United States Department of Labor
Employees' Compensation Appeals Board

K.B., Appellant	)	
and	)	**Docket No. 15-0418**
	)	**Issued: August 19, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Washington, DC, Employer	)	

Appearances:
Stephen V. Hunt, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 15, 2014 appellant, through his representative, filed a timely appeal from a September 18, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employee' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

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

FACTUAL HISTORY

On December 20, 2013 appellant, then a 67-year-old equal employment opportunity (EEO) and alternative dispute resolution specialist, filed an occupational disease claim alleging that on October 15, 2012 the employing establishment's "zero tolerance policy" was violated when his coworker humiliated, threatened, bullied, and subjected him to a hostile work

[1] 5 U.S.C. § 8101 *et seq.*

environment. He alleged that he sustained extreme stress. Appellant explained that his claim was not filed earlier, as he expected that the violation would have been investigated internally, but that did not occur. He stopped work on October 16, 2012.

In an October 15, 2012 statement, appellant indicated that on at approximately 12:55 p.m. on that day, while he was in the copy room across from his office, the coworker came to his office and stated in a loud voice: "I WANT YOU TO KNOW I AM NOT NO MOTHER F**KING CAROL OR SHARON, AND WILL NOT PUT UP WITH YOUR BULL**IT. YOU KEEP SENDING THESE MOTHER F**KING EMAIL AND I TOLD YOU THIS WAS A LAST MINUTE SITUATION." He indicated that he responded, "Mike, are you kidding?" Appellant noted that the coworker walked off toward his office and returned, repeating his statement and using profanity. He stated that he told his coworker that he was out of line and could not talk to him that way using profanity. Appellant noted that he asked his coworker if he "could read?" He related that his coworker then responded: "yes mother f**ker I can read, you keep hiding behind e[-]mails." Appellant alleged that he and his coworker stated nothing else and appellant went to his office to send an e-mail to his managers. He indicated that the contents of his e-mail were true but were not verbatim as the incident occurred so swiftly.

In an October 15, 2012 statement, the coworker explained that he had sent an e-mail to appellant and another employee invites them to a surprise Bosses Day luncheon for their bosses. He explained that he walked down the hallway and into the copier room with appellant. The coworker told appellant that they were right down the hall and indicated that they could talk to each other without having to go back and forth with e-mails. He explained that he told appellant that, even with simple things, appellant found negativity in everything and everyone and everything rubbed him the wrong way. The coworker's statement noted that appellant responded to the e-mail and remarked that it was untimely. He explained that he had notified appellant about the surprise lunch as soon as possible. The coworker stated that, at that point, he walked out of the copier room toward his office. However, he turned around and returned to appellant. The coworker admitted that he stated: "as far as that bull**it with you and [Carol Wafford], I [am] not [Ms. Wafford], I do n[o]t know what [i]s going on." He advised that appellant stated: "[D]on't talk to me like that. Don't use profanity with me." The coworker stated that he apologized and told appellant that he "always felt like you and I were friends and can talk. What is it?" The statement reports that appellant stated he "was going to call Carol."

In a December 26, 2013 statement, appellant related that on October 15, 2012, the coworker stepped toward him with his right fist clenched and his veins bulging from his neck. Appellant alleged that the coworker pointed a finger towards him and exclaimed: "I AM GOING TO GET YOU." He noted that he reported the incident to the employing establishment, but no communication was received from any employing establishment law enforcement personnel. Appellant stated that he was veteran with 38 years of service and was a model employee at the employing establishment. Appellant's job duties included addressing allegations of discrimination against the employing establishment and working to achieve amicable dispute resolutions at the lowest levels. He related that he frequently expressed a dissenting voice against the ineptness of the many managers and that there was an "effort, through conspiracy to silence" him. Appellant alleged that the employing establishment ignored the zero tolerance policy and rewarded the coworker with a promotion to manager and assigned him to supervise appellant. He termed this "a joke." Appellant argued that everyone should be treated equally and fairly. He asserted that, on the date in question, the coworker came to his work area with

premeditated intent. Appellant noted that the coworker, although an acting manager at times, was not a manager at the time of the incident. He repeated that he was terrified and immediately reported the incident to the employing establishment and to the employing establishment police. Appellant alleged that the employing establishment engaged in "protectionism of one of their crony." He stated that he sought medical care on October 18, 2012.

OWCP received a copy of the October 15, 2012 e-mail correspondence pertaining to the invitation to attend a Bosses Day Luncheon and the ensuing conversation between appellant and the coworker with regard to the timeliness of the invitation.

An October 15, 2012 employing establishment police incident report revealed that a call was made by appellant in regard to the aforementioned incident described by him. Appellant noted that he was threatened and or assaulted by his coworker, who denied that he had threatened appellant. The coworker denied that he used the words "Mother F**king or Bull**it" toward appellant. A threat assessment intake form was also completed and the coworker was instructed by management to keep a physical distance from appellant pending the outcome of the investigation. Official discussions were recommended for both employees regarding appropriate workplace behavior and how to handle conflicts.

In January 16, 2014 letters, OWCP requested additional factual and medical evidence from appellant and the employing establishment was asked to comment on the allegations.

In a February 5, 2014 response, Dwight David Plybon, an employing establishment manager, challenged appellant's statement. He asserted that appellant had embellished his statement. Mr. Plybon noted that the original claim did not mention anything about the coworker having his fist clenched, or a vein bulging from his neck, or turning toward appellant, pointing his finger and saying "I am going to get you." He noted that the coworker denied appellant's allegations. Mr. Plybon related that, after the October 15, 2012 incident, appellant used two days of sick leave and returned to work on October 18 and continued to work until October 24, 2012. He questioned why, despite asserting that he was "overwhelmed and terrified" and "stressed," appellant worked four days before he went out on sick leave and waited over a year to file his claim. Furthermore, Mr. Plybon noted that appellant had entered the employing establishment 12 times after October 24, 2012.[2] He denied that management failed to investigate the incident. Mr. Plybon explained that a threat assessment intake form was completed and a threat assessment team (TAT) conducted an inquiry into the incident. He noted that they determined that there was no credible evidence of a threat on February 5, 2013. Appellant was informed that, upon his return to work, management would conduct a conflict resolution meeting with him and his coworker. On May 23, 2013 Ms. Wafford again wrote to appellant and explained the outcome of the TAT inquiry. Copies of her letters to appellant, the coworker's statement, and the forms were attached.

By decision dated February 28, 2014, OWCP denied the claim finding that appellant failed to establish a compensable employment factor.

On March 3, 2014 OWCP received an undated statement from appellant. Much of the information was repeated. Appellant reiterated that he was involved in a verbal attack/altercation

[2] Copies of Mr. Plybon's access records were provided.

over his tasks, duty, and assigned expectations. He argued that, at that time, the coworker, did not have supervisory responsibility or authority over him, but expressed the expectation that he attend the luncheon. Appellant noted that, after the encounter with his coworker, he voluntarily changed his work shift to avoid contact. He reported that, subsequent to the attack, he felt the need to seek medical assistance. Appellant argued that his coworker was promoted to a manger because of his inappropriate behavior, despite his verbal threat and assault. He stated that his claim of threat, intimidation, bullying, and hostile work environment were not investigated, and have been virtually ignored. Appellant alleged that he was disappointed, but not surprised that management, despite being made aware of their obligation to ensure the safety of "all" employees, had ignored the situation at hand. He argued that the verbal altercation on October 15, 2012, was an assault intended to cause physical and emotional harm.

With his statement, appellant submitted a February 28, 2014 report from Dr. Anthony Moore, Board-certified in psychiatry and neurology. Dr. Moore stated that on October 18, 2012, appellant was "targeted in a bullying incident" by his coworker. He reported the history of the incident as related by appellant and diagnosed post-traumatic stress disorder secondary to the employment incident and chronic pain and bipolar disorder.

On March 22, 2014 appellant requested a review of the written record. On May 14, 2014 appellant's representative argued that appellant's post-traumatic disorder was aggravated by the work incident. He asserted that the work incident that occurred was a "triggering event" which caused a "reawakening" or exacerbation of his symptoms. The representative also asserted that appellant's case was similar to the personal comfort doctrine and alleged that appellant's personal space was invaded. He argued that the police report confirmed that the event occurred. The representative argued that the emotional condition was based upon how the employee/claimant interpreted the event and based upon the employee's experiences.

By decision dated September 18, 2014, OWCP denied modification of its February 28, 2014 prior decision.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. 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 regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA. 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.[3]

Appellant has the burden of establishing by the weight of the reliable, probative, and substantial evidence that the condition, for which he claims compensation was caused or

[3] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

adversely affected by employment factors.[4] 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.[5]

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 the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.[6] 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 the matter establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.[7]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[8] 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.[9] A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.[10]

ANALYSIS

Appellant alleged that work factors caused an emotional condition. OWCP denied his claim on the basis that no compensable factors had been established. The Board must review whether the allegations are sufficient to establish compensable factors under FECA. The Board finds that appellant has not established a compensable factor of employment.

Appellant has not attributed his emotional condition to the regular or specially assigned duties of his position as an EEO and alternative dispute resolution specialist. Therefore, he has not alleged a compensable factor under *Cutler*.[11]

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[4] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[5] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[6] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[7] *Id.*

[8] *Charles D. Edwards*, 55 ECAB 258 (2004).

[9] *Kim Nguyen*, 53 ECAB 127 (2001). *See Thomas D. McEuen, supra* note 3.

[10] *Roger Williams*, 52 ECAB 468 (2001).

[11] *See Lillian Cutler, supra* note 3.

Appellant also made several allegations related to administrative and personnel actions. In *Thomas D. McEuen*,[12] 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 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 and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[13]

The crux of appellant's claim stems from an incident in which he alleges that he was verbally abused by his coworker on October 15, 2012 because he received late notification related to a surprise Bosses Day luncheon. Appellant asserted that the employing establishment investigation of this incident was inadequate. He alleged that on October 15, 2012, his coworker yelled at him and verbally abused him. At that time, appellant presented a detailed statement and noted that on that day, the coworker came to appellant's office and spoke loudly and profanely about the luncheon. He told his coworker that he was out of line and not to use profanity. In his statement, the coworker explained that the incident occurred after he sent a last minute e-mail to appellant and another coworker to invite them to a surprise luncheon for their bosses. He noted that he told appellant that they could talk to each other at the lunch and questioned why appellant found negativity in everything. The coworker explained that appellant was told about the luncheon as soon as possible. He further noted that he used the word "bullshit" to appellant, but otherwise denied using any profanity and stated that he immediately apologized when appellant objected to the profanity. In a December 26, 2013 statement, more than a year after the incident, appellant asserted that the coworker actually stepped towards him on October 15, 2012 with his right fist clenched and his veins bulging from his neck and pointed a finger toward him and stated that he was going to "get" appellant.

The Board has recognized the compensability of verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.[14] The Board notes that the only profanity that both parties acknowledge is the word "bull**it." The coworker denied using any other profanity and claims he apologized to appellant. Appellant has not provided any corroborating evidence to support his allegation or that his coworker threatened to "get" him. The record reflects that a police report was made and the employing establishment investigated the incident without finding that appellant's version of greater profanity or threatening demeanor was corroborated. Appellant has not shown that the "bull**it" remark, in the context, rose to the level of verbal abuse or otherwise fell within the coverage of FECA.[15] The Board finds that his emotional reaction to the coworker's behavior

[12] *See Thomas D. McEuen, supra* note 3.

[13] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[14] *See Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783 (1991).

[15] *See Denise Y. McCollum*, 53 ECAB 647 (2002) (where appellant's supervisor told her that she was full of "piss and vinegar," appellant did not show how this comment, in the context in which it was made, rose to the level of verbal abuse or otherwise fell within the coverage of FECA).

must be considered self-generated in that it resulted from his perceptions regarding his coworker's actions.[16]

With regard to appellant's assertions that the employing establishment's investigation of the October 15, 2012 incident was inadequate, the Board notes that investigations are an administrative function of the employing establishment. They do not involve an employee's regular or specially assigned employment duties are not considered to be an employment factors where the evidence does not disclose error or abuse on the part of the employing establishment.[17] Although appellant has alleged that the employing establishment protected the coworker and sought to silence him, he has not submitted any corroborating evidence that the employing establishment's investigation was in error. He did not establish a compensable employment factor regarding this administrative matter.

The Board also notes that appellant alleges that he was passed over for a promotion because of comments that the coworker had been protected during the investigation. Denials by an employing establishment of a request for a different job, promotion, or transfer are not compensable factors of employment absent a showing of error or abuse 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.[18] There is no evidence to support a finding that the actions of the employing establishment were erroneous or abusive.

Appellant alleged that the actions of the coworker subjected him to a hostile work environment. He reports that he was humiliated, threatened, intimidated, and bullied by his coworker in violation of the employing establishment's zero tolerance policy. However, appellant has not submitted sufficient evidence to establish harassment or a hostile work environment. Mere perceptions of harassment alone are not compensable under FECA.[19] Another coworker in his statement also provided no support for appellant's assertions that he was unfairly treated. The employing establishment and its police investigated the matter and offered no basis to support that appellant was harassed by the employing establishment. The Board finds that there was no evidence to support a hostile environment or any type of harassment or retaliation and that appellant has not submitted sufficient evidence to establish an employment factor.

As appellant has not established a compensable employment factor, it is not necessary to address the medical evidence.[20]

On appeal, appellant's representative asserted that the employing establishment and OWCP made a judgment call on the validity of one statement over another. He also generally referred to various events and the perceptions of different individuals. Additionally, the

[16] *See David S. Lee*, 56 ECAB 602 (2005).

[17] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[18] *Hasty P. Foreman*, 54 ECAB 427 (2003).

[19] *Ruthie M. Evans*, 41 ECAB 416 (1990).

[20] *Garry M. Carlo*, 47 ECAB 299 (1996). *See Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

representative argued facts not found in the record. It is appellant's burden to establish his claim. He cited to several cases decided by the Board dealing with the issue of verbal abuse and noted that in some of those claims, the Board found verbal abuse. These opinions did not help appellant establish what is a factual burden.

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

Appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the September 18, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 19, 2015
Washington, DC

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

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

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