

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

S.T., Appellant

and

**DEPARTMENT OF LABOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Jacksonville, FL, Employer**

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**Docket No. 13-752
Issued: September 13, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2013 appellant filed a timely appeal of an August 23, 2012 decision of the Office of Workers' Compensation Programs (OWCP), denying an emotional condition claim. 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 established that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On December 8, 2011 appellant, then a 47-year-old claims examiner, filed an occupational disease claim alleging emotional distress, anxiety and depression as employment

¹ 5 U.S.C. § 8101 *et seq.*

related. He first became aware of his condition on December 10, 2010, but did not realize it was employment related until July 1, 2011. The factors of employment identified by appellant included stress from trying to perform his duties as a claims examiner and emotional abuse, public berating and misconduct by his supervisor over his work.

By correspondence dated January 3, 2012, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised as to the medical and factual evidence required to support his claim and given 30 days to provide the requested information.

By decision dated February 15, 2012, OWCP denied appellant's claim on the grounds that the evidence of record did not establish that the alleged incidents constituted compensable employment factors.

On February 15 and 17, 2012 OWCP received appellant's response to its request for additional evidence. Appellant submitted medical evidence, copies of memorandum and e-mail correspondence with his supervisor, Marlita Lotuaco. He noted his Performance Improvement Plan (PIP) for the period July 1 to September 28, 2011 and a November 29, 2011 memorandum from Ms. Lotuaco informing him of his termination due to failure on his PIP.

The record also contains e-mail correspondence between appellant and Ms. Lotuaco during the period July 21 to September 29, 2011 regarding the daily work log required in appellant's PIP, questions regarding his PIP, requests to discuss his PIP and his request for an update on his termination.

On December 5, 2011 appellant wrote a memorandum to Ms. Lotuaco regarding her November 29, 2011 memorandum informing him that he had failed his PIP. He disagreed with her finding that he had failed three elements and contended that she based her findings on situations occurring prior to the rating period for the PIP. It was not his fault that certain cases went over goal due to circumstances beyond his control. Appellant also argued that it was unclear from the information he received regarding the PIP as to what was required to meet his improvement plan or improve his work. He addressed the deficiencies noted by Ms. Lotuaco contending that they were either beyond his control or incorrect.

In e-mail correspondence dated December 6, 2011, appellant alleged that none of the information contained in the PIP was correct. He stated that his evaluation/rating was a month later than everyone in his unit and that he was asked to sign documents by his supervisor. Appellant related that Ms. Lotuaco indicated that she was going to make a recommendation to either terminate his employment or demote him.

In a February 12, 2012 report, Deanna Hughes, Psy.D., a clinical psychologist, stated that since August 2011 appellant was being treated for work stressors. Appellant attributed his depression and anxiety to abuse by his supervisor as well as his duties as a claims examiner including working on difficult cases. Dr. Hughes opined that there was a direct causal relationship between the onset of appellant's symptoms and his regular duties as a claims examiner and harassment by his supervisor. She noted that an unclear work status due to being

reassigned to duties other than his regular work duties did not help the improvement of his symptoms.

In an undated statement, appellant alleged that he was treated as a scapegoat and bullied by Ms. Lotuaco. He stated that his illness began on December 15, 2010 as a result of being ordered into a break room by Ms. Lotuaco, who proceeded to yell at him for 20 minutes over two cases. Appellant contended that Ms. Lotuaco's allegations on December 15, 2010 were based on hearsay and not supported by the facts. He also related that Ms. Lotuaco put false information into his record. Appellant alleged that he had two phone messages of December 15, 2010 on which his supervisor wrote illegible notations and jabbed with a pen. He alleged that mistakes were made in two cases that were out of his control which were used as a basis for placing him on a PIP. Appellant contended that he had a problem claim requiring him to devote an inordinate amount of time working on the case and which precluded him from working on other cases. His supervisor refused to assist him or give him any guidance on dealing with a claimant with depression. Appellant alleged that the demands of the claims examiner position were very high and that his job became impossible once he attracted the ire of his supervisor. Appellant alleged that his PIP was based on erroneous items, that it was incomplete and he was not given information on how to correct the errors on which the PIP was based. He alleged that Ms. Lotuaco lost her temper at a meeting to discuss his PIP with him and yelled at him to leave her office. Appellant contended that he was denied union representation during each of the PIP meetings. During his 150-day PIP, he was the back up for a GS-12 who was out of the office frequently. Appellant alleged that the PIP was to end on September 28, 2011, but that it did not end until November 28, 2011 and that he was excluded from access to new information and going to meetings. He alleged that the PIP was issued in reprisal after providing an affidavit in an Equal Employment Opportunity (EEO) matter involving a supervisor who worked in another division. Appellant also described procedural errors in the implementation of the PIP. He alleged that his duties as a claims examiner were very stressful due to deadlines, specific case management and the need for attention to detail.

On February 27, 2012 appellant requested an oral hearing of the February 15, 2012 decision before an OWCP hearing representative that was held on May 8, 2012. He was represented by his wife and provided testimony regarding the employment incidents he believed caused his emotional condition.

In a May 21, 2012 report, Dr. Anjali Pathak, a treating Board-certified psychiatrist, diagnosed recurrent, nonpsychotic major depressive disorder, moderate to severe. Appellant related that his depression and anxiety began on December 2010 as the result of an employment-related injury. The work incidents mentioned by appellant included harassment by his supervisor, difficulty concentrating due to feeling pressured and over scrutinization. Dr. Pathak noted that appellant was not assigned new cases and felt isolated from his coworkers, which affected his self-esteem and made him anxious and caused panic attacks.

On May 30, 2012 OWCP received an undated statement from Patty Hogue, a coworker. Upon her transfer to appellant's work unit Ms. Hogue was told that Ms. Lotuaco was a bully and picked an individual out to be a scapegoat. She related that, during a conversation with Ms. Lotuaco, she was informed that appellant was incapable of doing his job. Ms. Lotuaco allegedly told Ms. Hogue that she should be aware of issues with appellant, but did not identify

what the issues were. She related that Mr. Bibeault, the district director, told her to watch out for appellant as he was manipulative. Ms. Hogue related that she and appellant were called into Ms. Lotuaco's office where they were screamed at and bullied by Ms. Lotuaco who lost her temper. She discussed a claim involving an individual who was a very active claimant and it was given a priority. As a result of her meetings with Ms. Lotuaco and appellant, she filed an anxiety claim due to the supervisors actions.

On June 1, 2012 Ms. Lotuaco responded to appellant's hearing testimony. She disagreed with his comments regarding a December 2010 meeting and denied that she had screamed at him or stabbed with her pen. Ms. Lotuaco disagreed with appellant's testimony regarding a claimant's case by stating that it was inaccurate and omitted key facts. She also denied appellant's allegation that she kicked him out of her office twice or had bullied him. Ms. Lotuaco submitted a January 20, 2012 witness statement from Betty Gambill, a senior claims examiner, who was present at the December 2010 meeting with appellant.

In the statement, Ms. Gambill noted that she was present at the meeting with appellant and Ms. Lotuaco which took place in the break room. The break room was used as the door to Ms. Lotuaco's office was broken. Ms. Lotuaco placed a chair under the door to the break room so that they could have privacy and no one could enter. Ms. Gambill stated that the purpose of the meeting was to discuss appellant's progress on the problem case. She noted that appellant provided no reasons or solutions as to why he had not developed the case and appeared to be confused. Ms. Gambill noted that Ms. Lotuaco ended the meeting after appellant started raising his voice and directed him to work with her and review the case. She stated that appellant was not subjected to any disrespect during the meeting. Ms. Gambill noted that she had worked with appellant since July 2010 and that he has problems with accepting feedback. She related that he became terse and did not listen or follow instructions or directions.

On June 20, 2012 OWCP received an undated statement by Donna E. Apte, a coworker, in support of appellant's claim. Ms. Apte stated that their jobs were stressful due to policy issues and constant changes. She provided details of her dealings with Ms. Lotuaco. Ms. Apte alleged that Ms. Lotuaco caused stress for individuals she targeted.

By decision dated August 23, 2012, OWCP's hearing representative affirmed the denial of benefits on the grounds that appellant failed to establish any compensable employment factors.

LEGAL PRECEDENT

To establish a claim that he sustained an emotional condition in the performance of duty, an employee must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.²

² V.W., 58 ECAB 428 (2007); *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.³ 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.⁴ 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.⁵ 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.⁶

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.⁷ However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.⁸ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.⁹

The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of FECA. This principal recognizes that a supervisor or manager must be allowed to perform their duties and that employee's will, at times, disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.¹⁰ Although the handling of leave requests and attendance matters are generally related to employment, they are administrative matters and not a duty of the employee.¹¹

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.¹² Mere perceptions of harassment or discrimination are not compensable under FECA.¹³

³ *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁴ *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

⁵ 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *J.F.*, 59 ECAB 331 (2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁷ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

⁸ See *William H. Fortner*, 49 ECAB 324 (1998).

⁹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁰ *S.M.*, Docket No. 09-2290 (issued July 12, 2010); *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

¹¹ *C.T.*, Docket No. 08-2160 (issued May 7, 2009); *Jeral R. Gray*, 57 ECAB 611 (2006).

¹² *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, *supra* note 3.

A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹⁴ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁵ A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.¹⁶

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.¹⁷ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.¹⁸ 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.¹⁹

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. OWCP denied his emotional condition claim on the grounds that he did not establish any compensable work factors. The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

The reaction to assigned work duties is a compensable work factor. To the extent that appellant was reacting to the performance of his work duties, this is a compensable work factor. He alleged that his job demanded strict deadlines, which he was unable to meet. However, appellant has not identified what deadlines his work required which he found stressful. While he attributed his stress generally to being held responsible for deadlines for claims which were out of his location and his control, he provided no evidence supporting his assertion. Appellant also attributed his stress to having to deal with a difficult claimant. He alleged that the claimant made his life difficult as he was unable to satisfy various requests for assistance. A review of the record shows that appellant did not submit any factual evidence pertaining to the interactions

¹³ *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, *supra* note 3.

¹⁵ *G.S.*, Docket No. 09-764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

¹⁶ *Robert Breeden*; *supra* note 3; *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁷ *D.L.*, 58 ECAB 217 (2006); *Jeral R. Gray*, *supra* note 11.

¹⁸ *K.W.*, 59 ECAB 271 (2007); *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

¹⁹ *Robert Breeden*, *supra* note 3.

with the claimant which support his allegation. Thus, he has not established a compensable factor under *Cutler*.²⁰

Appellant also made several allegations related to administrative and personnel matters. In *Thomas D. McEuen*,²¹ the Board held that an employee's emotional reaction to administrative or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation of the work required of the employee. The Board noted, however, that coverage under FECA would attach if the factual circumstances regarding the administrative or personnel action established error or abuse by the employing establishment supervisor in dealing with the claimant. Absent such evidence of error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²²

Appellant's contentions regarding the counseling sessions and generation and administration of his PIP²³ are administrative matters and not compensable absent a showing of error or abuse on the part of the employing establishment. He contended that Ms. Lotuaco improperly placed him on a PIP, that the PIP was not properly generated and erred in the administration of the PIP. The Board finds that appellant did not submit any evidence establishing that the employing establishment erred in placing appellant on a PIP, in the generation of the PIP or in its administration. Thus, appellant had not established a compensable factor with respect to these allegations.

Appellant contended that he was subjected to harassment, bullying and discrimination by Ms. Lotuaco. Actions of a claimant's supervisor which the claimant characterizes as harassment may constitute a compensable factor of employment. However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did occur. Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.²⁴ An employee's allegations that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.²⁵ To establish entitlement to benefits, a claimant must establish a factual basis for his or her claim by supporting his or her allegations with probative and reliable evidence.²⁶ Appellant contended

²⁰ *Supra* note 5.

²¹ *Supra* note 7.

²² See *S.M.*, *supra* note 10; *David C. Lindsey, Jr.*, *supra* note 18; *Richard J. Dube*, 42 ECAB 916 (1991); *Thomas D. McEuen*, *supra* note 7.

²³ *Robert Breeden*, *supra* note 3.

²⁴ *G.S.*, *supra* note 15; *J.C.*, 58 ECAB 594 (2007); *Robert G. Burns*, *supra* note 13.

²⁵ See *C.T.*, *supra* note 11; *K.W.*, *supra* note 12; *Ronald K. Jablanski*, *supra* note 15.

²⁶ See *G.S.*, *supra* note 15; *C.S.*, 58 ECAB 137 (2006); *Frankie McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

that he was bullied and harassed by Ms. Lotuaco. He specifically referenced a December 2010 meeting with Ms. Lotuaco which took place in the break room where allegedly she yelled at him and publicly berated him. Appellant also alleged that on two occasions she tossed him out of her office. In support of his claim, he submitted witness statements from Ms. Apte and Ms. Hogue. Both Ms. Apte and Ms. Hogue contend that Ms. Lotuaco subjected both of them and appellant to harassment. Ms. Hogue mentions that during a meeting with Ms. Lotuaco in her office that Ms. Lotuaco lost her temper with them and screamed at them. She stated that Ms. Lotuaco bullied both of them about the alleged problem claimant. However, neither Ms. Hogue nor Ms. Apte provided specific details such as dates and what occurred.

The record also contains a statement from Ms. Gambill detailing a meeting she and appellant had with Ms. Lotuaco in December 2010. Her statement contains specifics as to what occurred at the meeting in December 2010 which counters appellant's version of what occurred. Ms. Lotuaco also denied appellant's statement as to the events of the meeting in December 2010. The Board finds that appellant has failed to establish that he was subjected to harassment and bullying by the employing establishment, especially Ms. Lotuaco.

Consequently, appellant has not established his claim for an emotional condition as he has not attributed his claimed condition to any compensable employment factors.²⁷ He 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 the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

²⁷ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. See *L.K.*, Docket No. 08-849 (issued June 23, 2009); *V.W.*, 58 ECAB 428 (2007); *Alberta Dukes*, 56 ECAB 247 (2005); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 23, 2012 is affirmed.

Issued: September 13, 2013
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board