United States Department of Labor
Employees' Compensation Appeals Board

GARY L. BROWNING, Appellant **and** **DEPARTMENT OF THE ARMY, ABERDEEN PROVING GROUNDS, Aberdeen, MD, Employer**	)	**Docket No. 04-535** **Issued: August 30, 2004**

Appearances:
Gary L. Browning, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 19, 2003 appellant filed an appeal from a September 22, 2003 decision by a hearing representative of the Office of Workers' Compensation Programs who found that he therefore was not injured while in performance of duty. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the aggravation of appellant's Crohn's disease occurred within the performance of duty.

FACTUAL HISTORY

The case has been on appeal previously.[1] In a June 26, 2002 decision, the Board found that appellant had cited two potential compensable factors of employment which aggravated his Crohn's disease: a false accusation by a supervisor that he had stolen a television/video cassette recorder (TV/VCR) and a complaint from appellant that his reports were being altered before being submitted to state environmental authorities. The Board set aside the Office's June 8, 2001 decision and remanded the case for further development.

In a July 31, 2002 letter, the Office requested further information from employing establishment concerning the allegations made by appellant. The Office also asked if the Equal Employment Opportunity (EEO) office had conducted an investigation and, if so, whether the employing establishment would send a copy of the report. The Office requested a response within 30 days. The employing establishment submitted emails concerning appellant's release to the employing establishment to review his EEO records and noting that appellant had made a bid for his department when he was informed that the duties of the department would be contracted out.

In a November 15, 2002 letter, the Office advised the employing establishment that the information it had submitted did not adequately respond to appellant's allegations. The Office repeated its request for information on whether Richard Wiggins had accused appellant of stealing television and audio equipment and whether the employing establishment altered reports after signing appellant's signature.

In a December 4, 2002 decision, the Office found that appellant had not established any compensable factors of employment. The Office denied appellant's claim on the grounds that he had not established that he sustained an emotional condition in the performance of duty. The Office cited a November 19, 1002 email from the employing establishment's workers' compensation program manager, Susie Ashby, who stated that appellant was not accused of stealing the equipment, but of not returning it to the proper location. She indicated that there was no falsification of environmental and discharge studies at the employing establishment. She commented that appellant was not accountable or responsible for the information requested.[2]

Appellant requested a hearing before an Office hearing representative. At the July 16, 2003 hearing, Linda Kimmel, who worked under appellant when he was chief of the Water Works section of the employing establishment, testified that she remembered Mr. Wiggins

---

[1] Docket No. 01-2270 (issued June 26, 2002). Appellant filed a claim for aggravation of Crohn's disease on March 2, 1999. He contended that his condition was aggravated by factors of his employment, including his division having insufficient staff, the employing establishment's neglect of the problem of exposure to chemical, biological and radioactive waste at the employing establishment, humiliation at several meetings, removal from his position allegedly due to retaliation, changes in the reports of waste discharge his division had submitted and a false claim that he had stolen equipment. In a September 24, 1999 decision, the Office denied appellant's claim on the grounds that he had not established that he sustained an injury in the performance of duty. The history of the case is contained in the prior appeal and is incorporated into this decision by reference.

[2] The case record submitted on appeal does not contain the November 19, 2002 email from Ms. Ashby cited by the Office in its December 2, 2002 decision.

accusing appellant of stealing a TV/VCR. She indicated that she was meeting with coworkers concerning matters at work when Mr. Wiggins came in and stated: "he was going to see [appellant] went to jail for stealing the VCR." Ms. Kimmel and her coworkers thought the statement was a joke. She commented that she did not know Mr. Wiggins was being serious because the VCR had been lent to the contracting division for a training session. Ms. Kimmel reported that, when appellant came back from a staff meeting, he was very upset because he had been accused of stealing.

Ms. Kimmel also stated that the Water Works Division had to submit reports on what it had discharged to be in compliance with the state waste water permit. She indicated that the samples were pulled by a contractor, Community Environmental Laboratories. She reported that appellant signed the report for the monitoring position. Ms. Kimmel noted that he would review the analytical reports, checking for exclusions or problems with the data and then certified under penalty of law that the report was prepared at his direction and supervision. When she was questioned on Ms. Ashby's statement that appellant was not responsible for monitoring the readings or concur with the findings, Ms. Kimmel noted that the statement was partly true. She indicated that the Department of Safety and Health (DSHE) was to ensure that the reports were completed and accurate, but appellant was responsible for preparing the reports. She related that the DSHE was responsible for compliance with the waste water permit, but the chief of the Water Works was the authorized agent. Ms. Kimmel noted that the reports from 1996 to 1998 were altered. She stated that the division of contracting had a contractor, General Physics Corporation, which performed monitoring samples of the distribution system which would be included in the Discharge Monitoring Reports. She indicated that the division of contracting had not informed the Water Works division that there was another analytical report being prepared. Appellant would sign the report and then the DSHE would include the other analytical report, add the data from it and change the monitoring report. Ms. Kimmel stated that appellant would not know whether his division was in compliance with the waste water permit until he received the report in which changes were made. She indicated that the analytical reports would be averaged and a figure would be changed as a result. Ms. Kimmel added, however, that the report should not be changed when it had already been signed. She testified that the changes in the monitoring reports were very stressful for appellant. She indicated that dealing with the monitoring reports was within appellant's job duties.

Appellant testified that he was not present at the staff meeting when Mr. Wiggins accused him of stealing equipment but was informed by a coworker who was at the meeting. He became upset and in disbelief at the accusation. Appellant indicated that equipment had to be signed for on a hand receipt. He stated that if he received a hand receipt, there was no way he could steal the equipment because he had signed for it. He was upset because the accusations affected his credibility.

Appellant stated that he was the only person responsible for meeting requirements concerning water and waste water at the employing establishment. He stated that he and his staff would do the in-house work on the reports, putting the data in the format required by state authorities. His group would review the data monthly to make sure the data was within the guidelines set by the state's Department of the Environment. Appellant stated that, once the review was done and all the data was reported, including any violations, he would sign the report and send it to the DSHE. He noted that DSHE was responsible for acting as a liaison to the

Maryland Department of the Environment (MDE), submitting the reports he signed and other required reports. Appellant stated that higher levels of stress would aggravate his Crohn's disease. He commented that he was proud of his division and changing reports made his group appear to be "shady". He alleged that people who had violated the provision of the monitoring reports had been investigated, found guilty and paid fines or were jailed. Appellant's attorney presented monitoring reports signed by appellant on February 10, 1997 to certify that the information in the reports was accurate, under penalty of law.

In an August 6, 2003 letter, in response to the hearing, Ms. Ashby stated that appellant's testimony was not correct. She indicated that Mr. Wiggins was the environmental safety compliance officer for DSHE, not the director. She reported that appellant had only served as an acting chief for the Water Works division on a detail assignment and was subsequently permanently assigned as the supervisory environmental protection specialist to the Office of the chief of the Water Works division. Ms. Ashby noted that Mr. Wiggins' role was to independently monitor reports, review analytical data results and recommend guidance or solutions in the Water Works process. He was also the authority to represent the employing establishment to the MDE on all matters relating to compliance, not the Water Works Chief. She stated that Mr. Wiggins, as acting authority for the employing establishment, would appropriately deal with any discrepancies he discovered in the final reports to the state. Ms. Ashby indicated that appellant played an integral role in directing the contractors to conduct analytical tests and samples as required, but was not the authorized proponent for interaction with the MDE. She declared that any alterations or additions to the monitoring reports were corrections to the data as determined by the certified wastewater laboratory and Mr. Wiggins. Ms. Ashby also stated that Mr. Wiggins denied that he ever had a conversation with appellant regarding the location of any equipment in the employing establishment. He had reported to his superior that the equipment assigned to his office was no longer in his office and had been taken from a locked room.

Ms. Ashby submitted a statement from Mr. Wiggins advising that he never had any conversation with appellant regarding a missing VCR, TV and wheeled stand equipment assigned to the Water Works Division that was missing from a locked area of the division. She also submitted an October 14, 1998 settlement agreement in which the employing establishment agreed to assign appellant to a detail to the Engineering and Construction Division. It also agreed to pay appellant $5,500.00 and restore 10 days of annual leave. Appellant agreed to withdraw all pending Merit Systems Protection Board complaints and not to initiate any further complaints or grievances concerning his detail or any other matter arising in his pending appeals to the Merit Systems Protection Board. The employing establishment did not admit that it had violated any law in regards to appellant's allegations. Ms. Ashby submitted a May 3, 1999 regulation which stated that the employing establishment's compliance officer had the responsibility to ensure compliance with state waste water permits.

In a September 22, 2003 decision, the Office hearing representative found that appellant's emotional condition was not caused by compensable factors of employment. He found there was insufficient evidence to establish that appellant was accused of stealing a VCR. He noted that while it may have been suggested that appellant was responsible for the missing equipment, he was not accused of theft. The hearing representative stated that appellant's reaction to the statement made by Mr. Wiggins as a threat and accusation of criminal activity was self-

generated. The hearing representative further found that the employing establishment did not abuse its discretion or commit error in modifying reports. He stated that appellant's department was not responsible for submitting the final discharge reports to the appropriate state agency. He noted that the Environment Compliance Office had the sole responsibility to submit the reports to the state agency and had the authority to correct discrepancies in the reports. The hearing representative found that the factors for which the Board remanded the case were not compensable factors of employment and affirmed the December 4, 2002 decision.

LEGAL PRECEDENT

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by 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 his frustration from not being permitted to work in a particular environment or to hold a particular position. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act. When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.[3] In these cases the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.[4]

ANALYSIS

Appellant alleged that the employing establishment altered reports he submitted on the discharge of minerals and chemicals into the waste water, thereby presenting inaccurate information for which he believed he could face a criminal penalty. However, the evidence submitted by Ms. Ashby shows that appellant submitted his reports to Mr. Wiggins, the Environmental Compliance Officer. Ms. Kimmel noted that appellant's department had one contractor to analyze the waste water and measure containments while another division of the employing establishment had another contractor performing the same task. Ms. Ashby stated that the results from different contractors were combined and consolidated for the find report to the state agency. There is no evidence that the employing establishment erred or abused its authority in changing the reports submitted by appellant to take into consideration other

[3] *Lillian Cutler,* 28 ECAB 125, 129-30 (1976).

[4] *Thomas D. McEuen,* 41 ECAB 387, 391-93 (1990), *reaff'd on recon.,* 42 ECAB 566, 572-73 (1991).

measurements of the waste water at the employing establishment. Appellant therefore did not establish that the changes made to his reports constitute a compensable factor of employment.

Appellant alleged that Mr. Wiggins falsely accused him of stealing a TV/VCR combination. Ms. Kimmel testified that Mr. Wiggins came into a meeting she was attending and stated that he would make sure appellant went to jail for stealing equipment. Mr. Wiggins stated that he never accused appellant of stealing equipment. Although Mr. Wiggins did not make the statement directly to appellant, he did make the statement in front of members of appellant's division who informed appellant of the comment. However, the evidence does not establish whether Mr. Wiggins made the statement seriously, as a joke, or as hyperbole. The record does not show that Mr. Wiggins' statement was intended to damage appellant's credibility or reputation in the employing establishment. Although the Board has recognized the compensability of verbal abuse in certain circumstances, not every utterance in the workplace will give rise to coverage under the Act.[5] Appellant has not established that Mr. Wiggins' statement constituted verbal abuse or harassment because he did not establish whether the remark constituted a joke as hyperbole exaggeration or a serious charge of theft. Appellant therefore has not established that Mr. Wiggins' statement was abusive and, as a result, has not shown that the statement was a compensable factor of employment. He therefore has not met his burden that he had compensable factors of employment under the Act which would be considered an injury in the performance of duty.

If a claimant does not establish any compensable factors of employment, it is unnecessary for the Board to consider the medical evidence of record.[6] In this case, appellant failed to show he had any compensable factors of employment which occurred in the performance of duty. The Board, therefore, does not need to review the medical evidence of record.

<u>CONCLUSION</u>

Appellant has not established that he sustained an aggravation of his Crohn's disease in the performance of duty.

[5] *Frank B. Gwozdz,* 50 ECAB 434, 438 (1999); *Christophe Jolicoeur,* 49 ECAB 553, 556 (1998).

[6] *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs, dated September 22, 2003, is affirmed.

Issued: August 30, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member