

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

C.M., II, Appellant)

and)

U.S. DEPARTMENT OF LABOR, WAGE &)
HOUR DIVISION, Falls Church, VA, Employer)

**Docket No. 17-0027
Issued: July 5, 2017**

Appearances:

Michael Eisenberg, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On October 5, 2016 appellant, through counsel, filed a timely appeal from an April 8, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to

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 Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's April 8, 2016 decision was October 5, 2016. Since using October 7, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark or other carrier's date marking is considered the date of filing. The date of the other carrier's date marking is October 5, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On June 30, 2014 appellant, then a 49-year-old wage and hour compliance specialist, filed an occupational disease claim (Form CA-2) alleging that he sustained anxiety, depression, and "generalized stress" in the performance of duty on or before December 5, 2011. He attributed the conditions to a "general pattern of harassment" at work. Appellant stopped work on June 27, 2012 and did not return.

In a July 14, 2014 letter, OWCP notified appellant of the evidence needed to establish his claim, including a detailed description of the causative work factors, and a report from his attending physician explaining how and why those factors would cause an emotional condition.

In response, appellant provided August 1, 2014 narrative statements, alleging that he sustained an emotional condition due to a pattern of supervisory harassment and discrimination, as follows: Supervisor L.B. discussed revoking appellant's telework privileges as of December 5, 2011 when he returned from leave; L.B. stated during appellant's December 15, 2011 performance appraisal that he should not expect an excellent rating in the coming year; L.B. interfered with appellant's participation in unspecified union activities on March 1, 2012; an "illegal" employee Performance Improvement Plan (PIP) issued on June 8, 2012 and rescinded August 23, 2012; having to return appellant's work-issued laptop computer to the employing establishment on April 29, 2013 although it contained e-mails he believed relevant to his grievances; being contacted by the employing establishment on May 7, 9, and 23, 2013, while on leave, regarding a pending deposition in a case he had worked on in January 2011; the employing establishment speaking to appellant's wife in May 2013 in an attempt to contact appellant about the deposition; and "inconsistent" letters of removal on unspecified dates. Appellant also generally alleged that supervisors L.B. and M.W. misinterpreted medical reports to deny his request for accommodations and remove him from his post.

Appellant also submitted documents relating to the identified incidents. On April 30, 2012 the employing establishment denied a grievance regarding use of official time, finding that, while a supervisor requested privileged information regarding the nature of appellant's activities, he did not deny appellant's request for official time. A June 8, 2012 PIP signed by himself and L.B., enumerated deficiencies in case management, timely submissions, support of employing establishment goals, internal and external customer service, professionalism, communication, and teamwork. L.B. sent appellant May 7 and 9, 2013 letters asking if he had documents relating to a case he worked on in January 2011, noting that a representative of the solicitor's office spoke briefly with appellant's wife in an attempt to contact appellant. On July 26, 2013 he

³ 5 U.S.C. § 8101 *et seq.*

denied appellant's request to work from home up to four days a week as the essential functions of his position involved onsite workplace investigations, and denied his request to change supervisors as there were no funded, vacant jobs available for his position description.

In a May 30, 2014 letter, the employing establishment noted appellant's continuous absence from work beginning June 27, 2012. It explained that Dr. Guillermo Brito, an attending licensed clinical psychologist, found that appellant's requested accommodations of telework up to four days a week, and transfer to a different supervisor, were unnecessary. In February 2013, the employing establishment's occupational health unit reviewed new reports from Dr. Brito and Dr. Alexa Andewelt, an attending Board-certified psychiatrist, and determined that appellant's condition had worsened, with substantial limitations on his ability to interact with others. L.B. therefore denied appellant's request for reasonable accommodations on July 26, 2013 as the medical evidence indicated that he was no longer able to perform the essential functions of his position. A January 8, 2014 discussion with appellant and his representative determined that appellant could no longer perform the essential functions of his position, as it was "endemic to [his unit's] work to encounter resistance and hostility in dealing with [employing establishments] under investigation," and to be able to discuss his job performance constructively with his supervisor. On July 1, 2014 the employing establishment proposed to remove appellant from employment, as Dr. Andewelt opined that appellant could no longer work.

Appellant also submitted medical evidence.⁴ Dr. Brito noted on May 10, 2012 that appellant experienced stress after being assigned to a new supervisor. He diagnosed major depressive disorder, single episode, and panic disorder, due to a "problematic work environment." Dr. Brito provided progress notes through July 21, 2013 noting extreme, increasing anxiety.

In an October 12, 2012 report, Dr. Andewelt related appellant's assertion that L.B. was jealous of appellant because junior investigators openly admired him. Appellant reiterated his allegations regarding the PIP and use of official time. Dr. Andewelt diagnosed depression and anxiety caused by "work stressors."

In a February 5, 2013 letter, Dr. Michelle Smith-Jeffries, a consulting physician to the employing establishment, noted that appellant had a long history of depression, anxiety, and panic attacks, well-controlled until June 2012 "after interacting with his supervisor." She opined that his "ability to interact with others [was] substantially limited by [appellant's] medical conditions." Dr. Smith-Jeffries explained that, while increased telework might relieve some of appellant's anxiety over his coworkers witnessing his panic attacks, additional medical evidence was necessary to make a final decision on his request for accommodations.

In a letter received on September 25, 2014, the employing establishment explained that appellant was unable to perform his duties in accordance with expectations due to performance problems. Supervisor L.B. issued appellant a draft PIP on June 8, 2012 and he was given the

⁴ Three practitioners diagnosed appellant with psychiatric conditions due to unspecified work-related stress: Dr. Ricardo Caldera, an attending Board-certified family practitioner, on May 29, 2012; Dr. Michael C. Trahos, an attending Board-certified family practitioner, on July 3, 2014; and Dr. Bernardo Hirschman, an attending Board-certified psychiatrist and neurologist, on July 29, 2014. Appellant also provided reports from a counselor.

opportunity to comment before the formal period began. Appellant worked sporadically through August 3, 2012, then stopped work and did not return.

OWCP, in a June 29, 2015 decision, denied appellant's claim finding that he had not established any compensable factors of employment. It found that the following factors were established, but not compensable: a December 5, 2011 discussion with L.B. about possible revocation of telework privileges; receiving a draft PIP on June 8, 2012; receiving a July 1, 2014 notice of removal; not being allowed to participate in union business, but not denied official time; the employing establishment requiring appellant to turn in his work laptop on April 29, 2013 as it contained official evidence about his assigned cases; and appellant's receipt of a May 23, 2013 letter asking him either to testify at a deposition regarding an assigned case or provide medical evidence that he could not participate. OWCP found that the following incidents did not occur as alleged: remarks by L.B. on December 15, 2011 that appellant could not expect to receive a favorable performance rating; and appellant's wife's rights being violated when the employing establishment telephoned her on May 23, 2013 asking to speak to appellant about the deposition.

In a June 25, 2015 letter appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Counsel submitted a December 30, 2015 brief asserting that all identified incidents were compensable as they occurred at work, and that the medical evidence established causal relationship.

At the hearing, held December 30, 2015, counsel and appellant contended that the performance appraisal, PIP, and December 5, 2011 discussion regarding possible revocation of telework were in the performance of duty and should be considered compensable factors of employment. He argued that appellant's emotional condition was also due to supervisory harassment, excessive supervision, and fear of losing his job. Appellant alleged that he had no difficulties at work prior to December 2011, when L.B. began to bully and menace him, criticize his job performance, discourage coworkers from speaking to him, prevented him from engaging in union activities, and threatened to revoke his telework privileges.

Following the hearing, appellant provided a July 3, 2012 memorandum from L.B. rescinding the June 8, 2012 PIP, but noted that he was not demonstrating an acceptable level of job performance.

In an April 8, 2016 decision, an OWCP hearing representative affirmed the June 29, 2015 decision, finding that appellant had not established any compensable employment factors. She noted that he did not attribute the claimed emotional condition to the performance of his job duties, but to administrative functions of performance appraisals, telework status, and use of employing establishment computer equipment. The hearing representative found that appellant did not establish error or abuse regarding administrative matters and that there were no final grievance decisions of record that indicated wrongdoing by supervisors. She further found that he failed to establish any incidents of supervisory harassment, noting that he did not submit witness statements or other corroboration of his allegations.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. 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. On the other hand, the disability is not covered where 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.⁵

To establish an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence stating that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensation employment factors are causally related to the emotional condition.⁶

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.⁷ 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.⁸

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.⁹ 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.¹⁰ In determining whether the employing establishment has erred or acted abusively,

⁵ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *D.C.*, Docket No. 16-1870 (issued May 19, 2017); *George H. Clark*, 56 ECAB 162 (2004).

⁷ See *Charles D. Edwards*, 55 ECAB 258 (2004); *Norma L. Blank*, 43 ECAB 384 (1993).

⁸ *Lori A. Facey*, 55 ECAB217 (2004); *Norma L. Blank*, *id.*

⁹ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, *supra* note 5.

¹⁰ See *William H. Fortner*, 49 ECAB 324 (1998).

the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹¹

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.¹² Mere perceptions of harassment, retaliation or discrimination are not compensable under FECA.¹³

ANALYSIS

Appellant has not attributed his emotional condition to the performance of his regular or specially assigned duties as a wage and hour investigator under *Cutler*.¹⁴ Rather, this case is based on his allegations of administrative error or abuse in performance evaluations, supervisory communications, and requests for reasonable accommodations, and a general pattern of supervisory harassment. On July 14, 2014 OWCP advised appellant of the type of evidence needed to establish his claim. Appellant provided statements regarding his allegations, copies of performance appraisals and correspondence regarding requests for reasonable accommodation, and medical evidence. OWCP denied the claim on June 29, 2015, finding that he failed to establish any compensable factors of employment. On April 8, 2016 an OWCP hearing representative affirmed the June 29, 2015 decision. The Board must evaluate if appellant established error or abuse that would bring the administrative matters under coverage of FECA, or if he established a pattern of harassment as alleged.

Appellant attributed his claimed emotional condition to a December 5, 2011 performance appraisal and a subsequent June 8, 2012 PIP. Performance appraisals and the monitoring of an employee's work performance are administrative matters not within the performance of duty.¹⁵ Appellant also contended that the PIP was "illegal" as it was issued on June 8, 2012, but rescinded on August 23, 2012. However, the Board has held that the mere fact that an administrative action is later modified or rescinded does not, in and of itself, establish error or abuse.¹⁶ Appellant has not otherwise provided evidence showing that the employing establishment erred or acted abusively in these matters. Therefore, he has not established a compensable employment factor regarding the performance appraisal or PIP.

Appellant also asserted that he experienced stress due to the denial of his request for reasonable accommodation and proposed rescission of his telework privileges on

¹¹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹² *Marlon Vera*, 54 ECAB 834 (2003).

¹³ *Kim Nguyen*, 53 ECAB 127 (2001).

¹⁴ *See supra* note 5.

¹⁵ *T.C.*, Docket No. 16-0755 (issued December 13, 2016); *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

¹⁶ *See Michael Thomas Plante*, 44 ECAB 510 (1993); *Richard J. Dube*, 42 ECAB 916 (1991) (reduction of a disciplinary letter to an official discussion did not constitute abusive or erroneous action by the employing establishment).

December 5, 2011. These matters pertain to his desire to work in particular environment, and do not constitute compensable factors of employment.¹⁷

Additionally, appellant alleged that the claimed emotional condition was due, in part, to being made to turn in his work computer on April 29, 2013. The record indicates that the computer was the property of the employing establishment. This is an administrative matter regarding the provision of equipment needed to accomplish assigned tasks. Appellant has not demonstrated that it was unreasonable to be asked to return the computer nearly one year after he had stopped work on June 27, 2012. Therefore, he has not established a compensable employment factor in this regard.

With regard to appellant's allegation that supervisor L.B. denied his request for official time to perform unspecified union activities on March 1, 2012, the Board has adhered to the principle that union activities are personal in nature and are not considered to be within the course of employment.¹⁸ While there is a recognized exception to the general rule, in that employees performing representational functions which entitle them to official time are in the performance of duty, this did not occur in this case as the April 30, 2012 grievance denial demonstrates that L.B. did not deny a request for official time.¹⁹

Appellant also attributed the claimed emotional condition to a pattern of supervisory harassment. The Board finds that he has not submitted probative evidence corroborating his allegations of harassment. Appellant did not provide witness statements or other documentation supporting any instance of harassment or disparate treatment. The absence of clear documentation diminishes the validity of his contentions in this case. As he has not substantiated his allegations with probative evidence, appellant has not established a compensable employment factor under FECA with respect to the claimed harassment.²⁰

The Board finds that appellant has not established any compensable factor of employment. Therefore, the Board will not address the medical evidence.²¹

On appeal, counsel reiterates that the employing establishment committed error or abuse in its administration of leave matters, assignment of telework, performance appraisals, PIP, and letter of proposed removal. As found above, appellant did not establish error or abuse regarding these matters. He newly alleged that the PIP demanded overwork as described in *T.J.*,²² but did not specify any period of overwork or any improper tasks. Additionally, counsel argues that appellant's supervisors did not have the authority under the Americans with Disabilities Act²³ to

¹⁷ *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹⁸ *Jimmy E. Norred*, 36 ECAB 726 (1985).

¹⁹ *L.D.*, Docket No. 15-0706 (issued May 9, 2016).

²⁰ *See supra* note 13.

²¹ *Margaret S. Krzycki*, 43 ECAB 496 (1992).

²² Docket No. 10-1116 (issued February 14, 2011).

²³ 42 U.S.C. § 12112(b)(5-7).

review medical evidence regarding appellant's ability to perform his job. The Board notes, however, that the employing establishment consulted Dr. Smith-Jeffries in this matter. Additionally, Board has held that disability criteria pursuant to other statutory schemes are not binding on OWCP or the Board with respect to whether the individual is disabled under FECA.²⁴

Counsel also contends that appellant's account of L.B.'s December 5, 2011 statement that he should not expect a favorable appraisal the following year should be accepted as factual, because he reported his condition promptly and obtained extensive medical treatment.²⁵ However, those factors are not dispositive. As noted above, appellant submitted no corroboration of his account of events.

Finally, counsel argues that the medical evidence was sufficient to establish causal relationship. However, as appellant did not establish a compensable factor of employment, it was not necessary for OWCP and hence, the Board to address the medical evidence with regard to causal relationship.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.

²⁴ See *Stephen R. Lubin*, 43 ECAB 564 (1992); *Hazelee K. Anderson*, 37 ECAB 277 (1986).

²⁵ Counsel cited to *Charles B. Ward*, 38 ECAB 667 (1987); *A.B.*, Docket No. 14-0522 (issued November 9, 2015); *D.B.*, 58 ECAB 464 (2007); *Samuel J. Chiarella*, 38 ECAB 363 (1987).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 8, 2016 is affirmed.

Issued: July 5, 2017
Washington, DC

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

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

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