

On September 22, 2003 appellant, then a 37-year-old immigration inspector, filed a claim alleging that he sustained an emotional condition in the performance of duty. He stopped work on September 22, 2003 and did not return. Appellant claimed that on December 1, 2000 the Department of Justice's Office of the Inspector General (OIG) and the El Paso Police Department arrested and wrongly charged him with five federal counts relating to the illegal

handling and sale of identification documents. He claimed that in January 2001 he was improperly suspended from work without pay and also had his leave, overtime, retirement and health insurance frozen pending the outcome of the trial.¹ Appellant stated that on July 23, 2001 he was found not guilty of all five counts in federal court. He claimed that he returned to work for the employing establishment on August 6, 2001 with the expectation that he would return to his regular inspector work, but that he was assigned to perform clerical work while the employing establishment performed its own investigation.² Appellant claimed that he was unfairly denied overtime work and wrongly experienced a delay in his promotion from GS-9/5 to GS-9/6.

Appellant further asserted that on August 20, 2002 every other inspector received a promotion from GS-9 to GS-11, but that he was told that his failure to receive a fully successful performance rating prevented his promotion. He claimed that he did not receive a promotion even after he received a fully successful performance rating on April 22, 2003. Appellant alleged that on March 26, 2003 the employing establishment advised him of a proposed 14-day suspension which he felt was improper. He claimed that in August 2003 he learned that he would be transferred from the Dedicated Commuter Lane (DCL) to another clerical position at the Yaleta Port of Entry (YPE) entry site. Appellant asserted that the employing establishment unreasonably prolonged its investigation and handling of his appeal of the matter, thereby caused him financial hardship.³

Appellant submitted a September 22, 2003 note in which Dr. Francisco J. Guerra, an attending Board-certified family practitioner, noted that he could not work and stated, "Patient needs time off due to stress at work. Depression and severe anxiety are the diagnosis."

In a report dated October 9, 2003, Dr. Guerra stated that, when appellant was examined on September 22, 2003 he reported that he had a history of clinical depression and severe anxiety. He indicated that appellant was diagnosed with fatigue, insomnia, hyperlipidemia and prostatitis. Dr. Guerra indicated that after seeing appellant on September 29, 2003 he referred him to another physician.⁴

Appellant also submitted reports of Lupe Castaneda, a licensed social worker, which were dated beginning in September 2003.

By letter dated October 2, 2003, the Office requested that appellant submit additional factual and medical evidence in support of his claim. In a statement dated October 13, 2003, he stated that he was humiliated by the various clerical duties he was required to perform.

¹ The record indicates that appellant's pay was reinstated in August 2001 after he was acquitted in federal court.

² Appellant asserted that on March 13, 2002 he was reassigned from the Bridge of the Americas Port of Entry site of the employing establishment to perform clerical duties at the YPE site. He indicated that he continued to perform clerical duties.

³ Appellant also alleged that the acute appendicitis he sustained in January 2001 was a direct result of his work-related stress.

⁴ The record also includes a September 29, 2003 note in which Dr. Guerra indicated that appellant could not work.

Appellant alleged that coworkers constantly asked him when he would be able to wear his inspectors uniform and that some coworkers stated that the investigation was taking so long because “he was guilty” and noted, “I still think [he’s] guilty, look at O.J.” He claimed that management unreasonably failed to advise him how long its investigation of him would take.

By decision dated March 26, 2004, the Office denied appellant’s emotional condition claim on the grounds that he did not establish any compensable employment factors. The Office noted that he did not show that the employing establishment committed error or abuse when carrying out its duties with respect to such matters as transfers, promotions and disciplinary actions.

Appellant requested a hearing before an Office hearing representative which was held on August 18, 2004. He provided further detail regarding the incidents and conditions at work which he believed caused him to sustain an emotional condition.

Appellant submitted documents pertaining to grievances he had filed regarding the employing establishment’s investigation, the suspension of his pay and benefits between January and August 2001, his relief from performing regular duties beginning January 2001, the effect of this relief on his pay, overtime work and promotions and the issuance of a proposed 14-day suspension. He submitted documents which indicated that in July 2001 he was acquitted of five counts in federal court regarding the handling and sale of identification documents. Appellant also submitted an August 30, 2004 report in which Dr. Guerra stated that he was given time off work beginning September 22, 2003 due to “his stressful situation at work.”

The record was supplemented to contain documents in which the employing establishment argued that it was proper to suspend appellant’s pay and benefits between January and August 2001, relieve him from his regular duties beginning in January 2001 and to advise him on March 26, 2003 of a proposed 14-day suspension from work. The employing establishment argued that, after his acquittal in federal court in July 2001, it was proper to continue to relieve him from his regular duties while it conducted its own investigation. In a September 10, 2004 document, the employing establishment indicated that, as a result of the investigation it performed in conjunction with the OIG, appellant was advised on March 26, 2003 of a proposed 14-day suspension related to his handling of identification document procedures. It noted that he had objected to the proposed 14-day suspension and stated that the “case is still pending a final decision.”

By decision dated and finalized December 29, 2004, the Office hearing representative affirmed the Office’s March 26, 2004 decision with modifications. He stated that criminal activity would not be covered under the Federal Employees’ Compensation Act, but noted that appellant had been acquitted in federal court of five counts relating to the handling of identification documents. The hearing representative determined that, because his arrest and trial were directly related to the duties he was performing as an immigration inspector, appellant had established compensable employment factors with respect to his arrest and trial. He further found that the medical evidence of record did not show that appellant sustained an emotional condition due his arrest and trial. The hearing representative stated that the Office’s March 26, 2004 decision was modified to reflect that he established an employment factor, but did not submit sufficient medical evidence to establish his claim.

LEGAL PRECEDENT

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 Act.⁵ 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.⁶

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.⁷ This burden includes the submission of a detailed description of the employment factors or conditions which he believes caused or adversely affected the condition or conditions for which compensation is claimed.⁸

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.⁹ 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.¹⁰

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. In particular, he alleged that his emotional condition was due to matters related to being arrested in December 2000 and charged with five federal counts concerning the illegal handling and sale of identification documents. On July 23, 2001 appellant was found not guilty of all five counts in federal court.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁷ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁸ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁹ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁰ *Id.*

By decision dated March 26, 2004, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. By decision dated and finalized December 29, 2004, an Office hearing representative affirmed the Office's March 26, 2004 decision as modified to reflect that he established employment factors in the form of his arrest and trial, but did not submit sufficient medical evidence to establish that he sustained an emotional condition due to these factors. The Board notes that appellant has established employment factors with respect to his arrest and trial.¹¹ The Board must now consider the other incidents and conditions which he alleged contributed to his emotional condition.

Appellant claimed that his pay and benefits were wrongly suspended between January and August 2001, that he was improperly transferred from one work site to another in March 2002, that he experienced an unfair delay in his promotion from GS-9/5 to GS-9/6, that he was wrongly denied a promotion from a GS-9 to GS-11 and that he was unfairly given a proposed 14-day suspension in March 2003. 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.¹² Although the handling of disciplinary actions and the processing of transfers and promotions are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹³ 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.¹⁴ The employing establishment submitted documents in which it contended that it handled these administrative matters in a proper manner. Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. The record indicates that he filed grievances with respect to some of these matters, but the record does not contain a copy of a final decision from any grievance. Appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant argued that, after his July 2001 acquittal in federal court, the employing establishment, as part of its own investigative process, unfairly continued to relieve him from his regular duties as an immigration inspector and that this action adversely affected his pay, benefits, overtime work and promotion opportunities. The Board has held that an investigation generally is not considered an employment factor as it is an administrative function of the employing establishment and does not involve an employee's regularly or specially assigned employment duties. Therefore, the Board must consider whether the employing establishment

¹¹ The Office hearing representative properly found that appellant's arrest and trial for actions alleged to have occurred while performing his work duties was sufficiently related to his work to be considered employment factors.

¹² 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).

¹³ *Id.*

¹⁴ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

committed error or abuse in handling its investigation of appellant. The employing establishment argued that its treatment of appellant was justified by the fact that it had the authority to conduct its own investigation into his activities. He has not submitted sufficient evidence showing that the employing establishment committed error or abuse with respect to this investigation and its effect on his work duties, pay and benefits. Appellant also filed a grievance with respect to these matters, but the record does not contain a copy of a final decision from any grievance.

Appellant also alleged that he was harassed by coworkers who stated that the investigation was taking so long because “he was guilty” and noted, “I still think [he’s] guilty, look at O.J.” To the extent that disputes and incidents alleged as constituting harassment by coworkers are established as occurring and arising from his performance of his regular duties, these could constitute employment factors.¹⁵ However, for harassment 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 are not compensable under the Act.¹⁶ In the present case, the employing establishment denied that appellant was subjected to harassment and he has not submitted sufficient evidence to establish that he was harassed by his coworkers.¹⁷ Appellant alleged that coworkers made statements which he believed constituted harassment, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made.¹⁸ Thus, he has not established a compensable employment factor under the Act with respect to the claimed harassment.

In the present case, appellant has established a compensable factor of employment with respect to his arrest and trial. However, his burden of proof is not discharged by the fact that he has established an employment factor which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.¹⁹

The Board finds that appellant did not submit sufficient medical evidence to establish that he sustained an emotional condition due to the accepted employment factors, his arrest and trial. In a September 22, 2003 note, Dr. Francisco J. Guerra, an attending Board-certified family practitioner, noted that he could not work and stated, “Patient needs time off due to stress at work. Depression and severe anxiety are the diagnosis.” In an August 30, 2004 report, Dr. Guerra stated that appellant was given time off work beginning September 22, 2003 due to “his stressful situation at work.” Although Dr. Guerra made note of stress at work, he did not make any specific reference to the accepted employment factors, appellant’s arrest and trial or

¹⁵ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁶ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁷ 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).

¹⁸ See *William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁹ See *id.* at 1168.

otherwise provide a rationalized medical opinion relating his claimed emotional condition to these accepted employment factors. None of Dr. Guerra's other reports made reference to the cause of his claimed condition.²⁰

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 Office of Workers' Compensation Programs' December 29 and March 26, 2004 decisions are affirmed.

Issued: October 7, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

²⁰ Appellant submitted reports of Ms. Castaneda, a licensed social worker, but the reports of a nonphysician do not have probative value concerning medical matters. *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).