United States Department of Labor
Employees' Compensation Appeals Board

C.E., Appellant	)	
and	)	**Docket No. 06-790**
	)	**Issued: September 25, 2006**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Indianapolis, IN, Employer	)	

Appearances:
C.E., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On February 1, 2006 appellant filed a timely appeal from a November 16, 2005 merit decision of the Office of Workers' Compensation Programs denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On March 26, 2001 appellant, then a 57-year-old former special agent, filed an occupational disease claim alleging that he sustained post-traumatic stress disorder (PTSD) and recurrent major depressive disorder causally related to factors of his federal employment. The employing establishment indicated on the claim form that he was removed from employment on June 28, 1978 for insubordination when he refused a transfer.

The record establishes that appellant was involuntarily committed to a hospital for psychiatric treatment on November 19, 1999. His sister, in a letter to the employing establishment dated November 8, 2000, related that appellant had been diagnosed with PTSD and severe depression which psychiatrists attributed to his children being attacked in 1978. She submitted psychiatric reports relating appellant's mental condition to his employment.[1]

In a statement dated April 3, 2001, the employing establishment controverted the claim, questioning whether it was timely and noting that allegations contained in the medical reports were unsubstantiated.[2] The employing establishment stated:

> "[Employing establishment] records indicate that on March 9, 1978 while on duty at the [employing establishment], [appellant] received a call from his 11-year-old daughter, because something had hit and broken the picture window of his home. [He] immediately returned home and initiated an investigation by local police. As the result of the investigation, it was determined that some projectile hit a double pane window in [appellant's] home and broke only the outer pane. No bullet was recovered and there was no confirmation that a shot had indeed been fired. [Appellant] refused to allow the [employing establishment] to investigate the incident and no motive or suspect has ever been identified. No connection has ever been established between this incident and [his] employment."

The employing establishment also noted that appellant had other stressors in his life, including the suicide or murder of his brother and obtaining custody of his brother's four children.

In letters dated April 18, 2001, the Office requested additional information from both appellant and the employing establishment. It received no response to its request within the time allotted and, by decision dated May 22, 2001, denied appellant's claim on the grounds that he failed to establish fact of injury.

On June 7, 2001 appellant requested a review of the written record. He submitted a statement dated May 14, 2001, in which he related that he was unaware that he had a psychiatric condition until 1999 when he experienced flashbacks to events that occurred at the employing establishment in 1978. Appellant attempted suicide and was consequently involuntarily committed for four months in 1999. He attributed his mental condition to his transfer to the organized crime squad in August 1977 to investigate irregularities in the organization and in Agent Dean Naum, who had cleared a gambling suspect of wrongdoing. Appellant and Agent Rex Rissen reinvestigated the gambling suspect and found evidence that he was guilty and that Agent Naum was receiving money from the gambling suspect.[3] He stated, "During this time Agent Naum became aware of our investigation and he took me aside and told me that, if I

[1] Appellant additionally submitted a transcript from the television show 20/20 in which he and other former special agents described corruption at his work location.

[2] In a medical report dated March 20, 2001, appellant attributed his condition to working long hours under stress due to the risk of danger and his children being shot at by the person he was investigating.

[3] Appellant noted that Agent Rissen was now deceased.

continued with the investigation I would be met in an alley and have my kneecaps struck with a baseball bat." In March 1978, the Special agent-in-charge was replaced by Harlan Phillips. Local police arrested the gambling suspect on March 8, 1978. Appellant related:

> "On March 8, 1978 I was [at the employing establishment] doing the paperwork on the arrest and finalizing our plans to arrest said gambler on [f]ederal charges on March 9, 1978. My daughter called and informed me that she had just been shot at. From that moment my [employing establishment] career ended and so did my mental health. My daughter saw the perpetrator and his vehicle. She had never met or seen Agent Naum before the shooting, but a few days after the shooting she picked his photo[graph] out of a photo[graph] spread showed to her by the local police."

Special Agent Phillips suspended appellant when he took leave on March 9, 1978 to be with his family. He alleged that Special Agent Phillips ordered agents with the employing establishment not to investigate the shooting. Appellant asserted:

> "From March 8 until June 28, 1978 I was continuously interrogated by [employing establishment] officials from Washington, D.C. and [Special Agent] Phillips. Two separate teams from the Office of Professional Responsibility (OPR) of the [employing establishment] and the Department [of Justice (DOJ)] interrogated me. I was immediately removed from the investigation. My days thereafter consisted of showing up for work and being interrogated for 8 to 10 hours per day for the next 3 months."

Appellant stated, "I was repeatedly informed that it would be much better for me if I would change the results of my investigation, particularly as they might relate to Agent Naum. When I refused and said to do so would be a [f]ederal crime, I too was transferred and then dismissed." Agent Phillips downgraded his performance appraisal from outstanding to unsatisfactory two weeks after the shots were fired at his window. Appellant attempted to take sick leave during the interrogation but was picked up at his home by special agents and taken in for additional interrogation. He was also ordered to undergo an evaluation by a psychiatrist, who found that he was not psychotic. When appellant refused to let his children be examined by a psychiatrist he was "charged with insubordination and was subjected to endless hours of interrogation…." He indicated that he had attempted to obtain the OPR reports through the Freedom of Information Act (FOIA), but was not successful. Appellant noted that, after he stopped work, the employing establishment accused him of leaking information to the press about other corrupt agents at his work location. The employing establishment offered to change his performance appraisal back to outstanding if he exonerated Agent Naum but he refused.

In a decision dated March 20, 2002, a hearing representative set aside the May 22, 2001 decision after finding that the case was not in posture for decision as appellant had now submitted a factual statement containing the factors of employment to which he attributed his emotional condition.

By decision dated May 29, 2002, the Office denied appellant's claim on the grounds that he did not establish an emotional condition in the performance of duty. The Office found that he had not substantiated any compensable employment factors.

On June 11, 2002 appellant requested an oral hearing. By letters dated June 29, 2002 and January 21, 2003, he requested that the hearing representative subpoena the employing establishment for numerous items including his personnel file and the OPR reports. Appellant indicated that a DOJ attorney, Joseph Gross, investigated actions taken against him by the employing establishment and had concluded that the employing establishment retaliated against him for reporting corruption in his office. He requested that the Office obtain Mr. Gross's OPR report from the DOJ.

In a telephonic hearing held on April 18, 2003, appellant again described the incidents to which he attributed his condition, primarily the corruption of Agent Naum, the shots fired at his children and his three-month interrogation by OPR. He asserted that the OPR report would establish error or abuse and noted that he had unsuccessfully tried to obtain his personnel file from the employing establishment. Appellant maintained that the employing establishment had his file as evidenced by its disclosure to the Office of his brother's suicide. He requested that the hearing representative obtain the OPR reports from the employing establishment and the DOJ.

In a letter dated April 18, 2003, the hearing representative requested that the employing establishment comment on appellant's allegations and forward the OPR reports.

By letter dated April 30, 2003, appellant again requested that the hearing representative obtain his files. He described the contents of a television news report on corruption at the field office where he worked in 1978. Appellant noted that he could not accept the transfer from the employing establishment because he was unable to move his family due to stress from the shooting.[4] In a decision dated August 6, 2003, the hearing representative affirmed the May 29, 2002 decision. She noted that she had not received a response from the employing establishment but found that the records might not exist given the passage of time.

Appellant requested reconsideration on October 6, 2003. In a decision dated December 2, 2003, the Office denied merit review of its August 6, 2003 decision. Appellant appealed to the Board. On June 29, 2004 the Board remanded the case for the Office to obtain a response to his allegations from the employing establishment.[5]

By letter dated August 29, 2004, the Office requested that the employing establishment either provide a copy of any OPR report from 1978 relevant to appellant or indicate whether such a report existed.

In a response dated December 7, 2004, the employing establishment related that its records office was renovating and that it could not provide a time frame for obtaining appellant's

[4] He stated that he was mentally ill from the time that he found out that his children had been shot at and his interrogation from March 8 to June 28, 1978, but did not realize his illness until his hospitalization in 1999.

[5] Order Remanding Case, Docket No. 04-961 (issued June 29, 2004).

files. No agents with knowledge of his allegations were "available for comment" but the employing establishment enclosed copies of letters written to appellant and his attorney regarding his FOIA request, noting that the correspondence established that it turned over documents to his attorney relevant to the shooting.

In a July 15, 1982 letter responding to appellant's FOIA request, the employing establishment noted that his personnel file was transferred to headquarters. By letter dated August 10, 1982, the employing establishment informed appellant's attorney that it had not located a main investigative file relevant to the March 1978 shooting incident but found a document in the general personnel file of the field office. A redacted March 9, 1978 internal employing establishment memorandum revealed that appellant confirmed that one of his children called him on March 8, 1978 to report that "someone had shot through his front window." He went home and found a hole in the window but no bullet; his children provided a description of the vehicle but not the suspect. Appellant reported the incident to the police and told the employing establishment that he was taking his children out of town. He had special agents with the employing establishment assisting with the investigation but did not want the special gent or assistant special agent at his house or any vehicles from the employing establishment. Special Agent Rissen, on March 9, 1978, "observed a round hole in the front window and that there were glass fragments scattered approximately four feet from the hole."

An undated memorandum to appellant's attorney from an unknown party indicated that appellant's personnel file contained 1,233 pages, of which 392 pages "were found to contain information concerning the shooting. These 392 were processed and 372 are enclosed."

By decision dated December 8, 2004, the Office denied appellant's emotional condition claim after finding that he failed to establish any compensable employment factors. He appealed to the Board. In an order dated October 12, 2005, the Board set aside the December 8, 2004 decision after finding the case record submitted on appeal was incomplete.[6] The Board remanded the case for reconstruction of the case record and a *de novo* decision.

By decision dated November 16, 2005, the Office denied appellant's emotional condition as he did not established compensable employment factors. The Office noted that the employing establishment, while unable to provide the requested information, had provided some documents to appellant's attorney that had not been submitted to the Office.

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 Federal Employees' Compensation Act.[7] On the other hand, the disability is not covered where it results from such factors as an

[6] Order Remanding Case, Docket No. 05-776 (issued October 12, 2005).

[7] 5 U.S.C. § 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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.[8]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[9] However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[10] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[11]

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.[12] 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.[13]

Office regulations provide that an employer who has reason to disagree with an aspect of the claimant's report shall submit a statement to the Office that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support that position.[14] The applicable regulation further provides that the employer may include supporting documents such as witness statements, medical reports or records, or any other relevant information.[15] If the employer does not submit a written explanation to support its disagreement, the Office may accept the claimant's report of injury as established.[16]

---

[8] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[9] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[10] *See William H. Fortner*, 49 ECAB 324 (1998).

[11] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[12] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[13] *Id.*

[14] 20 C.F.R. § 10.117(a).

[15] *Id*.

[16] 20 C.F.R. § 10.117(b); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Occupational Illness*, Chapter 2.806.4(d)(1) (October 1995).

ANALYSIS

Appellant attributed his emotional condition to a shot fired on March 8, 1978 through the window of his house at his children as a result of an investigation he was conducting during the course of his employment. At the time he was investigating a gambling suspect who had been arrested by local police that day and was going to be charged with federal crimes on March 9, 1978. Appellant indicated that he suspected Agent Naum of taking money from the gambling suspect and related that his daughter identified Agent Naum as the man who shot through the window. He also alleged that Agent Naum threatened to break his kneecaps if he proceeded with his investigation. In a statement dated April 3, 2001, the employing establishment noted that appellant received a call from his eleven-year-old daughter reporting that something had broken the window of their home. He went home and called the police, who determined that "some projectile hit a double pane window in his house and broke only the outer pane." A bullet was not found and appellant did not want the employing establishment to investigate. An employing establishment report dated March 9, 1978 reported that he indicated that, one of his children called and said that someone had shot through the front window and that he went immediately home and found a hole in the widow but no bullet. Appellant reported the incident to the police. He did not want the special agent or the assistant special agent at his house. Special Agent Rissen went to the house on March 9, 1978 and found a "round hole in the front window" and scattered glass fragments. Appellant has the burden of proof to establish a factual basis for his allegations by the submission of evidence corroborating the employment factors or incidents alleged to have caused his condition.[17] In this case, he has not submitted any evidence supporting that the breaking of his front window on March 8, 1978 had any connection to his federal employment. Appellant further has not substantiated his allegation that Agent Naum threatened to break his kneecaps and thus, has not established a compensable employment factor.

Regarding appellant's allegation that his performance appraisal was downgraded from an outstanding to an unsatisfactory in 1978, the Board has held that, although the handling of an evaluation is generally related to the employment, it is an administrative function of the employer rather than a duty of the employee and thus, not compensable absent evidence of error or abuse.[18] Appellant has not submitted any evidence substantiating that he received an unsatisfactory performance appraisal in 1978 or any evidence of error or abuse by the employing establishment and thus, has not established a compensable employment factor.

Appellant further asserted that he was continuously interrogated by agents of the employing establishment and the DOJ from March 8 to June 28, 1978 regarding his investigation findings. He contended that the employing establishment pressured him to change his investigative findings, particularly those made regarding Agent Naum. Appellant also related that he was questioned for refusing to allow a psychiatrist to examine his children. He maintained that he took sick leave during the interrogation period but was picked up at his house by agents of the employing establishment and brought in for more questioning. The Board has held that investigations, which are an administrative function of the employing establishment, do

[17] *Katherine A. Berg*, 54 ECAB 262 (2002).

[18] *See Paul L. Stewart*, 54 ECAB 824 (2003).

not involve an employee's regular or specially assigned employment duties and are not considered to be an employment factor where the evidence does not demonstrate error or abuse on the part of the employing establishment.[19] In this case, appellant asserted that the OPR reports from the employing establishment and the DOJ would establish error or abuse by the employing establishment in conducting its interrogation of him from March 8 to June 28, 1978. He stated that he had unsuccessfully attempted to obtain copies of the OPR reports of the investigation from the employing establishment. In a letter dated April 18, 2003, a hearing representative requested that the employing establishment forward the OPR reports and comment on appellant's allegations; however, she did not receive any response. By order dated June 29, 2004, the Board instructed the Office to obtain a response to appellant's allegations from the employing establishment and indicated that it had a duty to pursue the evidence as far as reasonably possible given that the evidence was in possession of the government. The Board noted that, if the Office did not receive a response to its request it could accept the allegations as factual.[20] By letter dated August 29, 2004, the Office requested that the employing establishment either provide a copy of any 1978 OPR report concerning appellant or state whether such a report existed. In a December 7, 2004 response, the employing establishment indicated that it was unable to obtain appellant's files due to renovations in its records office. The employing establishment enclosed copies of records relevant to the alleged shooting in March 1978, but did not comment on the existence of a 1978 OPR report.

The Office's regulations provide that an employer who has reason to disagree with an aspect of the claimant's report shall submit a statement to the Office that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support that position.[21] The applicable regulations further provides that the employer may include supporting documents such as witness statements, medical reports or records or any other relevant information.[22] If the employer does not submit a written explanation to support its disagreement, the Office may accept the claimant's report of injury as established.[23]

In its November 16, 2005 decision, the Office found that the OPR reports might not exist but did not provide sufficient explanation for this conclusion. Appellant has consistently maintained that he was interrogated from March 8 to June 28, 1978 by the OPR with the employing establishment and the DOJ. The Office noted that the employing establishment had released documents to appellant but it appears that these documents were relevant to the alleged shooting rather than his questioning by the employing establishment. The Board again notes that the type of information being sought is normally within the custody of the employing

[19] *Beverly A. Spencer*, 55 ECAB ___ (Docket No. 03-2033, issued May 3, 2004); *Linda K. Mitchell*, 54 ECAB 748 (2003).

[20] Order Remanding Case, Docket No. 04-961 (issued June 29, 2004).

[21] 20 C.F.R. § 10.117(a).

[22] *Id*.

[23] 20 C.F.R. § 10.117(b); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Occupational Illness*, Chapter 2.806.4(d)(1) (October 1995).

establishment and not readily available to appellant.[24] Accordingly, he should not be penalized for the employing establishment's failure to submit the requested information. The Board, consequently, finds that the case must be remanded for the Office to again request information from the employing establishment regarding the OPR investigative reports and any other relevant evidence. The Office should also request information from any OPR report from 1978 in the custody of the DOJ relevant to appellant. It should inform the employing establishment of the provisions of section 10.117(b) and the likely consequence of its repeated failure to submit the requested information.[25] Following this and such further development as the Office deems necessary, it shall issue a *de novo* decision.

On appeal, appellant argues that he timely requested reconsideration of the Board's October 12, 2005 order and thus, the Board retained jurisdiction of the case at the time of the Office's November 16, 2005 decision. The Board, however, did not receive a petition for reconsideration within 30 days of the issuance of its October 12, 2005 order and thus, the Office had jurisdiction to issue its November 16, 2005 decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 16, 2005 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 25, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

[24] *See Marco A. Padilla*, 51 ECAB 202 (1999).

[25] *See Alice F. Harrell*, 53 ECAB 713 (2002).