

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSE A. SOLEDAD and DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, El Paso, TX

*Docket No. 99-1312; Submitted on the Record;
Issued October 26, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

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 regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.¹ 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.²

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.³ This burden includes the submission of a detailed

¹ 5 U.S.C. §§ 8101-8193.

² See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁴

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, 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.⁵ If a claimant does implicate a factor of employment, the Office 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, the Office must base its decision on an analysis of the medical evidence.⁶

In April 1997 appellant, then a 42-year-old supervisory customs inspector, filed a claim alleging that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated December 2, 1997, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. By decision dated January 14, 1999, the Office affirmed its December 2, 1997 decision. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that he was subjected to harassment and discrimination by a supervisor, Gurdil Dhillon. Appellant alleged that Mr. Dhillon told another supervisor, Armando Jordan, that he was unprofessional, incompetent and unfit for his work unit. Appellant claimed that Mr. Jordan told him that Mr. Dhillon had advised the district Director that his work "did not meet standards." He alleged that Mr. Dhillon exhibited a pattern of discriminating against minorities and that he was treated differently from nonminorities, particularly with regard to his transfer to another work unit in April 1996. Appellant asserted that after he was transferred to another work unit, his coworkers made degrading comments such as calling him ignorant and incompetent.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.⁷ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.⁸

⁴ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁵ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁶ *Id.*

⁷ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

⁸ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

In the present case, appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.⁹ He submitted a March 21, 1997 statement in which Mr. Jordan indicated that Mr. Dhillon had received a report from the Office of operational efficiency which was critical of operations in the cargo area. Mr. Jordan indicated that, based on the report, Mr. Dhillon told him that appellant was “incompetent, unprofessional and not fit to be in cargo.” However, these comments were not made to appellant and appellant has not otherwise established that comments of such a nature would rise to the level of harassment.¹⁰ Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the work place will give rise to coverage under the Act.¹¹ Mr. Jordan generally alleged that Mr. Dhillon discriminated against minorities but he did not provide any specific evidence of discrimination against appellant. The record also contains a May 21, 1997 statement in which Margie Gutierrez, a supervisor, indicated that Mr. Dhillon made critical comments about appellant, but she did not indicate that the comments were made to appellant or provide sufficient detail regarding their content.¹²

Appellant alleged that supervisors and coworkers made other statements and engaged in actions which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹³ He filed an Equal Employment Opportunity claim with respect to some of these matters, but the record does not contain any results of the claim. Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant claimed that in March 1996 he heard rumors that he would be transferred to another work unit and demoted. He alleged that in March 1996 Mr. Dhillon unfairly requested that he be transferred from his work unit and asserted that the transfer which occurred in April 1996 was improper.¹⁴ The Board has held that the handling of promotions or transfers are not compensable factors of employment as they do not involve the employee’s ability to perform his regular or specially assigned work duties but rather constitute his desire to work in a different position.¹⁵

⁹ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹⁰ See *Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994) (where the alleged abusive comment was not made in the employee’s presence).

¹¹ *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

¹² Moreover, Ms. Gutierrez did not sign the statement.

¹³ See *William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁴ Appellant indicated that his work performance was above satisfactory and that he had not been advised of any deficiencies.

¹⁵ *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

Moreover, although the handling of transfers is generally related to the employment, it is an administrative function of the employer and not a duty of the employee. However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁶ However, appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to his transfer in April 1996.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹⁷

The decision of the Office of Workers' Compensation Programs dated January 14, 1999 is affirmed.

Dated, Washington, DC
October 26, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

¹⁶ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁷ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).