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

| | | |
|---|---|---|
| **D.B., Appellant** | ) | |
| **and** | ) | **Docket No. 19-1310** |
| | ) | **Issued: July 21, 2020** |
| **DEPARTMENT OF VETERANS AFFAIRS, SAN FRANCISCO VETERANS AFFAIRS MEDICAL CENTER, San Francisco, CA, Employer** | ) | |

*Appearances:*
*Sara Kincaid, Esq.,* for the appellant[1]
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On May 24, 2019 appellant, through counsel, filed a timely appeal from a January 9, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 6, 2017 appellant, then a 50-year-old supervisory supply manager, filed an occupational disease claim (Form CA-2) alleging that he sustained stress, anxiety, and insomnia after the police notified him of a "potential threat of violence by an employee." He noted that he first became aware of his condition and realized its relation to his federal employment on September 29, 2017. Appellant stopped work on September 30, 2017 and returned to work on October 2, 2017.

In a development letter dated October 20, 2017, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to provide the necessary evidence.

In a November 15, 2017 statement, appellant indicated that a female engineering employee had informed him on September 20, 2017 that she had been sexually harassed by R.F., one of his employees. He noted that R.F. had been "going through the progressive disciplinary process for many years. At the time of this incident [R.F.] was on a last chance employment agreement. No contact letters were issued to both [R.F.] and the female engineering employee. [R.F.] became incensed as a result of this action and left work." On September 26, 2017 an employing establishment police officer notified appellant that he was investigating a violent threat that R.F. made against appellant. The officer informed appellant that R.F. had been hospitalized and made threats against appellant in front of his health care provider. Appellant notified his superiors and the labor relations representative of the situation and sought their advice. He indicated that he was unable to sleep and that his hands were shaking after he learned of the threat made against him.

On September 27, 2017 appellant met with the department head, S.R., and acting associate director, J.L. J.L. informed appellant that R.F. had been "admitted to the locked psychiatric ward" of a medical center because he had threatened appellant in front of one of his health care providers. Appellant thereafter took sick leave for the rest of the week due to stress. When he returned to work from October 2 to 4, 2017, he could not concentrate and sought assistance from a counselor with the Employee Assistance Program. On November 3, 2017 management informed appellant that R.F. was returning to work, but that R.F. would be reassigned to another location. On November 15, 2017 appellant's supervisor, R.J., told appellant that R.F. had not returned to work and could not be located, and advised appellant to "stay off the radar" until they better understood the situation. Appellant asserted that management had not ensured his safety except for changing R.F.'s work location.

In an e-mail dated September 27, 2017, appellant requested information regarding the specifics of the threat, noting that a police officer had told him that it was serious. In an e-mail to R.J., dated October 30, 2017, he questioned whether the employing establishment was taking sufficient action regarding the situation with R.F. and requested relocation.

In a development letter dated November 29, 2017, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor, such as R.J., and from any other individuals with knowledge regarding the accuracy of appellant's statements. It further requested copies of all official incident or investigation reports. OWCP afforded the employing establishment 30 days to respond.

Appellant submitted medical records from the employing establishment and reports from Dr. Sandra Mucia, a psychologist.

In a March 16, 2018 development letter, OWCP requested that appellant provide statements from anyone who had witnessed R.F. threaten him, or could verify that R.F. made the threats. It also asked whether he had a relationship with R.F. outside of the office.

On April 13, 2018 in response to OWCP's March 16, 2018 development letter, appellant indicated that he was unable to obtain witness or police statements documenting the threat against him due to privacy issues. He noted that the police officer told him that he could not provide specific details about the threat. Appellant e-mailed his chain of command to learn more information about the threat and why it involved the police. He indicated that because the interaction was "between the employee and a treating health care provider (that admitted him because of this threat) this information is restricted under [the Health Insurance Portability and Accountability Act of 1996 (HIPAA)]/privacy laws." Appellant indicated that the employing establishment should have a copy of the police report. He also noted that a report was filed with the employing establishment's reporting system for disruptive behavior. Appellant asserted that, as R.F.'s supervisor, he had reprimanded and suspended him several times for sexual harassment. He noted, "As his supervisor I was responsible for taking disciplinary action against him and I was the one to issue him letters and suspend him. I was also the person to whom the female engineering employee reported the alleged sexual harassment on September 20, 2017 requiring me to take appropriate disciplinary action against him in response to this allegation." Appellant noted that he had no relationship or interaction with R.F. or the female engineering employee who had reported the harassment outside of work.

By decision dated April 18, 2018, OWCP denied appellant's emotional condition claim finding that the evidence of record was insufficient to establish a compensable employment factor. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On September 26, 2018 appellant, through counsel, requested reconsideration.

In support of his request for reconsideration, appellant submitted additional evidence, including a March 3, 2017 notice of proposed removal issued by the employing establishment to R.F. for unacceptable behavior toward female coworkers. On May 30, 2017 the employing establishment removed R.F. from employment, but, on the same date, it entered into a last chance agreement and held R.F.'s removal date in abeyance for a period of not more than two years.

In a report of contact statement dated September 20, 2017, C.W. advised that R.F. had behaved in an unacceptable manner.

In a fact finding interview of C.W. conducted on September 25, 2017 by the employing establishment, she described the September 21, 2017 encounter with R.F. that had resulted in her complaint of sexual harassment. OWCP also received an undated statement from C.W. regarding the incident.

In a report dated October 2, 2017, L.N., an employing establishment police officer, advised that he had interviewed R.F., who maintained that he did not want to hurt anyone, but himself and his supervisor, who was "the person that is causing him the most grief…." R.F. stated, however, that he no longer felt that way. Officer L.N. informed the nurse who had reported the incident that he did not have enough evidence to charge R.F. with making "terrorist threats." He notified appellant that one of his employees was in the emergency room under suicide watch and had "felt distressed and mentioned involving a nonspecific supervisor in his plans. I told [appellant] that he was not specifically mentioned" and that no other actions would be taken. Officer L.N. advised that no credible threat had been found.

On October 10, 2017 the employing establishment issued letters to R.F. and appellant prohibiting contact.

In a July 16, 2018 statement, J.V., one of R.F.'s supervisors, asserted that R.F. was "disrespectful, rude, verbally aggressive, and was a serial sexual harasser." He noted that he had been suspended at least two times during his time as cosupervisor. J.V. advised that R.F. got angry and blamed others when he was disciplined and that he was apparently "threatening to physically hurt [appellant]." He noted that management gave him a letter prohibiting contact. J.V. explained:

> "The [employing establishment] police were notified of the threats and in turn they informed [appellant]. The entire chain of command was notified all the way up to the director's office. For days nothing was done to ensure [his] safety. [Appellant] was visually distraught and he had to take stress leave for several weeks. Finally, someone decided to move [him] to [another location], however, by that time he had used up a great deal of his sick leave. For a short period, it seemed like no one wanted, or did [not] know what direction to take."

By decision dated January 9, 2019, OWCP denied modification of the April 18, 2018 decision. It again found that appellant had not established a compensable employment factor.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[3] 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

[3] *Id.*

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 a claimant's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers' compensation. 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.[7] However, disability is not compensable when it results from factors such as an employee's fear of a reduction-in-force, or frustration from not being permitted to work in a particular environment, or to hold a particular position.[8]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship, and which working conditions are not deemed factors of employment and may not be considered.[9] 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.[10]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular

[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] *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[8] *See Lillian Cutler*, *id.*

[9] *See R.B.*, Docket No. 19-0434 (issued November 22, 2019); *O.G.*, Docket No. 18-0359 (issued August 7, 2019).

[10] *Id*.

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]

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 the case is not in posture for decision.

The Board finds that appellant has met his burden of proof to establish as compensable employment factors that he was the subject of a threat of physical violence made by R.F., his subordinate, and that the employing establishment erred in failing to take adequate measures to protect appellant following the threat.

Appellant attributed his stress-related condition to a threat of violence made by R.F. after he issued appellant a no contact letter. He noted that on September 20, 2017 a female employee informed him that R.F. had sexually harassed her. Appellant also noted that as R.F.'s supervisor he was responsible for issuing the disciplinary action and indicated that he had previously suspended R.F. for sexual harassment. He advised that he had no interactions with R.F. or the employee who had accused R.F. of sexual harassment outside the workplace. Appellant indicated that on September 26, 2017 a police officer notified him that he was investigating a threat made against him by one of his employees to his health care provider. He informed appellant that the employee had been hospitalized because of threats that he had made against a supervisor. The officer advised that appellant was not in danger while R.F. was hospitalized.

In an October 2, 2017 report, Officer L.N. indicated that he had interviewed R.F. in the hospital, and that he had told him that he only wanted to hurt himself and his supervisor, the person who had caused him the most problems.

[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.*, Docket No. 18-0305 (issued October 18, 2018); *Roger Williams*, 52 ECAB 468 9(2001).

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

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.[15] It is appellant's burden of proof to submit evidence to establish that a threat of violence occurred such that it affected the conditions of employment.[16] The record in this case supports that R.F. made a threat against appellant and that the threat was investigated by the police. The threat was made after appellant had issued a disciplinary action to R.F. in his capacity as his supervisor based on a complaint that his subordinate, R.F., had sexually harassed a coworker.

As previously noted, 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.[17] The Board finds that the evidence of record is sufficient to establish that appellant was in the performance of his regular duties when he was subject to a threat made by his subordinate, R.F.[18]

Appellant also attributed his emotional condition to the employing establishment's failure to take adequate steps to protect his safety following notification of the threat made against him by R.F. He advised that management initially told him that R.F. would be reassigned, but subsequently notified him that R.F. had disappeared and told him to stay "off the radar" given the situation. In *Thomas D. McEuen*,[19] 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.[20]

The Board finds that the employing establishment committed error by failing to properly protect appellant following the threat made against him. Appellant submitted a statement from J.V., another of R.F.'s supervisors, who noted that R.F. had threatened to physically harm appellant. J.V. advised that the chain of command at the employing establishment had been notified of the threat, but had taken no action for weeks to make sure that he was safe. The employing establishment additionally issued appellant a no contact letter as if he was the one

[15] *M.R.*, Docket No. 17-1803 (issued February 8, 2019); *M.F.*, Docket No. 17-1649 (issued July 20, 2018); *see also J.C.*, 58 ECAB 594 (2007).

[16] *See M.F.*, *id.*; *J.C.*, *id.*; *Dorothy J. Williams*, 32 ECAB 665 (1981).

[17] *D.H.*, Docket No. 17-1529 (issued February 14, 2018); *Penelope C. Owens*, 54 ECAB 684 (2003); *Lillian Cutler supra* note 7.

[18] *M.R.*, *supra* note 15.

[19] *Supra* note 12.

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

receiving disciplinary action for the incident. Its lack of action to protect him constituted error.[21] As such, appellant has met his burden of proof to establish a second compensable factor of employment.

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 to analyze and develop the medical evidence of record.[22] 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 the case is not in posture for decision.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the January 9, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 21, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[21] *M.R.*, *supra* note 15.

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