U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of SALVATORE GIOVE and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Renton, WA

*Docket No. 02-463; Submitted on the Record;*
*Issued May 1, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, 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.

This is the second appeal in this case.[1] The Board issued a decision on July 3, 2001 in which, it set aside the February 28, 2000 Office of Workers' Compensation Programs decision and remanded the case for further review. The Board found that the refusal of the Office to reopen appellant's case for reconsideration of his claim constituted an abuse of discretion. The Board found that the evidence submitted by appellant in support of his reconsideration request constituted new and relevant evidence and directed the Office to conduct a merit review of appellant's claim.

On August 31, 1998 appellant, then a 38-year-old air traffic controller, filed a claim alleging that he sustained post-traumatic stress disorder in the performance of duty.[2] He alleged that he experienced stress because supervisors approved unsafe practices in directing airplane traffic which increased the likelihood of midair collisions and runway accidents. Appellant alleged that the fatal crash of a plane attempting to land at the airport where he worked could have been avoided if his supervisor had not made safety errors. By decision dated February 18, 1999, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors. By decision dated February 28, 2000, the Office affirmed its February 18, 2000 decision. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

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[1] Docket No. 00-2013 (issued July 3, 2001).

[2] The employing establishment advised appellant by letter dated August 3, 1998 of the proposed termination of his employment due to various disciplinary infractions and later terminated his employment effective September 4, 1998.

On remand, the Office conducted a merit review of appellant's claim. By decision dated October 15, 2001, the Office determined that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty. The Office reviewed the evidence which it had been directed to review by the Board and found that appellant had not established any compensable employment factors.

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.[3] 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.[4]

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.[5] 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.[6]

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.[7] 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.[8]

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[3] 5 U.S.C. §§ 8101-8193.

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

[5] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[6] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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

[8] *Id.*

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. 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 claimed that he sustained stress because the employing establishment instructed air traffic controllers to engage in unsafe practices and ignored his warnings of the danger posed by such actions. He alleged that these practices were contrary to air traffic control procedures contained in the employing establishment manuals. He submitted documents in which he detailed his objections to how various airplane landing and take-off incidents were handled.[9] These documents contain descriptions of incidents concerning aircraft between 1987 and 1998. Appellant alleged that at various unsafe practices were approved by the employing establishment involving such matters as aircraft entry altitude, management of the spacing between aircraft, approval of flight plans and maneuvers and the movement of aircraft on the runway.

Appellant claimed that he developed stress because the employing establishment engaged in various errors and oversights which led to the crash on October 31, 1992 of an airplane which was attempting to land at the airport where he worked.[10] He indicated that in mid October 1992 he gave landing instructions to a pilot from the airline which was involved in the October 31, 1992 crash. Appellant claimed that he denied the pilot's request to enter at a lower altitude and that the pilot indicated he had been allowed to make the maneuver on the day before. He asserted that the fact that the employing establishment had previously approved an inappropriate flight plan for the airline contributed to the crash. Appellant alleged that he warned his coworkers about following safe procedures for maintaining safe altitude and clearing pilots for an instrument approach, but that nothing was done to address his concerns. He suggested that a National Transportation Safety Board (NTSB) ruling showed that the employing establishment had erred in connection with the October 31, 1992 crash. Appellant has not alleged that he was on duty at the time of the fatal October 31, 1992 crash. The record indicates that he learned of the crash from a news broadcast on the following day.

Appellant claimed that he received an unfair performance appraisal because he was involved in National Guard service. He indicated that he was unfairly disciplined on several occasions, including times when he was unfairly charged with tampering with official documents, improperly using an elevator and taking leave under false pretenses. Appellant asserted that supervisors improperly handled his work schedule and made it difficult for him to use leave for National Guard service. He also claimed that he was not given adequate training for his position and that he was wrongfully terminated from the employing establishment.

[9] Some of these documents indicate that appellant was the air traffic controller involved in the incidents and other documents are vague as to whether he was directly involved. A number of these descriptions are contained on forms related to the "National Aeronautics and Space Administration Aviation Safety Reporting System." In his Office claim, appellant has not specifically alleged that any incident in which he was directly involved caused his alleged emotional condition.

[10] It appears that the crash resulted in three deaths.

The Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[11] Although the management of work assignments and safety matters and the handling of performance evaluations, disciplinary actions, training and leave usage, is generally related to the employment, they are administrative functions of the employer and not duties of the employee.[12] 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.[13]

Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse in connection with these administrative matters. Most of his claims related to his assertions that the employing establishment engaged in actions which compromised flight safety. However, he did not submit sufficient evidence to support this aspect of his claim. Appellant submitted newspaper articles and excerpts from safety manuals, but he did not adequately explain how these materials of general application established error on the part of the employing establishment, nor did he submit the findings of regulatory agencies, such as the NTSB, to support his claims of wrongdoing, either with respect to the October 31, 1992 accident or other instances when he felt the employing establishment acted in an unsafe manner.[14] Appellant also did not submit sufficient evidence to establish error or abuse by the employing establishment with respect to performance evaluations, disciplinary actions, training, and leave usage.[15] He apparently filed grievances regarding some of these matters, but the record does not contain any decision showing the employing establishment's wrongdoing. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant alleged that prior to the October 31, 1992 accident supervisors and coworkers "severely criticized and ridiculed" him for restricting pilots to safe altitudes in order to avoid accidents. He claimed that more senior coworkers yelled at him and used vulgar language when they discounted his concerns about pilots approaching the airport at unsafe altitudes. Appellant asserted that prior to October 31, 1992 he informed the facility manager about these problems but that he was "repeatedly rebutted, intimidated and threatened" by him. He claimed that, during a conversation regarding safety matters in March 1997, Earl Hittle, a supervisor, told him that he needed to "talk to a psychologist." Appellant asserted that Douglas Clayton, a supervisor,

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[11] *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).

[12] *Id.*

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

[14] It should be noted that the record clearly indicates that appellant was not on duty at the time of the October 31, 1992 accident and that he was not officially involved in the subsequent investigation and legal proceedings. Appellant's emotional condition claim was not filed until almost six years after this incident occurred.

[15] The record contains a number of statements in which the employing establishment explained its actions regarding these matters.

harassed him by calling him at home to criticize him, releasing his personal information to unauthorized parties and having a union representative present during meetings without his consent. He alleged that Dirk Brown, a coworker, harassed him and directed vulgar language towards him because he had filed grievances.

Appellant claimed that he was terminated from the employing establishment for speaking out about the October 31, 1992 accident and for otherwise filing grievances and pointing out safety violations. He asserted that Mr. Clayton made various slanderous comments about his performance and character in the document detailing the proposed termination of his employment. Appellant claimed that Mr. Clayton and other employees made false statements in documents concerning the October 31, 1992 accident, thereby unfairly calling his veracity into question. He asserted that, due to his ethnic background, his truthfulness was unreasonably questioned and that Mr. Clayton made derogatory comments about his ethnic background. Appellant claimed that decisions regarding his work schedule and leave usage were made on a discriminatory basis. He asserted that Mr. Clayton threatened to fire him and that he was wrongly accused of attempting to undermine Mr. Clayton. Appellant claimed that he was ridiculed for filing an Equal Employment Opportunity (EEO) complaint and that several supervisors deliberately mispronounced his name and denied him adequate training for certain tasks.

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.[16] 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.[17] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.[18] Appellant alleged that supervisors and coworkers made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided no evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[19] He did not provide any findings of claims or grievances, such as his EEO complaint, which showed the occurrence of harassment or discrimination. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

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

[17] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[18] *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).

[19] *See William P. George*, 43 ECAB 1159, 1167 (1992).

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.[20]

The October 15, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 1, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[20] 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).