a lot of work due to depression, stress, and anxiety.

In a letter dated July 24, 2019, Dr. Floyd E. Jernigan, a Board-certified family practitioner, excused appellant from work for the period July 22 through 29, 2019. He reported that appellant had situational stress disturbance and hypertension related to work issues.

In a report dated October 22, 2020, Fernando Gallindo, a certified physician assistant, indicated that appellant was under his care for anxiety, depression, and stress and excused appellant from work for five days.

In a November 25, 2020 progress report, Dr. Jernigan indicated that appellant informed him that he was under a lot of stress at work and felt like his supervisors were not supporting him. Appellant alleged that he was given extra tasks and unreasonable time frames to complete the tasks. Dr. Jernigan reported current problems of hypertension, anxiety, adult situational stress disorder, essential hypertension-elevated today, and vitamin D deficiency.

Appellant provided occupational health progress notes dated September 7 and October 12, 2021 by an unknown provider. The records indicated that appellant complained of stress from work due to feeling overworked and not getting support from his supervisors, feeling harassed by some of his coworkers, anxiety and depression regarding his work situation, fatigue, and occasional lightheadedness.

In a progress report and work status note dated October 6, 2021, Dr. Jernigan indicated that appellant was under a lot of stress at work and that he felt that his supervisor was singling him out. Appellant explained that he was given extra tasks and unreasonable time frames while other painters were allowed to coast. Dr. Jernigan reported current problems of hypertension, anxiety, steatohepatitis, hyperglycemia, snoring, primary insomnia, other depression, and attention deficit disorder. He indicated that appellant could return to work without restrictions.

In a report dated October 18, 2021, Dr. Jean N. Dortilus, a Board-certified psychiatrist, indicated that appellant was referred to him for psychiatric evaluation. Appellant informed him that he had problems at work for the past decade and alleged that his supervisor and coworkers had harassed him about his painting. Dr. Dortilus reviewed appellant's history and provided examination findings. He diagnosed generalized anxiety disorder, narcissistic personality disorder, and major depressive disorder.

In a November 5, 2021 note, Mr. Gallindo indicated that appellant was under his care for anxiety/work stress and excused appellant from work from November 3 through 5, 2021.

In reports dated November 17, 2021 and August 1, 2022, Dr. Dortilus indicated that appellant was evaluated that day for moderate depressive disorder, generalized anxiety symptoms, and difficulty falling asleep. Appellant reported that he was being harassed at work by his supervisors and coworkers, which had been causing him mental anguish. Dr. Dortilus provided examination findings and diagnosed generalized anxiety disorder, narcissistic personality disorder, and major depressive disorder.

In a letter dated August 9, 2022, Dr. Dortilus indicated that when he first evaluated appellant in November 2021, appellant complained of depressive and anxiety symptoms that he attributed to work-related stressors. He recommended that appellant perform light-duty work.

In an August 22, 2022 development letter, OWCP notified 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. In a separate letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding appellant's allegations. It afforded both parties 30 days to respond.

OWCP received a series of emails dated August 3 through 9, 2022. In an August 3, 2022 email, M.B., the maintenance operations sections chief, instructed appellant to report back to work at the employing establishment with full duties. In an email dated August 4, 2022, M.B. requested that appellant provide supporting documentation that indicated that he had not been released from workers' compensation. Appellant replied to M.B. that workers' compensation had not released him.

Appellant submitted a series of emails dated August 11 through September 7, 2021. In an August 11, 2021 email, he asserted that he had provided all the documentation and met all the requirements approved from human resources and payroll. Appellant indicated that he was still waiting for his payroll to be properly coded and contended that this was another form of harassment by his managers.

In a letter dated February 23, 2022, D.M., appellant's union President, described three incidents that occurred between March 2019 and November 2020. He recounted appellant's complaint that T.R., appellant's supervisor, was upset with appellant for questioning his conflicting guidance and bringing concerns to the union and changed information on appellant's annual appraisal. D.M. indicated that he informed M.B., who was T.R.'s supervisor, of what T.R. had done and alleged that this was a form of retaliation. M.B. advised appellant that he would address the situation. D.M. related that the next incident occurred shortly before July 2019 when

T.R. assigned appellant to complete a job that would require more than one painter. He indicated that appellant contacted a safety specialist because doing the work with one man would be unsafe and dangerous. D.M. explained that after this incident, T.R. started to follow appellant and negatively evaluate his work. He described a third incident when T.R. instructed appellant to stop allowing people in various areas to pick the color and designs of different areas in the hospital to paint.

In a July 8, 2022 statement, C.B., a branch chief of the division where appellant was assigned, explained that appellant painted several patient rooms, training rooms, and spots along the hallway. He reported that he was satisfied with appellant's quality of work, willingness to work hard, organization, and attention regarding safety concerns.

In a statement dated July 11, 2022, E.G., an engineer, explained that he witnessed appellant endure much harassment while working in engineering. He indicated that appellant was given unfair workloads on multiple occasions that would normally require a team of people to accomplish. E.G. reported that appellant was given unreasonable deadlines to accomplish these tasks, which caused appellant physical and emotional stress. He also witnessed appellant being harassed about his style of painting from management. E.G. further noted that appellant was moved to grounds when he was originally placed on light-duty work and instructed to sweep out Building 16. He alleged that he had seen appellant singled out on multiple occasions by management, for example, while on break management would tell him to "get back to work" when numerous employees were still in the area taking breaks.

Appellant submitted a nine-page statement, which outlined the harassment and hostile work environment that he alleged had occurred. He explained that stress started in early 2018 when T.R. allowed another painter to hand out work orders and critique his work. When appellant complained to the union, he began to experience harassment and hostility from T.R. He indicated that the other painter assigned him work that the painter would not finish and made threats against appellant. Appellant informed T.R. of the coworker's behavior, but nothing changed. He explained that he felt like he was not getting any support from his supervisor, which caused him to feel stress, hopelessness, and depression. Appellant indicated that in late 2018 T.R. assigned him to do construction jobs, which were outside of his position description as a maintenance painter, and also assigned him to finish up work that the other painter was supposed to finish. He also alleged that T.R. singled him out by following him around when he worked, only critiquing his work area while not looking at the other painter's area. Appellant contended that T.R. also instructed him to paint a popcorn ceiling, which was not the proper way to paint a popcorn ceiling. He also asserted that the job was for 10+ people and not just one person. Appellant explained that he talked with M.B., the site manager, about the other painter and T.R.'s behavior, and M.B. said he would talk to T.R. about the issues, but nothing was done. He also described that his supervisors constantly questioned if he was really disabled and needed to be on light-duty work. Appellant alleged that during a doctor's appointment, a supervisor barged in to ask him why his truck was parked on the grass. He contended that everybody else in engineering parked there and he believed that he was being singled out. Appellant also asserted that his supervisors never gave him a fair appraisal. He further contended that on August 3, 2022 the site manager informed him to return to full-duty work and completely disregarded his workers' compensation restrictions.

In a February 5, 2020 email to M.B., appellant discussed several problems that he had with T.R., including that T.R. was not treating him fairly as compared to J.B., another painter. Appellant indicated that T.R. instructed him to finish J.B.'s work, criticized his painting job, and let J.B. pick and choose which jobs to do. Appellant explained that he was tired of the favoritism and wanted to know what he needed to do in order to stop T.R. and J.B.

OWCP also received emails dated April 2, 2018 through June 8, 2021 wherein appellant expressed his concerns to T.R. about the heavy workload that he was assigned. He alleged that T.R. was retaliating against him for complaining to the union. Appellant also discussed the work orders that he had completed in various areas around the hospital. He further asserted that J.B. was singling him out and harassing him. Appellant also relayed information to T.R. from Hazards and Safety about painting a popcorn ceiling in Building 6.

In emails dated October 29 and November 18, 2020, appellant requested help from D.M. regarding T.R. He alleged that T.R. was not giving him a proper appraisal and would not rate him higher than a fully successful rating even though his work was outstanding. Appellant asserted that T.R. denied his work order to change the colors of a unit even though the interior designer and staff approved his designs and paint color. He contended that T.R. had created a hostile work environment.

In a statement dated July 11, 2022, D.B., a maintenance mechanic in engineering service, noted that T.R. was his immediate supervisor. He explained that he has witnessed appellant being harassed by multiple employees during his service in the engineering department. D.B. reported that J.B., another painter, would inspect the work that appellant did even though he was not a supervisor. He indicated that he worked on a Building 7 renovation with appellant and noticed that when he worked with appellant, they were under more scrutiny than normal.

In a statement dated July 13, 2022, M.G. explained that he had witnessed multiple occasions when J.B. caused a hostile work environment toward multiple coworkers, including himself and appellant. He indicated that supervisors had done nothing to correct J.B.'s negative behavior, which caused a stressful work environment.

In a July 14, 2022 statement, M.C., a coworker, indicated that he had witnessed J.B. call appellant a "liar" on numerous occasions and claim that he had pictures on his phone that proved appellant was lying about sick leave.

In a July 14, 2022 statement, J.A., a coworker, indicated that during the time that he worked with appellant, he noticed that T.R. would write appellant up for anything and it looked like T.R. was looking for a reason to write appellant up.

In a July 19, 2022 statement, T.B., an employing establishment safety occupational health specialist, recounted that appellant asked him about safety concerns with working on patching and painting the ceilings in the auditorium in Building 6. He indicated that he informed appellant that there should be at least two people working at Building 6 at any time while working out on the balcony or using any lift ladder or scaffolding. T.B. also informed appellant that he should conduct work on the weekend and spray paint the ceiling, which appellant's supervisor did not agree to.

In an undated statement, U.O., a nurse practitioner, described that on October 12, 2021 around 9:45 a.m. she was treating appellant as a patient at the occupational health clinic when she heard a knock on the door. She reported that when she opened the door she saw K.J., a grounds supervisor, and he appeared very angry. K.J. began to scold appellant about a work-related issue. U.O. indicated that appellant was greatly shaken up when K.J. left. She noted that she called M.B., their supervisor, to report the inappropriate behavior and incident.

In a development letter dated October 5, 2022, OWCP requested that the employing establishment review the additional statements submitted and provide comments from a knowledgeable supervisor regarding the accuracy of the statements provided. It also asked that the employing establishment respond to specific questions and provide additional information regarding appellant's claim. OWCP afforded the employing establishment 30 days to respond to the request.

By decision dated November 17, 2022, OWCP denied appellant's emotional/stress-related condition claim, finding that he had not established any compensable factors of employment. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA² 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 timely filed within the applicable time limitation of FECA, 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.³ 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.⁴

To establish an emotional condition in the performance of duty, appellant 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.⁵

² *Id.*

³ *A.J.*, Docket No. 18-1116 (issued January 23, 2019); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁴ 20 C.F.R. § 10.115(e); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *see Michael E. Smith*, 50 ECAB 313 (1999).

⁵ *See S.K.*, Docket No. 18-1648 (issued March 14, 2019); *G.R.*, Docket No. 18-893 (issued November 21, 2018); *George H. Clark*, 56 ECAB 162 (2004); *Kathleen D. Walker*, 42 ECAB 603 (1991).

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.⁶ There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁷ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁸

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than regular or specially assigned work duties of the employee and are not covered under FECA.⁹ Where 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.¹⁰

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.¹¹ Mere perceptions of harassment or discrimination are not compensable under FECA.¹² A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹³ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁴

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 compensable factors of

⁶ *L.Y.*, Docket No. 18-1619 (issued April 12, 2019); *L.D.*, 58 ECAB 344 (2007).

⁷ *A.M.*, Docket No. 21-0420 (issued August 26, 2021); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

⁸ *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *William E. Seare*, 47 ECAB 663 (1996).

⁹ *C.V.*, Docket No. 18-0580 (issued September 17, 2018); *Andrew J. Sheppard*, 53 ECAB 170, 171 (2001); *Matilda R. Wyatt*, 52 ECAB 421 (2001).

¹⁰ *C.V.*, *id.*; *Kim Nguyen*, 53 ECAB 127 (2001); *William H. Fortner*, 49 ECAB 324 (1998). See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon*, 42 ECAB 566 (1991).

¹¹ *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

¹² *A.E.*, *supra* note 8; *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *D.W.*, Docket No. 19-0449 (issued September 24, 2019); *J.F.*, 59 ECAB 331 (2008); *C.W.*, 58 ECAB 137 (2006).

¹⁴ *R.D.*, Docket No. 21-0050 (issued February 25, 2022); *Y.B.*, Docket No. 16-0193 (issued July 23, 2018); *Marguerite J. Toland*, 52 ECAB 294 (2001).

employment and may not be considered.¹⁵ 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.¹⁶

ANALYSIS

The Board finds that appellant has met his burden of proof to establish compensable factors of employment.

Appellant attributed his emotional condition, in part, to *Cutler*¹⁷ factors. Appellant described that, in 2018, T.R. instructed him to paint a popcorn ceiling even though the job required more than one person and had many safety concerns. Both D.M. and T.B. confirmed that appellant was asked to complete a job involving a ceiling in Building 6 that would be unsafe and dangerous for one man to complete. The Board has held that conditions related to stress from situations in which an employee is trying to meet his or her position requirements are compensable.¹⁸ Thus, appellant has established a compensable employment factor with regard to his allegation of working in unsafe and dangerous conditions.

In addition, appellant attributed his emotional condition to being overworked. The Board has held that overwork, when substantiated by sufficient factual information to corroborate his account of events, may constitute a compensable factor of employment.¹⁹ In a July 11, 2012 statement, E.G. confirmed that appellant was given unfair workloads on multiple occasions and expected to finish these tasks by unreasonable deadlines. He also noted that appellant was moved to work on the grounds when he was first placed on light-duty work. As appellant has submitted evidence to support his allegation that he was overworked, the Board finds that he has established overwork as a compensable factor of employment.²⁰

Appellant has also alleged that he sustained an emotional condition due to harassment. As noted above, for harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did in fact occur.²¹ In his July 11, 2022 statement, E.G. confirmed that he had witnessed management single appellant out on multiple occasions, including when they were on break, and that management would tell appellant to “get

¹⁵ *R.B.*, Docket No. 19-0434 (issued November 22, 2019); *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁶ *R.B.*, Docket No. 21-0643 (issued February 9, 2023); *O.G.*, Docket No. 18-0359 (issued August 7, 2019).

¹⁷ *Supra* note 7.

¹⁸ *K.J.*, Docket No. 17-1851 (issued September 25, 2019); *P.W.*, Docket 08-0315 (issued August 22, 2008); *Jeral R. Gray*, 57 ECAB 611 (2006).

¹⁹ *L.S.*, Docket No. 18-1471 (issued February 26, 2020); *V.M.*, Docket No. 15-1080 (issued May 11, 2017); *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

²⁰ *W.J.*, Docket No. 20-1226 (issued January 6, 2023).

²¹ *Supra* note 11.

back to work” when numerous other employees were still in the area on break. J.A. related that he noticed that T.R. would write appellant up for anything and that it looked like T.R. was looking for a reason to write appellant up. U.O., a nurse practitioner, also confirmed that on October 12, 2021 she was treating appellant when K.J. barged in to ask appellant why his truck was parked in the grass. Appellant also submitted statements describing multiple incidents beginning in early 2018, in which J.B., a coworker, handed him work orders, singled him out, and criticized his work. He submitted a July 11, 2022 statement by D.F., who indicated that he had witnessed multiple employees harass appellant. M.C. also confirmed in a July 14, 2022 statement that he had witnessed J.B. call appellant a “liar” on numerous occasions. In a July 13, 2022 statement, M.G. explained that he had witnessed multiple occasions when J.B. caused a hostile work environment towards appellant. The Board finds appellant’s detailed allegations of harassment, along with these corroborative witness statements, are sufficient to establish a compensable factor of harassment.²²

Appellant also alleged that he sustained error and abuse by the employing establishment with regard to administrative and personnel matters. His allegations that T.R. provided negative feedback,²³ gave him an improper performance appraisal,²⁴ and did not accommodate his limited-duty restrictions²⁵ related to administrative or personnel management actions. As a general rule, administrative and personnel matters, although generally related to the employee’s employment, are administrative functions of the employer rather than the regularly or specially-assigned work duties of the employee and are not covered under FECA.²⁶ The Board, therefore, finds that appellant has not established error or abuse by the employing establishment. As such, appellant has not established a compensable employment factor with regard to these administrative matters.²⁷

As OWCP found that there were no compensable employment factors, it did not analyze or develop the medical evidence. Accordingly, the Board will set aside OWCP’s November 17, 2022 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. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish compensable factors of employment. The Board further finds that the case is not in posture for decision as to whether

²² M.C., Docket No. 20-1051 (issued May 6, 2022).

²³ J.W., Docket No. 17-0999 (issued September 4, 2018); G.M., Docket No. 17-1469 (issued April 2, 2018).

²⁴ R.B., Docket No. 19-0343 (issued February 14, 2020).

²⁵ M.C., *supra* note 22; V.M., Docket No. 15-1080 (issued May 11, 2017); Gary N. Fiocca, Docket No. 05-1209 (issued October 18, 2005); Donney T. Drennon-Gala, 56 ECAB 469 (2005).

²⁶ *Supra* note 9.

²⁷ V.M., *supra* note 25.

appellant had established an emotional condition causally related to the accepted compensable employment factors.

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2022 decision of the Office of Workers' Compensation Programs is reversed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 18, 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