

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK A. FRANKLIN and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Springfield Gardens, NY

*Docket No. 02-710; Submitted on the Record;
Issued September 17, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty causally related to factors of his federal employment; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further reconsideration constituted an abuse of discretion.

The Office acknowledged that on August 1, 2000 it had received a claim for compensation benefits from appellant, then a 39-year-old air traffic control specialist, alleging that he suffered from a stress condition causally related to factors of his federal employment. The date of injury for appellant's claim was June 28, 2000. Appellant stopped work the same day.¹

In an undated statement, appellant asserted that he filed his June 28, 2000 claim for unfair, inequitable and discriminatory treatment in the area of training and development which created a hostile, offensive and unhealthy work environment. Appellant explained that the management team at Philadelphia Tower had decided to train three other people and failed to allow him the same opportunity. Appellant indicated that of the three people whom management allowed to train, one individual had arrived the same time he did and the other people had arrived approximately two months after him. He asserted that the person who had started with him was already certified and the others were actively training. Appellant indicated that the people management had trained or were training were white and he was black. He advised that, although he had requested an explanation, no factual reason was given for this decision.

¹ It is unclear from the present record whether appellant returned to work. In an undated memorandum to John F. Kelley entitled "update/information exchange," appellant indicated that he was requesting sick leave until October 7, 2000 and would return to work October 10, 2000. An October 23, 2000 letter, from Luvenia Nix, Injury Compensation Specialist, indicated that appellant would be applying for disability retirement. In another undated memorandum to Mr. Kelley entitled "information exchange/update," appellant indicated that he was requesting sick leave until December 30, 2000.

Appellant further stated that all attempts to settle this dispute have been unsuccessful. He advised that he had started the Equal Employment Opportunity (EEO) process, but indicated that there had been no resolution to date. Appellant stated that his reaction to the entire process could be found in the medical evidence. He indicated that his returning to a hostile, offensive and discriminatory work environment prior to the issue being resolved was extremely detrimental to appellant's health and well-being and, most importantly, adversely affected the performance of his duties. In an undated memorandum, appellant indicated that he was in the process of filing a reprisal complaint with the EEO after being informed that front office personnel at Philadelphia Tower had made false and damaging comments about him to an outside agency regarding his work record. Appellant indicated his belief that this was in retaliation for his filing a formal EEO complaint.

In a July 6, 2000 statement, appellant's first line supervisor, Mr. Kelley, indicated that appellant had not been trained since April and had privately and informally told him on at least two occasions that he was in no hurry to begin training. Mr. Kelley indicated that sometime in June, appellant had indicated that he was a little upset about his training status, especially since some of the developmentals who had reported to the facility at a date later than him had begun radar training. A meeting was held on June 23, 2000 with appellant and appellant's representative regarding appellant's feelings towards the training program. Mr. Kelley indicated that he had agreed to look into the matter and provide an answer in writing. Mr. Kelley further indicated that he had begun to look into the matter on his days off and when he returned after two days of leave and two regular days off, appellant had filed a Form CA-1 and returned home. Mr. Kelley further indicated that, during another meeting, which also took place on June 23, 2000 a training plan was initiated for appellant to begin training in the Philadelphia Tracon. The daily training plan work sheet at the Tracon supervisor desk reflected that appellant was in training status for the next few days following the meeting. Mr. Kelley advised that, since pay period 8, appellant was scheduled to work for 55 days, but was absent from the facility for 33 days or 60 percent of the time.

In a letter dated July 7, 2000, the employing establishment controverted the claim. LeRoy Johnson, manager, Philadelphia Tower, indicated that on June 23, 2000 appellant attended a plan for training meeting with his supervisor and other training team members. A decision to start his radar training at the final Vector position was reached after he completed two hours of on-the-job familiarization at that position. Two workdays later, appellant filed the Form CA-1. Mr. Johnson further indicated that appellant had been absent from work for 60 percent of his scheduled workdays, since completing his prior training assignment on March 29, 2000. He indicated that, in order for an employee to receive fair and equitable training, the employee must be available to receive it.

In a September 1, 2000 letter, Mr. Johnson further related that, on August 14, 2000, appellant was informed by letter from Mr. Kelley that he could return to work in a useful nonair traffic control capacity. Additionally, Mr. Johnson indicated that, on June 28, 2000, when appellant filed his claim, another supervisor had observed appellant laughing and had indicated

his surprise when he found out that appellant was in fact departing on traumatic leave. Copies of such material were attached.²

In an undated memorandum to Mr. Kelley, appellant indicated that he rejected Mr. Kelley's offer to be assigned nonair traffic control duties as indicated in Mr. Kelley's August 14, 2000 letter.

By decision dated January 26, 2001, the Office denied appellant's emotional condition claim finding that the evidence failed to establish that appellant's condition arose out of the performance of duty. The Office found that appellant failed to establish any compensable employment factors. Specifically, the Office found that he failed to substantiate his complaint that he was discriminated against by the employing establishment. The Office further found that there was no evidence to support that the employing establishment acted abusively or in error in regards to providing training or its training programs.

In a letter dated February 11, 2001, appellant requested an oral hearing, which was held on June 29, 2001. Additional evidence was not submitted. By decision dated September 20, 2001, an Office hearing representative found that appellant did not establish any compensable employment factors and affirmed the Office's decision dated January 26, 2001.

By an undated letter, which the Office received January 12, 2001, appellant requested reconsideration. He submitted evidence to show that an EEO hearing was pending and that it would determine whether discrimination had occurred. Also submitted was a form indicating that a representative from the employing establishment had been designated to handle all EEO matters. Appellant indicated that he hoped the hearing would be held prior to January 2002.

In a decision dated November 5, 2001, the Office denied merit review of appellant's claim on the grounds that the evidence submitted in support of appellant's request for reconsideration was irrelevant and immaterial.

The Board finds that appellant has failed to meet his burden of proof in establishing that he developed 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 of 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.³ On the other hand, the disability is not covered where it results from such factors as an

² Although appellant had indicated that based on information he received from Ms. Nix that his 45-day traumatic leave period ended on August 23, 2000 the employing establishment advised that Ms. Nix, their Regional Benefits Specialist, had advised them that she had informed appellant that his traumatic leave period expired July 24, 2000.

³ 5 U.S.C. §§ 8101-8193.

employee's fear of a reduction-in force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.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

Furthermore, 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.⁷ This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁸

In this case, the Office found that appellant failed to identify any compensable factors of employment. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

It is apparent from appellant's statements that he perceived he was discriminated against as he did not receive training at the time and manner that he felt he should have and that other employees who entered employment at the same time that he did and after he did received training before he did. It is also apparent from appellant's statements that he also perceived that he worked in a hostile, offensive and unhealthy environment. 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 are not compensable under the Act.⁹ In the present case, appellant made general allegations of actions which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that such actions actually occurred.¹⁰ Additionally, the record is

⁴ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

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

⁶ *Id.*

⁷ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁸ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁰ See *William P. George*, 43 ECAB 1159, 1167 (1992).

devoid of a final decision, by the EEO pertaining to any findings of harassment or discrimination. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant has also made allegations of being passed over for training. Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.¹¹ Administrative and personnel matters include matters involving the training or discipline of employees.¹² As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Act.¹³ However, to the extent that the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.¹⁴ In the instant case, appellant has failed to demonstrate that the employing establishment either erred or acted abusively with regards to his training or the training program. The record indicates that appellant had not been trained since the beginning of April 2000. The employing establishment indicated that, during that time, he was scheduled to work for 55 days, but was absent from the facility for 33 days or 60 percent of the time. The employing establishment opined that, in order for appellant to receive fair and equitable training, he must be available to receive it. The record further reflects that appellant had indicated to his supervisor, Mr. Kelley, on at least two occasions that he was in no hurry to begin training. When appellant first indicated that he was upset about his training status in June 2000, the employing establishment had arranged a meeting on June 23, 2000 to discuss appellant's feelings of discriminatory treatment and had advised that the matter would be investigated and he would receive a written answer. Appellant's supervisor indicated that he was off work for four days, but had started looking into the matter. Four days after the meeting and prior to receiving a response from the employing establishment, appellant filed his Form CA-1 claim on June 28, 2000. The record further reflects that, in another June 23, 2000 meeting, a training plan was initiated for appellant to begin in the Philadelphia Tracon, where he was involved in for a few days prior to filing his Form CA-1 claim on June 28, 2000. Accordingly, there is no evidence to support that the employing establishment acted abusively or in error regarding its training program. In fact, the employing establishment had indicated it would investigate the matter, had placed appellant in a training program wherein he was involved for a few days and had even offered appellant the opportunity to return to work and be assigned nonair traffic control duties, which appellant had declined.

As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record.¹⁵ Inasmuch as he failed to implicate any compensable

¹¹ See *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB ____ (Docket No. 00-743, issued February 8, 2001).

¹² *James E. Norris*, 52 ECAB ____ (Docket No. 98-2293, issued October 5, 2000).

¹³ *Dinna M. Ramirez*, 48 ECAB 308, 313 (1997).

¹⁴ *Id.*

¹⁵ *Gary M. Carlo*, 47 ECAB 299, 305 (1996).

factors of employment, the Office properly denied his claim without addressing the medical evidence of record.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁶ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.¹⁷ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his application for review within one year of the date of that decision.¹⁸ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹⁹

Appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law or a fact not previously considered by the Office. Accordingly, he may not obtain a merit review of his claim based on the first or second criterion set forth above.

Appellant, instead, offered several enclosures as additional evidence. This evidence, however, fails to satisfy the third criterion above. It is immaterial to the denial of appellant's claim that an EEO complaint is pending. What is needed to support appellant's allegations is a favorable EEO decision or finding that supports error or abuse by the supervisor in an administrative or personnel matter. A pending EEO complaint offers no such support.

As appellant's request for reconsideration fails to satisfy at least one of the three criteria for obtaining a merit review of his claim, the Board finds that the Office properly denied his request.

¹⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. §§ 10.606(b)(2).

¹⁸ 20 C.F.R. § 10.607(a).

¹⁹ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

The November 5 and September 20, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 17, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member