United States Department of Labor
Employees' Compensation Appeals Board

BARRY L. NATALE, Appellant	)	
and	)	**Docket No. 04-721**
	)	**Issued: January 12, 2005**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Stamford, CT, Employer	)	

Appearances:
Charles S. Harris, Esq., for the appellant
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 January 21, 2004 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated October 20, 2003, rescinding acceptance of his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has merit jurisdiction over the rescission issue in this case.

ISSUE

The issue on appeal is whether the Office met its burden of proof to rescind acceptance of appellant's claim for an emotional condition.

FACTUAL HISTORY

On February 2, 2000 appellant, then a 44-year-old electronics technician, filed a claim for major depression. He attributed his condition to four alleged acts by the employing establishment: disclosing personal information to the Stamford Police Department pursuant to a background check after he applied for police employment in December 1995; denying that such disclosures were made; refusing to provide him copies of personnel records related to the

disclosures; and denying a May 1999 request for 30 days leave without pay (LWOP). He stopped work on May 14, 1999 and did not return.

In support of his allegation of unauthorized disclosures, appellant submitted certified copies of September 1996 interviews with employing establishment officials Jay Appel, a human resources specialist, and Tony Venezio, an assistant manager, conducted by Sergeant Elizabeth Erickson of Stamford Police Department.[1] Mr. Appel stated that appellant followed instructions satisfactorily, was a "good worker" but did not "agree much lately, doesn't like to be told other than his way." He refused to indicate if he would reemploy appellant. Mr. Venezio stated that appellant had no problems getting along with supervisors and that he was "not sure" if he would trust appellant with sensitive or confidential materials.

In a September 26, 1996 note, Sergeant Erickson stated that she had spoken with Robert Olsen, manager, Mr. Appel and Mr. Venezio and that she faxed a release to the employing establishment to obtain additional information. This release is not of record. The record also contains Sergeant Erickson's notes on appellant's employment history beginning in May 1978. On September 30, 1996 Sergeant Erickson faxed a note to the employing establishment's personnel office stating that she was attaching "a signed release for [appellant] who is presently an applicant for the position of Police Officer in Stamford." The release is not of record.[2]

In an August 26, 1998 letter, the employing establishment denied receiving any informational requests regarding appellant from the Stamford Police Department. Then, in a September 28, 1998 letter, the employing establishment stated that Mr. Olsen referred a call from the Stamford Police Department to the personnel office but there was no record of any information disclosed. It was noted that, according to section 353.327.a of a postal administrative support manual, telephone disclosures were limited to an employee's "public information" of "grade, salary, duty status, employment dates and job titles … with no accounting of the disclosure." Section 353.327.b provided that a prospective employer may be given an employee's public information and the date and the reason for any separation. "If additional information is desired, the requester must submit the written consent of the employee and the custodian must keep an accounting of the disclosure."

In a September 15, 1998 letter, appellant requested an accounting of all information provided by the employing establishment to the Stamford Police Department regarding his

[1] Message slips show that employing establishment officials Lloyd Earl and Mr. Venezio left messages for Sergeant Erickson on September 19 and 23, 1996, respectively. These message slips do not contain any disclosures of information about appellant.

[2] Sergeant Erickson also interviewed Tony Rufrano of the Hartford Postal Police on October 30, 1996 regarding appellant's November 1994 application for a postal police position which he did not accept. In an April 14, 2000 letter, a regional postal manager stated that it appeared that the postal police "may have disclosed information from a record about [appellant] to the Stamford Police Department." As appellant was not employed by the postal police, any disclosures by Mr. Rufrano cannot be said to have been made by the employing establishment.

application for employment. In response, on October 7, 1998 the employing establishment provided copies of documents unrelated to the Stamford Police inquiries.[3] Appellant inquired in a November 13, 1998 letter as to whether employing establishment officials John Sgobbo, Mr. Earl or Mr. Venezio violated the Privacy Act of 1974 by providing information to the Stamford Police Department. In a December 8, 1998 letter, the employing establishment denied that "the named individuals provided any information" but that Mr. Olsen referred a Stamford Police Department inquiry about appellant to the personnel office.

The employing establishment denied appellant's May 10, 1999 request for 30 days of LWOP due to an anticipated personnel shortage. Appellant stopped work on May 14, 1999 and on May 24, 1999 requested attendance records needed to file a Family and Medical Leave Act (FMLA) request. He filed claims for wage-loss compensation (CA-7 forms) for the period May 14, 1999 and continuing.[4]

In June 1, 11 and 23, 1999 letters, the employing establishment directed appellant to report for duty or provide medical documentation justifying his absence. He then submitted a June 15, 1999 report from Dr. Stephen Cooper, an attending psychiatrist, finding him indefinitely disabled for work at the employing establishment. Appellant declined to attend a September 14, 1999 interview and was advised that he could be terminated from employment. He then submitted a September 14, 1999 report from Dr. Cooper explaining appellant's belief that the employing establishment "illegally compromised his chances of working for the Stamford Police Department."[5] On October 20, 1999 the employing establishment terminated appellant's employment as he had been absent from work since May 14, 1999 without justification and failed to follow leave regulations. Appellant filed a grievance regarding the removal which was settled by a confidential agreement prior to May 3, 2000.

In a December 6, 1999 letter, appellant requested that the employing establishment investigate whether its disclosures to the Stamford Police Department violated the Privacy Act of 1974. In a January 20, 2000 letter, the Office of the Inspector General determined that there was no investigation warranted at that time. In response to appellant's second request for a Privacy Act investigation, Kirt West, deputy general counsel to the Inspector General, submitted a February 28, 2000 letter stating that appellant appeared to have authorized the employing establishment to disclose his background information and that his "Privacy Act file" was not disclosed. Mr. West explained that "[w]hen a supervisor or coworker, pursuant to [appellant's]

[3] The employing establishment provided May 10, 1995 and March 4, 1997 releases for two law firms to obtain public information pursuant to a January 8, 1994 nonoccupational injury, disclosures of public information to the two firms as requested and verification of appellant's dates of employment to the American Philatelic Society pursuant to appellant's signed release.

[4] Appellant noted that, during this period, he owned and operated a seasonal marine transportation business, performed volunteer work, owned and managed rental properties and performed Coast Guard reserve duties.

[5] In September 14 and 27, 1999 letters, Dr. Paul Radford, an employing establishment physician, found Dr. Cooper's reports inadequate to justify appellant's continued absence. Dr. Cooper also submitted a February 29, 2000 report opining that appellant's condition was precipitated by the employing establishment's "disclosure of information to a law enforcement agency" and subsequent denial of the disclosures. He released appellant to unrestricted duty as of September 26, 2001.

release, provides information pertaining to [him] that is not necessarily from [his] Privacy Act file, *e.g.*, information relating to job performance, there is no requirement under the Privacy Act to document such disclosure in [his] Privacy Act file." Mr. West found that appellant's allegations did not establish a clear violation of law warranting an investigation.

In a March 22, 2000 letter, the Office advised appellant that the evidence of record was insufficient to establish his claim and requested additional information regarding any grievances or complaints filed and nonoccupational stressors. Appellant was also advised to submit a comprehensive report from his attending physician explaining how and why work factors would cause the claimed emotional condition. In a second March 22, 2000 letter, the Office requested that the employing establishment explain whether any information was disclosed to the Stamford Police. The employing establishment responded in an April 11, 2000 letter, disavowing any knowledge of a Privacy Act violation or that appellant's records were improperly withheld.

On August 24, 2000 the Office accepted appellant's claim for major depression. A September 26, 2000 file memorandum stated that appellant had established a Privacy Act violation as compensable. The Office found that the denials of LWOP and FMLA leave were noncompensable administrative actions and that no error or abuse was shown.[6]

By notice dated August 5, 2002, the Office advised appellant that it proposed to rescind acceptance of his claim. In an attached memorandum, it was noted that as the September 26, 2000 file memorandum listing the accepted employment factors was prepared one month after the August 24, 2000 decision, this established that the Office failed to consider whether appellant alleged any compensable work factors prior to accepting the claim. The Office also asserted that appellant had not established there was a Privacy Act violation. The Office noted that the postal inspector general's office found no investigation was warranted as there was no clear violation of the Privacy Act of 1974. The Office therefore concluded that appellant failed to establish any compensable factor of employment on which to base acceptance of his emotional condition claim.

Appellant responded by letter dated September 3, 2002, asserting that the Office's proposed rescission was improper as it was not based on new evidence or argument. He also alleged that the Office failed to prove that it neglected to analyze the evidence prior to accepting the claim. He noted that the Office developed the evidence by issuing March 22, 2000 letters requesting additional information, later commenting that both "parties submitted a multitude of evidence." He pointed out that the inspector general failed to explain why no investigation of the alleged Privacy Act of 1974 violation was necessary.[7] Appellant also alleged that the proposed rescission was an attempt to avoid paying wage-loss compensation.

[6] In an August 2, 2001 letter, the Office advised appellant that his case had been further reviewed and it appeared that the August 24, 2000 decision accepting the claim was issued prematurely and that further action was being taken to issue a "correct decision." In September 25 and October 31, 2001 letters, appellant asserted that the Office had not demonstrated that the acceptance was premature or otherwise improper. In a November 7, 2001 letter, the Office advised appellant that it had the authority to reopen his claim for further consideration.

[7] Appellant also offered that an August 14, 2000 letter from the postal inspector general stated that corrective actions were taken to update appellant's personnel file and to properly record disclosures. However, this letter is not of record.

By decision dated October 20, 2003, the Office rescinded acceptance of appellant's claim on the grounds that he had not established a Privacy Act violation. The Office noted there was no administrative error or abuse in the handling of his personnel file that would bring the releases of information to the Stamford Police under coverage of the Act.[8] Responding to appellant's contentions, the Office found that the acceptance of the claim was erroneous as it was not based on a performance of duty analysis and did not explain the basis for finding either a Privacy Act violation or a "mishandling" of appellant's personnel file. The Office noted that the employing establishment denied any improper release of information or that it had violated the Privacy Act of 1974. Also, the inspector general's February 28, 2000 letter found no violation of the Privacy Act of 1974 had occurred. The Office also noted that the employing establishment denied and that appellant did not establish any error or abuse in processing appellant's leave request or disciplinary letters. The Office therefore concluded that the claimed emotional condition was not sustained in the performance of duty as no compensable work factors were established. The Office also found that it had met all procedural requirements for rescinding acceptance of the claim.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where the Office later decides that it has erroneously accepted a claim for compensation.[9] The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[10] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[11] In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[12]

Acceptance of an emotional condition claim is predicated on the employee establishing that he sustained a diagnosed psychiatric illness causally related to identified compensable factors of his federal employment.[13] While administrative functions of the employer such as the

[8] The October 20, 2003 decision also had the effect of terminating appellant's entitlement to medical benefits and wage-loss compensation.

[9] *See* 20 C.F.R. § 10.610.

[10] *Eli Jacobs*, 32 ECAB 1147 (1981).

[11] *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

[12] *Delphia Y. Jackson*, 55 ECAB __ (Docket No. 04-165, issued March 10, 2004); *Paul L. Stewart*, 54 ECAB ___ (Docket No. 03-1107, issued September 23, 2003); *Alice M. Roberts*, 42 ECAB 747 (1991).

[13] *Brenda L. DuBuque*, 55 ECAB ___ (Docket No. 03-2246, issued January 6, 2004); *Lillian Cutler*, 28 ECAB 125 (1976).

handling of personnel records[14] and the processing of leave requests[15] are not considered to be within the performance of duty, error or abuse in carrying out such functions of the employer may constitute a compensable factor of employment under the Federal Employees' Compensation Act.[16]

Where a claim was accepted for an emotional condition caused by administrative error and it is then determined "that only correct and proper application of personnel and administrative matters were involved … the acceptance may be rescinded based on new legal argument that no employment factors were involved, without the need for new evidence."[17] The Office must then prepare a memorandum to the director detailing the deficiencies of the evidence and the new legal argument that there were no accepted factors of employment, and appellant is given an opportunity to respond.[18]

ANALYSIS

The Office's acceptance of appellant's claim was predicated solely on the finding that the employing establishment violated the Privacy Act of 1974 by releasing his personal information to the Stamford Police Department without his consent. The Office then sought to rescind its acceptance of appellant's claim as no Privacy Act violation had been established. In reaching this conclusion, the Office relied primarily on January 20 and February 28, 2000 letters from the postal inspector general's office finding insufficient evidence to establish a Privacy Act violation.[19] These letters reviewed the situation and found no basis on which to attribute any Privacy Act violation.

The Board finds that the Office correctly found that the January 20 and February 28, 2000 letters from the inspector general's office were entitled to the weight of the evidence in this case. Mr. West, deputy general counselor to the inspector general, determined that appellant's allegations were insufficient to warrant an investigation at that time. Mr. West also explained in detail that the appellant had not established a disclosure of Privacy Act information and that it appeared that appellant authorized the remaining disclosures. Thus, the administrative branch of the employing establishment authorized to determine whether the alleged Privacy Act violations occurred found that appellant did not substantiate a violation of the Privacy Act of 1974. The

[14] *See Angie Brumfield*, 46 ECAB 867 (1995) (the claimant established that the employing establishment committed compensable error by incorrectly listing her grade in her personnel record. The Board found that this error brought the administrative matter of maintaining personnel records under the coverage of the Federal Employees' Compensation Act).

[15] *Lori A. Facey*, 55 ECAB ___ (Docket No. 03-2015, issued January 6, 2004).

[16] *Charles D. Edwards*, 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004).

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty, Work-Connected Events Which are Not Factors of Employment, Rescission*, Chapter 2.804.17.k (March 1994).

[18] *Id*.

[19] The Board notes that, in an April 11, 2000 letter, the employing establishment denied that it committed a Privacy Act violation.

Board therefore finds that these letters are sufficient to meet the Office's burden of proof in rescinding acceptance of the emotional condition claim on the grounds that the alleged violation of the Privacy Act of 1974 did not occur.

Thus, it is clear that the Office properly rescinded its acceptance of appellant's emotional condition claim as the violation of the Privacy Act of 1974 on which it was predicated was later shown not to have occurred. The Board, however, will remand the case to the Office for consideration of the other factors, raised and alleged by appellant both before and after the rescission of acceptance, regarding the underlying claim: whether the employing establishment was authorized to disclose information to the Stamford Police Department.[20] This claim is distinct from appellant's Privacy Act allegations as it concerns whether the employing establishment committed administrative error or abuse by violating its internal procedures when it disclosed information to the Stamford Police Department. The Board notes that the Office did not develop this aspect of appellant's claim, as it addressed only the Privacy Act allegations in its decisions.

The Board finds that appellant submitted sufficient factual evidence in support of his allegations of administrative error or abuse to warrant further development. He established that employing establishment officials Mr. Appel and Mr. Venezio gave interviews to Sergeant Erickson of the Stamford Police Department in September 1996. The record demonstrates that these officials commented on his job performance, character and ability to handle criticism. According to the Postal Administrative Support Manual, this type of information may be released to a prospective employer only with the employee's written consent. Appellant alleges that this disclosure was not authorized. Although Sergeant Erickson referred to appellant's signed releases in September 26 and 30, 1996 fax cover sheets, these releases are not of record. Thus, it cannot be determined from the present record if appellant consented to the employing establishment's disclosures of information to the Stamford Police Department.

Also, the case requires further development on the issue of whether the employing establishment's denials of the disclosures constituted compensable administrative error or abuse.[21] In an August 26, 1998 letter, the employing establishment denied receiving any informational requests about appellant from the Stamford Police Department. However, the record contains Sergeant Erickson's notes from interviews with two employing establishment officials conducted in September 1996. In a December 8, 1998 letter, the employing establishment denied that Mr. Venezio, Mr. Earl and Mr. Sgobbo provided "any information to the Stamford Police Department." However, the record contains an interview between Sergeant Erickson and Mr. Venezio.

On remand of the case, the Office shall conduct appropriate development to determine whether any release of information about appellant by the employing establishment to the Stamford Police Department represents a compensable factor of employment. The Office shall

[20] As the Office met its burden of proof to rescind acceptance of the claim, appellant has the burden of proof to establish a compensable factor of employment. *See Kathleen D. Walker*, 42 ECAB 603 (1991).

[21] *See John H. Taylor*, 40 ECAB 1228, 1236 (1989) (when in the development of a claim the evidence indicates another aspect of the case, the evidence should be further developed and a determination made as to that aspect).

also conduct appropriate development to determine whether the employing establishment's denials that such disclosures were made constitute a compensable employment factor. Following such development as the Office deems necessary, the Office shall issue an appropriate merit decision in the case.

CONCLUSION

The Board finds that the Office properly rescinded its acceptance of appellant's emotional condition claim as the compensable factor of a Privacy Act violation on which the acceptance was based was shown not to have occurred. Thus, the Office has met its burden of proof to rescind acceptance of the emotional condition claim. However, the Board further finds that the case is not in posture for a decision regarding appellant's undeveloped allegations regarding whether the employing establishment's release of appellant's personal information to the Stamford Police Department, or its denials that such disclosures were made, constituted compensable employment factors.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 20, 2003 is affirmed in part regarding the rescission of the acceptance of the claim and remanded in part for further development regarding whether the employing establishment committed administrative error or abuse by releasing appellant's personal information to the Stamford Police Department or denying that it had done so.

Issued: January 12, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member