

File Number:
HR10-D-H

RECEIVED JAN 12 2018

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

Date of Injury
Employee:

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 11/07/2018. As a result of such hearing, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Your case file has been returned to the San Francisco District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 13 SFC
LONDON, KY 40742-8300

Sincerely,

Division of Federal Employees' Compensation

PAUL H FELSER
FELSER LAW FIRM, P.C.
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, January 09, 2019

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of
Claimant; Employed by the _____ Case
number _____ A Telephone Hearing was held on November 7, 2018.

The issue for determination is whether the claimant in fact sustained an emotional condition in the performance of duty causally related to his employment.

The claimant was employed by the _____ as a
_____ The claimant filed a CA2 Notice of Occupational Disease Claim on
December 11, 2017 claiming that he has worked as an _____ since 1988 and
over 28 years was exposed to traumatic events including the death of fire fighters in 2005
and 2006 and that he was almost killed six times. The claimant stated that he sustained
posttraumatic stress disorder and first became aware of his condition on _____
and realized that it was caused or aggravated by his employment on July 11, 2017.

By letter dated January 3, 2018 the Office requested that the claimant submit additional
factual and medical evidence to establish his claim.

A December 21, 2017 letter from _____ to
Dr. _____ was received in the Office on January 5, 2018 and stated in relevant part:

"We are in receipt of your completed Medical Evaluation Questionnaire, dated
12/16/2017. regarding _____

Your analysis indicates that Mr. _____ is a 'good healthy
individual' and is fully capable of performing all the duties of a _____

However, given that Mr. _____ has been absent from work since early July, 2017 and
has attributed his absence, in part, due to various illnesses (i.e. - diabetes,
depression, PTSD, alcoholism, prescription drug abuse and illicit drug use), we are
concerned that Mr. _____ may not have followed the instructions in the memorandum
associated with this Medical Evaluation Questionnaire. The instructions were, "So that
your physician has sufficient information to respond to the items concerning your
ability to perform your job and accommodations that might be recommended, it is
important that you provide him/her with the attached copy of your position description,
the attached medical evaluation questionnaire, as well as a copy of this
memorandum."

A August 15, 2017 email from the claimant to _____ and _____ was received in
the Office on January 5, 2018 which stated in relevant part,

"I was discharged from _____ where I was treated for depression.

Concurrently I was admitted to _____ I am being treated co-occurring disorders such as PTSD.

The program at _____ runs at least 30 days.

I remain medically unable to work with no prognosis or return to work date."

A October 23, 2017 e-mail to _____ from the claimant was received in the Office on January 5, 2018 that stated in relevant part,

"I apologize for Friday. I am dealing with severe PTSD and still need further treatment.

I am sure Friday and Saturday were incredibly hard.

Please tell _____ I am Ok. I will be getting additional treatment in _____ with no return to work date. I am focusing on treatment for the time being.

I don't plan on filing any further complaints. It's pretty obvious short comings people have--including me. Its [sic] not my Job to Judge people's character deficits. We all have challenges. I need to focus on my own issues.

You're a good _____ You lead an excellent _____
you're one of the best _____ We have an incredibly challenging
job at _____ and your doing a fine Job.

I am not worried about the investigation. I should be held accountable, but we should factor in that I wasn't well at all. I tried to get treatment after the _____ but it didn't work. Absolutely no _____ has been involved. I stopped drinking on July 10, 2003. One of the best decisions I ever made. I thought everyone knew, but I advertised the fact at all."

A August 5, 2017 email from _____ to _____ and _____ was received in the Office on January 5, 2018 and stated, "This message explains what happen to _____ the evening we were looking for him at _____ The email forwarded a August 4, 2017 email from _____ which was sent to _____ and stated:

"Hello _____, my name is _____ I worked at the _____ from _____, I was sponsor on _____ came by my house after not seeing him for 7 years, he was incoherent and not connected to much if any soundness of mind I took him home (I live in _____)to _____ and the next day to emergency, he was much more connected and coherent. He has moved on to drugs of which I have no experience, I feel so bad for him but I know one thing for sure, he Has to stop the bull, until he accepts responsibility for his train wreck, in my opinion, he will never get well. Because I worked the Park and

love my time there , and the fact I worked with [redacted] and his problem , I feel obligated to inform you of what little or not so little I know of [redacted] I work in the [redacted] , of which I know also suffered their own tragedy not too many months back , I would hate to see and hear of any more befalling [redacted]

A January 5, 2018 statement from Mr. [redacted] was received which stated in relevant parts,

"At present we are unable to find a clear causal relationship between the claimant's purported illness and the claimant's federal employment. This is, in part, because the medical documentation provided to us as of this date doesn't contain a clear and unequivocal medical rationale showing that the claimed emotional reaction is causally related to the work factors. Rather, it appears that the causes are personal in nature. The preliminary findings indicate that Mr. [redacted] employed in a drug/alcohol testing designated position, has been deceiving both medical professionals and the agency for the last several years regarding his history of mental illness (pre-dating his federal employment), physical trauma (i.e.-head) from off duty accidents/incidents, and history of drug/alcohol abuse and addictions during his federal employment up to the present. Presently, given the claimant's recently acquired eligibility for regular federal employee retirement, this claim appears to be an attempt to deflect responsibility from his personal issues, and place full blame upon the [redacted] in part, for the purpose of personal significant financial gain (see enclosed email " [redacted] email on financial benefit of OWCP 10 18 2017").

The claimant has been off work via a mixture of annual leave, sick leave, administrative leave and leave-share since early July, 2017. Throughout this period the claimant has exhibited behavior of mental instability via many emails, voice-messages, and in-person discussions. What follows, for the purpose of brevity, is a sampling of chronological history of the claimant's behavior, statements and other relevant documentation."

A statement dated March 15, 2018 from [redacted] in relevant part,

"On March 5, 2018 I met with the claimant to discuss his near-continuous absence from work from July, 2017 through present ,particularly in the context of his erratic behavior and emailed references to 'drug addiction' beginning on August 2, 2017, which was followed by denials of illicit drug use. I informed the claimant that I was conducting an administrative investigation and that any information the claimant would provide regarding that absence would not be used in a criminal prosecution, and as such, the claimant was required to provide candid and truthful responses. In response to my question asking the claimant if he had any substance abuse issues over the last several months, the claimant initially stated that he was using a prescription medication that, if tested, would give positive results for methamphetamine use. When I told the claimant that this was not a response to my question, the claimant stated that he had begun using methamphetamine (a Schedule 1 illegal drug) in May, 2017

and had used this drug weekly or every other week for several months through the fall of 2017."

By decision dated June 12, 2018 the Office denied the claimant's claim based on the determination that he did not establish that he in fact sustained an injury because he did not establish that any claimed employment incidents in fact occurred. The decision stated in pertinent parts,

"Incident(s) Alleged Which the Office Finds Are Not Factually Established:

1. You claim that over the course of 28 years you were exposed to many traumatic events including the deaths of other _____ which you claim caused your PTSD."

"In addition, in your email dated 08/02/2017 to _____ you also assert that "I don't suffer from PTSD. I don't believe I ever suffered from PTSD. I am an addict and alcoholic". You also mentioned that "The illness I reported to you in Jan 2016 is drug addiction covered under HIPPA. I was ashamed so I didn't tell you the entire story. I have been an alcoholic and addict my entire life. I became dependent on Avitan and Ambien while under treatment for stress".

2. You claim that the traumatic events of the 2016 _____ caused you mental trauma. You state that the mental trauma of the _____ was dominant for over a year, that the mental trauma was triggered recently by the 2017 budget rules, and that you have a classic case of PTSD."

"You claim that you were almost killed six times."

The claimant disagreed with the June 12, 2018 decision and requested an Oral Hearing. A Telephone Hearing was held on November 7, 2018. The claimant did not attend the Hearing but was represented by Paul Felser at the proceedings.

As required by Office procedures, a copy of the Hearing Transcript was forwarded to the employing agency to afford them the opportunity to comment on the claimant's testimony. No comments have been received and the time allotted to all parties for the submission of additional evidence has now passed.

At the Hearing Mr. Felser argued that the claimant in fact sustained an injury in the performance of duty. It was explained that in order to accept a claim for a psychiatric or emotional condition that the appellant would need to establish what he claimed in fact occurred with corroborated evidence. It was noted that then the medical evidence would have to establish that the he was diagnosed with a medical condition, which could be related to what he alleged, occurred. It was further explained that it would need to be determined that incidents that occurred in fact happened in the performance of his job duties. It was noted that then the medical evidence would also have to establish that he sustained a condition causally to an incident or incidents that were determined to be factual and occurred in the performance of his job duties for his claim to be accepted.

Mr. Felser was advised that the record would be held open for 30 days for the submission of additional evidence.

To establish that an emotional condition was sustained in the performance of duty, a claimant 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 psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.¹

The Employees' Compensation Appeals Board has held that: The claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which compensation is claimed was caused or adversely affected by factors of federal employment. This burden includes the submission of a detailed description of the employment conditions or factors which the claimant believes caused or adversely affected the condition or conditions for which compensation is claimed. In order for the Office to determine whether the employee has a compensable claim under the Act, the Office must have before it a statement from the claimant which identifies the specific employment factors or incidents believed to have caused or contributed to the condition.²

The Employees' Compensation Appeals Board has held that where a claimant fails to submit a statement describing in his own words the specific incidents and conditions that caused his condition, this office cannot make findings of fact regarding the working conditions.³

The evidence of record has been completely reviewed and considered. A July 17, 2018 memorandum from Superintendent to the claimant stated in relevant part,

"Since July 2017, you have exhibited behavior indicative of the potential for workplace violence. This includes statements on multiple occasions about suicide; drug abuse; extreme changes in behavior via oral and written statements; repeated incoherent and inaudible speech; disturbing phone calls; statements of desperation over family, financial, and other personal problems; disruptive contact particularly with our 911 emergency dispatch center; frightening behavior including remarks that coworkers were accessing your computer, deleting emails, listening in on your phone calls and 'gaslighting' you; disregard for management official instructions to cease misbehavior; and encounters with law enforcement officers with overtones of violence.

As recently as April 27, 2018, you left two voice messages to
in which you stated, "**Hey um, thought you might wanna help, you probably don't. But, my wrist is broken. You can actually see it an- I can see it angling off to the left**" and "**Man, my wrist hurts. And my back too, all the**

¹ *Martin Standel*, 47 ECAB ____ (Docket No. 94-1205, issued January 29, 1996)

² *Effie O. Morris*, 44 ECAB 470 (1993).

³ *Artice Dotson*, 47 ECAB 754 (1990).

beating. You took it a little bit too far, man. Uh, you took it a little bit too far. straightforward r-or arrest I didn't do anything, you can look on tile videotape. How long do they keep the videotapes, (unintelligible)? they fucking beat the shit out of me. Living shit. Batons. You know what, I offered to help 'em too, dumb shits. Why are these people so stupid?"

A August 16, 2018 statement from Mr. [REDACTED] was received which stated in relevant parts,

"We have uploaded to OWCP"... "dozens of documents outlining a multiyear history of drug and alcohol abuse as well as mental illness requiring psychiatric hospitalization going back to at least the late 1990s."

"On July 31, 2018, the claimant retired after receiving a Notice of Proposed Removal from federal service due to misconduct."

A November 20, 2018 statement from Mr. [REDACTED] was received which stated in relevant parts,

"The exhaustive documentation that the [REDACTED] has provided to the Office of Workers Compensation Program (OWCP) demonstrates that the claimant, [REDACTED], has withheld material information from medical professionals over the last several years with the clear intent of skewing their diagnoses for the purpose of personal gain. As such, these physician-based vague/general PTSD diagnoses and connection to the claimants' federal job as a secondary/administrative [REDACTED] made through the filter of the claimant's smokescreens, lack informed credibility. More so, the physician that the claimant has referred to over the longest period of time, Dr. [REDACTED], is an individual whom the claimant has stated is a "family friend". And, despite the claimant's long history of varied drug and alcohol abuse, Dr. [REDACTED] has provided no medical documentation referencing such addictions. This apparent selective filtering of medical information in arriving at a diagnosis of PTSD also merits consideration of lack of credibility.

The claimants' broad-sweeping statements regarding 'exposure to 100 traumatic events' and being 'nearly killed six times' over the 28 years of federal service don't establish fact of injury without corroborating detailed evidence. Additionally, the claimant's attorney's hyperbolic hearing statements referencing the claimant's involvement with "some of the most horrific [REDACTED]" and being a witness to "death, mayhem, destruction" also are general/vague assertions that are of no value in establishing the detailed factual evidence necessary to support the claim.

The claimant was not removed from employment with the federal government due to medical inability to perform work. Rather, the claimant received a Notice of Proposed Removal on June 23, 2018 for the serious charges and multiple specifications of:

Disruptive conduct
Making unfounded statements against

**Failure in carrying out follow instruction
Concealment or withholding of material information
Use of Illegal Drug**

On July 31, 2018, the claimant, instead of acknowledging responsibility, expressing remorse and accepting the disciplinary consequences for his serious acts of misconduct, retired from federal service."

By letter dated December 11, 2018 Mr. Felser stated in relevant part,

"Please accept this letter as Claimant request for an extension of time to submit the post-hearing summary and additional supporting evidence in the above-captioned matter. I would appreciate your extension until January 4, 2019 in order to insure that my client has the opportunity to review the hearing transcript; and to address any questions you may have posed on the record."

A January 17, 2018 statement from was received in the Office on December 27, 2018 which stated in relevant parts,

"I worked in the at from March 2002 through October 2014 as the Throughout this entire time I worked with as both a colleague and as his subordinate."

"In early June 2003, a member of the drowned in during in his first week of work. worked directly under my supervision and on the District Mr. managed. Mr. received the initial notifying phone call and subsequently contacted myself later that night."

"Mr. specifically bore much of the brunt of the trauma due to his role as being the primary Contact for the"

"On October 2, 2004 a was killed by a burning snag on the rescribed burn. Both Mr. and I were present on the burn and were part of the medical response and effort to save this life."

"In mid-August 2006 a member was killed in a single vehicle accident while off-duty. As I was on annual leave when this happened, it fell to Mr. to be the primary contact for the individual's family and maintain a presence at the hospital. Mr. was present when the decision was made to remove the crewmember from life support."

"On June 2, 2013 a member suffered a heat stroke and was put on 'a life flight to a hospital. Mr. and I visited the hospital first thing the following morning. We were admitted into the intensive care unit where we saw the condition of

this young I cannot describe how deeply affected Mr. and I were at seeing what was a healthy 23 year old lying in critical condition in a medically induced coma and hooked up to a breathing machine."

The claimant submitted a statement which is not dated but was received in the Office on December 28, 2018. Mr. attributed his claimed posttraumatic stress disorder to working on a for approximately three months, four deaths and accidents and incidents. He stated in relevant parts,

"The was the largest history, County history, and 14th largest in history. I worked non-stop, 14-hour days from August 1 to November 1, 2015 coordinating the operation and ensuring that the health and welfare of was provided for."

"The deaths of four at under my supervision have caused me severe emotional distress. [sic] The deaths listed below have caused my PTSD:

was killed in the line of duty on Oct 2, 2004. I was assigned to the as a Division Supervisor. was struck and killed by a approximately 100 yards from my location. I responded to the medical emergency by immediately responding to the fatality site. I took command of the to relieve the and served as acting for a week after death.

I received notification over the radio of a major traumatic injury and then ran over to the fatality site and arrived after 30 seconds. appeared to be mortally wounded with major head injury but a medical response was started. The force of the impact broke hard hart [sic] in two, cracked his skull, and caused large amount of blood loss. The facility site was chaotic because the area was on , many where in the area (some screaming's) and the area was blanked in smoke

I participated in the medical respond by carrying litter to an awaiting waiting ambulance. The ambulance was 0.25 mileages away on rough forest terrain with no trail. During the litter carry, heart had stopped beating and CPR was beginning.

We loaded nto the ambulance and he was pronounced dead 5 minutes later.

I took command of the so the original could rest and grieve. I was relieved of Command about 3 hours later by

 , 22, a who'd belonged to the since 2005, was involved in a serious single-car accident on Sunday, August 13th, 2005. was returning home after a 14-day assignment. He had just gotten off-duty and heading eastbound on Highway near the bridge when the

accident occurred. He was flown by Life Flight to University Medical Center in where he underwent brain surgery. He was then placed on life support but succumbed to his injuries on Wednesday afternoon. A CISD debriefing was held for staff yesterday morning. was also a with the out of

As acting I sat with and fellow as his family decided to terminate life support in Hospital in requested that some and me attend a meeting with the neurosurgeon. After the neurosurgeon briefed us, it was obvious that had sustained a severe [sic] head injury placing him in vegetative state. As a group we decided life-support support be ended and donate organs. After the decision was made, the conference room in the hospital was very chaotic with people crying, screaming, hugging, and pounding the wall. I was not prepared for the intense and angry emotions. was an active member of the who survived a in It seems unfair and absurd that in died in a traffic accident

I was sent to the hospital by my supervisor in official duty status as a federal government employee. I responded with one other agency employee, in an agency vehicle, and wearing a Uniform. It was an honor and privilege, to help with the such an important decision and provide support to the family."

"As I provided grief support to 35 employees, such as, and hosted 8 hours grief support and peer counselling."

a **June 2003** drowned in the River two weeks after he started work with our department. The Supervisor had taken the crew down to the River during peak spring runoff. didn't know how to swim and drowned in the high water almost instantly.

I was acting at the time, of the drowning. Therefore, I was notified on the ongoing search efforts by the of I responded to the ongoing search-and-rescue operation. I went to the Incident Command Post and participated in the search operations. I arranged the critical incident stress debrief for crew and provided direct emotional support."

a **died on Sunday July 29, 2018** battling the was member of our elite team of experienced called the stationed at I supervised the from 2015-2018."

"The serious injuries of _____ under my command have also deeply affected me."

"September 1990, I was performing _____ and _____ duties while assigned to the _____ at _____ I was marshalling a _____ into a landing when the _____ crashed 30 feet away from my position. _____ parts from the crashing _____ hit me. I immediately responded to the 8 _____ trapped in the _____ The mass causality incident (MCI) lasted two-three hours. We extricated 8 _____ from the _____ 6 of the victims had serious face trauma such as lacerations which bled prolifically."

"I can still remember the _____ flying (like a ragdoll) forward upon impact smashing into the _____ front window."

"1990-1996 _____ I responded to approximately 75 _____ and _____ operations as a team member of _____ The average operation consisted of medical responses in high-angle _____ remote wilderness extraction, or river environment. In most cases, the injuries were very severe: a broken pelvis, cardiac arrest, river drowning, compound bone fractures and mutilated human remains from climbing accidents."

"June 27, 1995, _____ received three degree burns during a _____ I was supervising a mop-up operation when _____ fell into a burning pit. _____ received three degree burns on her legs."

"June 26, 2012, _____ received _____ was struck by a _____ which severely broke his lower leg."

"June 27, 2013, _____ nearly lost his life due to Rhabdomyolysis and Heat Stroke. As _____ I was the first person to visit him in the ICU. _____ was near death with a 5 people fanatically trying to save _____ life. core body temperature was 107 and internal organs were failing. It's a miracle _____ survived, but the 23-year-old _____ is disabled for the rest of _____ life."

"June 30 2016, _____ fell ill with Rhabdomyolysis while performing duties for our _____ department."

"August 10-15, 1994. I was entrapped by a _____ during operations on the _____ in _____ To escape death and serious injury, I retreated to a small safety zone. We're surrounded by 100-300-foot flames for two hours. I emerged from the safety zone with some-minor lung injuries and mental trauma which has lasted for 25 years."

The Office properly denied Mr. _____ case based on the determination that he did not establish that he in fact sustained an injury. However, following the Office's decision the

claimant has submitted a detailed statement which identifies specific employment factors and incidents claimed to have caused or contributed to his psychiatric condition. Mr. also provided a statement which may corroborate some of the incidents he claimed caused his posttraumatic stress disorder. Therefore additional evidentiary development is required which necessitates a remand for resolution.

The Employees' Compensation Appeals Board has recognized the compensability of conditions related to stress resulting from situations in which an employee is trying to meet his or her position requirements.⁴

Where an employee experiences emotional stress in carrying out employment duties, and the medical evidence establishes that the disability resulted from his or her reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment, and would therefore come within the coverage of the Act. This is true where the employee's disability resulted from his or her emotional reaction to regular day-to-day or specially assigned work duties or to a requirement imposed by the employment.⁵ The Employees' Compensation Appeals Board has recognized the compensability of conditions related to stress resulting from situations in which an employee is trying to meet his or her position requirements.⁶

Many of the claimant's detailed allegations if established as factual could be considered compensable factors of employment within the performance of duty. However such a determination must be deferred until the employing agency has an opportunity to comment further on this issue.

Although Mr. submitted medical evidence in support of his claim, consideration of such evidence is being deferred until a compensable factor of employment has been verified and accepted by the Office.

The Office's regulations provide that, if the official superior has reason to disagree with any particular aspect of the injury as reported by the employee, the official superior shall submit to the Office a full written explanation specifying the areas of disagreement and the findings upon which the disagreement is based. The regulations also provide for the inclusion of supporting documentation, such as witness statements, records or any other relevant information.⁷ 20 CFR 10.117(b) provides that, in the absence of a full reply from the agency, OWCP may accept the claimant's allegations as factual.

On **remand**, the Office should forward a copy of January 17, 2018 statement and the claimant's statement, which was received in the Office on December 28, 2018. The Office should also request that the employing agency comment on the accuracy of the claimant's and Mr. statements. The agency should be advised that if it fails to provide the requested information, a decision will be made on the basis of available evidence

⁴ *Richard H. Ruth*, 49 ECAB 503 (1998).

⁵ *Carla E. Phillips*, 39 ECAB 1040 (1988); *Pauline Phillips*, 36 ECAB 377 (1984); *Lillian Cutler*

⁶ *Richard H. Ruth*, 49 ECAB 503 (1998).

⁷ 20 C.F.R. § 10.117(a).

and that the claimant's statements, if sufficiently clear and detailed, will be accepted as factual. Following this and any other development that the Office deems necessary for a proper adjudication of the case, the Office shall issue a *de novo* decision.

For the reasons set forth above, the decision of the District Office dated is June 12, 2018 is hereby set aside and the case file is **remanded** to the District Office for actions consistent with this decision

Issued:
Washington, D.C.

Hearing Representative
Branch of Hearings and Review
for
Director, Office of Workers'
Compensation Programs