U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

---

In the Matter of FLOYD O. KEDNAY and DEPARTMENT OF AGRICULTURE, PACIFIC NORTHWEST RESEARCH STATION, Portland, OR

*Docket No. 03-1181; Submitted on the Record;*
*Issued July 18, 2003*

---

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

On April 6, 2002 appellant, a former forestry technician, born May 21, 1949, filed an occupational disease claim alleging that the actions of the employing establishment aggravated his preexisting post-traumatic stress disorder. He listed December 20, 2001 as the date of injury. Appellant stopped work on November 21, 2000 and never returned.

According to the information submitted with the claim, appellant attributed his emotional condition to the refusal of the employing establishment to let him participate in fighting wildfires during a severe fire season. The record reflects that he was ultimately terminated for being absent without leave (AWOL). The Office received personnel documentation regarding the forestry technician position and work-related correspondence between supervisors regarding appellant's initiative to seek training as a firefighting and his absence from work. The Office also received a portion of appellant's military records, which outlined his prior military service in Vietnam.

In a letter dated May 29, 2002, Susan Willits, program manager for the employing establishment indicated that, in general, employees of the Pacific Northwest Research Station (PNW) are not expected to participate in fighting wildfires and fighting fires was not one of the duties appellant was hired to perform. She indicated, however, that when the PNW station was asked if there were employees with a fire fighting background that could be made available during fire season, the names of two employees, including appellant's were provided to the command office. Ms. Willits indicated that the understanding, at that time, was that if the employees were needed by the forest service fire organization, the named employees would be notified through the established chain of command with the research station. She noted, however, that appellant did not follow the established process.

In an August 28, 2000 letter, Melissa Patterson, the supervisor who signed appellant's claim form, stated that during the week of August 14, 2000 while she was away from the crew on vacation, appellant had called fire dispatch at the Gifford Pinchot National Forest and expressed both his and another employee's interest in fighting fires. She stated that the supervisor that stood in as crew leader in her absence had informed appellant to wait for instructions from his supervisor. Ms. Patterson indicated that appellant later requested August 21, 2000 off, which she granted for assumedly personal reasons. She noted that appellant requested additional time off and she later learned that appellant had an interest in getting his "red card" to fight fires. Ms. Patterson indicated that she spoke with another supervisor about the time appellant requested off work and that she felt that their work took priority over appellant taking the test, since they were already behind schedule and that she would rather that he work than to take off for this purpose. She stated that she discussed with appellant his interest in fighting fires and indicated that although appellant generally had her support, he should wait for his supervisors to make a decision and should not pursue it on his own. Ms. Patterson noted that appellant responded that he believed that he was intentionally being kept from being sent to a fire and that he thought it was arrogant to think that the research that they do was more important than fighting fires. The supervisor concluded that she believed appellant genuinely felt that it was his obligation to make himself and his skills as a helicopter crewperson available to fight fires and that he was willing to take the risks associated with defying his supervisor's orders. Ms. Patterson noted that she informed appellant that if he went to a fire on his own without his program's permission that he might be considered AWOL. She stated that she believed appellant understood that what he was doing was wrong but that he felt morally obligated to help the fire fighting efforts.

The August 28, 2000 letter from Ms. Patterson contained notations, apparently from appellant, in response to the supervisor's allegations. Regarding the time he allegedly was granted in August, appellant wrote that there was a "contradiction" regarding the contention that their program was behind schedule. He questioned that if they were behind, why were the employees able to take vacation for personal reasons but not to assist with a national emergency. Regarding his supervisor's comment about appellant's motivation to fight fires, appellant wrote that he had explained to several supervisors why he was interested and stated that he "freaked out" when someone died in his place on a helicopter in Vietnam and felt "helpless, hopeless and very angry."

The Office received a September 1, 2000 memorandum from Dale Baer to other supervisors with the employing establishment, which discussed that appellant had been absent for an unspecified period of time to pursue fire fighting without permission. The memorandum indicated that appellant was a valuable field employee and that he would eventually have been granted official permission to fight fires; however, if appellant chose to go around the direct request of his supervisor to go fight a fire, he should, when the fire season ended find another job that suited his fire fighting needs and cease his employment. The memorandum also contained hand written notations from appellant. He indicated his belief that his supervisors had lied about eventually granting him permission to fight fires and that although he had heard that he was on a "list" with other employees, none of those employees on the "list" were called to fight a fire that season. Appellant further indicated that he was under constant and increasing stress from being lied to about his availability. He stated: "I explained my fear about circumstances in Vietnam being repeated and my supervisors continued with the lie. "Upon my return from the fire, I stopped by [Mr. Baer's] office. He got up from his chair and walked away without saying a

word. Upon my return to the field, [Ms. Patterson] went on nonstop about how I was to be punished."

The Office further received a November 16, 2000 memorandum addressed to appellant from Ms. Patterson, which noted that appellant had been absent since November 16, 2000 without authorization. She stated that appellant last worked on September 12, 2000 when he told her that he was too stressed and could not work and then left their field site for Portland, Oregon. Ms. Patterson noted that on October 2, 2000, she spoke with appellant who said that he expected to return to work within the next few days; however, he did not return. She stated that on October 10, 2000, she spoke with appellant and requested a note from his doctor validating his absence and appellant indicated that he would call her back later and let her know when he would return to duty. Ms. Patterson noted that on October 16, 2000 she left a message on appellant's voice mail indicating that he was out of sick leave and that she was documenting him on annual leave. She indicated that appellant never responded. Ms. Patterson stated that she had allowed appellant to use sick and annual leave without the appropriate documentation and that he had continued his leave without authorization. She advised appellant that he would be charged as AWOL.

The Office further received a proposal for termination of appellant dated December 21, 2000 for being AWOL and a letter from appellant dated February 15, 2001, which indicated that he tendered his resignation at the request of his supervisor. His resignation letter contained additional hand written notes which stated "[w]hat gets me is that I lost my career and mental health helping my country, now those same supervisors that fiddled around while America burned are flying American flags these days!"

By decision dated July 12, 2002, the Office denied appellant's emotional condition claim. The Office found that the evidence was insufficient to establish that the emotional condition arose out of and in the course of employment because the emotional reaction appellant experienced as a result of his employing establishment's decision not to assign appellant to fight a forest fire did not constitute a compensable factor of employment.

In a letter received August 5, 2002, appellant requested an oral hearing scheduled for February 12, 2003. By decision dated February 24, 2003, the Office determined that appellant abandoned his request for a hearing.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to establish that he sustained an emotional condition while in the performance of duty.

The Board must, thus, initially review whether the alleged incidents and conditions of employment are covered employment factors under the terms of the Federal Employees' Compensation Act.

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 illness has some connection with the employment, but nevertheless does not come within the coverage of the Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of 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 frustration from not being permitted to work in a particular environment or hold a particular position.[1]

Appellant alleged that he was motivated to work as a forestfighter because of an incident that occurred during his military service in Vietnam and that, although he expressed his desire to fight fires during a national emergency to his supervisors, he was never called to serve, which caused him stress and aggravation of his post-traumatic stress condition. The Board finds that any emotional reaction arising from appellant being denied an official fire fighting assignment does not arise from the performance of his duties, but rather arises from appellant's desire to work in a particular position, which is not covered under the Act.

Appellant suggested that the employing establishment acted improperly in placing him on AWOL. The Board finds that this allegation relates to an administrative or personnel matter, unrelated to the employee's regular or specially assigned work duties and does not fall within the coverage of the Act.[2] Although discipline is generally related to the employment, it is an administrative function of the employer and not a duty of the employee.[3] 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.[4] Appellant has not shown that the employing establishment committed error or abuse in connection with its handling of his workload. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Based on the statements of Ms. Willits, Ms. Patterson and the memorandum from Mr. Baer of record, the Board finds that the employing establishment did not err or act abusively in expressing their dissatisfaction that appellant pursued fire service without approval, for documenting appellant as AWOL and ultimately proposing to terminate him for being AWOL. It is clear from the record that appellant's supervisors were willing to allow appellant to train and work as a firefighter, since he had relevant work experience, had the fire service called him for duty. Appellant's name was submitted and the employing establishment was advised that if appellant were needed his office would be notified. He had a personal desire to work as a forest firefighter and he decided, without approval from the employing establishment, to train and serve in this capacity. Appellant took leave for his personal pursuit, with full knowledge that supervisors disapproved of him circumventing the process of being officially chosen for fire service. His supervisors notified appellant that documentation was required when taking leave and once his authorized leave expired he would be charged AWOL if he did not return to work. Appellant has not submitted any evidence that the employing establishment erred or acted

[1] *Lillian Cutler*, 28 ECAB 125 (1976).

[2] *See Janet I. Jones,* 47 ECAB 345, 347 (1996), *Jimmy Gilbreath,* 44 ECAB 555, 558 (1993); *Apple Gate,* 41 ECAB 581, 588 (1990); *Joseph C. DeDonato,* 39 ECAB 1260, 1266,-67 (1988).

[3] *Id.*

[4] *See Richard J. Dube,* 42 ECAB 916, 920 (1991).

abusively in handling these administrative matters, thus, appellant has failed to establish a compensable employment factor under the Act.[5]

As appellant has not established any compensable factors of his federal employment that caused the aggravation of his emotional condition, he has failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

The Board further finds that the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

In finding that appellant abandoned his August 5, 2002 request for an oral hearing before an Office hearing representative, the Office noted that the hearing was scheduled for February 12, 2003, that appellant received written notification of the hearing 30 days in advance, that appellant failed to appear and that the record contained no evidence that appellant contacted the Office to explain his failure to appear.

The legal authority governing abandonment of hearings rests with the Office's procedure manual. Chapter 2.1601.6.e of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests.
>
> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
>
> "Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district Office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.
>
> "(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.
>
> "This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[6]

[5] As appellant has not implicated a compenable factor of employment, it is not necessary to review the medical evidence of record. *Martha L. Watson*, 46 ECAB 407 (1995).

[6] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

In the present case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on February 12, 2003. The record shows that the Office mailed appropriate notice to appellant at his last known address. The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

The February 24, 2003 and July 12, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
July 18, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member