

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

D.T., Appellant)	
)	
and)	Docket No. 19-1270
)	Issued: February 4, 2020
DEPARTMENT OF DEFENSE, DEFENSE CONTRACT MANAGEMENT AGENCY, Redondo Beach, CA, Employer)	
)	

Appearances: *Case Submitted on the Record*
 William H. Brawner, Esq., for the appellant¹
 Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On May 20, 2019 appellant, through counsel, filed a timely appeal from an April 2, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

On October 2, 2018 appellant, then a 54-year-old computer engineer, filed an occupational disease claim (Form CA-2) alleging that he sustained an emotional condition due to factors of his federal employment including overwork and lack of training. He noted that he first became aware of his claimed condition and its relation to his federal employment on March 27, 2018. He stopped work on July 10, 2018.

In a statement dated October 3, 2018, appellant attributed his stress to overwork and the lack of training. He noted that he had been assigned four programs and one contract receipt and review (CRR) task, which he alleged exceeded the maximums specified in the Software Surveillance Plan (SSP). Appellant stated that the maximum workload for his position was 1,740 hours per year and that his workload has been approximately 2,295.5 hours per year, or approximately 53 hours per week and 132 percent of the normal workload. He explained that on June 9, 2018 he had submitted a Family and Medical Leave Act (FMLA) request, and on that date his workload consisted of one CRR task and four programs. Appellant noted that his workload had been increasing since April 19, 2018 and provided four specific examples. First, on April 19, 2018, he was required to perform surveillance on a B2 program for which he had no training. Appellant claimed that training for this task normally takes about seven months. Second, he asserted an increased workload on June 14, 2018 when he was assigned the "F35 program." Next, on June 25, 2018 appellant claimed he was assigned additional programs requiring more work. Finally, on July 18, 2018, he alleged that he was required to sign off on "DD250," which was a task he was not authorized to perform as he did not have the required training. Appellant also alleged: that he was required to perform duties without a mentor as a trainee, which he noted was required by agency regulations and procedures; that he was forced to use his personal property to perform his duties as he had not been provided the necessary computer equipment; that he had been reprimanded on several occasions; and that he feared that he was unable to adequately perform his work duties so he had requested FMLA leave.

In support of his claim, appellant submitted a September 24, 2018 report from Dr. Sara Epstein, a Board certified psychiatrist and neurologist. Dr. Epstein diagnosed post-traumatic stress disorder (PTSD), prior alcohol use disorder, labile hypertension, and mixed traits. She provided detailed medical, social, and employment histories. Dr. Epstein's narrative report recounted specific instances of overwork and lack of training occurring during the period August 2017 to June 20, 2018. She noted that appellant started work with the employing establishment on July 10, 2017 and that in August 2017 he worked with C-RAM C2 computer program without assistance and adequate training. Dr. Epstein noted that on January 14, 2018 appellant requested a laptop from the employing establishment so that he could perform his job and developed anxiety as he could not perform his job and when no laptop was provided, appellant brought in his personal laptop to perform his basic job tasks. She further noted that in March 2018, appellant related that he had been ordered to discontinue work on the C-RAM C2 program and start working alone on the B2 program when he was already assigned to work on two other programs, with these two

programs constituting a full workload. Dr. Epstein indicated that a C-RAM C2 customer protested appellant's removal from the program in April 2018, which resulted in his being instructed to add surveillance for the Formal Quality Test and B2 program to his existing heavy workload. She also indicated in June 2018 he was assigned three days per month to work on the F35 program, which exceeded the 1,740 hours allotted to a full-time employee and at this time he became anxious and fearful that he could not perform his job. Dr. Epstein reported that appellant confirmed that he should not be assigned to do four programs due to his lack of having a software professional development program (SPDP) certificate and it was a very heavy workload. She reported that appellant had noted that D.F. confirmed he was not qualified to perform software surveillance on four programs as no mentor had been assigned, he had not begun a mentorship task, and he had not finished the SPDP program; and that appellant was assigned to a cyber-resilience review task, which required eight hours per day for three weeks along with the other four programs he was assigned to do. Dr. Epstein opined that appellant's diagnosed conditions were caused by the increasing heavy workload.

In a February 26, 2019 development letter, OWCP advised appellant of the deficiencies in his claim. It requested additional factual and medical evidence and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the requested information. In a separate letter of even date to the employing establishment, it requested comments from a knowledgeable supervisor regarding the accuracy of his statements.

In response to OWCP's request, appellant submitted a March 20, 2019 report from Dr. Epstein who noted the medical records reviewed, examination dates, and description of symptoms and findings. Dr. Epstein opined that appellant's symptoms were consistent with a diagnosis of PTSD, chronic stress, and depression. Diagnoses were unchanged from her prior September 24, 2018 report. Dr. Epstein further opined that appellant sustained a severe permanent aggravation of his preexisting PTSD due to overwork at his job which in turn caused appellant to fear catastrophic failure. In support of this conclusion, she explained that appellant had recovered substantially from his preexisting PTSD and showed no overt symptoms prior to working at the employing establishment. If not for the overwork, Dr. Epstein concluded that appellant would have remained symptom free and, thus, the overwork had aggravated his stress syndrome, which in turn resulted in new symptomatology.

In a March 26, 2019 letter, the employing establishment responded to OWCP's request. It noted that appellant was one course away from completing his SPDP and had been assigned a mentor and that the software surveillance task on the B2 program were the same tasks performed on his other programs. The employing establishment noted that software personnel were on a team which supports various programs throughout the year. It used 1,760 hours as the number of hours for a full-time employee and that tasks which exceed this number would be reassigned or eliminated if low risk. Thus, when appellant was assigned the F35 task, due to his higher risk, it eliminated some of his assigned lower risk tasks. It noted that 2,156.50 hours exceeded a regular 40-hour workweek and there had been no direction that appellant should work overtime. The employing establishment indicated that it was an oversight agency, there was no overtime requirement, the workload was risk-based surveillance, deadlines were twice a month, and there were two travel training events. Finally, the employing establishment listed actions taken to accommodate appellant's workplace concerns. It also noted no conduct or performance problems

and that generally appellant was able to meet expectations with respect to the performance of his employment duties.

The employing establishment submitted a “student profile” for appellant showing his training history, position description, and premium request summary. The training history noted one course, CME 250 -- Software Acquisition Management Policy Implementation, had not been completed and that he had completed the other 14 courses. Appellant was approved to earn cumulative CB -- Travel Compensatory time for February 26, March 2, and June 18 to 22, 2018 (13.5 hours). His requests for approval to earn cumulative CB -- Travel Compensatory time for February 26 and March 2, 2018 were withdrawn.

By decision dated April 2, 2019, OWCP denied appellant’s claim finding that he had not established an emotional condition in the performance of duty as he failed to submit sufficient corroborating evidence to prove a compensable factor of employment. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

To establish an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying an employment factor or incident alleged to have caused or contributed to his or her claimed emotional condition; (2) medical evidence establishing that he or she has a diagnosed emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the accepted compensable employment factors are causally related to the diagnosed emotional condition.⁶

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment.⁷ 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

³ 5 U.S.C. § 8101 *et seq.*

⁴ *A.J.*, Docket No. 18-1116 (issued January 23, 2019); *Gary J. Watling*, 52 ECAB 278 (2001).

⁵ 20 C.F.R. § 10.115(e); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *see T.O.*, Docket No. 18-1012 (issued October 29, 2018); *see Michael E. Smith*, 50 ECAB 313 (1999).

⁶ *See S.K.*, Docket No. 18-1648 (issued March 14, 2019); *M.C.*, Docket No. 14-1456 (issued December 24, 2014); *Debbie J. Hobbs*, 43 ECAB 135 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁷ *T.G.*, Docket No. 19-0071 (issued May 28, 2019); *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

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.⁸ On the other hand, the disability is not covered when 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.⁹

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.¹⁰ 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.¹¹ 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.¹²

For harassment or discrimination to give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment or discrimination did in fact occur.¹³ Mere perceptions of harassment, retaliation, or discrimination are not compensable under FECA.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 compensable factors of employment and may not be considered.¹⁵ If an employee does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim. The claim must be supported by probative evidence.¹⁶ If a compensable factor of employment is substantiated, OWCP must base its decision on an analysis of the medical evidence which has been submitted.¹⁷

⁸ *L.H.*, Docket No. 18-1217 (issued May 3, 2019); *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁹ *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹⁰ See *G.R.*, Docket No. 18-0893 (issued November 21, 2018); *Andrew J. Sheppard*, 53 ECAB 170-71 (2001), 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

¹¹ See *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *D.R.*, Docket No. 16-0605 (issued October 17, 2016); *William H. Fortner*, 49 ECAB 324 (1998).

¹² *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹³ *T.G.*, Docket No. 19-0071 (issued May 28, 2019); *Marlon Vera*, 54 ECAB 834 (2003).

¹⁴ *Id.*; see also *Kim Nguyen*, 53 ECAB 127 (2001).

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

¹⁶ *Charles E. McAndrews*, 55 ECAB 711 (2004).

¹⁷ *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

ANALYSIS

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

Appellant has attributed his emotional condition in part to *Cutler*¹⁸ factors. He alleged that he was overworked. Appellant noted that he had been assigned four programs and one CRR program, which resulted in him working about 2,295.50 hours per year instead of the maximum workload for his position of 1,740 hours per year. The Board has held that overwork is a compensable factor of employment if appellant submits sufficient evidence to substantiate this allegation.¹⁹ Appellant has not submitted evidence such as witness statements, or time and attendance forms or work logs supporting his allegation of overwork. The employing establishment noted that appellant had not been directed to work overtime and that software personnel are part of a team so that tasks exceeding the 1,760 base hours would be assigned to another employee if the task was high risk or eliminated if the task was lower risk. It is appellant's burden to submit the requisite factual evidence supporting his allegation that he was overworked, which he failed to provide.²⁰ Thus, the Board finds that appellant has not established overwork as a compensable factor of employment.

Appellant also asserted that he had not received the requisite training to perform the tasks assigned, nor had he been provided a mentor. The employing establishment submitted his training history which noted that he had completed 14 required courses with 1 course remaining uncompleted. Appellant has not submitted factual evidence supporting his assertion that he was denied the requisite training for the tasks he had been assigned. The training history showed that he had completed the required 14 courses and only 1 required course had not been completed. Appellant has not submitted witness statements or other factual evidence in support of his claim that he had not been afforded the training required to perform the tasks assigned by the employing establishment. He did not specify what training he lacked and which was necessary to complete the assigned tasks. Also, there is no evidence of record to establish that appellant had been denied a mentor or that mentors were permissible at the employing establishment. As noted above, it is his burden to prove the factual basis of his claim with supporting evidence.²¹ Thus, the Board thus finds that appellant has not established a compensable employment factor with regard to these claims.

On appeal counsel reiterates that appellant had not received the appropriate training for the tasks he was assigned and that he had been assigned a heavier work load. As discussed above appellant has not submitted factual evidence sufficient to establish a compensable employment

¹⁸ *Lillian Cutler*, *supra* note 8.

¹⁹ *W.F.*, Docket No. 18-1526 (issued November 26, 2019); *J.E.*, Docket No. 17-1799 (issued March 7, 2018); *Bobbie D. Daly*, 53 ECAB 691 (2002).

²⁰ *Supra* note 4.

²¹ *Id.*

factor. As he has not established a compensable employment factor, the Board need not analyze the medical evidence of record.²²

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2020
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

²² *G.G.*, Docket No. 18-0432 (issued February 12, 2019); *A.C.*, Docket No. 18-0507 (issued November 26, 2018).