

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD S. DIAZ and DEPARTMENT OF DEFENSE,  
Fort Sam Houston, TX

*Docket No. 03-1222; Submitted on the Record;  
Issued September 2, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

On May 15, 2000 appellant, a 44-year-old medical laboratory technician, filed an occupational disease claim alleging that his stress, depression and anxiety were due to discrimination by the employing establishment. Appellant first realized his condition was employment related in August 1997.

In a September 17, 2000 statement, appellant detailed events during the period August 20, 1997 through October 15, 1999 which he alleged constituted harassment by Roger Avery, a coworker. He also noted his salary became an issue with his supervisor, Sargent Ledesma and Mr. Avery. Appellant alleged that Mr. Avery treated him differently due to appellant's Hispanic heritage and Mr. Avery refused to help appellant and noted that his "stress was building up from me wanting to proficiently perform my job having to do without my trainers help, and putting up with Roger's constant rage." He alleged that coworkers took lunch breaks without coordinating with each other and the supervisors were not around when needed. On March 24, 1998 Mr. Avery accosted appellant and accused him of taking a two and a half hour lunch break. Appellant alleged that Mr. Avery took too many breaks which put a burden on appellant. Appellant alleged that Lt. Jose F. Quesada, a supervisor, talked to appellant on March 25, 1998 regarding his long lunch break, which caused him to have an asthma attack due to stress. Appellant was accused of improperly handling a specimen which he did not process and that Lt. Quesada still lectured him on it. Mr. Avery allegedly made false accusations against appellant on April 28, 1998 regarding specimens which got lost in the tube system. Appellant noted that Mr. Avery was responsible for a spill due to a urine shipment which was over packed and nothing happened to Mr. Avery which appellant contended "is clearly indifferent and discriminatory treatment toward me." Appellant noted that he became upset by Mr. Avery's profanity and attitude when Mr. Avery was instructed to train appellant on July 6, 1998. He alleged that Mr. Avery stated, "Kelly AFB [Air Force Base] is closing because all the Mexicans like you do nothing but complain." On July 13, 1998 Mr. Avery threatened to file an Equal

Employment Opportunity complaint because appellant was paid at a higher rate. Appellant alleged that he was harassed by Captain Theodore K. Hatch on August 5, 1998 when Captain Hatch asked to speak to appellant about an incident on August 3, 1998 in which appellant stated that he “had already dealt with this problem with St. Ortiz, but was getting in trouble again, this time from Capt[ain] Hatch.” On February 26, 1999 Captain Hatch informed appellant that he was being moved to area laboratory so he could be trained “on something new with less or no stress.” On March 31, 1999 appellant alleged that Mr. Avery accused him of returning to work late from lunch when he was not the only one involved and he was with a group of fellow laboratory workers. On April 19, 1999 appellant alleged that Mr. Avery picked a fight with him and that Mr. Avery “came at me over the counter” when he “told Mr. Avery ‘get off my back.’” Appellant alleged that his evaluations were down graded even though he had been told his work was excellent. On October 15, 1999 appellant alleged that Mr. Avery made a harassing call to him at work and threatened to sue him and get the inspector general involved.

The employing establishment responded by submitting statements from appellant’s supervisors, Colonel Martin D. Morris, Staff Sargent Felix A. Ortiz-Plaza, Captain Hatch, Lt. Quesada and Felix Duelm, which denied appellant’s allegations of harassment and discrimination.

In an October 16, 2000 statement, Mr. Avery denied appellant’s allegations. Mr. Avery stated that appellant blamed other people for his mistakes, and denied any bias towards Hispanics. He noted that appellant brought up his salary.

By decision dated October 23, 2000, the Office of Workers’ Compensation Programs denied appellant’s claim on the basis that he failed to establish any compensable factor of employment.

Appellant requested an oral hearing in a November 14, 2000 letter.

A hearing was held on April 24, 2001 at which appellant was represented and allowed to testify. At the hearing appellant submitted evidence including reports from his attending physicians, Dr. Robert L. Jiminez, an attending Board-certified psychiatrist, and Dr. Jose E. Salinas, an attending physician. In a November 15, 2000 report, Dr. Salinas concluded that appellant was totally disabled from working and recommended that he be transferred to another work site. In the March 28, 2001 report, Dr. Jiminez diagnosed depressive symptoms and anxiety.

In a decision dated July 6, 2001, the hearing representative affirmed the denial of appellant’s claim.

In a letter dated June 29, 2002, appellant requested reconsideration and submitted evidence in support of his request.<sup>1</sup>

By decision dated February 19, 2003, the Office denied modification of the July 6, 2001 decision.

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.

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 factors of his federal employment.<sup>2</sup> To establish appellant's claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.<sup>3</sup>

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.<sup>4</sup> However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.<sup>5</sup>

Appellant alleged that he was treated unfairly at work and was the victim of discrimination or harassment. 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 may constitute employment factors.<sup>6</sup> 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.<sup>7</sup>

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<sup>1</sup> Part of the evidence submitted by appellant included a transcript of testimony of coworkers and his superiors during an investigation by the employing establishment initiated by a complaint appellant filed. Testimony was provided by appellant; his supervisors, Captain Hatch, Sargent Ortiz-Plaza and Colonel Morris; and his coworkers, Mr. Avery, Pablo Rodriguez, Sr., Maria Jesus Martinez, Estelle Ballesteros, Diana Hernandez and Erma Garza; and the union president, Richard R. Rangel. The Board notes that there are pages missing from the transcript and individuals are not always identified by the transcriber so appellant has written their names next to the testimony.

<sup>2</sup> *Edward C. Heinz*, 51 ECAB 652 (2000); *Martha L. Street*, 48 ECAB 641, 644 (1997).

<sup>3</sup> *Ray E. Shotwell, Jr.*, 51 ECAB 656 (2000); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>4</sup> *Clara T. Noga*, 46 ECAB 473, 481 (1995); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

<sup>5</sup> *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>6</sup> *Katherine A. Berg*, 54 ECAB \_\_\_ (Docket No. 02-2096, issued December 23, 2002).

<sup>7</sup> *Jack Hopkins, Jr.*, *supra* note 5.

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 coworker.<sup>8</sup> Appellant submitted a copy of a transcript made during an investigation into a complaint he filed internally against the employing establishment. However, appellant did not submit any decision from the employing establishment addressing complaints filed by appellant regarding his allegations of harassment. The transcript appellant provided is insufficient to establish appellant's allegations of harassment for several reasons. While the statements from Ms. Garza, Ms. Martinez, Ms. Ballesteros and Ms. Hernandez offer some support for appellant's general allegations of harassment, they are too vague to constitute reliable evidence on various allegations raised in appellant's claim. These statements are insufficient to establish the incidents alleged as the statements noted in the transcript are not sufficiently detailed as to describe the time, date or parties involved. In addition, pages are missing from the transcript submitted by appellant and individuals are not always identified by the transcriber.

Appellant also alleged that supervisors and a coworker made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided insufficient evidence, such as detailed witness statements, to establish that the statements actually were made or that the actions actually occurred.<sup>9</sup> Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant alleged that he was given an inordinate amount of work. The Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if the record substantiated such activity.<sup>10</sup> The employing establishment controverted appellant's claim that he was overworked. The employing establishment acknowledged that the work of appellant's two coworkers had doubled, but appellant has submitted insufficient evidence to corroborate his allegations that he was overworked. Appellant has thus failed to establish a compensable factor of employment.

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 while in the performance of duty.<sup>11</sup>

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<sup>8</sup> 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).

<sup>9</sup> See *Jamel A. White*, 54 ECAB \_\_\_\_ (Docket No. 02-1559, issued December 10, 2002); *William P. George*, 43 ECAB 1159, 1167 (1992).

<sup>10</sup> *Diane C. Bernard*, 45 ECAB 223, 227 (1993).

<sup>11</sup> As appellant has not established any compensable factors, the Board need not consider the medical evidence of record; see *Garry M. Carlo*, 47 ECAB 299 (1996).

The February 19, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
September 2, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member