United States Department of Labor
Employees' Compensation Appeals Board

K.E., Appellant	)	
	)	**Docket No. 09-85**
and	)	**Issued: April 9, 2009**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Hilliard, FL, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument February 12, 2009

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 15, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated September 11, 2008, which denied modification of a June 19, 2008 decision denying his claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On March 26, 2008 appellant, then a 55-year-old air traffic controller, filed a traumatic injury claim alleging that on March 25, 2008 he sustained traumatic stress due to the behavior of

an operations manager. He stopped work on March 25, 2008 and did not return and subsequently retired.

On April 7, 2008 the Office asked appellant to submit additional factual and medical information, including a detailed description of the employment factors or incidents that he believed contributed to his claimed illness. In a letter of the same date, it requested the employing establishment provide comments from a knowledgeable supervisor on the accuracy of appellant's statements and allegations.

Appellant submitted an attending physician's report from Dr. Ronnie L. Burak, a psychologist, dated April 1, 2008, who diagnosed post-traumatic stress disorder as a result of an incident at work. Dr. Burak noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity and was not able to return to work at this time.

The employing establishment submitted a statement from Mario Bosque, operations manager, dated March 25, 2008. Mr. Bosque indicated that on the same date appellant approached him and asked if his boots were considered "work boots" and therefore not compliant with the dress code. He replied "yes" and appellant indicated that he had been wearing the boots for six years and would continue to wear them. Mr. Bosque noted informing appellant that "he was talking to the wrong person like that and to get a [u]nion rep[resentative.]" He indicated that appellant proceeded to his workstation and requested a union representative from the front-line manager, Dennise Roseman. Mr. Bosque indicated that after a few minutes Ms. Roseman advised that she could not find a union representative. He indicated that he was going to speak with appellant about his insubordinate attitude in the presence of a union representative; however, since a representative could not be located he proceeded to counsel appellant in front of Ms. Roseman about the dress code as set forth in the employee handbook. Mr. Bosque inquired as to whether appellant was ill and he stated that he was fine until he was questioned about his boots. He indicated that he sent appellant home to change his boots and appellant responded that if he left to change his boots he would not return. Mr. Bosque noted that appellant stated that he was being harassed and left work. He instructed Ms. Roseman to note appellant as absent without leave. Also submitted was a statement from Dan Weston, a coworker, dated March 25, 2008, who noted that he was on duty when appellant approached Mr. Bosque regarding his boots and noted Mr. Bosque advised appellant that his boots were considered work boots. He indicated that appellant stated that he had been wearing the footwear for six years and would continue to wear the boots. Mr. Weston indicated that Mr. Bosque instructed appellant to get a union representative for a discussion and after a few minutes appellant and Ms. Roseman returned to the watch desk where Mr. Bosque recited the contract language pertaining to dress code. He indicated that appellant stated that he was being harassed and was going to leave work and did not know when he would return. Mr. Weston indicated that he overheard this conversation but did not hear every word or comment of the discussion.

The employing establishment submitted a copy of Article 69 of the handbook for controllers, entitled "dress code" which provided: "Section 2. The mode of attire for the workplace shall be business casual…. Shoes shall be neat and clean. Articles of inappropriate attire include, but are not limited to, jogging suits, shorts, sweats (pants, shirts, shorts), jeans, tee/tank/muscle/sleeveless shirts (for men).… Flip-flops, flat sandals and athletic shoes are prohibited."

In an April 16, 2008 letter, Kim M. Olson, office program consultant for the employing establishment, indicated that the dress code for air traffic controllers was outlined in Article 69 of the handbook for controllers. She indicated that the term "business casual" has been further defined verbally on a number of occasions to the air traffic workforce and was defined as "leather loafers or leather shoes that tie, whereas sandals, work boots and athletic footwear (tennis shoes, etc.) would be considered unacceptable." Ms. Olson indicated that on March 25, 2008 Mr. Bosque instructed appellant to get a union representative to participate in the discussion; however, a representative was not located and Mr. Bosque made the decision to conduct the discussion without a representative. She noted Mr. Bosque informed appellant that his shoes did not meet the dress code and asked him to return home to change them and to indicate the type of leave he would be using when he left the facility. Ms. Olson indicated that appellant left the facility and did not return. She stated that her office recently conducted a conference with the facility personnel manager, Rebecca Dawkins, who confirmed that the dress code has been both well documented and discussed at management and employee meetings on a number of occasions to further define "business casual" and answer employee questions about the issue. Ms. Olson quoted Ms. Dawkins as stating that "there should be no question that work boots do not fit within what is considered appropriate footwear." In a May 1, 2008 statement, Ms. Olson indicated that appellant filed an Equal Employment Opportunity (EEO) complaint against an assistant manager, Pepe Garcia, when he was not selected for a particular staff position. She indicated that the EEO complaint, filed on March 6, 2008, was still in the informal counseling state with no formal finding. Ms. Olson noted that appellant inquired about the mandatory retirement age of 56 for air traffic controllers and sought to explore his employment options. She stated that appellant submitted a job application for a military liaison position within the agency; however, he was not selected and filed an EEO complaint. Ms. Olson indicated that the candidate selected for the position was over 40 years old. She asserted that appellant's reaction was self-generated and not within the performance of duty.

Appellant submitted a report from Dr. Burak, dated April 20, 2008, who noted treating him for anxiety and insomnia, which were triggered by a traumatic incident at work.

In a May 12, 2008 decision, the Office denied appellant's claim finding that he failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty on March 25, 2008.

On May 27, 2008 appellant requested reconsideration. He submitted an April 28, 2008 statement and indicated that on November 20, 2007 he approached his assistant chief and expressed his desire to apply for two staff positions within his facility. Appellant indicated that the assistant chief advised him that one of the positions was advertised for a younger candidate to groom to be a supervisor. He advised that in February 2008 he learned that a younger person was selected for the position and he filed an EEO complaint based on age discrimination. Appellant indicated that, on March 25, 2008, his supervisor, Ms. Roseman, counseled him on his work attire as she had been instructed to do so by the operations manager, Mr. Bosque. Appellant noted that Ms. Roseman stated that she found nothing wrong with his boots and he requested permission to speak to Mr. Bosque about the matter. He indicated that he inquired of Mr. Bosque what was wrong with his boots and Mr. Bosque stated that they were inappropriate for the workplace. Appellant noted that he had worn the boots for five years without complaint. He stated that Mr. Bosque advised him to get his supervisor and union representative; however, a

union representative was unavailable. Appellant noted that Mr. Bosque proceeded to speak to him in a loud manner reading from Article 69 of the employee handbook and instructed him to go home and change his boots. He alleged that this incident was in retaliation for filing an EEO complaint and noted other coworkers were also wearing boots and not approached regarding their attire. Appellant alleged that he was harassed and could not continue to work in a hostile environment. He submitted a work capacity evaluation prepared by Dr. Burak dated May 22, 2008 who diagnosed post-traumatic stress disorder and advised that appellant could not return to work.

In a June 19, 2008 decision, the Office modified the prior decision but denied the claim. It noted that an incident did occur on March 25, 2008 and appellant was diagnosed with a medical condition in connection with the incident. However, the Office advised that appellant did not establish a compensable work factor in the performance of duty. It noted that the employing establishment submitted statements indicating that appellant was advised by his supervisors that his footwear was outside the employing establishment's dress code. The Office noted that appellant had a union representative when he was counseled by Mr. Bosque. It noted Article 69 of the employee handbook and stated: "Statements on file from your [employing establishment] supporting that the dress code imposed by your [employing establishment] was clarified to be 'business casual' and that all employees were previously advised in detail before your date of injury what was interpreted by management to be business casual attire. Of note is that your [employing establishment] advised that footwear such as sandals, work boots and athletic footwear was specifically outside of the dress code."

On August 26, 2008 appellant requested reconsideration. He submitted a July 28, 2008 statement and reasserted his allegation that the counseling session with Mr. Bosque regarding his boots was a reprisal for filing an EEO complaint. He alleged that two of his coworkers wore similar boots and were not counseled and he believed that he was singled out by management. Appellant indicated that he had no union representation during the counseling session with Mr. Bosque.

Appellant submitted an August 13, 2008 statement from Ms. Roseman, his front-line supervisor, who noted that Mr. Bosque bought to her attention that his boots were not dress code compliant. Ms. Roseman did not see a problem with appellant's boots as they were not the yellow work boot that was prohibited. She advised that she was instructed by Mr. Bosque to send appellant home to change his footwear. Ms. Roseman indicated that she attempted to obtain a union representative for appellant prior to confronting him but there was no representative available. She indicated that Mr. Bosque instructed her to continue the meeting without a representative and if appellant had questions he could speak with Mr. Bosque. Appellant requested to speak with Mr. Bosque where she witnessed a heated discussion, which concluded when Mr. Bosque instructed him to go home and change his footwear and return to work. Ms. Roseman reported that appellant was too upset to return and indicated that he was going home on leave. She noted that the only individuals present were appellant, Mr. Bosque and herself. Appellant submitted a statement from William E. Beaumont, an air traffic controller, who indicated that he routinely wore boots to work, was wearing boots on the day he was counseled and management did not question him about his foot wear. In another statement, David Cook, a union facility representative at the employing establishment, indicated that he wore boots to work without incident. He noted there was no boot policy, negotiated or imposed,

at the employing establishment. Appellant submitted a statement from Steven R. Coleman, an air traffic controller, who indicated that on the day appellant was confronted by management about his boots he wore similar boots and was not counseled. He noted that he was unaware of a policy prohibiting boots and, if there was such a policy, it was not enforced. Mr. Coleman advised that, after management confronted appellant about his boots, he and other controllers continued to wear boots and were ignored by management.

Appellant submitted a copy of Article 6 of a union contract which addressed union representation rights for employees. Section 1 provides: "When it is known in advance that the subject of a meeting is to discuss or investigate a disciplinary or potential disciplinary situation, the employee shall be so notified of the subject matter in advance. The employee shall also be notified of his/her right to be accompanied by a [u]nion representative if he/she so desires and shall be given a reasonable opportunity both to obtain such representation and confer confidentially with the representative before the beginning of the meeting." Section 1 further notes "This [s]ection applies to meetings conducted by all Management representatives…."

By decision dated September 11, 2008, the Office denied modification of the June 19, 2008 decision.

LEGAL PRECEDENT

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[1]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[2] the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[3] 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 under the Act.[4] When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[5] On

[1] *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[2] 28 ECAB 125 (1976).

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[5] *Lillian Cutler*, *supra* note 2.

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]

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.[7] 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.[8]

ANALYSIS

Appellant alleged that he was singled out and harassed by the operations manager, Mr. Bosque, on March 25, 2008 when he was counseled for wearing boots which Mr. Bosque advised were inappropriate for the workplace. He indicated that he had been wearing the boots for five years without complaint. Appellant indicated that Mr. Bosque advised him to get his supervisor and union representative; however, a union representative was unavailable. Mr. Bosque proceeded to counsel him without representation and instructed him to go home and change his boots. Appellant asserted that Mr. Bosque was harassing and retaliating against him for filing an EEO complaint because other coworkers were also wearing boots and were not counseled on their attire.

The Office's June 19, 2008 decision is based on the premise that a union representative was present when appellant was counseled by Mr. Bosque on March 25, 2008 with regard to his boots. The claims examiner further noted that there were statements from appellant's agency supporting that the dress code imposed was clarified and that all employees were previously advised in detail what was interpreted to be business casual attire and that work boots were known to be outside of the dress code. The Board finds that the Office's finding of facts with respect to these statements is inadequate.

The June 19, 2008 decision relies on a statement from Mr. Weston confirming that a union representative was present at the counseling session on March 25, 2008 between appellant and Mr. Bosque; however, an examination of the record reveals that Mr. Weston's knowledge of the conversation was incomplete as he was not a party to the discussion but merely overheard the conversation. Mr. Weston specifically stated that he "could not hear every word or comment of the discussion." Mr. Weston, in his statement dated March 25, 2008, does not indicate that a

[6] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Culter*, *id*.

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

[8] *Id.*

union representative was present at the counseling session; rather, he noted that Mr. Bosque instructed appellant to get a union representative for a discussion and that after a few minutes appellant and Ms. Roseman returned to the watch desk where Mr. Bosque proceeded to counsel appellant. Likewise, in a statement from Ms. Roseman, dated August 13, 2008, she noted attempting to obtain a union representative for appellant but there was no representative available. She indicated that Mr. Bosque instructed her to continue the meeting without a representative. Additionally, Ms. Olson, office program consultant for the employing establishment, acknowledged that a union representative was not located and Mr. Bosque proceeded with the counseling session. Therefore, contrary to the findings of the Office, the evidence does not establish that appellant had union representation at the time of the counseling session.

In the June 19, 2008 decision, the Office found that statements from the employing establishment supported that the dress code imposed was clarified and that all employees were previously advised in detail what was interpreted to be business casual attire. The Board finds that the Office's finding with respect to the dress code is not substantiated in the record. The evidence included Article 69 of the employee handbook which, as noted, identifies types of dress that are permitted and those which are inappropriate. There is no mention in Article 69 that work boots are prohibited. A review of the record reveals that the policy against wearing boots to work was only substantiated by a subsequent letter from Ms. Olson on April 16, 2008, after appellant's work incident and there is no further evidence that there was prior dissemination of a broader interpretation of Article 69 of the employee's handbook. Although Ms. Olson indicated that the dress code for air traffic controllers as outlined in Article 69 had been further defined verbally on a number of occasions to the air traffic workforce to exclude work boots and was both well documented and discussed at management and employee meetings, the employing establishment did not cite specific instances of when, where and how the broader interpretation of Article 69 was disseminated. Furthermore, appellant's supervisor, Ms. Roseman, noted that she did not see a problem with appellant's boots as they were not the yellow work boots that were prohibited. Likewise, appellant's coworkers, including Mr. Beaumont, Mr. Cook and Mr. Coleman, all indicated that they routinely wore boots to work and were wearing boots on the day he was counseled and yet they were not counseled by management.

It is the Office's obligation, as part of its adjudicatory function, to consider the entire record and make accurate findings based on the content of the record and supported by the evidence in the record as to whether a compensable work factor has been substantiated. The Board finds that the Office has failed to fulfill its duty in this regard. The case will be remanded to the Office for proper findings of fact with respect to the evidence of record. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 11 and June 19, 2008 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this decision.

Issued: April 9, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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