

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

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T.S., Appellant)	
)	
and)	Docket No. 23-0839
)	Issued: January 17, 2024
DEPARTMENT OF VETERANS AFFAIRS,)	
JOHN J. PERSHING VA MEDICAL CENTER,)	
Poplar Bluff, MO, Employer)	
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Appearances:
Scotty Lee White, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 30, 2023 appellant, through his representative, filed a timely appeal from an April 17, 2023 merit decision of the Office of Workers' Compensation (OWCP). 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.

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.

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.*

FACTUAL HISTORY

On August 24, 2021 appellant, then a 49-year-old licensed practical nurse, filed an occupational disease claim (Form CA-2) alleging that he experienced a mental breakdown due to factors of his federal employment, including a pattern of retaliation at work by his supervisor, R.F. He noted that he first became aware of his condition on January 4, 2021 and realized its relationship to his federal employment on March 15, 2021. Appellant stopped work on July 5, 2021. He stated that the “[m]ental breakdown did not occur until July 7, 2021.”

OWCP received appellant’s statement attributing his July 7, 2021 mental breakdown and inpatient psychiatric stay to R.F.’s actions. Appellant alleged that, in January 2021, he received a lower assessment on his annual review than in the five previous years, and that the union assisted him to resolve the matter. In March 2021, he became a union steward and R.F. became his supervisor. Appellant alleged that R.F. bullied him, wrongfully denied appellant official time, and withheld compensatory time and travel pay when he traveled to other employing establishment facilities to represent other employees. Additionally, he attributed his emotional condition to R.F. issuing a proposed 15-day suspension, sent to him by certified mail, for accessing his father’s medical chart during the father’s visits to the clinic where appellant worked. Appellant contended that his prior supervisors had permitted him to access his father’s chart since he began working there in 2015. He characterized the proposed suspension as retaliation for his union activities and use of official time.

OWCP received reports dated January 4 through June 25, 2021, wherein Dr. General Lee Cranfill, III, an internist, recounted that appellant “hated his work” and had a difficult relationship with his supervisor. Dr. Cranfill diagnosed depression and anxiety and prescribed antidepressant medication. In the June 25, 2021 report, he opined that appellant’s “depression, stress, and anxiety issues” were “certainly exacerbated by situational problems at work,” including being served with a proposed notice of termination on June 24, 2021.

In a July 7, 2021 report, S. Hudson, a certified family nurse practitioner, recounted appellant’s homicidal ideation regarding his supervisor and referred him to urgent care.

In reports dated from July 7 through 16, 2021 report, Dr. Victor S. McNerny, an osteopath Board-certified in psychiatry, recounted that on July 7, 2021 appellant presented at a hospital emergency department with homicidal ideation against his supervisor due to difficult working conditions, including a hostile work environment, and bullying. He noted, “[appellant] states he believes [that] his supervisor has also been trying to suspend him due to him working with the union and findings issues with the building such as mold. [Appellant] states that he ‘blew up’ at a meeting recently and the police were called, but he was not taken to jail and left the premises.” Appellant was admitted for inpatient treatment. He diagnosed unspecified mood (affective) disorder and post-traumatic stress disorder.

In a development letter dated September 13, 2021, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments for a knowledgeable supervisor regarding the accuracy of appellant’s statement. It afforded both parties 30 days to submit the necessary evidence.

In an October 21, 2021 statement, appellant alleged that the employing establishment had retaliated against him by attempting to reopen the suspension matter after its rescission. He noted that he filed numerous grievances regarding denial of official time and maintained that R.F. refused to discuss the matter and engaged in illegal surveillance. Appellant asserted that he had not sought mental health treatment prior to his issues with supervisors, R.F., and C.M. at the employing establishment.

OWCP also received copies of appellant's electronic timesheets dated March 14 through August 14, 2021 regarding requests to use official time for union activities, in which appellant asserted that he had not been paid.

In a July 9, 2021 letter, C.M. directed appellant to have no contact with R.F. during an investigation into alleged misconduct.

In a July 9, 2021 letter, C.M. temporarily detailed appellant to a Travel Assistant position in the Veterans Transportation Service "during an investigation into alleged misconduct issues." He had the opportunity to telework during the detail and his pay and benefits were not affected.

In a July 19, 2021 e-mail, the employing establishment requested that appellant participate in a threat assessment team interview and advised him of mental health resources.

In an August 6, 2021 letter, C.M. suspended appellant from duty for seven days, for the period August 12 through 18, 2021, for "[u]nauthorized access to Veteran's record." He noted that as appellant had taken responsibility for his actions and admitted to "being in [appellant's] father's medical records periodically over the last five years," he sustained the charge in its entirety.

In a letter dated August 13, 2021, C.M. rescinded the suspension imposed by the August 6, 2021 letter.

In a development letter dated January 28, 2022, OWCP requested that the employing establishment review the evidence submitted by appellant regarding his emotional/stress-related condition claim and provide a statement of concurrence or disagreement with his allegations, accompanied by relevant witness statements and documentary evidence. It also provided a questionnaire regarding the stresses of appellant's position and inquiring if any accommodations had been made. OWCP afforded the employing establishment 30 days to respond. No response was received.

By decision dated March 7, 2022, OWCP denied appellant's occupational disease claim, finding that he had not established any compensable factors of employment. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On August 17, 2022 appellant requested reconsideration.

OWCP received progress notes dated from January 26, 2021 through July 20, 2022 by Eric Busby, a licensed professional counselor, and dated from July 19, 2021 through March 7, 2022 by Darice Barber, an advanced practice registered nurse and qualified behavioral health provider.

By decision dated August 24, 2022, OWCP denied appellant's request for reconsideration of the merits of his claim.

On September 7, 2022 appellant again requested reconsideration. No additional evidence was received.

By decision dated September 13, 2022, OWCP denied appellant's request for reconsideration of the merits of his claim.

On February 27, 2023 appellant, through his representative, again requested reconsideration. He alleged that, as the employing establishment had not provided a full reply to OWCP's development letter or dispute appellant's statement, OWCP should accept appellant's account of events as factual.

OWCP also received a February 18, 2023 witness statement from a coworker H.L., who explained that, on or about January 2, 2021, a senior union official had assigned appellant 100 percent official time to represent employees at three employing establishment clinics. R.F. denied appellant's requests for official time and improperly found him in absent without leave (AWOL) status. As he had been denied official time, appellant worked "extreme amounts of hours after duty hours to keep up with the demands of his Union duties." Work stress caused anxiety, depression, culminating in the July 7, 2021 visit to employee health, which led to appellant's inpatient hospitalization. H.L. recalled that, during the July 7, 2021 employee health visit, a nurse gave appellant information about filing a claim, but appellant was not "in any frame of mind and was not aware of [appellant's] surroundings at that time." Appellant was discharged on July 16, 2021.

By decision dated April 17, 2023, OWCP denied modification of its March 7, 2022 merit decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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, 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.⁴ 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.⁵

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

³ *Id.*

⁴ *A.J.*, Docket No. 18-1116 (issued January 23, 2019); *Gary J. Watling*, 52 ECAB 278 (2001).

⁵ 20 C.F.R. § 10.115(e); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *see T.O.*, Docket No. 18-1012 (issued October 29, 2018); *see Michael E. Smith*, 50 ECAB 313 (1999).

evidence establishing that the accepted compensable employment factors are causally related to the diagnosed emotional condition.⁶

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*,⁷ 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 the concept or coverage of workers' compensation.⁸ 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. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁹

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.¹⁰ 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.¹¹ A claimant must support his or her allegations with probative and reliable evidence.

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

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

⁶ *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).

⁷ 28 ECAB 125 (1976).

⁸ *G.R.*, Docket No. 18-0893 (issued November 21, 2018). *Robert W. Johns*, 51 ECAB 137 (1999).

⁹ *Supra* note 7. *See also K.F.*, Docket No. 23-0278 (issued August 7, 2023).

¹⁰ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹¹ *Kim Nguyen*, 53 ECAB 127 (2001). *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹² *S.B.*, Docket No. 18-1113 (issued February 21, 2019).

¹³ *Id.*

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.”¹⁴

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.¹⁵ 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.¹⁶

ANALYSIS

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

Appellant attributed his condition to a pattern of bullying, harassment, and retaliation by supervisors R.F. and C.M. for his participation in the union, administrative actions taken by the employing establishment regarding leave use, and a disciplinary suspension.

In development letters dated September 13, 2021, and January 28, 2022, OWCP requested additional information from the employing establishment, including comments from a knowledgeable supervisor regarding the accuracy of appellant’s allegations, witness statements, and relevant documentary evidence. However, no response was received.

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.¹⁷

The case shall 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 or argument regarding appellant’s allegations. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding whether he has established an emotional/stress-related condition in the performance of duty, as alleged.

¹⁴ 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); *G.K.*, Docket No. 20-0508 (issued December 11, 2020); *S.L.*, Docket No. 17-1780 (issued March 14, 2018).

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

¹⁶ *Supra* note 14 at Chapter 2.800.7a(2) (June 2011).

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

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2023 decision of the Office of Workers' Compensation is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 17, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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