

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES B. MARKLE and DEPARTMENT OF JUSTICE,  
U.S. MARSHALS SERVICE, Honolulu, HI

*Docket No. 00-514; Submitted on the Record;  
Issued January 10, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty causally related to factors of his employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a hearing.

On July 24, 1998 appellant, then a 45-year-old deputy marshal, filed an occupational disease claim, alleging that he sustained an emotional condition due to being removed from a promotional position due to an office reorganization; being harassed and discriminated against by supervisors; being dissatisfied with management's administrative decisions, being denied training, not being given sufficient special recognition for his work such as quality step increases and teamwork awards; being investigated for acts of vandalism, which occurred in the employing establishment offices<sup>1</sup>; being asked to change his testimony given at a criminal detention hearing because it cast the employing establishment in a negative light; and being accused of having a disruptive work attitude, threatening Marshall Annette Kent, permitting his girlfriend to drive his government vehicle and being late and not performing his duties.

In a report dated July 29, 1998, a psychologist diagnosed major depression and anxiety disorder which appellant attributed to problems with his supervisors.

In a report dated August 6, 1998, Dr. Michael N. Kurosawa stated that he had been treating appellant for situational stress and anxiety disorder related to his work environment, including unspecified problems with his supervisor. In clinical notes dated August 6, 1998, Dr. Kurosawa related that appellant became upset after receiving a letter from the employing establishment advising him that he would be charged with leave without pay for failing to submit medical documentation for his use of sick leave.

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<sup>1</sup> The record shows that appellant was given a verbal reprimand following an investigation of this incident.

In a letter dated April 20, 1999, Howard Tagomori, a marshal, responded to appellant's allegations on behalf of the employing establishment. He stated that he had little personal knowledge of appellant's allegations as he had assumed his position in September 1998, prior to the incidents alleged by appellant to have contributed to his emotional condition. Mr. Tagomori stated that he could not address appellant's specific allegations in detail as they were the subject of an Equal Employment Opportunity (EEO) investigation, which was not concluded. He stated that the management decisions cited by appellant in his claim for compensation were enacted in furtherance of the management officials' duties and prerogatives.

By decision dated July 22, 1999, the Office denied appellant's claim on the grounds that he had failed to establish that his emotional condition was causally related to factors of his employment.

By letter dated August 30, 1999, appellant requested a review of the written record and submitted additional evidence.

In a report dated October 7, 1998, received by the Office on September 7, 1999, Dr. Kurosawa related that appellant was under stress at work due to what he perceived as discrimination from his supervisors.

By decision dated October 14, 1999, the Office denied appellant's request for a review of the written record on the grounds that his request was untimely filed and the issue in the case could equally well be addressed by a request for reconsideration and the submission of additional evidence.

By letter dated October 29, 1999, appellant requested reconsideration.

By decision dated November 17, 1999, the Office denied modification of its July 22, 1999 decision.

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty causally related to factors of his employment.

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.<sup>2</sup> 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.<sup>3</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> See *Thomas D. McEuen*, 41 ECAB 387, 391 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28

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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

In the present case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, thus, 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 the employing establishment denied his requests for training and did not give him special recognition for his job performance, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.<sup>8</sup> Although these matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.<sup>9</sup> However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>10</sup> In this case, appellant has failed to establish

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ECAB 125 (1976).

<sup>4</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

<sup>5</sup> *Effie O. Morris*, 44 ECAB 470, 473 (1993).

<sup>6</sup> *See Garry M. Carlo*, 47 ECAB 299, 305 (1996); *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

<sup>7</sup> *Id.*

<sup>8</sup> *See Dinna M. Ramirez*, 48 ECAB 308, 313 (1997); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

<sup>9</sup> *See Anne L. Livermore*, 46 ECAB 425, 431-32 (1995); *Richard J. Dube*, 42 ECAB 916, 920 (1991).

<sup>10</sup> *See Michael Thomas Plante*, *supra* note 8.

that the employing establishment acted unreasonably in denying his requests for training. Thus, appellant has not established a compensable employment factor under the Act in this respect.

The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.<sup>11</sup>

Regarding appellant's allegation that the employing establishment unfairly removed him from a promotional position due to a reorganization, the Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.<sup>12</sup> Thus, appellant has not established a compensable employment factor under the Act in this respect.

Regarding the employing establishment's investigation of the vandalism at its offices, the Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.<sup>13</sup> 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. Although appellant has made allegations that the employing establishment erred and acted abusively in conducting its investigation, appellant has not provided sufficient evidence to support such a claim. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant has also alleged that harassment and discrimination on the part of his supervisors contributed to his claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.<sup>14</sup> 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.<sup>15</sup> In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.<sup>16</sup> In this case, appellant has provided insufficient evidence that his supervisors harassed or discriminated

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<sup>11</sup> *Id.*

<sup>12</sup> *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

<sup>13</sup> *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

<sup>14</sup> *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

<sup>15</sup> *See Donna J. DiBernardo*, 47 ECAB 700, 703 (1996); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>16</sup> *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).

against him and, therefore, he has not established a compensable employment factor under the Act in this respect.

Regarding appellant's dissatisfaction with management's decision concerning staff reorganization and the handling of the employing establishment tasks and responsibilities, the Board has held that an employee's dissatisfaction with work underload or 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.<sup>17</sup>

Regarding appellant's allegations that his supervisor asked him to change his testimony given at a criminal detention hearing because it cast the employing establishment in a negative light and accused him of having a disruptive work attitude, threatening Marshall Kent, permitting his girlfriend to drive his government vehicle and being late and not performing his duties, there is insufficient evidence to establish that these incidents occurred. Therefore, these allegations cannot be deemed compensable factors of employment.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.<sup>18</sup>

The Board further finds that the Office did not abuse its discretion in denying appellant's request for a hearing.

Section 8124(b) of the Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.<sup>19</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>20</sup> As appellant's request for a hearing was dated August 30, 1999 more than 30 days after the Office's July 22, 1999 decision, appellant was not entitled to a hearing as a matter of right. The Office then exercised its discretion and determined that the issue in the case could equally well be resolved through a request for reconsideration and the submission of additional evidence. The Board finds no evidence to indicate that the Office abused its discretion in denying appellant's untimely request for a hearing.

The decisions of the Office of Workers Compensation Program dated November 17, October 14 and July 22, 1999 are affirmed.

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<sup>17</sup> See *Michael Thomas Plante*, *supra* note 8.

<sup>18</sup> As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, *supra* note 6.

<sup>19</sup> See 5 U.S.C. § 8124(a).

<sup>20</sup> See *Charles J. Prudencio*, 41 ECAB 499, 501 (1990); see also 20 C.F.R. § 10.616 (1999).

Dated, Washington, DC  
January 10, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member