United States Department of Labor
Employees' Compensation Appeals Board

M.R., Appellant	)	
and	)	**Docket No. 17-1803**
	)	**Issued: February 8, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Alabaster, AL, Employer	)	

Appearances:
James A. Haggerty, Jr., Esq., for the appellant[1]
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 August 22, 2017 appellant, through counsel, filed a timely appeal from a June 5, 2017 merit decision and a July 28, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated December 19, 2017, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1803 (issued December 19, 2017).

[3] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a stress-related condition in the performance of duty; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 2, 2016 appellant, then a 56-year-old postmaster, filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment caused hypertension and stress. He indicated that he first became aware of his claimed condition on July 17, 2013 and of its relationship to his federal employment on March 25, 2016. Appellant stopped work on March 28, 2016. The employing establishment indicated on the claim form that the claim was being controverted.

In an attached statement, appellant alleged that the employing establishment failed to timely process a form for an upgrade level at his facility beginning in 2011. He indicated that he was not notified of the upgrade, which would have provided a two percent increase in his salary, until June 2015 when he was eligible to retire.

In the statement appellant further described three interactions with K.W., a letter carrier. First, he noted that on September 14, 2015 K.W. telephoned him and became profane while they were discussing the scheduling of K.W.'s route. Second, appellant related that he had conducted an investigative interview with K.W. on January 20, 2016 for conduct that was insubordinate, hostile, aggressive, and rude. After the interview, K.W. stated that he would see appellant soon, left the office, immediately returned and stated that he would see appellant real soon. This interaction was witnessed by two acting supervisors, L.D. and T.I. Third, appellant related that after he read a letter of removal to K.W. on February 11, 2016, with L.D. present, K.W. stated that God was watching and appellant would "be among the nonliving." He then informed a labor relations specialist and put K.W. on emergency placement immediately so that he could not enter the employing establishment's facilities, except as a customer. The labor relations specialist thought the statement could be a threat to the postal inspectors, so that was included as an addendum.

In his statement appellant also noted that K.W. had filed two grievances at the employing establishment, following the emergency placement, which appellant requested be filed at another postal facility. This request was denied. On February 24, 2016 appellant overheard a telephone call during which a union steward discussed where the grievances would be filed and noted that he was forceful in stating that the grievances would be filed at the employing establishment. On March 25, 2016 he had to accept a grievance from K.W. as the acting supervisor was sick and not at work, causing appellant's blood pressure to increase.

In his statement appellant also related that, a subordinate employee, J.W., became upset because he had changed her schedule resulting in a confrontational conversation. He noted that after this confrontation the Threat Assessment Team arrived at the employing establishment on March 28, 2016 to investigate him because he had allegedly threatened her. Later that day, appellant called his physician because his blood pressure had increased again.

Appellant submitted two September 3, 2015 statements from postmasters at other facilities who discussed an upgrade for the Alabaster facility. In e-mail correspondence dated February 22 and 23, 2016, S.B., an employing establishment official, told appellant that he must allow K.W. to file a grievance at the employing establishment, even if he was in an emergency placement, noting that a union representative would also attend. Appellant recommended that, if K.W. had to file the grievance at his facility, then a postal inspector should be present, indicating that he believed that he had the right to protect other employees. A union representative confirmed that K.W. must have access to file a grievance and would be accompanied by a union steward during the process, although not contractually required.

In an attending physician's report (Form CA-20), Dr. W. Guy Patterson, Board-certified in internal medicine, diagnosed acute stress reaction with hypertension. He checked a box marked "yes" indicating that appellant had no history of similar symptoms. Dr. Patterson noted that he increased appellant's medication, referred him to counselling, and advised that there were possible long-term effects.

Dr. Anna McIntyre, Ph.D., a clinical psychologist, noted that she had been providing psychotherapy to appellant beginning on April 22, 2016. She advised him to stop work on April 27, 2016 until after mediation between appellant and K.W. was held.

In a letter dated May 9, 2016, the employing establishment controverted the claim. It maintained that appellant's statement documented reactions to administrative actions taken by management. The employing establishment noted that it was in the process of obtaining rebuttal statements to address the allegations in the claim form.

By development letter dated May 13, 2016, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It requested that he respond to an attached questionnaire in order to substantiate the factual elements of his claim and that he submit medical evidence from a physician to establish a diagnosed condition causally related to his employment. A development letter was also sent to the employing establishment. OWCP afforded 30 days for responses.

In a June 13, 2016 statement, appellant indicated that he had no sources of stress outside of work. He reiterated the circumstances of the investigative interview he conducted with K.W. on January 20, 2016 and when he read K.W.'s letter of removal on March 25, 2016. Appellant indicated that his stress-related symptoms had increased. On June 15, 2016 he reported that his stress and anxiety, including increased blood pressure, escalated on June 14, 2016 when he was informed that K.W. would be returning to work at the employing establishment.

Appellant also forwarded incident reports concerning the events of September 14, 2015 when K.W. used profanity over the telephone and reports regarding the January 20, 2016 investigative interview.

In a January 20, 2016 statement, T.I. indicated that she sat in on the investigative interview, during which K.W. was very irate, belligerent, hostile, aggressive, and insubordinate toward appellant. She advised that K.W. told appellant that he would "see him soon" and after K.W. left, popped his head in the door and stated, "I will see you real soon."

A January 22, 2016 statement with an illegible signature indicated that K.W. became defensive and aggressive and interrupted appellant several times during the January 20, 2016 investigative interview. The statement reported that K.W. told appellant that he would see him soon, and later that he would see him real soon.

In a February 11, 2016 statement, L.D. indicated that, when appellant read K.W. the removal letter, K.W. stated, "God is watching you," mumbled for a few seconds, and then stated that appellant would be" among the nonliving."

A police report dated March 10, 2016 noted that appellant made a complaint of harassment or harassing communications at the employing establishment. The report indicated that the offending party was on an emergency placement at another location for making comments directly to appellant, including that he would be among the nonliving.

Mediation between appellant and K.W. was held on May 10, 2016 with no agreement reached. In a June 15, 2016 statement, G.C., an area manager of employing establishment operations, indicated that appellant had informed him in February 2016 that he had been threatened by K.W., was concerned for his safety and that of his employees, and that he had elevated blood pressure due to increased anxiety.

Dr. Patterson submitted treatment notes dated March 28 to May 13, 2016. On March 28, 2016 he noted appellant's complaint of extreme stress at work with long hours and problem employees. Dr. Patterson indicated that appellant was very anxious. Following physical examination, he diagnosed essential hypertension, other forms of dyspnea, and acute stress reaction. Dr. Patterson advised that appellant was at risk for acute decompensation and acute stroke given his marked elevation in blood pressure, and advised that appellant should not work until his blood pressure stabilized. In each report he described physical examination findings and reiterated his diagnoses.

In a report dated May 26, 2016, Dr. McIntyre advised that appellant's sick leave should be extended so that he could continue to work on his psychological symptoms.

By decision dated July 11, 2016, OWCP denied appellant's claim, finding that he had not established a compensable factor of employment.

On July 19, 2016 appellant, through counsel requested a hearing before an OWCP hearing representative.

In reports dated July 21, 2016 to January 9, 2017, Dr. McIntyre noted that she continued to treat appellant and, in each report, recommended that he continue to take leave from work. On January 9, 2017 she noted that he continued to address a work-related stressor.

In reports dated August 30 and October 4, 2016, Dr. Joseph Lucas, a Board-certified psychiatrist, noted appellant's complaint of work stress related to alleged violence in the workplace. He performed a mental status examination and diagnosed post-traumatic stress disorder (PTSD), unspecified. Dr. Lucas prescribed medication and advised that appellant continue treatment. In an undated report, he advised that he had treated appellant since August 30, 2016 for PTSD.

During the hearing, held on March 20, 2017, T.I. testified that K.W. had an aggressive personality. She indicated that she witnessed the verbal altercation between appellant and K.W. on January 20, 2016, stating that K.W. was very irate and aggressive and kept interrupting appellant, and that after the discussion was over K.W. got up to leave and stated, "I'll see you soon." K.W. then walked out, but popped his head back in and stated, "real soon." T.I. opined that she considered K.W.'s statements a credible threat of bodily harm to appellant.

L.D. testified that on January 20, 2016 she heard K.W. tell appellant that he knew where he lived, which she considered to be a credible threat. She also stated that she witnessed a second altercation between appellant and K.W. on February 11, 2016 when K.W. told appellant that God was watching him and that he would be among the nonliving, which she also considered a credible threat.

Appellant testified that he had been diagnosed with PTSD and was on medication for hypertension and anxiety. He stated that K.W. made threats of bodily harm, that he was still on medical leave due to PTSD, and that he still felt threatened, even away from work. Counsel argued that since the threats were made in the course of appellant's duties as a postmaster, they were compensable.

By decision dated June 5, 2017, an OWCP hearing representative affirmed the July 11, 2016 decision. She determined that appellant had not established an injury in the performance of duty because there were no compensable factors of employment.

On July 13, 2017 appellant, through counsel, requested reconsideration. In a report dated June 24, 2017, Dr. Lucas opined that appellant's PTSD was caused by events that occurred at work which led to treatment due to this issue. On June 26, 2017 Dr. Patterson wrote that appellant was still having symptoms from PTSD. On May 31, 2017 Dr. McIntyre noted that she continued to treat appellant for PTSD caused by a work-related stressor. She related that his functioning had been increasingly limited over the past year. In a June 30, 2017 report, Dr. McIntyre noted that appellant reported that his life had been threatened by a coworker and that since presenting for treatment in April 2016, his symptoms of clinical anxiety had increasingly worsened. She opined that he avoided social activities due to fear and experienced strong physiological symptoms when he was reminded of the work stressor or the idea of returning to work. Dr. McIntyre advised that appellant clearly met the criteria for a diagnosis of chronic PTSD. On June 28, 2017 she noted that she continued to treat him and that he remained disabled.

By decision dated July 28, 2017, OWCP, denied appellant's request for reconsideration of the merits of his claim pursuant to section 8128(a) of FECA.[4] It found that the medical evidence submitted in support of his timely reconsideration request was irrelevant and immaterial to the underlying issue, which was not medical in nature.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric

[4] *Id.* at § 8128(a).

disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.[5]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[6] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.[7] There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under FECA.[8] When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[9] In contrast, a disabling condition resulting from an employee's feelings of job insecurity per se is insufficient to constitute a personal injury sustained in the performance of duty within the meaning of FECA. Thus disability is not covered when it results from an employee's fear of a reduction-in-force, nor is disability covered when it results from such factors as an employee's frustration in not being permitted to work in a particular environment, or to hold a particular position.[10]

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.[11] 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.[12] 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.[13]

[5] *R.L.*, Docket No. 17-0883 (issued May 21, 2018).

[6] 28 ECAB 125 (1976).

[7] *Id.*

[8] *See M.R.*, Docket No. 18-0305 (issued October 18, 2018); *Robert W. Johns*, 51 ECAB 136 (1999).

[9] *Supra* note 6.

[10] *Id.*

[11] *C.V.*, Docket No. 18-0580 (issued September 17, 2018); *Charles D. Edwards*, 55 ECAB 258 (2004).

[12] *C.V., id*.; *Kim Nguyen*, 53 ECAB 127 (2001). *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon*, 42 ECAB 566 (1991).

[13] *M.R., supra* note 8; *Roger Williams*, 52 ECAB 468 (2001).

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under FECA. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[14]

ANALYSIS

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

The Board finds that appellant has met his burden of proof to establish two compensable employment factors which include being the subject of a threat of physical violence made by K.W. on February 11, 2016 when he stated that appellant would be "among the nonliving," and also the employing establishment's requirement that appellant meet with and accept a grievance filing from K.W. following the established threat of physical violence and K.W.'s removal from the workplace. The Board further finds that appellant has not established compensable employment factors for an alleged failure of the employing establishment to timely process an upgrade form; for interactions with K.W. and other coworkers which were considered profane, insubordinate, hostile, aggressive, and rude; and for having a subordinate employee, J.W., become upset and confrontational because he changed her schedule and resulted in an investigation.

When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed due to the employment, the disability is deemed compensable.[15]

Appellant primarily attributed his stress-related condition to his interactions with and remarks made by K.W., a letter carrier, during an investigative interview conducted by appellant on January 20, 2016, and when he read a letter of removal to K.W. on February 11, 2016. The description of the events of January 20 and February 11, 2016 are supported by both written witness statements and by testimony at the hearing from T.I. and L.D., acting supervisors. The Board finds that K.W.'s language in which he stated that appellant would be "among the nonliving" clearly rises to the level of a credible bodily threat directed at appellant.[16] The threat was reported to a labor relations specialist and found sufficiently severe to result in K.W.'s immediate prohibition from entering the employing establishment, except as a postal customer. The Board has held that, with regard to a claim that bodily harm was threatened, the evidence of record must support a finding that a specific threat occurred.[17] It is appellant's burden of proof to submit evidence to support that a specific threat of violence occurred such that it affected the

[14] *Supra* note 5; *Alice M. Washington*, 46 ECAB 382 (1994).

[15] *D.H.*, Docket No. 17-1529 (issued February 14, 2018); *Penelope C. Owens*, 54 ECAB 684 (2003); *see supra* note 6.

[16] *See M.F.*, Docket No. 17-1649 (issued July 20, 2018).

[17] *Id.*

conditions of employment.[18] The record in this case supports that K.W. made a specific threat of bodily harm, which would reasonably lead one to fear for his or her personal safety and which was witnessed by other postal employees. Appellant was performing his regularly assigned work duties when he experienced the stressful event. He also provided witness statements and elicited hearing testimony to support the occurrence of the threats of physical violence, all of which is sufficient to establish a compensable factor of employment.

As previously noted, when disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.[19] The Board finds that the evidence of record is sufficient to establish that appellant was in the performance of his regular duties as postmaster while conducting the investigative interview with K.W. on January 20, 2016 and when reading a letter of removal to K.W. on February 11, 2016. Appellant has established that he performed these duties in his role as postmaster. As such, he has met his burden of proof to establish a compensable factor of employment.[20]

Appellant also attributed his emotional condition to additional actions of the employing establishment. 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]

The Board finds that the employing establishment committed error when it required appellant to meet with and accept a grievance from K.W. following the established threat of physical violence and K.W.'s emergency removal from the workplace. The record supports that following K.W.'s emergency removal he filed two grievances. Appellant requested that the grievances be filed at another postal facility so that he could avoid contact with K.W. This request was denied. On March 25, 2016 appellant was required, in his position as a postmaster, to perform the administrative act of accepting the two grievances from K.W. This requirement resulted in appellant's blood pressure increasing due to the stressful situation of being personally confronted by K.W. The prior conduct of K.W. included threatening physical violence against appellant and

[18] *See M.F.*, Docket No. 17-1649 (issued July 20, 2018); *J.C.*, 58 ECAB 594 (2007); *Dorothy J. Williams*, 32 ECAB 665 (1981).

[19] *Supra* note 15.

[20] *Supra* note 18.

[21] 41 ECAB 387 (1990), *reaff'd on recon,* 42 ECAB 566 (1991).

[22] *See Y.B.*, Docket No. 16-0193 (issued July 23, 2018).

alluding to impending death, and such conduct was found by the employing establishment to be sufficient grounds for his emergency removal from the employing establishment as he was a danger to appellant and others. The employing establishment's requirement that appellant, the target of the threat of violence, be required to personally meet with the perpetrator of the threat and the source of the danger to his person was an unreasonable act and was therefore in error.[23] As such, appellant has met his burden of proof to establish a second compensable factor of employment.

Appellant alleged additional acts of error and abuse against the employing establishment. Although he generally alleged that the employing establishment failed to properly process forms for an upgrade level at his facility, as a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of FECA.[24] Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error or abuse.[25] There is no evidence of record to establish that the employing establishment's action relating to the failure to process an upgrade form, under the facts of this case, constituted error or abuse.

Appellant also attributed his stress-related condition to a March 28, 2016 employing establishment investigation of charges where he was alleged to have threatened a subordinate employee. An employing establishment has the right to conduct investigations if wrongdoing is suspected.[26] Appellant submitted no evidence of error or abuse by the employing establishment in discharging its administrative duties with regard to this investigation. As such this is not a compensable factor of employment.[27]

The Board has recognized that verbal abuse when sufficiently detailed by the claimant and supported by evidence, may constitute compensable employment factors.[28] The fact that appellant disliked a conversion by a union steward that he overheard on February 24, 2016 would not warrant a finding of verbal abuse. The conversation was not directed to appellant.[29] Likewise, K.W.'s use of profanity over the telephone on September 14, 2015, prior to the escalation to threats of physical violence, may have upset appellant. This, however, did not rise to the level of coverage under FECA.[30]

As appellant has established two compensable factors of employment, OWCP must base its decision on an analysis of the medical evidence. The case will therefore be remanded to OWCP

[23] *Id.*; *see also C.M.*, Docket No. 17-1076 (issued November 14, 2018).

[24] *R.V.*, Docket No. 18-0268 (issued October 17, 2018); *Carolyn S. Philpott*, 51 ECAB 175 (1999).

[25] *Z.S.*, Docket No. 16-1783 (issued August 16, 2018); *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

[26] *D.G.*, Docket No. 17-0514 (issued May 4, 2018).

[27] *Id.*

[28] *C.V.*, *supra* note 11; *T.G.*, 58 ECAB 189 (2006).

[29] *See L.K.*, Docket No. 08-0849 (issued June 23, 2009).

[30] *See D.J.*, Docket No. 16-1540 (issued August 21, 2018); *V.W.*, 58 ECAB 428 (2007).

to analyze and develop the medical evidence of record.[31] After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision on the merits of this claim.

CONCLUSION

The Board finds that this case is not in posture for decision.[32]

ORDER

IT IS HEREBY ORDERED THAT the July 28 and June 5, 2017 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: February 8, 2019
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

[31] *See S.S.*, Docket No. 17-0959 (issued June 26, 2018).

[32] In light of the Board's disposition of the first issue, the second issue is moot.