

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WELLINGTON H. MITCHELL and DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, Silver Spring, Md.

*Docket No. 97-1380; Submitted on the Record;
Issued May 19, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an emotional condition in the performance of duty.

The case has been on appeal previously.¹ In a July 1, 1996 decision, the Board found that appellant had related his emotional condition to numerous incidents and events that began in 1979 and culminated in a November 9, 1990 incident in which appellant questioned his supervisor's request for documentation of requests for sick leave and two November 21, 1990 memoranda which addressed sick leave and his request for training. The Board concurred with the Office of Workers' Compensation Programs that the incidents cited by appellant which concerned denial of promotion, the request for documentation of sick leave, suspensions, reprimands, performance evaluations and performance improvement plans were administrative matters that were not within the performance of appellant's assigned duties. The Board, however, found that the Office had not completed its consideration of appellant's claim. The Board noted that appellant had submitted evidence that he had been subjected to harassment in the form of a decision by a U.S. District Court that found that the denial of a promotion of appellant in 1980, in favor of a younger, less qualified male of another race, was a violation of his rights. The District Court ordered that appellant be promoted retroactively with back pay and subsequently issued a permanent injunction against the employing establishment, forbidding it from engaging in any harassment or discrimination against appellant. The Board found that the decision of the District Court was evidence of error or abuse by the employing establishment in at least part of the administration actions cited by appellant as the cause of his emotional condition. It stated that the Office had erred in not considering this evidence in the proper context in denying appellant's claim. The Board also noted that the Office had failed to comply with the instructions of an Office hearing representative who ordered the Office to obtain signed statements from appellant's supervisors and coworkers on whether the incidents occurred as alleged. The Board indicated that although the Office had found that the incidents did not occur in the performance of duty, appellant had alleged such actions as abusive language by a superior

¹ Docket No. 94-1624 (issued July 1, 1996). The history of the case is contained in the prior decision and is incorporated by reference.

and denial of resources and training necessary to complete assigned duties would be considered error or abuse if shown to have occurred. The Board, therefore, remanded the case for further development along the lines previously ordered by the Office hearing representative.

In compliance with the Board's decision, the Office sent letters to former coworkers and supervisors cited by appellant, asking them to review appellant's statement of alleged incidents of harassment and discrimination and comment on his statement. In a September 25, 1996 response, James Ellickson, a former supervisor, requested additional time to respond but subsequently failed to do so. In a September 30, 1996 letter, C.S. James, a former supervisor, indicated that he could not recall the facts that gave rise to appellant's allegations and did not have any files or records relating to appellant's case. In an October 1, 1996 letter, Richard K. Thigpen, another former supervisor, stated that he had reviewed appellant's statement and found no merit to the incidents where he was listed as the supervisor. He declared that the adverse actions taken were the direct result of appellant's actions and job performance. In an October 8, 1996 letter, William C. Burkhart, a former supervisor, indicated that he could not recall the denial of administrative leave or the denial of job-related training courses for appellant at any time in the period November 17, 1980 through November 24, 1983.

In an October 11, 1996 letter, Benjamin Watkins, a former superior, submitted copies of a July 25, 1988 proposal by Mr. Ellickson to suspend appellant and the statements of coworkers in support of the proposal. The coworkers stated that appellant was looking for a printout of work he had done and began cursing and yelling when he could not find it. The coworkers reported that appellant insulted them and others and became disruptive. Mr. Ellickson noted that appellant had been reprimanded on November 20, 1987 for abusive and threatening behavior. Appellant refused to sign the notice of suspension and alleged that the statements of the coworkers were false and deceptive.

In a November 21, 1996 decision, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that the activities or employment factors occurred in the performance of duty. In an accompanying memorandum to the Director of the Office, a senior Office claims examiner concluded that the documentation submitted by Benjamin Watkins indicated that appellant's suspension for five days after the incident with three coworkers was warranted and therefore was not a factor of his employment. The senior claims examiner stated that, because of the general response or lack of response from other coworkers or supervisors, appellant's claims of adverse actions for the other incidents involved could not be proven or disproved. She noted that appellant had claimed in part that he was verbally abused by his supervisors and coworkers. She indicated, however, that the evidence relating to the incident involving three coworkers seriously weakened appellant's argument that he suffered verbal abuse. She recommended that appellant's claim be denied because a thorough review of the evidence failed to support appellant's claim.

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

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act. 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 frustration from not being permitted to work in a particular environment or to hold a particular position. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.² When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.³ In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.⁴

In its consideration of appellant's claim the Office only considered the statements of witnesses it had solicited. The Office failed to consider the decision of the U.S. District Court which found that appellant had been subjected to discrimination in the denial of a promotion even though it was directed to do so by the Board's prior decision in this case. The Court's decision is evidence of error or abuse by the employing establishment in carrying out a promotion, an administrative action. This evidence must be considered in determining whether appellant has established that there existed at least one compensable factor of employment as part of establishing that he sustained an emotional condition in the performance of duty. The case must therefore be remanded for consideration of this evidence, as previously directed by the Board.

The Office denied appellant's claim on the grounds that, as many of the coworkers or supervisors did not provide a response, appellant's allegations regarding the incidents he cited could not be proven or disproved and therefore he could not establish that there existed compensable factors of employment which caused his emotional condition. However, the Office's procedures provide that when the employing establishment has been asked to comment on appellant's case and has failed to do so, an Office claims examiner may accept appellant's claim as factual.⁵ The Office acknowledged that it did not receive responses or received only general responses from coworkers and former supervisors of the employing establishment in reference to appellant's accounts of incidents which he claimed caused his emotional condition. The Office claims examiner therefore retains discretion to determine whether to accept appellant's account of the incidents as factual. In the absence of specific, detailed responses necessary to resolve the issue, the Office must fully exercise this discretion. The Office exercised this discretion only in regard to appellant's claim of verbal abuse on several occasions. The Office pointed out that other evidence of record from witnesses showed that appellant was verbally abusive to coworkers and supervisors which cast doubt on his claim that he was

² *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984); *Dario G. Gonzalez*, 33 ECAB 119 (1982); *Raymond S. Cordova*, 32 ECAB 1005 (1981); *John Robert Wilson*, 30 ECAB 384 (1979).

⁴ *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 566 (1991).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Occupational Illness*, Chapter 2.806.5(e) (April 1993).

verbally abused on those occasions. While the Office exercise of discretion was appropriate to the incidents of verbal abuse raised by appellant, the Office did not exercise its discretion in other alleged incidents of verbal abuse or other claims of appellant that he was subjected to discrimination or harassment in the denial of training, in his performance evaluations and in the proposal to place him on a performance improvement plan. The Office must exercise its discretion to determine, in the absence of any meaningful response from the employing establishment or its employees, whether to accept appellant's statement as factual.

On remand, the Office should consider the District Court decision finding that appellant was subjected to discrimination in promotion. The Office should also exercise its discretion in determining whether to accept appellant's statements, in part or in full, as factual. After further development as it may find necessary the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated November 21, 1996 is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
May 19, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member