

ADDITIONAL AND ALTERNATIVE REMEDIES FOR DISABLED EEO COMPLAINANTS AND MSPB APPELLANTS

Moderator: Steven E. Brown – Steven E. Brown, PLC

Speakers: Daniel M. Goodkin – Steven E. Brown, PLC

What is the FECA?

Simply put, it's the workers comp system for employees of the US Government (excludes active duty military). Unlike state workers' compensation, there is no apportionment. It is supposed to be a non-adversarial system, but anyone who has filed a claim knows that is not true.

Who is covered by FECA?

- Employees of all federal agencies in all three branches of government, and the Postal Service, including temporary and probationary employees, but not employees of contractors or of entities covered by other federal workers' compensation laws such as the Longshore & Harbor Workers Compensation Act, The Defense Base Act, the Outer Continental Shelf Lands Act, and the War Risk Hazards Act. There is also coverage for volunteers, certain non-federal law enforcement officers, etc.

What are the elements that must be proven in every FECA claim?

- (1) status as a federal employee covered by the Act; (2) fact of injury (including toxic exposures, repetitive motion activities, etc.); (3) injury occurring in the performance of duty (AOE/COE); (4) fact of medical condition (diagnosis, etc.); (5) causal relationship between the injury and the medical condition, such that the injury caused or contributed to the condition or aggravated a pre-existing medical condition.

What benefits can an employee receive with an approved FECA claim?

- Medical – all bills for treatment for the accepted condition. No co-pays.
- Wage loss – 66 2/3% of date-of-injury wage (does not include overtime) if no dependents, 75% with dependents; all benefits tax free
- Schedule award – cash payment for permanent impairment to an affected limb or specific organ
- Mandatory restoration rights if recovery takes place within one year. Priority placement after that.
- Vocational Rehabilitation.

Some positives about FECA claims

- Lots of money! No cap on benefits. No time limit on benefits.
- No fault
- No apportionment. Any contribution – no matter how slight – by the employment to the production of the injury or disease is sufficient to make the entire disability compensable, without apportionment. Beth P. Chaput, 37 ECAB 158 (1985). This means if you allege 30 things, and one is proven, and medical evidence shows it contributed, the whole condition is accepted as work-related.
- The injured worker is afforded nearly infinite “bites at the apple.” After each denial on the merits, a claimant can submit additional evidence and request that OWCP reconsider its decision, with no limit on the number of such requests that can be filed. See 20 C.F.R §10.600.
- Emotional conditions caused by the stress of the work duties themselves, including where the employee is trying to meet the regular or specially assigned duties of his/her position, are fully compensable. See, e.g., Robert J. Benetti and Department of Transportation, Federal Aviation Agency, [106 LRP 42673](#) (ECAB 2006).

Some negatives about FECA

- No right to judicial review, except in rare instances of constitutional rights violations. 5 U.S.C. §8128(b); Duncan v. Department of Labor, 49 Fed. Appx. 653 (8th Cir. 2002); Rodrigues v. Donovan, 769 F.2d 1344 (9th Cir. 1985); Czerkies v. USDOL, 73 F.3d 1435, 1439 (7th Cir. 1996).
- Inconsistent application of the law and interpretation of the facts by OWCP.
- Constant review by OWCP employees who try to terminate benefits.
- Excessive OWCP delays in taking actions and making decisions, with no penalty (such as interest added to benefits or payment of attorney fees) against the government for same.
- Difficulty communicating with and obtaining information from OWCP.

Some positives about FERS/CSRS

- Do not have to prove total disability. Only that the employee is disabled from his/her position.
- You can get FERS/CSRS even if you were fired for cause.
- Only requires yearly medical reports.
- Can work at a non-federal job and make up to 80% of the current pay-rate of your last federal position and still receive your annuity.
- Retirement application is not adjudicated by the employing agency.
- Employing agency has no interest in preventing disability retirement as the money for disability pensions does not come from the agency budget.

FECA and EEO

- If there is a finding of discrimination or harassment or HWE in an employees' EEO claim, that employee will likely have a solid FECA claim if there is a medical diagnosis resulting from the discrimination.
- Conversely, a finding of no discrimination does not prevent a FECA claim for a medical condition resulting from the Agency's actions. Martha L. Cook. 47 E.C.A.B. 226 (1995).
- OWCP factual findings are not binding on the EEOC.

FECA & MSPB

- Removal for cause does not necessarily terminate a claimant's right to wage loss compensation. Janice J. Green, Docket No. 96-874 ECAB (1998). In that case, the claimant was removed for cause while she was working 4 hours per day and collecting 4 hours of OWCP wage-loss compensation. When she was terminated for cause, OWCP cut off all of her wage-loss benefits. She appealed. The ECAB overturned OWCP's decision and determined that the claimant continued to be entitled to the 4 hours per day of wage-loss compensation, because she was unable to work for those four hours regardless of whether she had been removed.
- Error or abuse in a personnel matter (bad performance evaluation and failure to give step increase) may give rise to a workers' compensation stress claim. Janet I. Jones, 47 ECAB 385 (1996).
- OWCP's factual findings are not binding on the MSPB. New v. Department of Veterans Affairs, 142 F.3d 1259, 1264 (Fed. Cir. 1998)

FERS & EEO

- Filing a FERS application does not preclude a complaint for failure to accommodate.
- Filing a FERS application does not preclude a claim for back wages if you can show that the applicant would have been able to work with reasonable accommodation.

FECA and/or Disability Retirement Instead of EEO/MSPB

Non-hypothetical #1

- Aviation safety inspector
- Placed on admin leave after being arrested for selling steroids to individuals without a prescription online using his government computer.
- While on admin leave, fell down a staircase at work causing severe injury to his spine.
- Ultimately, he was terminated from his position due to misuse of a government computer.

Non-hypothetical #1 – What we did

- Filed a workers' compensation claim for his injury resulting from falling down the stairs while at work. Also filed a disability retirement application due to permanent medical restrictions resulting from his fall. Settled his union grievance in exchange for a clean record, attorney's fees and for the FAA agreeing to indicate on its portion of the injured worker's disability retirement application that he was medically unable to perform the essential functions of his position. Client agreed not to seek re-employment with the FAA at any point in the future. Workers' comp and disability retirement were both approved.

Non-hypo #2

- Secret Service Agent
- Threatened with having his security clearance revoked for carrying a gun onto a plane without proper clearance.
- It goes without saying that without security clearance, one cannot be a secret service agent.
- At around the same time, a hearing test revealed significant hearing loss.
- He had to qualify for shooting and was also involved in explosives demonstrations while an agent.

Non-hypo #2 – What we did

- Filed a disability retirement claim based on his hearing loss. While the issue of security clearance was still pending, his disability retirement came through, rendering the security clearance moot. Filed for and received a schedule award for permanent impairment due to his hearing loss. Then filed a wage loss claim for the difference between what he had made as a secret service agent and what he was making as a maintenance worker for a school district.

Non-hypo #3

- Fired from her job due to a disturbance while she was on board an aircraft as a passenger when she became drunk and threatened to open the emergency door during flight.
- She began seeing a psychiatrist after that incident occurred for major depression and alcoholism.
- She was assigned to administrative duties.
- Shortly thereafter, she was removed from her position for that incident.
- Air Traffic Controllers are considered medically disqualified if they use anti-depressants.

Non-hypo #3: What we did

- Her medical conditions were believed to be non-work related so we filed an application for disability retirement. Even though the medical reports showing she had a disabling condition were prepared after the incident, she was still an employee even though working light duty. Her disability retirement was granted.

FECA and/or Disability Retirement in addition to MSPB/EEO

Non-hypo #4

- Prison guard.
-
- His office was moved to a supply closet. He was interrupted while teaching a class and berated in front of his students. No other officer was treated that way.
- Wanted to file an EEO complaint because he felt he was discriminated against on the basis of not being a native Hawaiian.
- Eventually, he just picked up and moved back to California without a word to his agency.
- Doctor had told him he could not go back to that environment due to his severe depression.
- In the meantime, his agency removed him for abandoning his position.
- He filed an MSPB for wrongful termination.

Non-hypo #4: What we did

- Ultimately, he just wanted to be done with his employment and start over. We filed a disability retirement application and settled the MSPB wrongful termination case for a clean record and the agency agreeing to remove him for medical inability to perform his job due to his depression. His application for disability retirement was granted and he went back to school.

Non-hypo #5

- DHS examiner
- While on TDY for training about two months after initial hire, he came down with sepsis. Lost several fingers, both legs and his nose.
- Employer marked him AWOL during the pendency of his workers comp claim. After workers' comp claim was accepted and the EEO investigation started up, Agency removed him from service for AWOL 16 months after hire date.
- He filed an EEO claim for failure to accommodate and hostile work environment

Non-hypo #5: What we did

- He won his FECA claim while the EEO was pending. We then settled his EEO complaint for a clean record and the Agency's agreement to cancel the termination, delete all AWOL from his OPF and then remove him for medical reasons which will assist his disability retirement application which is still pending.

Non-hypo #6

- Computer Scientist
- Removed after 18+ years on the job, for poor performance
- Psychologist had written that she needed 20% more time to complete assignments because of her major depression.
- Filed an MSPB appeal.

Non-hypo #6 – What we did

- Settled her MSPB claim for the Agency's agreement to remove her for performance deficiencies believed to be related to her medical condition, a clean record, a small cash payment, restrictions on information to be given to prospective employers, and a statement that the Agency was unable to accommodate her disability. We then filed a disability retirement application which was granted.

FECA claim after successful EEO complaint

Non-hypo #7

- Postal letter carrier
- Postal worker in a small rural office (3 people) is given the silent treatment, has boxes slammed down near her and is constantly given dirty looks after injuring her shoulder. Co-worker blames her in conversations with customers for the mail not getting out on time.
- Works light duty until her psychologist tells her she needs to leave that environment due to anxiety and depression.
- Psychologist recommends against her going anywhere near the postal facility, even for a deposition.
- Finding of hostile work environment after an EEOC hearing.

Non-hypo #7: What we did

- After successful resolution of the EEO, we filed a FECA claim for an emotional condition caused by the hostile work environment. The claim was accepted and the claimant is being paid wage loss compensation. We also filed a disability retirement application based on her physical and psychological conditions, which was also granted.

Non-hypo #8

- Air Traffic Controller
- Worker was sexually assaulted in her home by a co-worker with whom she did not have a relationship outside of work.
- Successful in district court in proving harassment, discrimination and wrongful termination.
- Awarded maximum non-pecuniary damages (\$300,000) plus back pay plus front pay for seven years.

Non-hypo #8: What we did

- Filed a FECA claim based on the harassment and wrongful termination. Claim was accepted despite it having been 7 years since the incidents had occurred because in filing the EEO claim and District Court Claim, she alleged that she had suffered psychological damage as a result of the work related events. So, the Agency was on notice and the 3-year period for filing a claim was tolled. She is now entitled to the difference between the wages she currently makes and what she was making as an Air Traffic Controller.