

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

S.T., Appellant)	
)	
and)	Docket No. 18-0267
)	Issued: October 18, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Federal Way, WA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 20, 2017 appellant filed a timely appeal from an October 26, 2017 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 the case.

ISSUE

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

FACTUAL HISTORY

On October 22, 2014 appellant, then a 56-year-old operations industrial engineer, filed an occupational disease claim (Form CA-2) alleging anxiety with neck and bilateral shoulder pain

¹ 5 U.S.C. § 8101 *et seq.*

commencing on or before December 11, 2013.² He attributed his symptoms to an alleged pattern of managerial harassment and discrimination on the basis of race and national origin, and receiving a September 11, 2014 letter of warning that was withdrawn on October 20, 2014. Appellant also alleged that managers retaliated against him for identifying “gross mismanagement, wastefulness, and safety issues.” He did not initially stop work, and remained exposed to the claimed employment factors.

By development letter dated October 27, 2014, OWCP notified appellant of the type of evidence needed to establish his claim, including factual evidence in corroboration of the identified work factors, and a report from his attending physician diagnosing a condition causally related to those work factors. It afforded him 30 days to submit additional evidence.

In response, appellant provided a November 1, 2014 supplemental statement. He alleged that Manager D.H. harassed him on the basis of national origin, race, and “perceived religion.” Appellant reported this behavior to Supervisors P.L. and T.M., who allegedly took no action. He contended that the September 11, 2014 letter of warning noted violations of a postal regulations requiring loyalty to the U.S. Government, whereas letters of warning to other employees contained no such reference.³ Appellant alleged that the letter of warning was issued in retaliation for his reporting waste, mismanagement, and safety violations by Managers K.M., T.M., R.T., and D.H., that managers warned him not to exercise his rights as a “whistleblower,” and that managers retaliated against him for filing an Equal Employment Opportunity (EEO) complaint.

Appellant submitted a note dated November 17, 2014 from Mary Galaszewski, an attending clinical psychologist, diagnosing adjustment disorder with mixed anxiety and depressed mood.

By decision dated December 18, 2014, OWCP denied appellant’s claim, finding that he had not established that the claimed work factors occurred as alleged.

The record indicates that appellant stopped work in early February 2015 and did not return.

On March 10, 2015 appellant requested reconsideration. He alleged that, on unspecified dates, managers D.H. and R.T. made biased comments to him about “foreigners,” told him to “go back to [his] country,” and called him naïve for reporting safety violations. D.H. allegedly warned appellant to “play the game” or that others would “stab him in the back.” D.H. also allegedly told appellant that he carried a gun in his car and on postal property, and instructed him in July and August 2014 to “shut his mouth” during national teleconferences when he discussed the lack of managerial support for his initiatives. Appellant also alleged that plant Manager K.M. taunted him in April 2014 when senior managers rejected appellant’s data model, gave him an unwarranted failing rating for a website project, rejected his Lean Six Sigma project safety and efficiency suggestions, disagreed with his Lean Mail Processing (LMP) proposals, assigned him custodial

² Appellant began work at the employing establishment on October 5, 2013.

³ The September 11, 2014 letter of warning noted appellant’s unsatisfactory performance for contravening direct instructions by utilizing national teleconference time on August 20, 2014 to report safety violations instead of utilizing the appropriate local chain of command.

duties before an audit in an attempt to deceive the auditor, told him to find another job, ordered T.M. not to investigate whether D.H. carried a gun to work, fabricated data in December 2014, told manager J.L. to create a false report under appellant's name, and portrayed appellant as "un-American." He also accused Manager T.M. of demanding that he falsify a progress report, of retaliation when appellant refused to falsify the report, of requiring him to take communication training as part of a December 9, 2014 Performance Improvement Plan (PIP), and asking him to sign a blank document in December 2014. Additionally, appellant contended that a December 18, 2014 Letter of Concern about "undesirable communications" was in retaliation for his identification of waste and mismanagement.

Appellant submitted February 10 and 11, 2015 documents concerning Family and Medical Leave Act leave, unemployment insurance documents, and a February 24, 2015 notice of a meeting on reasonable accommodations.⁴

In a June 11, 2015 letter, the employing establishment controverted appellant's claim. It explained that T.M. had ordered appellant's claims to be investigated and that they were found to be unsubstantiated. Investigators found no evidence that D.H. told appellant that he had a gun in his car or to go back to his country. Also, there was no evidence that managers asked appellant to sign blank documents or that they told him to go back to his country. The employing establishment asserted that appellant was frustrated that he was not allowed to define and execute his job duties as he saw fit, or implement ideas that were in contravention of rules and policies. It found as of March 27, 2015 that he was a "person with a disability" that required accommodation, but could not grant his April 6, 2015 request not to work with plant Manager K.M. as an accommodation because appellant's allegations against him were unfounded. The employing establishment provided statements from managers addressing appellant's allegations.

In a statement dated April 8, 2015, Manager T.M. asserted that, after appellant had reported that D.H. claimed to have a gun in his car on postal property, he called district investigators who searched D.H.'s car and found no firearms. On December 9, 2014 T.M. issued appellant a PIP to address his communication problems. The PIP included enrollment in communications training courses.

In a statement dated April 17, 2015, Supervisor D.H. explained that, on an unspecified date, appellant had seen him wearing a cap with a firearms insignia on it, and that appellant expressed his disapproval. He denied discussing firearms with appellant or that he told appellant that he had a gun in his car. D.H. noted that he had allowed inspectors to search his car, and that no firearms were found. He recalled that, on an unspecified date, he tried to discuss appellant's poor attitude with him. There had been a "heated discussion" between appellant and other engineers in March 2014. Appellant had demanded his own parking space and a private office as he was an engineer. He had habitually told coworkers that they were "dismissed" instead of ending conversations in a professional or nonadversarial manner. To illustrate that appellant's attitude

⁴ Appellant also provided a February 9, 2015 physical therapy evaluation, February 10 and 19, 2015 reports from Dr. Doug Kim, a family medicine physician, which diagnosed anxiety, chest pain, a neck sprain, and lumbosacral sprain, a February 11, 2015 report from Dr. Elizabeth Cook, Board-certified in pain management, diagnosing stress and neck pain, and a February 26, 2015 report from Dr. Veena Prabhakar, Board-certified in psychiatry, diagnosing an anxiety disorder.

was not productive, D.H. told appellant that he had to “play the game” or others would “put a knife in your back.”

In a statement dated April 30, 2015, Acting Manager of In-Plant Support P.L. explained that appellant felt “bullied” and “frustrated” when she investigated reports that he had bullied other employees. Appellant also took credit for others’ work and refused to cooperate with other engineers or managers.

In a statement dated May 6, 2015, Plant Manager K.M. asserted that he was unaware of any harassment toward appellant. Instead, he contended that, because appellant was not willing to cooperate with him or with other engineers, it was difficult for appellant to have a successful career. K.M. explained that after appellant had raised a local safety issue during a July 2014 national training teleconference, he had counseled appellant not to do so. However, appellant raised a forklift safety issue in the August 2014 teleconference, in direct violation of his instructions. Additionally, K.M. strongly denied that he refused to investigate whether D.H. had a gun in his car.

In a statement dated May 15, 2015, Manager J.L. asserted that many of appellant’s allegations were investigated and found baseless. Investigators found no evidence of a hostile work environment. J.L. noted that appellant had restricted himself from working with plant manager K.M., which limited appellant’s opportunities.

By decision dated June 15, 2015, OWCP denied appellant’s claim finding that the evidence of record was insufficient to establish any compensable factors of employment. It found that his allegations were either not established as factual, or pertained to administrative functions not considered to be within the performance of duty. OWCP noted that, as appellant had failed to establish a compensable factor of employment, the medical evidence of record need not be reviewed.

On June 23, 2015 appellant requested reconsideration. He asserted that OWCP was obligated to conduct an independent investigation of his allegations against the employing establishment. Appellant submitted additional evidence.

In an October 20, 2014 final EEO complaint mediation settlement agreement, the employing establishment agreed to withdraw the September 11, 2014 letter of warning, provide appellant with coaching in communication, and provide a workplace free of discrimination and retaliation. Appellant and T.M. signed the agreement.

In a letter dated December 9, 2014, T.M. offered appellant a PIP as part of the October 20, 2014 EEO complaint settlement “to improve the communication-related issues to an acceptable level.” Appellant refused to sign the plan. J.L. suspended the plan on February 27, 2015 as appellant had stopped work on an unspecified date.

In a memorandum dated December 18, 2014, K.M. issued appellant a letter of concern regarding his failure to achieve objectives of two data projects, unauthorized attempts to exceed

his authority, inappropriate conduct during training teleconferences, and failure to comply with safety reporting instructions.

In a notice dated March 27, 2015, the employing establishment denied appellant's request to be removed from K.M.'s supervision as a reasonable accommodation as the relevant employing establishment precedents and regulations did not allow for a change in supervisor "as a form of reasonable accommodation."

Appellant also submitted copies of employing establishment data reports he had authored, June 2015 documents related to an application for state unemployment benefits, an unsigned draft of an employing establishment settlement agreement regarding appellant's whistleblower complaint, his undated letter of resignation, October and November 2014 e-mails to and from an Office of the Inspector General hotline, October and November 2014 efficiency statistics worksheets, December 2014 e-mails regarding how to log in to online communications training courses, photographs of alleged safety violations, and his April 21 and May 24, 2015 EEO affidavits reiterating his allegations. He also submitted additional medical reports.

By decision dated September 8, 2015, OWCP denied modification of its prior decision finding that the additional evidence submitted on reconsideration failed to substantiate a compensable factor of employment. It found that the letter of warning and letter of concern were administrative matters which did not establish error or abuse. OWCP further found that appellant had failed to establish his allegations of harassment, discrimination, and retaliation as factual.

On July 10, 2016 appellant requested reconsideration. He alleged that OWCP had failed to interview him although it had contacted the employing establishment. Appellant contended that the evidence of record was sufficient to establish harassment, discrimination, and retaliation by the employing establishment. He submitted copies of employing establishment policies and procedures, EEO investigative affidavits,⁵ and copies of evidence previously of record.

By decision dated March 15, 2017, OWCP denied modification of its prior decision, finding that the additional evidence submitted failed to establish any compensable factors of employment. It found that the policy and procedure documents were irrelevant to the claim and that the investigative affidavits did not substantiate appellant's allegations of harassment, discrimination, or retaliation.

On July 27, 2017 appellant requested reconsideration. He reiterated his allegations of harassment, discrimination, retaliation, waste, fraud, and mismanagement by employing establishment officials. In support of his request, appellant provided EEO investigative affidavits obtained in June and July 2015.

In an affidavit dated July 17, 2015, Plant Manager K.M. generally and specifically denied each of appellant's allegations of harassment, discrimination, and managerial misconduct. He contended that he took all actions to assist appellant in improving his performance or to curtail

⁵ Appellant submitted approximately 797 pages of documents on CD-ROM. This evidence was later imaged into the electronic case record on October 5, 2017 and was fully reviewed by the Board.

behaviors that were detrimental to the efficient accomplishment of the employing establishment's mission.

Employees R.A., R.F., T.D., C.Y., and D.Y. had no specific knowledge of appellant's allegations. Employees G.W. and R.C. were aware of administrative actions concerning appellant, but not of his specific allegations. C.D. denied that managers instructed employees not to speak during the July 2014 training teleconference. M.G. recalled that appellant was offended in August or September 2014 when K.M. became displeased that appellant had missed LMP project deadlines. Specialist C.G. asserted that when she met with appellant on February 27, 2015 to discuss his medical restrictions, appellant asserted that he would not perform tasks that were "beneath him" or would "insult his intelligence." Manager M.S. offered that appellant seemed to have difficulty adapting to changes within the employing establishment.

Appellant also submitted his motion for summary judgment, EEO affidavits, a March 17, 2015 investigative summary, February 2015 e-mails regarding leave requests, employing establishment policy and procedure manuals, audio recordings allegedly from September 16, 2014, February 2 and July 29, 2015 workplace meetings, April 2016 state unemployment insurance documents, position descriptions, and copies of evidence previously of record.

By decision dated October 26, 2017, OWCP denied modification, finding that the additional evidence submitted on reconsideration was insufficient to establish a compensable factor of employment. It reiterated that the September 11, 2014 letter of warning and December 18, 2014 letter of concern were established as factual, but that these were administrative matters not within the performance of duty and that no error or abuse had been shown. Appellant's allegations regarding other disciplinary actions, evaluations, leave requests, assignment of work, and monitoring of his performance concerned administrative functions that were not in the performance of duty, and no error or abuse had been shown. OWCP further found that he had not established any of the alleged incidents of harassment, discrimination, or retaliation as factual. Additionally, it found that the audio recordings could not be considered as evidence as there was no means to identify the parties recorded, to verify that the recordings were complete or accurate representations of the meetings involved, and that there was no evidence that appellant obtained permission to record these individuals.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an 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.⁶ 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

⁶ *Supra* note 1.

his or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁷

Appellant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by employment factors.⁸ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁹

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.¹⁰ 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.¹¹

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

ANALYSIS

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

Appellant does not attribute his claimed emotional condition to regular or specially assigned duties as a claims authorizer under *Cutler*.¹⁴

⁷ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁸ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁹ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

¹⁰ See *Charles D. Edwards*, 55 ECAB 258 (2004); *Norma L. Blank*, 43 ECAB 384 (1993).

¹¹ *Lori A. Facey*, 55 ECAB217 (2004); *Norma L. Blank id.*

¹² *Marlon Vera*, 54 ECAB 834 (2003).

¹³ *Kim Nguyen*, 53 ECAB 127 (2001).

¹⁴ See *supra* note 1. See *Thomas D. McEuen*, *supra* note 7; *Lillian Cutler*, *supra* note 7.

Rather, appellant made several allegations related to administrative and personnel actions including disciplinary letters, leave requests, assignment of work and training courses, and instructions regarding conduct during training teleconferences. In *Thomas D. McEuen*,¹⁵ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employing establishment and do not bear a direct relation to the work required of the employee. The Board notes that these matters are administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of FECA.¹⁶ Although these matters are generally related to the employment, they are administrative functions of the employing establishment, and not duties of the employee.¹⁷ The Board noted, however, that coverage under FECA would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁸

Regarding appellant's request not to work in K.M.'s chain of command, the Board has held that denials by an employing establishment of a request for a different job, promotion, or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties, but rather constitute his or her desire to work in a different position or environment.¹⁹ Therefore, appellant has not established a compensable factor of employment in this regard.

Appellant attributed his condition, in part, to his frustration at employing establishment managers for not adopting his recommendations regarding safety and efficiency. The Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under FECA.²⁰ As such, appellant has not established a compensable employment factor with respect to these administrative matters.

The Board finds that appellant did not substantiate any of his allegations of harassment, discrimination, retaliation, or disparate treatment. Appellant submitted no evidence, such as

¹⁵ See *Thomas D. McEuen, id.*

¹⁶ See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988). See also *Beverly R. Jones*, 55 ECAB 411 (2004) (monitoring work is an administrative function of a supervisor).

¹⁷ *Beverly R. Jones, id.*

¹⁸ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁹ *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

²⁰ *Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

personnel records or witness statements, corroborating his version of events.²¹ Rather, the supervisory and coworker affidavits refute his allegations of harassment and additional mistreatment. In his April 17, 2015 statement, Supervisor D.H. denied appellant's allegation of harassment and discrimination. He explained that appellant had misinterpreted colloquial remarks concerning interpersonal relations that were intended as feedback so appellant could improve his performance. In his May 6, 2015 affidavit, Plant Manager K.M. explained that appellant had been provided appropriate feedback and instructions to improve his performance. Manager J.L. asserted in his May 15, 2015 statement that appellant's allegations of managerial misconduct were investigated and found baseless. As appellant's allegations were not established as factual, they do not constitute compensable employment factors.²²

For the foregoing reasons, the Board finds that appellant has not established a compensable employment factor. Therefore, he has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty, as alleged. As appellant did not establish a compensable employment factor, the Board need not consider the medical evidence of record.²³

On appeal appellant reiterates his allegations. He asserts that the employing establishment was abusive as it directed him to perform fraudulent or illegal actions. Appellant also contends that the medical evidence submitted was sufficient to establish his claim.²⁴ As explained above, he has not submitted sufficient factual evidence to establish an emotional condition in the performance of duty, as alleged.

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.

CONCLUSION

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

²¹ *L.G.*, Docket No. 17-0160 (issued May 1, 2017).

²² *Lori A. Facey*, *supra* note 12; *Norma L. Blank*, *supra* note 11.

²³ *See Katherine A. Berg*, 54 ECAB 262 (2002).

²⁴ Appellant cited to the Board's holding in *Kenneth J. Deerman*, 34 ECAB 641 (1983) regarding the evaluation of medical evidence. As the issue at bar remains factual, *Deerman* is not relevant to the present appeal.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 26, 2017 is affirmed.

Issued: October 18, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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