United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 13-1005**
	)	**Issued: September 11, 2013**
U.S. POSTAL SERVICE, POST OFFICE, San Antonio, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 19, 2013 appellant filed a timely appeal from a January 7, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his emotional condition claim. Pursuant to the Federal Employees' Compensation Act[1] (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 met his burden of proof to establish that he sustained an emotional condition or an aggravation of his fibromyalgia condition in the performance of duty.

FACTUAL HISTORY

On April 12, 2012 appellant, then a 54-year-old customer service supervisor, filed an occupational disease claim (Form CA-2) alleging that his fibromyalgia condition was aggravated by a hazardous and hostile work environment perpetrated by his station manager, Bertha E. Mertz. He stated that his condition worsened as a result of the stressful work environment and

[1] 5 U.S.C. § 8101 *et seq.*

six days-a-week work schedules. Appellant indicated that he had submitted a doctor's note restricting him to five days of work per week, which only increased the hostile work environment.

In an August 1, 2012 letter, OWCP informed appellant that additional evidence was needed to establish his claim. It afforded him 30 days to submit additional factual evidence and a medical report from a physician explaining how compensable factors of employment caused or contributed to an emotional condition.

Subsequently, appellant submitted a June 13, 2011 statement listing his duties and a May 17, 2012 statement from Dori Ojeda who indicated that she had no complaints about appellant as he was a great supervisor to work with. In an August 28, 2012 statement, he indicated that on January 27, 2012 Ms. Mertz told him that he needed to request light-duty work if he wanted to work five days per week. On March 7, 2012 Ms. Mertz told appellant to report to work the following day, which was his scheduled day off, and threatened to place him on absent without leave (AWOL) status. Appellant then described several separate incidents in which he believed he had been harassed and subjected to disparate treatment by the employing establishment. He indicated that Ms. Mertz redirected his attention from a female customer who wanted to look at different stamps for her business to a couple that were asking her questions about passports. Appellant also noted that she treated him differently from other supervisors in the way that she spoke to him regarding schedule changes and she asked him why he did not greet her in the mornings. He stated that Ms. Mertz told him that he was worthless because he was not a team player. Appellant filed an Equal Employment Opportunity (EEO) Commission grievance and felt that the three investigations which ensued were a product of the employing establishment's retaliation against him. He attached e-mail correspondence between him and the employing establishment regarding his light-duty request and doctor's restrictions. In a March 28, 2012 e-mail, appellant indicated that on March 21, 2012 Ms. Mertz told him that he needed to work on his scheduled day off, which was Thursdays. When he reminded her that she was telling him to violate his restrictions, she stated that she was telling him because she was going to put him as scheduled to work Thursday and that he could call Family and Medical Leave Act (FMLA) if he wanted to, but that was what she was going to do.

Appellant also submitted an April 25, 2012 report from Dr. Brian Senger, a Board-certified internist, who indicated that appellant had been suffering from fibromyalgia for the past couple of years. He explained that this condition caused joint pains and muscle aches with extensive use. Dr. Senger restricted appellant to work five days per week to prevent flare-ups from occurring. If appellant experienced a flare-up, he would need to miss work and this could be up to a couple days at a time. On August 13, 2012 Dr. Senger indicated that appellant gave a history of harassment at work. He diagnosed fibromyalgia and nonspecified arthritis, which limited his ability to perform certain duties. Dr. Senger indicated that appellant had been given notes to excuse him from certain duties but his supervisors continued to abuse and break the restriction, causing him undue stress. He further diagnosed anxiety and depression, as a result, and referred him to a psychologist.

In an undated statement, Ms. Mertz indicated that everything was fine until she addressed appellant's absences in January or late February and when she attempted to assign him duties he would continuously complain that his disease was causing him not to be able to perform his duties. When questioned he would never specify what his disease was or any additional

information. Ms. Mertz stated that appellant never provided her with restrictions but would say he could only work five days per week. Then in the beginning of April, appellant had an incident that occurred with a customer. He had several incidents in the past and this one was unique in that the customer had him on video. Appellant was immediately placed off the clock and administrative action was given.

In an April 4, 2012 statement, Jose Cantu indicated that he answered the customer service line on April 3, 2012 and the customer on the other end was very upset because he was placed on hold for 30 minutes.

In an August 27, 2012 statement, Jeanette Post indicated that verbal criticism, often very personal and derogatory, was directed at all station clerks. She stated that there was obvious animosity between appellant and Ms. Mertz, although she was not privy to any discussions between them that took place behind closed doors. Ms. Post indicated that she would gladly work with appellant as her supervisor at any time and at any station.

On April 6, 2012 appellant was put on emergency off-duty status without pay and remained on the rolls. Subsequently, he was charged on June 8, 2012 with unacceptable conduct for failure to provide satisfactory customer service and the employing establishment issued a proposed letter of warming in lieu of time-off suspension.

In an August 1, 2012 letter, the employing establishment controverted appellant's claim. It stated that Ms. Mertz would assign appellant duties to perform throughout the day. This was an administrative function to monitor and make necessary changes in duty assignments within the operations on a daily basis. In January 2012, Ms. Mertz addressed her concern about appellant's absences and complaints that his medical condition was the reason for his inability to perform his duties and that he could only work five days per week. When appellant was asked about his medical condition, he would not provide any information and/or medical documentation to support his claim. The employing establishment indicated that management was following the administrative process with regards to attendance issues whereby appellant perceived Ms. Mertz's actions as hostile. On April 3, 2012 appellant was involved in an incident with a customer concerning a complaint about mis-deliveries of her mail. He was rude and discourteous in the handling of the situation which was caught on video. Appellant was immediately placed off the clock and put on administrative leave due to this incident from April 7 through June 6, 2012. He was referred to the District Reasonable Accommodation Committee (DRAC) for a resolution. On April 23, 2012 the DRAC requested medical documentation from appellant in support of his reasonable accommodation request. According to appellant's PS Form 3972, Absence Analysis, he had been working five days per week since February 2012 to accommodate his medical restrictions even though no documentation was provided to management.

By decision dated January 7, 2013, OWCP denied appellant's claim finding that the evidence did not establish an emotional condition or an aggravation of his fibromyalgia condition arising from a compensable factor of employment.

LEGAL PRECEDENT

To establish a claim that he or she sustained an emotional or stress-related condition in the performance of duty, an employee must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) medical evidence establishing that he or she has an emotional or stress-related disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the condition.[2] If a claimant implicates a factor of employment, OWCP should determine whether the evidence of record substantiates that factor. Allegations alone are insufficient to establish a factual basis for an emotional condition claim and must be supported with probative and reliable evidence. If a compensable factor of employment is established, OWCP must then base its decision on an analysis of the medical evidence.[3]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to a claimant's employment. In the case of *Lillian Cutler*,[4] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition under FECA. When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that a disability resulted from this emotional reaction, the disability is generally regarded as due to an injury arising out of and in the course of employment. This holds true when the disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work. On the other hand, there are disabilities that have some causal connection with the claimant's employment but nonetheless fall outside FECA's coverage because they are found not to have arisen out of employment, such as when a disability results from a fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.[5]

The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of FECA. This principal recognizes that a supervisor or manager must be allowed to perform their duties and that employees will, at times, disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.[6]

ANALYSIS

Appellant attributed his anxiety and depression and an aggravation of his fibromyalgia condition to actions by management of the employing establishment. He has not alleged that the actual performance of any of his work duties caused his emotional condition. Rather appellant alleges that he was treated improperly by Ms. Mertz. The allegations of record relate to actions

[2] *See W.B.*, Docket No. 12-1369 (issued May 1, 2013).

[3] *See G.S.*, Docket No. 09-764 (issued December 18, 2009).

[4] 28 ECAB 125 (1976).

[5] *See William E. Seare*, 47 ECAB 663 (1996).

[6] *See S.M.*, Docket No. 09-2290 (issued July 12, 2010); *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

taken by his supervisor, some of which appellant alleges were taken in retaliation for his EEO complaint.

As the Board has previously stated, a supervisor or manager must be allowed to perform his or her duties and that employees will, at times, disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.[7]

For harassment to give rise to compensability under FECA, there must be evidence that harassment did, in fact, occur. Mere perceptions of harassment are not compensable under FECA.[8] The Board has long held that grievances and EEO complaints by themselves do not establish that workplace harassment or unfair treatment occurred.[9]

In the present case, OWCP found that appellant was not subjected to any harassment and did not submit any evidence substantiating his allegations. Specifically, there is no evidence substantiating any derogatory remarks made by Ms. Mertz to appellant. Although appellant alleged that Ms. Mertz told him that he was worthless because he was not a team player, there is no witness statement corroborating this incident. The Board has recognized the compensability of verbal altercations or abuse when sufficiently detailed by the claimant and supported by the record. This does not imply, however, that every statement uttered in the workplace will give rise to compensability.[10] The evidence of record does not establish that this incident rose to the level of verbal abuse or otherwise constitute a compensable work factor.[11] There is no evidence of record from any witness substantiating appellant's contention that he was harassed by Ms. Mertz. Moreover, the evidence of record establishes that appellant was put on emergency off-duty status without pay on April 6, 2012, charged with unacceptable conduct for failure to provide satisfactory customer service on June 8, 2012 and issued a proposed letter of warning in lieu of time-off suspension. Appellant did not submit any evidence to show that the employing establishment erroneously placed him in an emergency off-duty status or otherwise acted in an abusive or unreasonable manner. There is no evidence from appellant in support of his allegations that he was harassed by his supervisors.

The Board finds that appellant has not established that his supervisor acted in error or abusively when she asked appellant why he did not greet her in the mornings. Appellant has not cited any employing establishment policy or rule which would prevent Ms. Mertz from asking this question. Likewise, while he may not have liked being instructed to work on a Thursday, he has not established that Ms. Mertz in error or abusive when making this assignment. Similarly, appellant has not established that being told to redirect his attention from a female customer who

[7] *See supra* note 6.

[8] *See Michael Thomas Plante*, 44 ECAB 510 (1993); *William P. George*, 43 ECAB 1159 (1992).

[9] *See supra* note 2.

[10] *See David C. Lindsey*, 56 ECAB 263 (2005). The mere fact that a supervisor or employee may raise his or her voice during the course of an argument does not warrant a finding of verbal abuse. *Joe M. Hagewood*, 56 ECAB 479 (2005).

[11] *See J.J.*, Docket No. 07-2014 (issued January 24, 2008).

wanted to look at stamps to a couple that were asking questions about passports, was an erroneous instruction or abusive.

In this regard, the Board notes that appellant's allegations pertaining to the incidents with Ms. Mertz relate to administrative and personnel matters of the employing establishment involving scheduling assignments. Generally, an employee's emotional reaction to administrative or personnel matters is not covered under FECA. However, when the evidence of record demonstrates that the employing establishment erred or acted unreasonably in a personnel matter, coverage may be afforded.[12] The Board finds that the evidence of record does not establish that Ms. Mertz acted unreasonably or erred in the administrative and personnel matters she raised with appellant in assigning his duties.[13] Appellant's emotional reaction to personnel and administrative matters can be described as self-generated and not arising in the performance of duty but due to his personnel frustration in not being permitted to work in a particular work environment. Because he has not presented sufficient evidence that his supervisor acted unreasonably or committed error or abuse, he has failed to identify a compensable work factor.[14] Thus, appellant has not met his burden of proof to establish a claim.[15]

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition or an aggravation of his fibromyalgia condition in the performance of duty.

[12] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Norman A. Harris*, 42 ECAB 923 (1991).

[13] *See Kathi A. Scarnato*, 43 ECAB 220 (1991) (the Board noted that the employing establishment retains the right to preserve an environment in which the performance of work is an essential goal). *See also Drew A. Weissmuller*, 43 ECAB 745 (1992).

[14] *See H.C.*, Docket No. 12-457 (issued October 19, 2012).

[15] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2013 Office of Workers' Compensation Programs' decision is affirmed.

Issued: September 11, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board