

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

T.M., Appellant)	
)	
and)	Docket No. 07-2284
)	Issued: May 2, 2008
DEPARTMENT OF THE INTERIOR, FISH & WILDLIFE SERVICE, Hadley, MA, Employer)	
)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs decision dated March 23, 2007, which denied modification of the Office's July 31, 2006 decision, which denied 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 met his burden of proof to establish that he sustained a traumatic injury or an emotional condition in the performance of duty.

FACTUAL HISTORY

On May 27, 2005 appellant then a 42-year-old maintenance worker, filed a traumatic injury claim alleging possible asbestos exposure when, on February 15, 2005, he was demolishing a structure when he noticed debris that appeared to be asbestos. The employing establishment noted that appellant was using an excavator to demolish a house when he noticed tiles that were "suspicious for asbestos" and "stopped work immediately." The employing

establishment stated that some samples tested positive for asbestos. Appellant stopped work on May 27, 2005.

A February 16, 2005 report from Craig Testing Laboratories revealed that seven samples were taken from the demolition site. They included samples from a mask, floor insulation debris, floor tiles and gray insulation from cabinets. The insulation and debris tested positive for asbestos. A separate sheet accompanied the report, identifying the samples that were taken. Sample number two, which did not test positive for asbestos, was identified as the mask that was used after finding the “suspicious material.”

On June 16, 2005 appellant filed an occupational disease claim and alleged that he had depression which he first realized was caused or aggravated by his employment on June 15, 2005. The Office subsequently doubled appellant’s claims.

The Office received a May 12, 2005 e-mail from appellant to Deborah Long, a supervisor, containing his allegations and Ms. Long’s responses. Appellant alleged that he was depressed and was stressed and Ms. Long responded that she would try to reduce his work stress but that she would need additional information to assist him. He also alleged that he had a panic attack on April 24, 2005 with a volunteer regarding a boat purchase. Ms. Long advised that this matter was not work related and stated that he should avoid conducting business with coworkers and volunteers. Appellant alleged that Jorge Coppen, a coworker, closely watched him and reported his actions to a supervisor. Ms. Long indicated that this was likely because appellant had been in a private business arrangement with Mr. Coppen in which “hard feelings” developed; she advised that it was important to use government time and property in an honest effort to perform duties and to minimize giving coworkers the wrong impression about work ethics. She also noted that discussions about E-Bay business transactions at work were inappropriate and it was possible that appellant’s being “closely watched” might stem from his transactions outside work. Appellant stated that his schedule was changed to satisfy other staff members but Ms. Long noted that his schedule was changed to accommodate him and that she almost always approved his leave requests except for occasional adjustments. He noted being told to remove his personal items from the maintenance area, while other employees were allowed to have items in various places. Ms. Long asserted that all employees were asked to remove personal items though it was “ok” to use personal property in work areas during breaks, provided it did not involve using government property.

Appellant alleged that he was “yelled at and cursed at by a volunteer.” Ms. Long noted that, while this incident stemmed from a nonwork-related personal business arrangement, this type of behavior was “unacceptable” and requested that appellant notify her if it occurred again. Appellant noted being required to sign in a book every morning, which was not required of other staff. Ms. Long advised appellant that there were “concerns” regarding “official use of time” and “perceptions by other coworkers” that appellant was not pulling his weight. She stated that to address these concerns and accommodate his schedule request, a notebook and e-mail would be utilized to document his arrival time for a month. Ms. Long indicated that other coworkers would be required to do the same thing if they requested a similar schedule. Appellant stated that he was recently placed in an unspecified hazardous situation. Ms. Long noted that safety was a “top priority” for which safety inspections were performed to identify and correct any safety issues. As to appellant’s assertion that he was entitled to a raise, Ms. Long stated that

numerous factors were considered with regard to raises. He alleged that he was stressed when a coworker accused him of having attention deficit disorder. Ms. Long noted that this was inappropriate and that she discussed the matter with the individual concerned. Appellant stated that he was accused of using government property for personal use and was told to inform a supervisor if he removed something from a dumpster on his own time. Ms. Long advised that there was nothing wrong with removing items from a dumpster outside work hours; however, supervisors were to be informed and prior approval was to be obtained before disposing of government property and advertising it for resale on E-Bay. Appellant claimed that he was closely watched and Ms. Long advised that “as long as [he] was following the rules, [he] should n[o]t have to worry about it.” He separately listed allegations that included that a feeling of insufficient supervisory involvement in conflict management and stress from possible side effects from asbestos exposure and from being accused of “proselytizing.”

In a June 26, 2005 statement, Stephen Atzert, appellant’s second line supervisor, responded to his allegations. He noted that he and appellant’s first line supervisor were involved with conflict management among the staff. Regarding allegations of stress from possible side effects from asbestos exposure, Mr. Atzert noted that appellant was the lead maintenance professional on an excavation project when he discovered the suspected asbestos. He indicated that appellant immediately stopped the demolition project and told his first line supervisor who arranged to have the material tested; including the dust on the excavator and the mask that he was wearing. Mr. Atzert noted that the testing confirmed that material was asbestos; however, the sample from the excavator and mask revealed no asbestos. He indicated that appellant saw a physician with apparently no positive findings. Mr. Atzert also noted that the employing establishment arranged to have contractors remove the asbestos and complete the demolition. Regarding appellant’s request for a raise, he stated that he had problems that gave him and the first-line supervisor “concern” about going forward with a raise. Additionally, Mr. Atzert noted that the incident involving a volunteer concerned a nonwork-related matter. He also addressed appellant’s allegation that he was stressed about being told what he could talk about at work and explained that he had counseled appellant not to talk about his E-Bay sales at work, because he was “spending too much work time talking about them.”

In an August 8, 2005 report, Dr. James Manlandro, a psychiatrist and osteopath, noted that he treated appellant on a “continuous basis” for about two years. He stated that appellant was treated for periodic upper respiratory complaints and that in 2005 he began having difficulty with fatigue, insomnia, irritability and mood changes, due to stress and depression from his job. Dr. Manlandro advised that appellant indicated that he was exposed to asbestos and lead paint at work but became overwhelmed because he had a sense of being “disposable” at work. He indicated that appellant stopped work on May 27, 2005 and continued to receive treatment. Dr. Manlandro diagnosed a major depressive episode and mild obstructive pulmonary disease and advised that appellant was “extremely fearful” of returning to work and indicated that job stress and “job conditions would be too overwhelming for him to resume at this time.”

In a March 1, 2005 chest x-ray, Dr. Stephen McManus, a Board-certified diagnostic radiologist, determined that appellant had hyperaerated lungs with no evidence of pneumonia or congestive heart failure. A copy of a March 1, 2005 spirometry report was also included and revealed a “mild obstruction.”

By letters dated August 17 and 25, 2005, the Office advised appellant of the type of evidence needed to establish his claim. In an August 17, 2005 letter, the Office requested that the employing establishment submit additional evidence.

In an August 30, 2005 letter, Ms. Long described the February 15, 2005 incident when appellant discovered asbestos. She indicated that appellant's discovery occurred on the second day of the demolition project and he immediately stopped work. Ms. Long indicated that testing was done, which confirmed that the material was asbestos and that an outside company completed the project. She also noted that the samples from the excavator and the mask that appellant was using, were negative. Ms. Long indicated that appellant also underwent a precautionary physical examination after which he indicated test results did not show that he should be concerned about asbestos inhalation. She indicated that appellant did not express any concerns about the incident until May or June when he filed his occupational disease claim.

In a September 6, 2005 statement, appellant alleged that not getting a raise was part of his depression, but the main reason was from being exposed to "an unfair and hazardous work environment" that contained asbestos. He alleged that this exposure "triggered" his depression. Appellant alleged that his condition began in late May 2005. He noted having no other sources of stress but stated that he had prior emotional problems, including panic attacks, shortness of breath, trouble breathing, loss of sleep, high blood pressure, loss of weight, trouble concentrating and a "very bleak outlook on life." In a November 6, 2005 letter, appellant stated that he advised his supervisors in March 2005 that he felt depressed.

By decision dated January 30, 2006, the Office denied appellant's claim. The Office found that the factual evidence supported that he had been exposed to asbestos on February 15, 2005. However, there was no medical evidence which established that he sustained a medical condition or an emotional condition in connection with this exposure. The Office found that other allegations did not constitute compensable employment factors.

Appellant requested a hearing that was held on May 9, 2006. He submitted a February 27, 2006 report, from Dr. George W. Ackley, a licensed psychologist, who diagnosed post-traumatic stress disorder. Dr. Ackley indicated that appellant was moderately to severely impaired and opined that the traumatic event was "asbestos exposure." He also noted that appellant had panic attacks which were not well controlled by medication and which were a significant impediment to work-related functioning. In a June 2, 2006 addendum, Dr. Ackley opined that appellant's post-traumatic stress disorder was directly related to his asbestos exposure on February 15, 2005. He explained that prior to his asbestos exposure appellant did not show evidence of his current primary symptoms such as panic attacks and trauma cue hyper-avoidance/obsessiveness as reported by himself, his wife and others. Dr. Ackley also indicated that prior to his trauma exposure there was no evidence of appellant's secondary symptoms of mixed depressive anxious mood with significant bursts of irritability/anger, trauma-related nightmares, hyper alertness and vigilance, significant social withdrawal, light headedness, nausea, hand/arm tingling and distorted sleep and appetite.

On June 12, 2006 Mr. Atzert questioned appellant's asbestos exposure on February 15, 2005, noting that test results showed that there was no asbestos in the dust sample taken from the exterior of the excavator appellant was operating.

By decision dated July 31, 2006, the Office hearing representative affirmed the Office's January 30, 2006 decision.

On January 22, 2007 appellant requested reconsideration. He alleged that Dr. Ackley's June 2, 2006 report established causal relationship. He provided a copy of the previously submitted report.

By decision dated March 23, 2007, the Office denied modification of its prior decision.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. There are situations where an injury or 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 specifically 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 frustration from not being permitted to work in a particular environment or to hold a particular position.²

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.³ 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.⁴

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 the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.⁵ 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 the

¹ 5 U.S.C. §§ 8101-8193.

² See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

³ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁴ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁵ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁶

ANALYSIS

Appellant filed claims which alleged that he sustained an emotional condition and a traumatic injury as a result of a number of employment incidents and conditions. The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding appellant's allegations that he sustained job stress due to lack of supervisory involvement in conflict management,⁷ from being denied a raise,⁸ from being closely watched or monitored at work,⁹ from being told what he could talk about at work,¹⁰ from matters pertaining to his schedule and being required to sign in upon his arrival at work,¹¹ the Board finds that these allegations generally relate to administrative or personnel matters, which are 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 such as being involved in conflict management, the monitoring of activities at work, scheduling and pay matters, as well as personnel issues, 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

⁶ *Id.*

⁷ The Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act. See *Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

⁸ 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. *Hasty P. Foreman*, 54 ECAB 427 (2003).

⁹ Although the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee. See *Lori A. Facey*, 55 ECAB 217 (2004); *Charles D. Edwards*, 55 ECAB 258 (2004).

¹⁰ The Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act. See *Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

¹¹ Assignment of work is an administrative function of the employer. See *James W. Griffin*, 45 ECAB 774 (1994).

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.*

whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁴

Appellant's supervisor, Ms. Long noted that his concern about being watched by a coworker, Mr. Coppen, likely resulted from his private business dealings with Mr. Coppen which had resulted in "hard feelings." She did not indicate that the employing establishment was involved in this matter and noted that appellant should have no concern if he was in conformance with employing establishment rules. As the evidence indicates that the matter with Mr. Coppen pertained to a nonwork-related matter, it would not be a compensable employment factor. In any event, there is no evidence that the employing establishment acted unreasonably in otherwise monitoring appellant's work. Regarding schedule concerns, Ms. Long explained that appellant's schedule was changed to accommodate him and indicated that she almost always approved his leave requests. Regarding the requirement that he sign in, which was not required by other staff members, Ms. Long noted that there were "concerns" regarding "official use of time" and "perceptions by other coworkers" that appellant was not pulling his weight. She explained that to address these concerns and accommodate appellant's schedule, a notebook and e-mail were used to document his arrival time for a month. Ms. Long explained that other coworkers would also be required to follow the same procedure if they requested a similar schedule. She also addressed his allegations regarding his belief that he was entitled to a raise and explained that numerous factors were considered with regard to a raise. In a June 26, 2005 statement, Mr. Atzert also addressed appellant's claim that he was denied a raise and explained that there were other issues. He also addressed appellant's allegation that he was stressed about being told what he could talk about at work and explained that he had counseled him not to talk about his E-Bay sales at work, because he was "spending too much work time talking about them." The Board finds that the employing establishment acted reasonably and appellant has not established a compensable employment factor under the Act with respect to these administrative matters.

Regarding appellant's allegation that he was placed in a hazardous situation, this general allegation is insufficient to establish a compensable work factor. As noted, part his burden of proof includes providing detailed descriptions of employment conditions, which he believes caused or adversely affected the condition.

Appellant alleged that he was stressed when a coworker told his supervisor that he had attention deficit disorder. The Board has recognized the compensability of verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.¹⁵ Appellant's allegation regarding this incident is also vague and lacks specificity or any details. Additionally, Ms. Long noted that she discussed the matter with the individual concerned and advised appellant that it was not appropriate. Appellant has not shown how such an isolated comment would rise to the level of

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

¹⁵ *Charles D. Edwards*, 55 ECAB 258 (2004).

verbal abuse or otherwise fall within the coverage of the Act.¹⁶ He also alleged that he was stressed when he was involved in an altercation with a volunteer who cursed and yelled at him. However, his supervisor, Ms. Long noted that this incident involved the sale of a boat and was not a work-related matter. She advised appellant to avoid conducting business with his coworkers and volunteers. Mr. Atzert also confirmed that the incident involved a nonwork-related matter. The Board notes that an altercation between coworkers which arose out of a claimant's regularly or specially assigned duties would be considered an employment factor, but an altercation which arose out of nonemployment factors, *i.e.*, a purely personal dispute, would not be considered an employment factor.¹⁷ The Board finds that these allegations do not rise to the level of a compensable factor of employment.

Regarding appellant's allegation that he was accused of using government property for personal use and that he was told that he should inform a supervisor if he was removing something from a dumpster on his own time. Ms. Long noted that appellant could remove items from a dumpster outside work hours if supervisors were informed and he had prior approval. The Board finds that this allegation does not pertain to any factors of appellant's employment and that the employing establishment administrative policy regarding such matters is not unreasonable.

Appellant also made general allegations that he was stressed from being harassed. To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹⁸ However, for harassment or discrimination 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 or discrimination are not compensable under the Act.¹⁹ In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and he has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.²⁰ Appellant provided no corroborating evidence, such as witness statements, to establish that harassing statements or actions actually occurred.²¹ Thus, he has not established a compensable employment factor with respect to the claimed harassment. Likewise, appellant also alleged that he was stressed when he was told to remove his personal items from the

¹⁶ See, *e.g.*, *Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). Compare *Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

¹⁷ See *Irene Bouldin*, 41 ECAB 506, 514 (1990); *Lester O. Rich*, 32 ECAB 1178, 1180 (1981).

¹⁸ See *David W. Shirey*, 42 ECAB 783, 795-96 (1991); see also *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

²⁰ 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).

²¹ See *William P. George*, 43 ECAB 1159, 1167 (1992).

maintenance area, while other employees were allowed to have their items in various places. However, Ms. Long explained that all employees were asked to remove personal items that were brought to work for the purpose of using government property. The Board notes that this would not be a compensable factor as it does not pertain to appellant's duties and the evidence does not show that he was treated disparately. Appellant also made a general allegation that he was stressed from being accused of proselytizing. However, he did not submit any specific statements to support these allegations and it does not appear that this would be related to any specific factors of his employment and this would not be a compensable factor.

The record does establish that appellant was exposed to asbestos on February 15, 2005. 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 asbestos exposure caused an occupational disease claim or an emotional condition, appellant must also submit rationalized medical evidence establishing that he has a physical, or an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.²²

The medical evidence includes Dr. Manlandro's August 8, 2005 report noting that in 2005 appellant began having difficulty with fatigue, insomnia, irritability and mood changes, due to stress and depression from his job. He also indicated that appellant related that he was exposed to asbestos and lead paint at work but became overwhelmed because he had a sense of being "disposable" at work. Dr. Manlandro indicated that appellant stopped work on May 27, 2005 and continued to receive treatment. He diagnosed major depression and opined that "the stress of his job and job conditions would be too overwhelming for him to resume at this time." However, while Dr. Manlandro noted what appellant related and provided a diagnosis, he did not provide his own specific opinion as to whether the February 15, 2005 asbestos exposure incident caused or aggravated the diagnosed depression. To establish causal relationship, a claimant must submit a physician's report in which the physician reviews the employment factors identified as causing the claimed condition and, taking these factors into consideration as well as findings upon examination, states whether the employment injury caused or aggravated the diagnosed conditions and presents medical rationale in support of his or her opinion.²³

The testing, reports and diagnosis of Dr. McManus do not address let alone establish, a causal relationship between appellant's lung condition and his employment. His reports do not reference an asbestos-related condition. The Board finds that the evidence does not support a traumatic injury.

In a February 27, 2006 report, Dr. Ackley diagnosed post-traumatic stress disorder and opined that appellant was moderately to severely impaired. He added that the traumatic event was "asbestos exposure." In a June 2, 2006 addendum, Dr. Ackley, opined that appellant's post-traumatic stress disorder was directly related to his asbestos exposure on February 15, 2005. He explained that, prior to his asbestos exposure, appellant did not show evidence of his current primary or his secondary symptoms. However, the mere fact that a disease manifests itself

²² See *William P. George*, 43 ECAB 1159, 1168 (1992).

²³ *J.M.*, 58 ECAB ____ (Docket No. 06-2094, issued January 30, 2007).

during a period of employment does not raise an inference that there is a causal relationship between the two.²⁴ Additionally, he did not explain the reasons the asbestos exposure on February 15, 2005 caused or contributed to appellant's diagnosed condition. This is particularly important in light of the fact that the test results from the samples taken from appellant's mask and excavator were negative and the evidence does not show that he related any concern about the exposure for at least a month after it occurred. Additionally, both appellant and Mr. Atzert confirmed that appellant immediately stopped work at the beginning of the project when he noticed the suspected asbestos. Thus, Dr. Ackley's opinion is insufficient to establish causal relationship.

Other medical reports submitted did not specifically address whether workplace asbestos exposure on February 15, 2005 caused or aggravated a diagnosed condition.

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained either a traumatic injury or an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 23, 2007 is affirmed.

Issued: May 2, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²⁴ *Lucrecia M. Nielsen*, 42 ECAB 583, 593 (1991); *Joseph T. Gulla*, 36 ECAB 516, 519 (1985).