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JOHN WYSINCAVAGE, Appellant		
and		
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, New Cumberland, PA, Employer		

Docket No. 04-55

Issued: March 9, 2004

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

On October 6, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated May 16 and September 17, 2003, denying an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue on appeal is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On May 17, 2002 appellant, then a 39-year-old visual information specialist, filed a claim alleging that he sustained an emotional condition due to discrimination, disparate treatment, harassment, intimidation and retaliation by Supervisors Jackie Noble and Paul Okum from

July 2001 to May 2002.¹ After briefly returning to duty on May 30, 2002, appellant filed a claim for a recurrence of disability.²

Appellant set forth his allegations in February 25, March 5 and May 17, 2002 statements. He contended that Ms. Noble refused to support his promotion to GS-13, tried to downgrade him by diverting visual information projects to female coworkers and assigning him low-grade videoconferencing (“VTC”) duties, refused his requests for web design training, and conspired to remove him by attempting to hire a contract visual information specialist. Appellant alleged that Ms. Noble wrongly counseled him on November 16, 2001 regarding his assignment of a projector repair to a coworker instead of fixing the problem himself. He accused Ms. Noble of creating a hostile work environment by scheduling December 13, 2001 and February 1, 2002 meetings when she knew he was unavailable and assigning him simultaneous tasks in two different locations on February 7, 2002. Appellant alleged that Ms. Noble delayed approving his January 8, 2002 request for summer leave until May 2002, but accommodated leave requests from female coworkers.

Appellant also contended that Ms. Noble erroneously issued a January 9, 2002 letter of instruction and a January 18, 2002 reprimand as he had taken a scrapbook project from a coworker without authorization. Appellant contended that Ms. Noble misrepresented the facts and did not afford him due process. Ms. Noble also issued a 10-day suspension to appellant in June 2002 for misconduct including misuse of government equipment.³ Appellant alleged that the suspension was erroneous as he informed Ms. Noble in November 2001 work reports that he was practicing using a digitizing program to create elf-like images for a holiday card he wished to design. Appellant also alleged that Ms. Noble erroneously found him absent without leave (AWOL) from March 25 to April 11, 2002 as she later charged the absence to sick leave.

Appellant asserted that the disciplinary actions were, in part, retaliation for filing an Equal Employment Opportunity (EEO) complaint on December 27, 2001 alleging discrimination based on male sex and a May 9, 2002 EEO complaint alleging discrimination based on mental and unspecified physical disability, including denial of reasonable accommodations. He also alleged a conspiracy to deny his first complaint.⁴ Appellant also requested a transfer from

¹ By letters dated November 22, 2002 and March 10, 2003, the Office requested that appellant submit additional evidence in support of his claim.

² Dr. Donald Potter, an employing establishment occupational health physician, submitted a May 30, 2002 report diagnosing “job stress” and sent appellant home.

³ Ms. Noble issued an April 17, 2002 notice of proposed suspension for multiple incidents of alleged misconduct in March 2002, including: failure to follow established leave procedures; failure to follow chain of command in reporting that a brochure would not be completed on time; threatening not to return to work until he used 700 hours of sick leave or was transferred or promoted; contemptuous behavior toward a constituted authority for accusing Ms. Noble of favoritism in a work status report; misuse of government equipment for using his work computer to create distorted facial images of Ms. Noble, Secretary of Defense Donald Rumsfeld and another official.

⁴ In July 17, 2002 letter, Ms. Noble denied appellant’s June 3, 2002 request for reasonable accommodations as Dr. Thompson found him able to perform his assigned duties but only for a different supervisor.

Ms. Noble's group. An investigation of the first complaint found no discrimination or harassment. There are no findings of record regarding the second complaint.

Appellant submitted a June 19, 2002 report from Dr. James S.G. Thompson, an attending Board-certified family practitioner, diagnosing an adjustment disorder with anxiety and depression.⁵ Dr. Thompson found appellant in a "severe emotional crisis" and stated his concern that appellant might harm himself or others.⁶ Appellant was separated involuntarily from federal service effective September 12, 2002 on the grounds that he was unable to perform his assigned duties. Appellant alleged that his termination was retaliatory and discriminatory.

Ms. Noble submitted March 26 and June 6, 2002 statements denying appellant's allegations. She explained that appellant was transferred to the command unit as a GS-11 visual information specialist and promoted to GS-12. To obtain a promotion to GS-13, appellant requested a desk audit which found the GS-12 classification to be appropriate. Appellant grieved the classification, which was upheld. He also grieved Ms. Noble's mid-2001 appointment as his direct supervisor, alleging that he did not receive adequate notice and that she was not qualified to review his work. Ms. Noble investigated hiring a contract visual information specialist as appellant was the only visual information specialist in the command unit and a back-up was needed. Some of the tasks appellant performed were assigned to female coworkers but this did not enhance their positions or detract from appellant's classification. As appellant was removed from telephone coverage at his request, he was assigned increased VTC coverage to balance the diverse needs and functions of the command unit. She denied appellant's request for web page design training as those skills were not relevant to his assigned duties. He was provided photoshop special effects, leadership and stress management training needed for his work. She did not realize appellant could not attend the December 13, 2001 meeting and that she delayed the February 1, 2002 meeting for 45 minutes to give appellant an opportunity to attend. Ms. Noble contended that the January 9, 2002 letter of instruction and January 18, 2002 reprimand were appropriate as appellant was not authorized to assign or take away the work of other employees. Ms. Noble approved appellant's summer 2002 leave request on May 9, 2002 after the change of command date became known.

Appellant's claims were denied by a May 16, 2003 decision of the Office on the grounds that he had not established any compensable factors of employment. Following appellant's request for reconsideration, the Office issued a September 17, 2003 decision affirming the May 16, 2003 decision. The Office noted that, while the alleged incidents did occur, they were administrative actions and appellant had not submitted evidence establishing any error or abuse that would bring those incidents under coverage of the Federal Employees' Compensation Act.

⁵ Appellant submitted medical reports from Dr. Thompson dated from April 1 to June 19, 2002 holding him off work from March 22 to April 26, 2002, and again from May 31, 2002 for one month.

⁶ On July 10, 2002 Captain C.R. McKelvey, the employing establishment's chief security officer, ordered appellant not to enter the installation based on Dr. Thompson's opinion that he might pose a safety threat.

LEGAL PRECEDENT

The Act provides for payment of compensation for personal injuries sustained while in the performance of duty.⁷ Where disability results from an employee's reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.⁸ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁹ 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.¹⁰

In cases involving emotional conditions, the Board has held that when working conditions are alleged as factors in causing 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.¹¹ If a claimant implicates 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.¹²

ANALYSIS

Appellant alleged that he sustained an adjustment disorder with anxiety and depression as a result of a number of employment incidents and conditions which the Office found to be noncompensable. The Board must determine whether these alleged incidents and conditions are covered employment factors under the terms of the Act.

Appellant alleged harassment and discrimination by his supervisors caused or contributed to his claimed stress-related condition. He asserted that his supervisors created a hostile work environment, excluded him from meetings, denied him training, diverted desirable or higher grade work to female coworkers, delayed or denied his leave requests and issued retaliatory disciplinary actions due to his male sex or mental or physical disability. Appellant also alleged reprisals, including termination, related to filing EEO complaints. Incidents of harassment or discrimination by supervisors and coworkers, if established as occurring and arising from the employee's performance of his or her regular duties, may constitute employment factors.¹³

⁷ 5 U.S.C. § 8102(a).

⁸ 5 U.S.C. §§ 8101-8193. *Lillian Cutler*, 28 ECAB 125 (1976).

⁹ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹⁰ *Effie O. Morris*, 44 ECAB 470 (1993).

¹¹ *See Norma L. Blank*, 43 ECAB 384 (1992).

¹² *Marlon Vera*, 54 ECAB ____ (Docket No. 03-907, issued September 29, 2003).

¹³ *Janice I. Moore*, 53 ECAB ____ (Docket No. 01-2066, issued September 11, 2002). *See David W. Shirey*, 42 ECAB 783 (1991).

However, the issue is not whether the claimant has established harassment or discrimination under standards applied by the EEO Commission. Rather the issue is whether the claimant, under the Act, has submitted evidence sufficient to establish an injury arising in the performance of duty.¹⁴ For harassment or discrimination to give rise to a compensable disability under the Act, there must be probative and reliable evidence that harassment or discrimination did in fact occur.¹⁵ Mere perceptions of harassment or discrimination are not compensable under the Act.¹⁶

In support of his allegations of harassment and discrimination, appellant provided several statements, assignment schedules, supervisory memoranda and disciplinary documents. The Board finds that, although the incidents occurred, appellant has submitted insufficient evidence of harassment, discrimination or disparate treatment. Ms. Noble submitted statements providing reasonable explanations regarding the disciplinary matters, work assignments and processing of leave and training requests. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Additionally, the results of the EEO complaints are not in the record. The absence of such documentation diminishes the validity of appellant's contentions in this case, where there is no evidence to document that he was discriminated or retaliated against. As appellant has not submitted sufficient evidence, such as findings from an adjudicatory body regarding his EEO complaints and grievances, he has failed to establish discrimination, harassment or retaliation as a compensable factor of employment. For these reasons, the Board finds that appellant has failed to establish discrimination as a compensable factor of employment.

Appellant also generally alleged that the employing establishment engaged in improper disciplinary actions, wrongly denied leave and improperly assigned work duties. 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.¹⁷ Although the handling of disciplinary actions and leave requests and the assignment of work duties are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁸ 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

¹⁴ See *Martha L. Cook*, 47 ECAB 226 (1995).

¹⁵ *Marlon Vera*, *supra* note 12.

¹⁶ *Kim Nguyen*, 53 ECAB ____ (Docket No. 01-505, issued October 1, 2001). To the extent appellant alleged that the processing of his EEO claims constituted harassment or discrimination, the Board has held that the stress of filing and processing of EEO complaints was not compensable. See *Bernard Snowden*, 49 ECAB 144 (1997); see *Eileen P. Corigliano*, 45 ECAB 581, 585 (1994).

¹⁷ *Lori Facey*, 55 ECAB ____ (Docket No. 03-2015, issued January 6, 2004); see *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

¹⁸ *Lori Facey*, *supra* note 17.

whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁹

The Board finds that appellant has not submitted sufficient evidence to show that the employing establishment committed error or abuse with respect to the disciplinary and leave matters or the assignment of work. Ms. Noble explained that appellant's January 2002 leave request could not be approved until confirmation in May 2002 of the date of a pending change at the command. Regarding the rescission of the AWOL charge, the Board has held that the mere fact that personnel actions are later modified or rescinded does not establish error or abuse.²⁰ Additionally, Ms. Noble set forth in detail the specific disciplinary violations which led to the January 18, 2002 reprimand and June 2002 suspension. Appellant did not deny that he took the scrapbook project away from a coworker and delegated the projector repair without authorization, and admitted distorting the photographs of his superiors. Ms. Noble explained that work assignments, including VTC duties, were designed to balance the diverse needs of the command unit. The Board finds that appellant has not established error or abuse regarding these administrative matters.

Appellant also attributed his emotional condition, in part, to frustration over not having his position classified as a GS-13, his dislike of VTC duties, not being given web design tasks and not being granted a transfer. While appellant may have been unsatisfied in his job, the Board has held that self-generated frustration arising from not being allowed to work in a particular position or to hold a particular job is not compensable under the Act.²¹ Denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment absent a showing of error or abuse as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.²² Similarly, appellant's frustration regarding the denial of web page training pertained to his desire to perform such work, not to a requirement of his assigned duties. The Board finds that appellant has not established error or abuse regarding these administrative matters.

Regarding appellant's allegations of stress due to insecurity about maintaining his position related to the August 2001 solicitation for a contract visual information specialist, the Board has held that such job insecurity is not a compensable factor of employment.²³ Also,

¹⁹ See *Richard J. Dube*, 42 ECAB 916, 920 (1991); see *Charles D. Edwards*, (Docket No. 02-1956, issued January 15, 2004).

²⁰ See *Linda K. Mitchell*, 54 ECAB ____ (Docket No. 03-1281, issued August 12, 2003) (the Board held that the mere fact that the employing establishment lessened a disciplinary action did not establish that the employing establishment erred or acted in an abusive manner).

²¹ *Lori A. Facey*, *supra* note 17; see *Katherine A. Berg*, 54 ECAB ____ (Docket No. 02-2096, issued December 23, 2002).

²² *Hasty P. Foreman*, 54 ECAB ____ (Docket No. 02-723, issued February 27, 2003).

²³ *Paul L. Stewart*, 54 ECAB ____ (Docket No. 03-1107, issued September 23, 2002).

appellant's reaction to his termination is not within the performance of duty as he has not established any error or abuse regarding his removal.²⁴

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.²⁵

CONCLUSION

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.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 17 and May 16, 2003 are affirmed.

Issued: March 9, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

²⁴ See *Ana D. Pizzaro*, 54 ECAB ____ (Docket No. 02-1036, issued February 27, 2003).

²⁵ 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, 503-03 (1992).