

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

A.F., Appellant)

and)

DEPARTMENT OF THE INTERIOR,)
NATIONAL PARK SERVICE, JEFFERSON)
NATIONAL EXPANSION MEMORIAL,)
St. Louis, MO, Employer)
-----)

Docket No. 23-0277
Issued: August 4, 2023

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 21, 2022 appellant filed a timely appeal from an August 25, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on appeal.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 20, 2020 appellant, then a 53-year-old maintenance mechanic, filed an occupational disease claim (Form CA-2) alleging that he sustained a cerebral vascular accident (CVA) and transient ischemic attack (TIA) due to factors of his federal employment, including harassment and discrimination. He explained that he eventually had to take two and a half months of leave from work due to stress, which he alleged caused him to suffer a stroke while at work on February 13, 2020. Appellant indicated that he first became aware of his condition on February 13, 2020, and first realized its relation to factors of his federal employment on February 14, 2020. On the reverse side of the claim form the employing establishment noted that "all findings have come back unsubstantiated." Appellant stopped work on February 13, 2020.

In a development letter dated March 10, 2020, OWCP advised appellant of the factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. It afforded 30 days for a response.

Appellant provided a series of statements alleging a hostile work environment at his workplace. He asserted that on September 10, 2018 a coworker referred to Muslims as "rag heads," and on September 17, 2018 two coworkers referred to appellant as "other" or "boy." On September 20, 2018 coworkers prevented appellant from correctly completing his training. Appellant reported the failure of coworkers to demonstrate procedures for him to his supervisor on October 9 and November 13, 2018. On November 16, 2018 a coworker informed him that he needed to "return to the railroad," as he was not wanted at the employing establishment. Another coworker yelled at and threatened appellant on December 10, 2018.

On February 13, 2019 appellant informed coworkers P.D. and M.H. that he was not "taking the bull they were bringing." He alleged that he was harassed and belittled by coworkers, that he had experienced verbal abuse, and that the stress of his work situation had caused complications with his post-traumatic stress disorder (PTSD). Appellant used leave due to stress from February through May 2019.

On March 29, 2019 appellant filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC).

In a May 21, 2019 statement, appellant alleged that his supervisor K.L. was ignoring him and separating him from his coworkers, and that he was trying to push him into becoming angry. He also asserted that his coworkers were attempting to gather information to use against him through J.W., another coworker, but that he had provided him with false information.

Appellant alleged retaliation by his supervisor, K.L., and his coworkers in a statement dated June 25, 2019. He asserted that K.L. transferred him against his will, that his coworkers ignored him, that K.L. changed his work assignments without a valid work-related rationale, that he was improperly disciplined, that his performance appraisal did not reflect his work performance, that

² Docket No. 20-1635 (issued June 9, 2022).

coworkers engaged in verbal or physical abuse, and that he was threatened with invalid reports. Appellant further alleged that B.M. informed him that he did not like him.

In a statement dated July 21, 2019, appellant reported that he sustained an injury on July 5, 2019 when B.M. refused to work with him to help to complete an assigned task. He attempted the task alone and fell off of a ladder on to a work bench, and then the floor.

Appellant completed a statement dated September 6, 2019 alleging that his coworkers were not communicating with him due to his EEOC complaint. He noted that during a meeting on September 4, 2019, as he was apologizing, a coworker, M.H., asserted that he was taking advantage of his veteran's disability, and that he would never talk or work with him. Another coworker, P.D. refused to talk or work with appellant on advice of counsel. Following the meeting, appellant was stressed and angry.

In a September 24, 2019 statement, appellant alleged that he and a coworker, B.M., had a disagreement while working and had argued about whether there was lead paint at the base of a pump. He asked a question after the end of the argument, and B.M. threw a sharp five-inch scraper at him. Appellant chastised him for throwing tools, but felt scared, intimidated, and threatened by B.M. He reported these events to his supervisors. Appellant alleged that he was experiencing anger, harassment, intimidating, and threatening behavior from his coworkers. He further alleged that B.M. informed him that everyone in the department hated him and that during a meeting coworkers indicated that they refused to work with him.

On January 31, 2020 appellant alleged that he was subjected to a verbal assault on January 31, 2020 and that an Occupational Safety and Health Administration (OSHA) violation had occurred as he did not receive a job briefing for that day's tasks. He asserted that B.M. verbally abused him by yelling using profanity, and belittling him.

In a February 3, 2020 statement, appellant alleged OSHA violations when a coworker jumped from the tram when the system was energized. He reported this to his supervisor.

Appellant provided a February 10, 2020 statement regarding the events of September 6, and 24, 2019 recounted that on September 6, 2019 his coworkers had explained that they were not going to work with him, and that they had not. He asserted that his coworkers talked about his disability, did not like him, and did not want to work with him. Appellant believed that they were waiting for him to make a mistake. He further alleged that his supervisor had supported his coworkers which created a messy, unprofessional, and hostile environment.

On March 1, 2020 appellant filed an administrative grievance regarding a written reprimand and asserted that he had not yelled at a coworker. He alleged that the written reprimand was harassment and retaliation and that he had experienced extreme stress at the employing establishment.

In a March 9, 2020 statement, appellant described a series of work incidents. On February 14, 2019 he was informed that a coworker was filing a hostile work environment claim against him, which he alleged included false allegations. Appellant did not work on February 19, 2019 and reported to a supervisor that he was experiencing a hostile work environment. On February 20, 2019 his coworkers refused to speak with him, there was heavy tension in the department, and he believed they were angry with him. On March 7, 2019 appellant informed a coworker that he was not angry with him, but that coworker informed him that he did not want to

talk with him. He alleged that, on February 13, 2020, due to stress, he felt ill while on duty and developed symptoms of a light stroke. Appellant denied any prior history of smoking or heart problems.

On March 11, 2020 Dr. John Scally, a Board-certified cardiologist, indicated that appellant was under his care for TIA, sleep apnea, and hyperlipidemia. He recommended that he keep his stress levels and physical demand low with respect to his job. Dr. Scally noted that appellant's current job duties required physical demands and were high stress and recommended that he take on a less physically demanding and less stressful position if possible.

In a March 12, 2020 note, Dr. Perris J. Monrow, a Board-certified psychologist, recounted appellant's treatment beginning June 2018 due to severe PTSD, which he developed during his time serving active duty in the United States Army from 1985 to 1990. He opined that appellant had been suffering from severe work-related stress since 2019 and that the recent stroke he suffered was more likely than not caused by his work-related stress further aggravating his PTSD.

On March 16, 2020 appellant respond to OWCP's questionnaire and asserted that the instances that led to his condition amounted to EEOC and OSHA violations, as well as instances of physical and verbal assault.

By decision dated August 31, 2020, OWCP denied appellant's claim finding that he had not established any compensable factors of employment. Thus, it concluded that the requirements had not been met to establish an injury as defined by FECA.

Appellant appealed OWCP's August 31, 2020 decision to the Board. In a June 9, 2022 decision, the Board set aside OWCP's decision and found that the case was not in posture for a decision as OWCP had failed to comply with its procedures and failed to request that the employing establishment respond to appellant's allegations and provide relevant evidence regarding his allegations of harassment, discrimination, verbal abuse and hostile work environment. The Board remanded the case for further development, to be followed by a *de novo* decision.

Beginning on December 23, 2020 appellant provided additional evidence. C.B., the employing establishment safety officer, provided a safety statement regarding appellant's July 5, 2019 fall and asserted that he had not alleged an injury, that the ladder was undamaged and stable, and suggested that the area should be cleaned for better ladder placement to avoid awkward positioning.

In a June 13, 2022 development letter, OWCP requested that the employing establishment provide statements and copies of any additional documents, video evidence, and all investigations regarding appellant's allegations. It afforded 30 days for a response.

On June 23, 2022 the employing establishment filed a November 2, 2020 motion for summary judgment before the EEOC asserting that appellant had not established EEOC's legal standard of a hostile work environment. This document referenced testimony from B.M., multiple witnesses to the February 13, 2019 verbal argument between appellant, M.H., and P.D., and the actions of appellant's supervisor K.L.

By decision dated August 25, 2022, OWCP denied appellant's occupational disease claim finding that he had not met the requirements to establish an emotional condition in the performance

of duty because he did not establish that the condition arose during the course of employment and within the scope of compensable employment factors. It explained that the evidence did not establish that he was the subject of harassment or discrimination by coworkers.

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. In the case of *Lillian Cutler*,⁷ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.⁸ 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.⁹ 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.¹⁰

³ *Supra* note 1.

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 *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 28 ECAB 125 (1976).

⁸ 5 U.S.C. § § 8101-8193.

⁹ *G.R.*, Docket No. 18-0893 (issued November 21, 2018). *Robert W. Johns*, 51 ECAB 136 (1999).

¹⁰ *Supra* note 1.

Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.¹¹ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹² Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹³ A disabling condition resulting from an employee's feelings of job insecurity *per se* is not sufficient to constitute a person's 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.¹⁴

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.¹⁵ 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.¹⁶ 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.¹⁷ Mere perceptions of harassment are not compensable under FECA.¹⁸ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹⁹ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.²⁰

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

¹¹ *B.O.*, Docket No. 17-1986 (issued January 18, 2019).

¹² *Id.*

¹³ *M.R.*, Docket No. 18-0305 (issued October 18, 2018).

¹⁴ *Supra* note 9.

¹⁵ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹⁶ *Kim Nguyen*, 53 ECAB 127 (2001). *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹⁷ *S.B.*, Docket No. 18-1113 (issued February 21, 2019).

¹⁸ *Id.*

¹⁹ *See S.G.*, Docket No. 22-0495 (issued November 4, 2022); *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, 57 ECAB 622 (2006).

²⁰ *S.G., id.*; *T.Y.*, Docket No. 19-0654 (issued November 5, 2019); *G.S.*, Docket No. 09-0764 (issued December 18, 2009); *Ronald K. Jablonski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

of employment and may not be considered.²¹ If an employee does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. If a compensable factor of employment is substantiated, OWCP must base its decision on an analysis of the medical evidence which has been submitted.²²

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.²³ Its procedures 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.²⁴

ANALYSIS

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

Appellant attributed his condition, in part, to verbal disagreements with coworkers and actions of his supervisor resulting in harassment and discrimination, and a hostile work environment.

OWCP, in a development letter dated June 13, 2022, requested that the employing establishment provide statements and copies of any additional documents, video evidence, and all investigations regarding appellant's allegations. The employing establishment did not respond fully to this request. It merely provided its summary judgment motion in appellant's EEOC claim. The employing establishment did not provide documents, witness statements, or comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations including harassment and discrimination.²⁵

The Board finds that it is unable to make an informed decision in this case as the employing establishment did not adequately respond to OWCP's request for information.²⁶ As discussed, OWCP's procedures provide that, in emotional condition cases, a statement from the employing establishment is necessary to adequately adjudicate the claim.²⁷

²¹ *S.G.*, *supra* note 19; *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *Dennis J. Balogh*, 52 ECAB 232 (2001).

²² *S.G.*, *supra* note 19; *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

²³ 20 C.F.R. § 10.117(a); *S.G.*, *supra* note 19; *D.L.*, Docket No. 15-0547 (issued May 2, 2016).

²⁴ Federal (FECA) Procedural Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7a(2) (June 2011).

²⁵ *See L.G.*, Docket No. 21-0690 (issued December 9, 2021); *D.C.*, Docket No. 21-0231 (issued August 27, 2021); *A.O.*, Docket No. 19-1612 (issued April 8, 2021); *C.K.*, Docket No. 20-1493 (issued March 29, 2021).

²⁶ *J.R.*, Docket No. 20-1382 (issued December 30, 2022); *G.I.*, Docket No. 19-0942 (issued February 4, 2020); *V.H.*, Docket No. 18-0273 (issued July 27, 2018).

²⁷ *Supra* note 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.²⁸

The case will accordingly be remanded for OWCP to further develop the evidence. On remand, OWCP shall request that in addition to the information previously requested, the employing establishment provide testimony and other documents associated with appellant's EEOC claim, a detailed statement from a knowledgeable supervisor, and any other relevant evidence and/or argument regarding appellant's allegations. OWCP's procedures provide that, if an employing establishment fails to respond to a request for comments on a claimant's allegations, OWCP's claims examiner may accept the claimant's statements as factual.²⁹ 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.

CONCLUSION

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

²⁸ See *A.O.*, *supra* note 25; *S.L.*, Docket No. 19-0387 (issued October 1, 2019); *R.A.*, Docket No. 17-1030 (issued April 16, 2018); *K.W.*, Docket No. 15-1535 (issued September 23, 2016).

²⁹ *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *K.W.*, 59 ECAB 271 (2007).

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2022 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: August 4, 2023
Washington, DC

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

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

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