

**United States Department of Labor
Employees' Compensation Appeals Board**

H.T., Appellant

and

**DEPARTMENT OF THE INTERIOR, BUREAU
OF RECLAMATION, Yakima, WA, Employer**

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**Docket No. 07-1512
Issued: November 6, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 14, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated November 7, 2006 and February 13, 2007 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 October 4, 2006 appellant, then a 55-year-old power systems journeyman, filed an occupational disease claim alleging that he experienced stress and high blood pressure as a result of his federal employment. He attributed his condition to the employing establishment's refusal to promote him when his supervisor retired, contending that he was unfairly evaluated for the position. Appellant alleged that the individual selected was not qualified for the position and that

his selection created a hostile work environment. He became aware that his condition was related to his employment on September 19, 2006.

In an October 6, 2006 letter, the Office informed appellant that the evidence submitted was insufficient to establish his claim. The Office requested additional information, including details of employment-related conditions or incidents that he believed contributed to his illness; a description of the development of his condition and a physician's report with a diagnosis, examination results and an opinion, with an explanation, on the cause of his condition.

Appellant submitted a note dated October 9, 2006 from Sandra Saffran, M.N., ARNP, who stated that appellant was under her care for acute stress disorder related to his work, and that he should refrain from working at that time. He submitted personnel records, including: a March 10, 1997 application for employment as a power systems journeyman; a March 4, 1997 supervisory appraisal form; a listing of awards received by appellant; a job description for a power systems journeyman (mechanical); and an August 7, 2006 notification of personnel action, reflecting a pay increase.

In an October 27, 2006 report, Dr. Abhijit Deshpande, Board-certified in the areas of internal and sleep medicine, indicated that appellant had excessive daytime sleepiness and major problems focusing and concentrating on the job. Noting that appellant had a history of hypertension and anxiety, he provided an assessment of obstructive sleep apnea with daytime hypersomnolence.

By decision dated November 7, 2006, the Office denied appellant's claim on the grounds that the evidence did not establish that he sustained an emotional condition in the performance of duty. The Office found that the evidence was insufficient to establish that the incidents occurred as alleged.

Appellant submitted an August 12, 2006 statement describing the selection process for a Supervisor II, Power Systems position. On May 9, 2006 he was notified by April Heck that his application for the position had been received, but that he had not been referred to the selection committee for consideration because he had no prior supervisory experience. On May 19, 2006, after clarifying that the position was a "merit promotion" position, Ms. Heck informed appellant that he had been referred to the selection committee. Around mid-July Mr. Coleman, a member of the selection committee, informed appellant that another candidate had been selected for the position, noting that only candidates with supervisory experience had been seriously considered. Appellant met with Gerald Kelso, who stated that the committee had screened each individual, and that he had not been excluded from consideration solely on the basis that he lacked supervisory experience. Mr. Kelso told appellant that he had been looking for a "paper pusher," and not "an experienced power plant journeyman trying to work his way up the ladder." Appellant allegedly told Mr. Kelso that the person selected was not qualified to be a power plant journeyman. Mr. Kelso told appellant that he would ask the committee to respond in writing as to why his application was not moved through the selection process. Appellant indicated that, as of the date of his memorandum, he had received no correspondence from the committee, and stated his belief that upper management had intentionally delayed in responding to him.

In a statement dated October 31, 2006, Supervisor Thomas Glover indicated that he had not observed any serious conflicts between appellant and his coworkers or supervisors. In an October 19, 2006 witness statement, Jeffrey W. Sullivan, a coworker, indicated that appellant was quite distraught after being passed over in the selection of power plant supervisor. Appellant had voiced frustration and anger at not being chosen or interviewed, and was further agitated by not being selected to be upcoded to Foreman I of the Roza powerplant.

In a letter dated October 31, 2006, appellant reiterated that the factors contributing to his illness included the hiring of a new supervisor on August 21, 2006, who was not qualified for the position and who had no operation experience or high-voltage training or experience. He contended that working under the unqualified supervisor would be detrimental to his health, as his risk of exposure to death or injury would be increased by the lack of field experience. Appellant expressed disagreement with the appointment of an “adversarial coworker” as Foreman I on September 19, 2006. He stated that the new foreman did not follow proper procedures and lacked attention to detail. As a result of being forced to work with a partner he was unable to trust in high-voltage situations, appellant lacked a feeling of safety. He stated that there were “many instances of misinformation coming from [his] coworker, who [was] now Foreman I,” but he could not give specific examples because “it happened on a regular basis.” Appellant was reprimanded twice for failing to meet deadlines, once because the foreman had him performing other jobs, and once because he was talking with a safety officer about a respirator. He stated his belief that his illness was indirectly related to his failure to receive a promotion, and that he was “stonewalled” when he requested information about the selection process through the Freedom of Information Act.

On November 26, 2006 appellant submitted a request for reconsideration. In a November 1, 2006 report, Dr. George J. Vlahakis, Jr., a Board-certified psychiatrist, related appellant’s statement that he had a conflict with his prior manager, David Murillo, when he served as chief union steward. Appellant also reported that he was not promoted when his supervisor retired, because he had no supervisory experience. Subsequently, the new supervisor appointed a coworker as Foreman I, instead of appellant, ostensibly because he had more experience than appellant. Appellant felt unsafe and did not trust either the foreman or the supervisor. Dr. Vlahakis diagnosed acute stress disorder precipitated by fear that he could be put in a dangerous situation on the job. He stated that appellant should not return to work at that time.

On February 13, 2007 the Office modified the November 7, 2006 decision to find that the evidence established that appellant’s supervisor retired and an individual other than appellant was selected to fill the vacant position. However, the Office found that appellant failed to establish a compensable factor of employment.

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 or her 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.¹ 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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.²

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.³ 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.⁴ 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.⁵

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.⁶ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.⁷ The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁸ The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.⁹

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

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

² *Gregorio E. Conde*, 52 ECAB 410 (2001).

³ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

⁴ See *William H. Fortner*, 49 ECAB 324 (1998).

⁵ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁶ See *Michael Ewanichak*, 48 ECAB 364 (1997).

⁷ See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

⁸ See *James E. Norris*, 52 ECAB 93 (2000).

⁹ *Beverly R. Jones*, 55 ECAB 411 (2004).

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.¹⁰ 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.¹¹

ANALYSIS

The Board finds that appellant has failed to establish a compensable employment factor. Therefore, he has failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

Appellant has not alleged that he developed an emotional condition due to the performance of his regular or specially assigned duties, or out of a specific requirement imposed by his employment. Rather, he attributed his emotional condition primarily to the denial of a promotion to a supervisory position. The Board has held that failure to be promoted is not compensable because the lack of a promotion does not involve the employee's ability to perform his or her regular or specially assigned duties, but rather constitutes the employee's desire to work in a different position.¹² As the Board held in *Lillian Cutler*,¹³ where an employee becomes upset over not receiving a promotion, the resulting disability does not have such a relationship to his assigned duties as to be regarded as arising out of the employment. The emotional reaction in such circumstances can truly be described as self-generated.¹⁴ The Board finds that appellant's reaction in this case to being passed over for the supervisory position was self-generated.

Appellant also alleged that the process of selecting the new power plant supervisor was flawed and that he was unfairly evaluated. He further contended that the individual chosen was unqualified for the position and created a danger to appellant and his coworkers. As noted previously, 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,¹⁵ unless error or abuse is established on the part of the employing establishment.¹⁶ There is no evidence of record showing that the employing establishment erred or acted abusively in the selection of appellant's new supervisor.

¹⁰ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹¹ *Id.*

¹² *Andrew J. Sheppard*, 53 ECAB 170 (2001).

¹³ *See Lillian Cutler*, *supra* note 1.

¹⁴ *Id.*

¹⁵ *See supra* note 3.

¹⁶ *See supra* note 4.

Appellant alleged that he had been informed by Mr. Kelso of the supervisor's lack of experience. However, he provided no evidence to corroborate that the new supervisor was unqualified or that he presented a danger to appellant or his coworkers. A witness statement from a coworker merely corroborated that appellant was distraught after being passed over in the selection of plant supervisor.

Appellant also disagreed with the appointment of an "adversarial coworker" as Foreman I, alleging that the new foreman did not follow proper procedures and lacked attention to detail. As a result of being forced to work with a partner he was unable to trust in high-voltage situations, he lacked a feeling of safety. Appellant stated that there were "many instances of misinformation coming from [his] coworker, who [was] now Foreman I, but he could not give specific examples because it happened on a regular basis." He alleged that he was reprimanded twice for failing to meet deadlines, once because the foreman had him performing other jobs, and once because he was talking with a safety officer about a respirator. For the reason stated above, the Board finds that appellant's reaction to the selection of the foreman was self-generated. Moreover, an employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor, or the manner in which a supervisor exercises his supervisory discretion, fall, as a rule, outside the scope of coverage provided by the Act.¹⁷ This principle recognizes that a supervisor or manager in general must be allowed to perform his duties, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.¹⁸ In reprimanding appellant for his failure to meet deadlines, the foreman was performing an administrative function which, absent evidence of error or abuse, is not compensable. Appellant has not submitted any evidence that the foreman acted unreasonably in this case and, thus, has not established a compensable employment factor in that regard.

Appellant alleged that the selection of the new power plant supervisor created a hostile work environment; that he was unfairly evaluated for the supervisory position; and that he was stonewalled when he requested information about the selection process. For harassment or discrimination to give rise to a compensable disability, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable.¹⁹ Appellant has not submitted any evidence, such as witness statements, to corroborate his allegations. On the other hand, his supervisor stated that he had observed no serious conflicts between appellant and his coworkers or supervisors. Consequently, appellant has not established a compensable employment factor with respect to the claimed harassment and discrimination.

As appellant failed to establish any compensable factors of employment, the Office properly denied his claim.²⁰

¹⁷ *Judy L. Kahn*, 53 ECAB 321 (2002).

¹⁸ *Id.*

¹⁹ *Jamal A. White*, 54 ECAB 224 (2002).

²⁰ As appellant did not establish a compensable employment factor, the Board need not address the medical evidence of record. See *Kathleen A. Donati*, 54 ECAB 759 (2003).

CONCLUSION

The Board finds that appellant has not established 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 February 13, 2007 and November 7, 2006 are affirmed.

Issued: November 6, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board