

ISSUE

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On October 13, 2015 appellant, then a 45-year-old border patrol officer, filed an occupational disease claim (Form CA-2) alleging that he experienced anxiety, depression, chronic fatigue, gastritis, and sleep apnea causally related to factors of his federal employment. He first became aware of his condition on February 14, 2014 and of its relationship to his federal employment on September 4, 2014.³ Appellant attributed his condition to mandatory overtime, including working 16-hour shifts, the stress and danger of his work, harassment, discrimination, and false accusations, and working beside vehicle fumes.

By development letter dated October 30, 2015, OWCP requested additional factual and medical information from appellant, including a detailed description of the work factors that he believed caused his condition.

In a statement received by OWCP on November 6, 2015, appellant related that he was discriminated against based on his national origin beginning in December 2011. In December 15, 2011, a senior border patrol officer called him a Russian communist, used vulgar language, and told him he hated him and wanted him to die. On September 8, 2012 a senior border patrol officer told him to take a polygraph because he thought he was spying for Russia. On September 26, 2012 a coworker joked about his accent and told him that people in the area of Europe where he came from were not educated. Appellant informed management of the September 2012 incident and the two coworkers were separated. A senior border patrol agent accused him of taking money from the government when he was working at the x-ray machine. On September 1, 2015 appellant and two coworkers had to raise their voices when a woman kept passing by the x-ray machine without putting her purse through the machine. The woman used profanity toward him and asked for his name. A senior border patrol agent told appellant that she used profanity because he was screaming, and he responded that he had to raise his voice “to get her attention.” He received a letter of caution on September 15, 2015 for unprofessional behavior.

Appellant related that his work location arrested more people wanted by law enforcement than all the other entry points into the country combined. They dealt with terrorists, “[d]rug traffickers, people smugglers, guns, dead bodies, and mountains of drugs.” On numerous occasions appellant had to try to control “unruly individuals,” many of whom were high on drugs. It took eight officers three minutes to subdue one man, even with pepper spray and a Taser, and they subsequently discovered a large knife in his pocket. After being diagnosed with gastritis, appellant complained to the union of discrimination and harassment. Management retaliated

³ Appellant indicated on the claim form that he first became aware of the relationship between his condition and his federal employment on September 4, 2015. Counsel subsequently specified that the date should be corrected to September 4, 2014.

against him in January 2015 by taking away his duty firearm and accusing him of using excessive force.

Appellant asserted that long work hours, harassment, and a lack of sleep adversely affected his health. He advised that he was forced to work 16-hour shifts with 4 or 5 hours between shifts due to lack of staffing. Appellant also maintained that he breathed in vehicle exhaust as much as eight hours per day.

Appellant submitted earnings and leave statements showing that he worked 204 hours during the two-week pay period from January 1 to 14, 2012, 167.25 hours from February 12 to 25, 2012, 137.75 hours from July 15 to 28, 2012, and 157.25 hours from July 29 to August 11, 2012. From August 12 to 25, 2012 he worked 152 hours, from December 16 to 29, 2012 he worked 195 hours, from January 27 to February 9, 2013 he worked 151 hours, from March 24 to April 6, 2013 he worked 119.25 hours, from August 11 to 24, 2013 he worked 120 hours, from October 6 to 18, 2013 he worked 124 hours, and from December 1 to 14, 2013 he worked 120 hours.

In an officer report/narrative continuation form (incident report) dated November 25, 2014, appellant related that, on that date, he deployed oleoresin capsicum spray to subdue a combative individual that he was otherwise physically unable to control.

In a March 4, 2015 e-mail, appellant requested a transfer. He described incidents of harassment based on his national origin and noted that his work location dealt with drug smugglers, dead bodies, drugs, and guns. Appellant related that travelers abused him physically and verbally and that he did not feel safe. He asserted that management placed him on administrative duty without explanation and that he had lost his night differential.

M.L., a coworker, completed an incident report on September 9, 2015. He related that on September 1, 2015 appellant politely asked a woman to place her bag on the x-ray machine. The woman did not comply and he was forced to raise his voice. She used profanity towards appellant. A supervisor came over to talk to appellant.

In a September 15, 2015 incident report, J.R., a border patrol agent, related that on September 1, 2015 a pedestrian failed to put her bags on an x-ray machine. Appellant "politely called out [to her] three times to return and place her bags on the x-ray machine." All three officers then raised their voices to get the person to stop. The woman yelled and used profanity toward appellant, and a supervisor talked to him about it. The employing establishment issued appellant a letter of caution on September 9, 2015 as he "yelled at multiple travelers" to use the x-ray machines.⁴

On February 5, 2016 counsel submitted a timeline of events. He related that, on December 15, 2011, D.D., a senior officer, called him a communist, used profanity, and told him he wanted him dead. On September 8, 2012 a senior officer accused him of possible green card fraud, and on September 26, 2012 a coworker joked about his accent and accused him of being from an uneducated part of Europe. Appellant complained and the coworker was reassigned to a

⁴ Appellant underwent a fitness-for-duty examination on September 30, 2015. He also submitted medical evidence in support of his claim for a stress-related condition.

different shift. He described numerous other incidents which he believed constituted harassment, including being accused of defacing property for having stickers on his locker, failing to scan documents, abusing sick leave, using excessive force, and violating cell phone policy. Appellant applied for a position as a K9 handler, but did not get the position even though he had seniority. Management took his gun and badge away on February 6, 2015, citing as the reason excessive force. Appellant was reinstated on May 1, 2015.

By decision dated February 18, 2016, OWCP denied appellant's emotional condition claim. It found that he had not established any compensable employment factors.

Appellant, through counsel, on March 30, 2016 requested reconsideration. Counsel contended that OWCP erred in failing to request information from the employing establishment regarding his allegations. He maintained that appellant's September 1, 2015 "confrontation with a traveler who failed to comply with his orders" occurred while he was performing his work duties and thus constituted a compensable work factor. Counsel related that he and coworkers had a verbal altercation with the traveler, but only appellant received a letter of caution as a result.

Counsel additionally contended that OWCP failed to consider appellant's allegation that he was overworked due to the lack of sufficient staffing. He further maintained that appellant identified the nature of his work duties, including dealing with fugitives, drug traffickers, and other dangerous individuals, as a source of stress. Counsel asserted that OWCP failed to properly develop appellant's allegations by obtaining statements from witnesses, coworkers, and supervisors. He reviewed the supporting medical evidence.

By letter dated March 31, 2016, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's contentions and address any stressful aspects of his job duties.

In a May 27, 2016 response, the employing establishment related that it placed appellant on light duty effective December 11, 2014 and on administrative duty effective February 6, 2015 after allegations that he had used excessive force. It enclosed a November 10, 2015 letter of reprimand he received for inappropriate conduct on November 3, 2015.

In a September 28, 2015 memorandum, the employing establishment discussed appellant's claim that four supervisors harassed and discriminated against him on five occasions. The Port Director at his work location advised that one of the identified supervisors had retired and the other three received letters of cease and desist. Management briefed all employees on its policy of no discrimination or harassment.

By decision dated August 25, 2016, OWCP denied modification of its February 18, 2016 decision.

On November 8, 2016 appellant, through counsel, requested reconsideration. Counsel contended that incident reports established that the altercations with travelers occurred as alleged.

In an April 30, 2013 incident report, appellant advised that on that date he went over to assist another officer with an argumentative traveler. The individual told him that he memorized

his face and would “kick [his] ass” when he saw him on the street. Appellant and another officer escorted him to security and he was put in a detention cell.

Appellant, in a May 13, 2013 incident report, had to handcuff a traveler who told him about his arrests for smuggling aliens and his internal debate about whether to also begin smuggling drugs. On June 20, 2013 a traveler reached for something behind his seat and had to be physically restrained.⁵ Appellant used “the pressure point striking technique in order to apprehend the subject.” In a November 22, 2013 incident report, he related that on that date he had to grab the jacket of a traveler walking across the border. The individual tried to hit appellant, at which point he put him on the ground and handcuffed him. He had to subdue the traveler a second time when he became physically resistant during a pat down.

On November 5, 2014 a traveler evidencing pre-assault indicators accused appellant of not being American. Appellant used minimal force to escort the “argumentative and belligerent” traveler to security. He provided other incident reports on November 27, 2012, May 12 and 13, September 13, October 26, and December 14, 2013, and April 3, 2014 describing altercations with travelers.

In a November 19, 2014 incident report, appellant advised that on that date a traveler acted suspiciously and he tried to pat him down. The individual physically resisted him and threatened him. In a November 21, 2014 incident report, appellant described a physical altercation with a traveler who tried to hit him in the face, put him in a headlock, and dragged him toward a metal rail. The traveler, who had been drinking, attempted to reach for his gun. He was charged with assault on appellant, a federal officer, while he was performing his official duties.

A position description for border patrol agent indicated that the duties included protecting one’s self and others from physical attacks, using a firearm, and the “pursuit and apprehension of individuals who may be uncooperative, hostile, combative, or dangerous.” The job required working “substantial amounts of overtime.”

By decision dated January 31, 2017, OWCP denied modification of its August 25, 2016 decision. It found that the allegations of appellant’s counsel had not been established as factual.

On appeal counsel contends that appellant has established as compensable work factors that he sustained stress due to overwork, understaffing, working double shifts, and the dangerous nature of his employment. She notes that he submitted 17 incident reports describing dangerous encounters with travelers that he experienced while performing his assigned job duties.

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

⁵ The incident report is dated April 30, 2013, but this appears to be a typographical error.

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

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.⁸ 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.⁹ 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.¹⁰

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹¹ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.¹² The issue is whether the claimant has submitted sufficient evidence under FECA to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹³ The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by OWCP and the Board.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 factors of employment and may

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

⁷ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁸ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

⁹ See *William H. Fortner*, 49 ECAB 324 (1998).

¹⁰ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹¹ See *Michael Ewanichak*, 48 ECAB 364 (1997).

¹² See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

¹³ See *James E. Norris*, 52 ECAB 93 (2000).

¹⁴ *Beverly R. Jones*, 55 ECAB 411 (2004).

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

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, finding that he had not established any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under FECA.

Appellant attributed his emotional condition, in part, to the performance of his regularly assigned job duties. He related that, as part of his federal employment, he had to deal with drug smugglers, fugitives, armed individuals, and large quantities of drugs, firearms, and dead bodies. The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable.¹⁷ In support of his contention, appellant submitted numerous employing establishment incident reports describing altercations with travelers during the course of his federal employment. He used pressure points to subdue a traveler in June 2013, handcuffed a traveler who tried to strike him in November 2013, and was put in a headlock and dragged by a traveler in November 2014. Other incident reports describe additional physical and verbal altercations with travelers during the course of appellant's federal employment from 2012 through 2014. The employing establishment did not challenge these allegations. Appellant has thus factually supported his allegation that, during the course of his federal employment, he had to subdue verbally and physically combative travelers. Where a claimed disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to an imposed employment requirement, the disability comes within the coverage of FECA.¹⁸ Appellant, therefore, has identified a compensable employment factor of employment.

The Board further finds that appellant has established overwork as a compensable employment factor. Overwork, when substantiated by sufficient factual corroboration, may constitute a compensable factor of employment.¹⁹ Appellant submitted official time and attendance records verifying that he worked significant overtime during 2012 and 2013. The employing establishment did not challenge these allegations and his position description confirms that the job duties include working overtime. Overtime, even if voluntary, is related to the performance of appellant's regular or specially assigned duties and constitutes a compensable

¹⁵ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁶ *Id.*

¹⁷ *Trudy A. Scott*, 52 ECAB 309 (2001).

¹⁸ *Robert Bartlett*, 51 ECAB 664 (2000); *Ernest St. Pierre*, 51 ECAB 623 (2000).

¹⁹ *See Bobbie D. Daly*, 53 ECAB 691 (2002).

employment factor.²⁰ The Board finds that the evidence of record is sufficient to substantiate his allegations of overwork.

Appellant additionally attributed his emotional condition, in part, to the employing establishment issuing him a letter of caution in September 2015, failing to transfer him to a position as a K9 handler, and taking away his gun and badge in February 2015. In *Thomas D. McEuen*,²¹ 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 facts surrounding the administrative or personnel action established error or abuse by 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.²²

Appellant has not submitted any evidence corroborating that the employing establishment erred in failing to transfer him to a K9 handler or in taking away his gun and badge for alleged violent behavior. Regarding the September 2015 letter of caution, he related that on September 9, 2015 he and coworkers asked a woman to put her bags on an x-ray machine, and had to eventually raise their voices in order to get her to comply. She used profanity toward appellant. A supervisor spoke with him afterward about the incident, and issued him a letter of caution on September 9, 2015 for yelling at multiple individuals. Appellant submitted incident reports, which related that he and two coworkers raised their voices to get the woman to put her bag on the x-ray machine, but the supervisor only talked with appellant after the incident. The statements, however, are insufficient to show that the employing establishment erred in issuing the September 2015 letter of caution, which provided that it was issued as he yelled at numerous individuals on that date. Appellant, consequently, has not established error or abuse in an administrative matter as a compensable work factor.

Regarding appellant's allegation of harassment and discrimination, if disputes and incidents alleged as harassment and discrimination by supervisors and coworkers are established as occurring and arising from the employee's performance of his regular duties, these could constitute employment factors.²³ The evidence, however, must establish that the incidents of harassment and discrimination occurred as alleged.²⁴ Appellant alleged that in December 2011 a senior officer referred to him as a communist, in September 2012 a senior officer accused him of spying for Russia, and also in September 2012 a coworker told him he was from an uneducated area of Europe. He also related that he was accused of defacing property, failing to scan

²⁰ See *V.D.*, Docket No. 10-0280 (issued October 8, 2010); *Ezra D. Long*, 46 ECAB 791 (1995).

²¹ See *Thomas D. McEuen*, *supra* note 8.

²² See *Richard J. Dube*, 42 ECAB 916 (1991).

²³ *Janice I. Moore*, 53 ECAB 777 (2002).

²⁴ *Id.*

documents, and violating the employing establishment's cell phone policy. Appellant, however, has submitted no evidence corroborating his allegations of harassment and discrimination. Mere perception of harassment or abuse, absent any factual substantiation, is not in the performance of duty.²⁵ As he has not substantiated his allegations with probative evidence, appellant has not established a compensable employment factor under FECA with respect to the claimed harassment and discrimination.

As appellant has established compensable work factors, the case presents a medical question regarding whether his emotional condition resulted from the compensable employment factors. OWCP found there were no compensable employment factors and thus did not analyze or develop the medical evidence. The case will be remanded to OWCP for that purpose.²⁶ After such further development as deemed necessary, it should issue a *de novo* decision on this matter.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 12, 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

²⁵ See *F.K.*, Docket No. 17-0179 (issued July 11, 2017).

²⁶ See *Robert Bartlett*, 51 ECAB 664 (2000).