

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

_____)
B.K., Appellant)
)
and) **Docket No. 24-0335**
) **Issued: May 30, 2024**
U.S. POSTAL SERVICE, POST OFFICE,)
Los Angeles, CA, Employer)
_____)

Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 11, 2014 appellant filed a timely appeal from a January 11, 2024 merit decision and a January 31, 2024 nonmerit decision of the Office of Workers’ Compensation Programs (OWCP).¹ Pursuant to the Federal Employees’ Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish an emotional/stress-related condition in the performance of duty on February 1, 2023, as alleged; 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).

¹ The Board notes that, following the January 31, 2024 decision, OWCP received additional evidence. The Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.³ The relevant facts are as follows.

On February 18, 2023 appellant then a 53-year-old senior delivery specialist, filed a traumatic injury claim (Form CA-1) alleging that on February 1, 2023 he developed emotional conditions, including distress, aggravation of post-traumatic stress disorder (PTSD), depression, anger, irritability, paranoia, hopelessness, and rage when his manager, C.C., allowed and encouraged V.D., a coworker, to harass, intimidate, cause emotional distress and mental suffering. He explained that V.D. blamed him and two other disabled employees for his required overtime during a 10-minute "rant" which occurred during an official meeting while in the performance of duty. Appellant did not stop work.

Appellant provided documentation of his 50 percent Department of Veterans Affairs service-connected disability due to PTSD and persistent depressive disorder. He further submitted a February 1, 2023 statement addressed to C.C. regarding the 10-minute remarks made by V.D. during the official meeting on that date where V.D. blamed three employees, including appellant, for the overwork of the remaining carriers, as they performed light and limited duty and had not "walked for years." V.D. requested that C.C. take appellant's route away and asserted that the three employees were the reason why he had to work overtime. Appellant alleged that management failed to properly manage staffing and attendance, and to prevent harassment and intimidation by V.D., resulting in a hostile workplace.

In a February 27, 2023 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of additional evidence needed and provided a questionnaire for his completion. In a separate development letter of even date, OWCP also requested that the employing establishment provide information, including comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations. It afforded both parties 30 days to respond.

Appellant provided statements dated December 8 and 10, 2018, alleging that temporary supervisor, S.C., had not provided him sufficient auxiliary assistance, and was punishing him for her mistake, and that she failed to respond to his request to use the restroom in retaliation. He also provided an October 23, 2017 statement alleging that manager U.J. was watching him on his route without explanation, which he felt was a form of intimidation given the Equal Employment Opportunity Commission (EEOC) complaint he had filed against U.J.

In October 2 and 26, 2017 witness statements, L.F., chief union steward, asserted that appellant was instructed by U.J. to keep the mail up front with him following each swing shift and she subsequently explained that this went against a memorandum that clearly states that no mail was to be kept up front. She further asserted that he had not been given the same respect and courtesy from management.

³ Docket No. 23-0092 (issued November 29, 2023).

On January 2, 2020 appellant provided a statement in support of his EEOC alleging that work was taken from him and given to less disabled carriers. He further alleged hostile treatment and retaliation based on race.

In March 11, 2023 statements, appellant alleged that an additional incident occurred on March 10, 2023 concerning how overtime on his route was divided between carriers. Supervisor R. yelled at him in front of coworkers while he was in the middle of the workroom floor, causing him embarrassment and shame because of his physical disabilities. He asserted that this was an obvious attempt to shame him in front of his fellow employees. Appellant related that V.D. also verbally assaulted him concerning the portion of his route that he wanted to carry for overtime. In a separate statement of even date, he reported that supervisor R. harassed him by repeatedly requesting his medical restrictions and criticizing the time he took to case the mail on his route.

On March 14, 2023 Dr. Yun Chong, a psychiatrist, diagnosed severe anxiety due to stress and additional PTSD symptoms. On March 23, 2023 he completed an attending physician's report (Form CA-20) diagnosing severe symptoms of anxiety due to PTSD, exacerbated by stress. Dr. Chong checked a box marked "Yes" indicating that the diagnosed condition was caused or aggravated by an employment activity.

On March 29, 2023 the employing establishment responded to OWCP's development letter and asserted that on February 1, 2023 a carrier was asking questions about routes because there were no able bodies on those routes. It disagreed that violations occurred. The employing establishment noted that appellant worked four hours a day casing different routes. It further noted that the February 1, 2023 meeting concerned carrier performance, and that a carrier asked why the burden was being placed on those who could carry mail. The employing establishment asserted that when appellant began to speak about others, management interrupted him and informed the group that there would be no discussion of any individual's performance or status.

By decision dated April 5, 2023, OWCP denied appellant's emotional/stress-related condition claim, finding that he provided only vague and general information without supporting evidence, while the employing establishment provided multiple statements from eyewitnesses which were in direct conflict with his stated sequence of events such that he had not established a compensable employment factor. It concluded, therefore, that the requirements had not been met for establishing that he sustained an injury as defined by FECA.

On May 11, 2023 appellant requested reconsideration. He submitted additional statements regarding the events of the February 1, 2023 meeting. Appellant further explained the basis for his disagreement with OWCP's evaluation of the evidence submitted.

In a May 18, 2023 statement, J.G., a coworker, recounted that V.D. blamed light-duty or limited-duty carriers for the extra overtime that he had been forced to carry, that V.D. mentioned appellant by name, and that C.C. allowed V.D. to do so.

By decision dated June 14, 2023, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

On June 20, 2023 appellant appealed the April 5 and June 14, 2023 decisions to the Board. By decision dated November 29, 2023,⁴ the Board affirmed the April 5, 2023 merit decision, finding that the evidence was insufficient to establish an emotional/stress-related condition in the performance of duty on February 1, 2023 as alleged; however, it set aside the June 14, 2023 decision, finding that the evidence submitted on reconsideration was sufficient to warrant a merit review. The Board, therefore, remanded the case for an appropriate merit decision on appellant's claim.

In October 6 and 16, 2023 statements, appellant alleged an escalation of harassment by supervisor D., through his tone of voice, his attitude, and alleged perception that appellant was a malingerer because he was an injured employee. He asserted that supervisor D. required him to recite his medical limitations on the work floor in front of V.D., which was a form of harassment. He further alleged favoritism and disparate treatment as supervisor D. talked and joked with V.D., who was concerned with attendance, but did not talk or joke with appellant.

By decision dated January 11, 2024, OWCP denied modification.

On January 19, 2024 appellant requested reconsideration. He alleged that OWCP failed to consider the previously-submitted medical evidence. Appellant completed separate statements on January 19 and 26, 2024 further disagreeing with OWCP's handling of his claim. He provided excerpts from internet medical publications.

By decision dated January 31, 2024, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim,⁶ including that he or she sustained an injury in the performance of duty and that any specific condition or disability from work for which he or she claims compensation is causally related to that employment injury.⁷ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁸

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

⁴ *Supra* note 3.

⁵ *Supra* note 2.

⁶ *L.G.*, Docket No. 21-0690 (issued December 9, 2021); *S.S.*, Docket No. 19-1021 (issued April 21, 2021); *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁷ *L.G., id.*; *S.S., id.*; *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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

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.⁹

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.¹⁰ 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 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.¹¹ 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.¹²

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.¹³ 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.¹⁴ 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.¹⁵

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.¹⁶ Mere perceptions of harassment, retaliation, or discrimination are not compensable under FECA.¹⁷

⁹ 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).

¹⁰ *T.G.*, Docket No. 19-0071 (issued May 28, 2019); *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

¹¹ *L.H.*, Docket No. 18-1217 (issued May 3, 2019); *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

¹² *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹³ 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).

¹⁴ 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).

¹⁵ *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁶ *R.D.*, Docket No. 19-0877 (issued September 8, 2020); *T.G.*, Docket No. 19-0071 (issued May 28, 2019); *Marlon Vera*, 54 ECAB 834 (2003).

¹⁷ *Id.*; see also *Kim Nguyen*, 53 ECAB 127 (2001).

ANALYSIS -- ISSUE 1

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

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's April 5, 2023 decision because the Board considered that evidence in its November 29, 2023 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁸

Appellant attributed his emotional condition due to harassment, specifically that his manager, C.C., allowed and encouraged V.D., a coworker, to harass, intimidate, cause emotional distress and mental suffering by blaming him and two other disabled employees for his required overtime during a 10 minute "rant" which occurred during an official meeting while in the performance of duty. As noted above, 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.¹⁹ On May 18, 2023 J.G., a coworker, recounted that V.D. blamed light-duty or limited-duty carriers for the extra overtime that V.D. had been forced to carry, that he mentioned appellant by name, and that C.C. allowed him to do so. The Board finds appellant's detailed allegations of harassment, along with this corroborative witness statement, is sufficient to establish a compensable factor of harassment.²⁰

Appellant alleged additional incidents of harassment by supervisor D. through his tone of voice, his attitude, and alleged perception that appellant was a malingerer as he was an injured employee. He again asserted that supervisor D. required him to recite his medical limitations on the work floor in front of V.D. which was a form of harassment. Appellant further alleged favoritism and disparate treatment as supervisor D. talked and joked with V.D. who had issues with attendance, but not with appellant. The Board finds that appellant has not provided evidence that these alleged incidents of harassment and discrimination did in fact occur.²¹ Consequently appellant has not established a compensable work factor with respect to these allegations.²²

As OWCP found that there were no compensable employment factors, it did not analyze or develop the medical evidence. Accordingly, the Board will set aside OWCP's January 11, 2024 decision and remand the case for consideration of the medical evidence with regard to whether appellant has established an emotional condition in the performance of duty causally

¹⁸ *C.H.*, Docket No. 19-0669 (issued October 9, 2019); *J.D.*, Docket No. 18-1765 (issued June 11, 2019); *J.L.*, Docket No. 17-1460 (issued December 21, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

¹⁹ *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

²⁰ *B.K.*, Docket No. 23-0679 (issued January 18, 2024); *M.C.*, Docket No. 20-1051 (issued May 6, 2022).

²¹ *Supra* note 18.

²² *See E.G.*, Docket No. 20-1029 (issued March 18, 2022); *D.B.*, Docket No. 19-1310 (issued July 21, 2020).

related to the compensable employment factor. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.²³

CONCLUSION

The Board finds that appellant has met his burden of proof to establish a compensable factor of employment. The Board further finds that the case is not in posture for decision as to whether appellant had established an emotional condition causally related to the accepted compensable employment factors.

ORDER

IT IS HEREBY ORDERED THAT the January 11 and 31, 2024 decisions of the Office of Workers' Compensation Programs are reversed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 30, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²³ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.