United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 20-1382**
	)	**Issued: December 30, 2022**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, HOMELAND SECURITY INVESTIGATIONS, Camarillo, CA, Employer	)	

Appearances:
Daniel Goodkin, 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
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 13, 2020 appellant, through counsel, filed a timely appeal from an April 7, 2020 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 January 21, 2017 appellant, then a 55-year-old supervisor, filed an occupational disease claim (Form CA-2) alleging that he developed cracked and chipped teeth due to work-related stress-induced grinding of his teeth due to factors of his federal employment. He explained that he did not know the exact date that the injury occurred, but that it developed between June 8 and December 14, 2016 with the first physical manifestation of his condition presenting on December 14, 2016. Appellant indicated that he first became aware of his condition on March 10, 2011 and realized its relation to his federal employment on December 14, 2016. He did not stop work.

Dr. Harry T. Albert, a dentist, completed a note on January 11, 2017 in which he indicated that appellant had several failing crowns. Appellant reported that he was under a great deal of work-related stress and possibly clenching his teeth. In a report dated January 19, 2017, Dr. Albert noted that several of his teeth were severely fractured and required full coverage crowns. He opined that the tooth fractures could possibly be caused by clenching and grinding indicative of stress and thereby work related.

Appellant's supervisor, J.K., reported in a January 25, 2017 e-mail that from May through December 1, 2016 appellant was using sick and annual leave continuously due to work-related shoulder surgery.[3] He noted that he was unaware of any issues caused by work stress or any dental concerns during this time period.

In a February 7, 2017 development letter, OWCP informed appellant of the deficiencies of his claim. It requested additional factual and medical evidence from appellant, and provided a questionnaire for his completion. By separate development letter of even date, OWCP requested that the employing establishment provide additional information regarding appellant's occupational disease claim, including comments from a knowledgeable supervisor regarding the accuracy of appellant's statements. It afforded both parties 30 days to respond.

In a February 24, 2017 e-mail from the employing establishment, J.K. noted that he became appellant's supervisor on August 15, 2016. He again reported that appellant used leave from April 2016 through December 1, 2016 and was able to complete his duties from December 1 to 14, 2016.

On February 28, 2017 appellant completed the development questionnaire. He alleged that he was targeted for harassment by P.W. and K.K., his prior supervisors. On March 10, 2011 P.W. and K.K. fabricated false allegations of wrongdoing that were ultimately withdrawn and rescinded by legal agreement. P.W. and K.K. also harassed another agent which resulted in a fatal workplace

[3] Appellant has a previously accepted traumatic injury claim under OWCP File No. xxxxxx254 for incomplete rotator cuff tear or rupture of the left shoulder. He underwent left shoulder surgery on May 4, 2016. OWCP authorized wage-loss compensation from May 4 through November 30, 2016.

shooting in February 2012. Appellant alleged that his statement under oath, as well as his documentation, resulted in a finding of harassment by P.W. and K.K. against the other agent. As a result, he was subjected to further reprisals and constructive termination as all meaningful authority was stripped from his position. Appellant alleged that the Special Investigations Unit (SIU) of the employing establishment completed a report and had an investigative file which would verify his allegations.

Appellant filed Merit System Protection Board (MSPB) and Equal Employment Opportunity Commission (EEO) complaints. He asserted that his actions were settled when the wrongful actions by the employer were rescinded and withdrawn. Appellant alleged that his supervisor perjured himself under oath. He asserted that harassment efforts commenced on March 10, 2011 in the form of fabricated and false allegations that were withdrawn and rescinded. Reprisals continued and overt and egregious acts of insubordination and misconduct by his subordinates and coworkers were overlooked or rewarded. Appellant was prohibited from acting and his reports were ignored.

Appellant completed an additional undated narrative statement, and asserted that beginning in 2005 what he believed to be punitive work assignments were being disproportionately directed at him which resulted in work-related stress. He asserted that in 2010 his supervisor, P.W., harassed him because he held him accountable for the actions of other agencies and for statements made by others alleging that P.W. was not credible, could not be trusted, and had made numerous blatant misstatements regarding operations and criminal investigations. P.W. was transferred in 2011, but attempted to impose discipline through an inaccurate letter of counseling dated March 10, 2011. Appellant alleged that through documentation and other evidence, he was able to establish that the allegations contained in the March 10, 2011 letter were false and the letter of counseling was removed. He further alleged that he was required to utilize a stressful and prolonged series of appeals to have the letter removed. Appellant asserted that P.W. and his second-line supervisor K.K. then increased harassment. He alleged that in February 2012 similar actions by P.W. and K.K. against another employee resulted in a fatal shooting in the Long Beach office. Appellant noted that as he had firsthand knowledge of what transpired, he was compelled to give a statement under oath and submit his documents and e-mails pursuant to a separate inquiry conducted by the SIU. He asserted that as a result of his participation in the SIU investigation, it rendered an adverse finding and issued a report on or about October 28, 2014. Appellant alleged that SIU warned him that reprisals and retaliation should be expected. He noted that he was denied awards for which he qualified, was denied credit for his extended time as an acting supervisor, and was denied promotions, while his subordinates were allowed to commit misconduct, insubordination, and unprofessional behavior.

Appellant asserted that a memorandum requesting waiver from firearms qualification was routinely filed for other agents out on extended leave, but was not filed for him. He noted that he was required to draft and submit the waiver request for his subordinates, but when he appeared to draft the waiver for himself, he was prohibited from doing so, and was placed on administrative duties with his right to carry a firearm revoked. After requalifying, appellant's authorization to carry a firearm was delayed over a month when other agents received instant authorization.

On February 14 and 21, as well as March 1, 2017, Dr. Michelle Conover, a clinical neuropsychologist, found that appellant's level of stress was affecting his physical health. She recommended that appellant stop work from February 14 to March 10, 2017.

In an undated report, Dr. Conover diagnosed chronic post-traumatic stress disorder (PTSD) and attributed this condition to the workplace shooting death of a coworker in February 2012, workplace harassment through a March 30, 2011 letter of counseling, and the rewarding of his subordinate who cursed him and physically threatened him over the telephone on December 11, 2012, and again about a year and a half later. She also noted that when appellant alleged misconduct it was ignored.

Appellant provided additional documentation. On August 22, 2011 P.W. provided appellant with an August 19, 2011 counseling letter. He asserted that appellant failed to keep his chain of command accurately informed regarding a money laundering investigation. P.W. found that appellant made interagency agreements without approval, failed to keep him informed about the money laundering investigation, reported a need to travel to Korea, and improperly designated the case as "proof of concept." Instead, he found that the basic investigative research was not conducted to identify the Los Angeles based target to warrant an undercover investigation.

P.W. determined that appellant failed to accurately portray his responsibilities with the High Intensity Financial Crime Area (HIFCA) investigation in 2011. He noted that appellant had informed him that he co-led the HIFCA task force and that five to seven police officers reported directly to him. Instead P.W. found that his Internal Revenue Service (IRS) counterpart had full operational command of the HIFCA, and that the officers reported to her.

P.W. asserted that appellant failed to cooperate with a Cyber Crimes Center (C3) international investigation. He found that the Immigration and Customs Enforcement unit chief, C.M., reported that appellant was unsupportive and difficult to work with causing unnecessary delays. P.W. determined that appellant's on-going dispute with C3 on investigative techniques required his direct oversight so that federal search warrants could be quickly obtained.

Appellant responded on September 1, 2011 and provided 74 exhibits largely comprised of e-mails regarding the money laundering, HIFCA, and C3 investigations, which he asserted disproved P.W.'s allegations. In a May 19, 2011 letter, C.A. noted that nine officers had been cross-designated as customs officers and assigned to the employing establishment and the HIFCA task force with appellant as the contact. In a July 2011 e-mail, L.D., of the IRS, informed appellant that a meeting was needed to discuss the issues concerning misstatements by P.W. and the HIFCA.

On May 17, 2011 appellant explained to P.W. that he had presented to HIFCA because he was looking for a "proof of concept" case for money services business (MSB) and that the IRS agreed and obtained special travel funding. On July 12, 2011 appellant noted that he would not be traveling to Korea. He also repeated that this was a "proof of concept" investigation. In a July 21, 2011 e-mail, P.W. noted that all agreed that the case should be pursued and then hold high level meetings with the Korean Nation Police for MSB sweeps. On July 22, 2011 R.V., Assistant U.S. Attorney, questioned whether those meetings should take place. On July 25, 2011 L.D., IRS supervisor agent, determined that the IRS would not be traveling to Korea. In a previous July 25, 2011 report, appellant's coworker, M.S., noted that the IRS was pulling out of the planned coordination meeting in Korea, and informed R.V. of the changes including no large scale sweeps and no partnership with HIFCA in Korea.

On February 6, 2012 C.A. issued an official letter of reprimand as appellant had purchased computer equipment on his personal credit card for the C3 investigation. Appellant responded on

March 1, 2017 grieving the February 6, 2012 letter of reprimand and asserted that use of his credit card did not violate policy as reimbursement of personal expenses by undercover operations was specifically provided in the employing establishment handbook.

The MSPB issued a mutual settlement agreement on April 17, 2013 in which the employing establishment purged all documents from appellant's official personnel file including the August 19, 2011 letter of counsel and the February 6, 2012 letter of reprimand. It noted that the letters of discipline could not be used as a basis for future progressive disciplinary action and could not be referenced in any litigation, administrative or judicial proceedings.

On March 10, 2017 appellant provided a series of documents describing his difficult relationship with two subordinate employees, C.F., and C.O. He provided e-mails describing the interactions as well as disciplinary actions he proposed.

By decision dated September 20, 2017, OWCP denied appellant's emotional condition claim as contributing to the injuries to his teeth. It found that he had not substantiated a compensable factor of employment and noted that the MSPB decision did not establish error or abuse on the part of the employing establishment in issuing disciplinary actions. OWCP further noted that appellant had not established error or abuse by the employing establishment in an investigation. It noted that he had not established harassment by P.W. or K.K. or by his subordinates.

On September 19, 2018 appellant requested reconsideration of the September 20, 2017 decision. He asserted that he developed PTSD due to the performance of his duties as a federal law enforcement officer and that harassment by his supervisors, P.W. and K.K. further aggravated this condition. Appellant attributed his PTSD to the workplace shooting incident. He asserted that there was an extremely traumatic shooting within his offices, that he was deeply involved, and that this shooting resulted in his diagnosis of PTSD. Appellant further contended that his e-mail exhibits established that the allegations in the two disciplinary letters were false regardless of the MSPB settlement agreement.

In a December 11, 2018 development letter, OWCP requested that the employing establishment respond to appellant's specific allegations of harassment, punitive work assignments, and his participation in the investigation of the February 2012 workplace shooting. It afforded 30 days for a response. The employing establishment did not respond.

By decision dated January 25, 2019, OWCP denied modification of its prior decision.

On December 18, 2019 appellant submitted two newspaper articles regarding the workplace shooting. In an October 30, 2015 article, The Columbus Dispatch quoted appellant as the former supervisor of the shooter and noted that P.W. had killed the shooter. The article noted that the shooter's firearm authorization had been briefly revoked while supervised by appellant due to prescription drug use and that appellant had objected to the reinstatement of his firearm authorization approved by P.W.

On December 24, 2019 appellant, through counsel, requested reconsideration.

By decision dated April 7, 2020, OWCP denied modification of its prior decisions. It found that appellant had not alleged his emotional condition was due to being interviewed for a

newspaper article regarding the shooting incident of February 2012. OWCP further found that he had not established error or abuse on the part of the employing establishment through the letter of counseling.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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.[5] 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.[6]

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.[7]

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*,[8] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.[9] There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation.[10] 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.[11]

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[4] *Supra* note 2.

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

[6] 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).

[7] *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).

[8] 28 ECAB 125 (1976).

[9] 5 U.S.C. §§ 8101-8193.

[10] *G.R.*, Docket No. 18-0893 (issued November 21, 2018). *Robert W. Johns*, 51 ECAB 136 (1999).

[11] *Supra* note 4.

Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[12] Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[13] Personal perceptions alone are insufficient to establish an employment-related emotional condition.[14] A disabling condition resulting from an employee's feelings of job insecurity *per se* is not sufficient to constitute a person 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.[15]

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.[16] 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.[17] A claimant must support his or her allegations with probative and reliable evidence.

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.[18] Mere perceptions of harassment are not compensable under FECA.[19]

OWCP's procedures provide:

> "An employee who claims to have had an emotional reaction to conditions of employment must identify those conditions. The [claims examiner] must carefully develop and analyze the identified employment incidents to determine whether or not they in fact occurred and if they occurred whether they constitute factors of the employment. When an incident or incidents are the alleged cause of disability, the [claims examiner] must obtain from the claimant, agency personnel and others, such as witnesses to the incident, a statement relating in detail exactly what was [stated] and done. If any of the statements are vague or lacking detail, the

[12] *B.O.*, Docket No. 17-1986 (issued January 18, 2019).

[13] *Id*.

[14] *M.R.*, Docket No. 18-0305 (issued October 18, 2018).

[15] *Supra* note 10.

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

[17] *Kim Nguyen*, 53 ECAB 127 (2001). *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[18] *S.B.*, Docket No. 18-1113 (issued February 21, 2019).

[19] *Id*.

responsible person should be requested to submit a supplemental statement clarifying the meaning or correcting the omission."[20]

OWCP's regulations provide that an employing establishment who has reason to disagree with an aspect of the claimant's allegation should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.[21] Its regulations further provide in certain types of claims, such as a stress claim, a statement from the employing establishment is imperative to properly develop and adjudicate the claim.[22]

ANALYSIS

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

Appellant attributed his condition, in part, to participating in an investigation by the employing establishment into a workplace shooting. He contended that the shooting caused his PTSD. Appellant further attributed his emotional condition to harassment and discrimination by management and his subordinates, and to administrative actions taken by the employing establishment.

OWCP, in development letters dated February 7, 2017 and December 11, 2018, requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations. The employing establishment did not respond to these requests.

The Board finds that it is unable to make an informed decision in this case as the employing establishment did not respond to OWCP's requests for information.[23] As discussed, OWCP's procedures provide that, in emotional condition cases, a statement from the employing establishment is necessary to adequately adjudicate the claim.[24]

Although it is a claimant's burden of proof to establish his claim, OWCP is not a disinterested arbiter, but rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment.[25]

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17(j) (July 1997); *G.K.*, Docket No. 20-0508 (issued December 11, 2020); *S.L.*, Docket No. 17-1780 (issued March 14, 2018).

[21] 20 C.F.R. § 10.117(a); *G.K.*, *id.*; *D.L.*, Docket No. 15-0547 (issued May 2, 2016).

[22] *Supra* note 20 at Chapter 2.800.7(a)(2) (June 2011).

[23] *G.K.*, *supra* note 20; *G.I.*, Docket No. 19-0942 (issued February 4, 2020); *V.H.*, Docket No. 18-0273 (issued July 27, 2018).

[24] *Supra* note 20.

[25] *R.A.*, Docket No. 17-1030 (issued April 16, 2018); *K.W.*, Docket No. 15-1535 (issued September 23, 2016).

The case will accordingly be remanded for OWCP to further develop the evidence. On remand, OWCP shall request that the employing establishment provide a detailed statement and relevant evidence and/or argument regarding appellant's allegations. Following this and any necessary further development, it shall issue a *de novo* decision regarding whether he has established an emotional condition in the performance of duty.[26]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2020 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: December 30, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[26] *G.K., supra* note 20.